UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant DEBBIE A. SMITH
United States Air Force

ACM 36113

31 August 2006

Sentence adjudged 16 June 2004 by GCM convened at United States Air Force Academy, Colorado. Military Judge: James L. Flanary.

Approved sentence: Dismissal.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

ORR, JACOBSON, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge:

The appellant was convicted, consistent with her pleas, of operating a vehicle while drunk, being drunk on duty, and of being incapacitated for the proper performance of her duties as a result of wrongful previous overindulgence in intoxicating liquor, in violation of Articles 111, 112, and 134, UCMJ, 10 U.S.C. §§ 911, 912, 934. Contrary to her pleas, she was found guilty of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A general court-martial composed of officer members sentenced the appellant to be dismissed from the Air Force. The convening authority approved the sentence as adjudged. On appeal the appellant raises one error, averring trial counsel erred by improperly commenting on her Fifth Amendment right not to

testify, thereby shifting the burden of persuasion to the defense. Finding no error, we affirm.

The standard under which claims of improper argument are reviewed depends upon the content of the argument and whether defense counsel objected at trial. "The legal test for improper argument is whether [it] was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer,* 53 M.J. 235, 237 (C.A.A.F. 2000). If the trial defense counsel fails to object or request a curative instruction, the issue is waived, absent plain error. Rule for Courts-Martial (R.C.M.) 1001(g); *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001); *United States v. Powell,* 49 M.J. 460, 462-65 (C.A.A.F. 1998). If the plain error is constitutional error, the Government must show beyond a reasonable doubt that the error was not prejudicial. *Powell*, 49 M.J. at 465 (citing *United States v. Adams*, 44 M.J. 251, 252 (C.A.A.F. 1996)).

In the case sub judice, the appellant claims that various comments made by the trial counsel during his findings argument were meant to "comment on the failure of the defense to present evidence sufficient to contradict the government's case or explain the presence of Benzoylecgonine (BZE)[*] in the appellant's urine sample." Thus, he asserts the arguments were meant to send the message to the members that "*the defense has not proven its case*." At trial, the defense counsel did not object to any of the comments, so we review for plain error.

The law is well settled that a "trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990). However, the focus of our inquiry is not on the words of the trial counsel in isolation, but in the context of the entire trial. *Baer,* 53 M.J. at 238. A "criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985). A trial counsel is permitted to make "a fair response" to claims made by the defense. *Gilley*, 56 M.J. at 120; *see also* R.C.M. 919.

Under the "invited response" or "invited reply" doctrine, trial counsel is not prohibited from offering a comment that provides a fair response to claims made by the defense. *See, e.g., United States v. Robinson*, 485 U.S. 25, 32 (1988); *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005); *Gilley,* 56 M.J. at 120-21. A close reading of the entire record of trial indicates that the allegedly improper comments by trial counsel were, in fact, responsive to points and questions raised by trial defense counsel during his

[*] The presence of the BZE metabolite in urine is an indication that the sample provider ingested cocaine.

hard-hitting cross-examination of the government witnesses. For example, trial defense counsel was able to attack the integrity of the Air Force's drug testing program by raising issues of sample leakage, cross-contamination, and malfeasance and incompetence on the part of drug laboratory personnel. He was also able to raise questions, during cross-examination, in regard to unknowing ingestion of cocaine and the integrity of a government witness' ability to recall events. In this context, we view the trial counsel's comments as appropriate responses to the questions and concerns raised by trial defense counsel, and thus do not find error, plain or otherwise.

Assuming, arguendo, that error did occur, we find it to be harmless beyond a reasonable doubt. The crux of the appellant's argument seems to be that the trial counsel's comments somehow confused the members into believing the defense bore the burden of proving the appellant's innocence; however, the members were repeatedly instructed and reminded that the burden of proof was on the government and never shifted to the defense.

During voir dire, the military judge asked two questions designed to ascertain that the members were aware of the government's burden and the defense's lack thereof. Trial defense counsel followed up with three similar questions of his own. In response to all five questions, the members indicated that they understood where the burden of proof rested.

In his opening statement, the trial counsel explained to the members that the government bore the burden and told them "we accept that burden." Defense counsel followed up by re-emphasizing in his opening that the government must prove the elements of the crime "beyond a reasonable doubt before asking you for that conviction." Finally, in his findings instructions, the military judge instructed the members that the accused had the absolute right to remain silent, and told them three separate times that the burden of proof rested with the government.

The appellant gives this panel of officers short shrift by claiming they were somehow confused or misled by trial counsel's argument. First, we believe the members were clearly capable of understanding trial counsel's argument for what it was: reasonable comment in response to the questions and concerns raised by the trial defense counsel during cross examination. Second, we believe the members were capable of understanding and complying with the military judge's instructions, and see no evidence in the record that they were incapable or unwilling to so comply. "[I]n the absence of evidence to the contrary, court members are presumed to have followed the military judge's instructions." *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006) (citing *United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993)). Thus, we are convinced beyond a reasonable doubt that if the trial counsel's comments had been error, the error was harmless beyond a reasonable doubt.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator