UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BENJAMIN D. THOMPSON
United States Air Force

ACM 35274

29 April 2005

Sentence adjudged 14 June 2002 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge and confinement for 1 year.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

STONE, ORR, and PETROW
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PETROW, Judge:

Contrary to his pleas, a panel of officer and enlisted members found the appellant guilty of use, possession, and distribution of marijuana on divers occasions. Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of a bad-conduct discharge and confinement for 1 year. The appellant asserts three errors: (1) The military judge erred in admitting incriminating statements the appellant made on 18 September 2001 to investigators with the Air Force Office of Special Investigations (AFOSI); (2) The military judge erred in admitting evidence of uncharged misconduct; and (3) The trial counsel's findings argument was improper because he expressed his personal opinions and inflamed the passions and prejudices of the court members by

repeatedly calling the appellant a liar. Finding no prejudice to the substantial rights of the appellant, we affirm the findings and sentence.

I. Failure to Provide Rights Advisement

At trial, the appellant moved to suppress four statements he made to investigators. On appeal, he focuses on the first of these statements, the one taken on 18 September 2001. He argues it was improperly admitted because he was not advised of his rights pursuant to Article 31(b), UCMJ, 10 U.S.C. § 831(b). He further argues that all of the evidence admitted at trial against him is tainted by this unwarned interview, and thus his convictions must be set aside.

The appellant concedes he was not a suspect at the beginning of the 18 September 2001 interview. Nonetheless, he argues that during the course of the interview, he provided incriminating information indicating he associated with drug users, saw his friends use drugs, and was present while his friends purchased drugs. Upon making these disclosures, he argues, he should have been suspected of dereliction of duty for not reporting drug abuse by other military members, and therefore advised of his Article 31(b), UCMJ, rights.

At trial, AFOSI Special Agent (SA) Christopher Daniel testified for purposes of the motion to suppress. He had learned that the appellant was telling others that Airman Basic (AB) Joseph Buchert should have come up positive for drug use on a recent unit urinalysis test. AB Buchert was, at that time, already under investigation for marijuana use. On 18 September 2001, the appellant was asked to report to the AFOSI office. The appellant drove himself there and SA Daniel interviewed him for the purpose of obtaining a witness statement regarding AB Buchert's drug abuse. The appellant told SA Daniel he had observed AB Buchert purchasing and using marijuana and using what he believed to be methamphetamine. SA Daniel did not ask the appellant if he himself was illegally using drugs. SA Daniel then had the appellant accomplish a written statement on an Air Force Form 1168, after first indicating on the form that it was a witness, rather than a suspect, statement. The form also reflected that no rights advisement was given. At the conclusion of the meeting, the appellant agreed to work for the AFOSI as a confidential informant concerning drug use by military members and others.

We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). A military judge's findings of fact are reviewed under a clearly erroneous standard, whereas conclusions of law are reviewed de novo. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000) (citing *Ayala*, 43 M.J. at 298).

Article 31(b), UCMJ, warnings are required if: (1) the person being interrogated is a suspect at the time of questioning, and (2) the person conducting the questioning is

participating in an official law enforcement or disciplinary investigation. *Swift*, 53 M.J. at 446. *See also United States v. Moses*, 45 M.J. 132, 134 (C.A.A.F. 1996). Whether the person being interviewed by the military questioner is a suspect and entitled to a rights warning is an objective question that is answered by "considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense." *Swift*, 53 M.J. at 446 (quoting *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991)).

In order to be guilty of dereliction of duty, the law requires the government to establish the particular duty an accused allegedly failed to perform. Article 92, UCMJ, 10 U.S.C. § 892. In this case, the question is whether the appellant, an airman basic, had a duty to report the drug use of others. For a duty to be properly established, it must be "imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 16(c)(3)(a). We are unable to discern any support for the appellant's position that he had a duty to report the drug use of his peers. The cases he cites are not apropos. In those cases, the duty to report drug abuse was based on a now obsolete Air Force regulation. *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991); *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986). Furthermore, the appellant has no particularized status that would require him, as a matter of custom, to report drug abuse, e.g., status as an officer, noncommissioned officer, or law enforcement officer. Under the facts and circumstances of this case, we hold that the military judge did not abuse his discretion in denying the appellant's motion to suppress.

II. Admission of Other Crimes, Wrongs, or Acts

At a session held pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), the parties discussed whether three statements the appellant made about his prior marijuana use and distribution were admissible under Mil. R. Evid. 404(b). Citing Mil. R. Evid. 403, the appellant also argued that the prejudice likely to result from admitting these statements outweighed their probative value. The parties focused on three statements: (1) the appellant's statements to AB Buchert regarding his pre-service use of marijuana; (2) the appellant's statement to a military dependent regarding his pre-service distribution of marijuana; and (3) another statement to the same military dependent that he used marijuana in high school. The military judge determined that (1) and (3) were admissible because they illustrated knowledge of marijuana use and absence of mistake, but excluded (2) on the basis it was unduly prejudicial under Mil. R. Evid. 403.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Mil. R. Evid. 404(b). It may, however, be admissible for other purposes, inter alia, proof of knowledge or

absence of mistake. *Id*. In determining the admissibility of other-acts evidence, our superior court has set out a three-tiered analysis:

> (1) whether "the evidence reasonably supports a finding by the court members that [the] appellant committed prior crimes, wrongs or acts";
>
> (2) "[w]hat fact of consequence is made more or less probable by the existence of this evidence"; and
>
> (3) whether "the probative value [is] substantially outweighed by the danger of unfair prejudice[.]"

United States v. Humpherys, 57 M.J. 83, 90-91 (C.A.A.F. 2002) (citing *United States v. Tanksley*, 54 M.J. 169, 176-77 (C.A.A.F. 2000)). *See also United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

"If the evidence fails any of the three tests, it is inadmissible." *Humpherys*, 57 M.J. at 91 (quoting *United States v. Cousins*, 35 M.J. 70, 74 (C.M.A. 1992)). As to the first prong, we conclude the evidence would reasonably support a finding that the appellant engaged in pre-service drug activities. However, the record fails to support the second prong, which addresses relevancy. Specifically, the evidence must be relevant to a fact "in issue." *See Humpherys*, 57 M.J. at 91. In *Humpherys*, our superior court made it clear that being "in issue" means more than just proving an element of the offense. In this case, the military judge ruled that the evidence was relevant to the issues of knowledge or mistake of fact. Without question, the prosecution must prove that the appellant knew that the substance he used was marijuana or was of a contraband nature. However, nowhere in the record does it appear that the appellant failed to appreciate that the substance he and the others were using or possessing was marijuana. Indeed, the appellant never raised the issues of knowledge or mistake of fact. Rather, trial defense counsel argued that acquittal was warranted on two bases: (1) the testimony of the government's key witnesses lacked credibility; and (2) that on the two occasions the appellant admitted to investigators he had inhaled marijuana while serving as an informant, he did it under duress in order to avoid detection.

The appellant's pre-service use of marijuana does not assist the factfinder in determining whether the appellant was under duress, since he could still feel compelled to smoke in the presence of his friends to avoid being discovered, regardless of his prior use. To the extent that the appellant's pre-service use of marijuana was probative, it could only be so on the basis of showing the appellant's predisposition to use marijuana– the one purpose for which the admissions could not be admitted. *See generally United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999). Had the evidence suggested the appellant lacked knowledge about marijuana or mistakenly believed he was using a legal substance, then the relevance of the uncharged misconduct would be much enhanced.

That is not the case in the record before us. Because the appellant did not raise the defenses of lack of knowledge or mistake of fact, the relevance of the uncharged misconduct was minimal, at best. Thus, we conclude that the military judge abused his discretion in admitting this evidence.

Having determined that the military judge erred, we next assess whether the admission of the inadmissible evidence materially prejudiced the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). First and foremost, there is the testimony of four witnesses describing the appellant's use, distribution, and introduction of marijuana. No special emphasis was placed on the uncharged misconduct. While the trial defense counsel did their best to attack the credibility of the three military witnesses by citing their pretrial plea agreements at their own courts-martial, the wide range of the events they describe does not support the existence of a broad conspiracy directed at the appellant. Again, as in *Humpherys*, we note that during the prosecution's closing argument on the merits, which covers more than 17 pages in the record of trial, the trial counsel never mentioned the uncharged misconduct. It is only after the defense raised the issue of duress in its closing argument that trial counsel in his rebuttal discusses the uncharged misconduct. Finally, having admitted the uncharged misconduct, albeit erroneously, the military judge dutifully instructed the court members, without objection from the trial defense counsel, as to the limited purpose for which the uncharged misconduct could be used in their deliberations, to wit, knowledge and intent. In essence, the instruction under the facts present in the case directed the court members that, if they decide that the accused inhaled from the pipe that was being passed, they could use the uncharged misconduct to satisfy themselves that the accused knew that the pipe contained marijuana, and that, by puffing on the pipe, intended to feel the effects of the marijuana. Furthermore, the military judge explicitly instructed the court members that they "may not consider this evidence for any other purpose," and they "may not conclude from this evidence that the accused is a bad person or has general tendencies and that he, therefore committed the offenses charged."

We find that the military judge's "clear, cogent, correct, and complete instructions to the court members" regarding the proper use of the uncharged misconduct mitigated against its prejudicial impact. *Tanksley*, 54 M.J. at 177. Therefore, we conclude that the military judge's error was harmless because it did not have a substantial influence on the findings. *See United States v. Adams*, 44 M.J. 251, 252 (C.A.A.F. 1996).

III. Improper Findings Argument by Trial Counsel

During his argument on findings, the trial counsel repeatedly accused the appellant of being a liar. With regard to the appellant's interview with SA Kyle, trial counsel argued, "That is when the accused lies to him and he is lying to you right here." This was followed by: "Who knows what [the appellant] is thinking because he is lying"; "It is the accused lying about his own drug use and that is what is going on"; "He got caught in his

own lie"; "We all know even if you say you got [marijuana] to your mouth once and didn't inhale it is a lie"; and "The accused is lying . . . he lies to the OSI."

During rebuttal, the trial counsel argued:

> When he first went [to AFOSI] and he is given an opportunity to spit up a lie, and not read his rights, and was not treated like a suspect, he took the opportunity to lie. He wasn't caught ultimately until some months later. That is what you have got here. Everybody has got a motive to lie. It is just highlighted by the accused's lies. The biggest lie is "I had marijuana to my mouth 25 times simulating it. No, it was five times I was around it. No, it was two times I dragged it into my lungs." That is the biggest lie in this courtroom that this Air Force has seen in a long time or anybody has heard -- TV or books or anything.
>
> It is ultimately, ultimately the accused's attempt to come up with this story of 25 times of simulating smoking weed that he got caught by Special Agent Kyle and that now the lie has been caught and the prosecution would ask you, when you vote secretly . . . those votes will all be guilty on all the charges and specifications and that is because when you come out and read that verdict of guilty that will be the truth. Finally, people are going to know this big lie of "I put the weed to my lips but I didn't inhale" will finally come to an end.

The trial defense counsel did not object to these statements or request a curative instruction by the military judge.

The appellant argues that the effect of repeated references to him as a liar was specifically intended to inflame the passions or prejudices of the court members. Furthermore, he argues that it was improper for the trial counsel to express his personal belief that the appellant was a liar.

The legal test for improper argument is whether it was error 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 defense counsel fails to object or request a curative instruction, the court will grant relief only if the improper argument amounts to plain error. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001); *United States v. Southwick*, 53 M.J. 412, 414 (C.A.A.F. 2000); *United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986).

In argument, trial counsel may strike hard blows, but he or she is not at liberty to strike foul ones. *United States v. Stargell*, 49 M.J. 92, 93 (C.A.A.F. 1998). Arguments

must be based on a fair reading of the record. *United States v. Kropf*, 39 M.J. 107 (C.M.A. 1994). "Indeed, it is impermissible and unprofessional for a lawyer in closing argument to express his personal belief or opinion in the truth or falsity of any testimony or evidence." *United States v. Fuentes*, 18 M.J. 41, 52 (C.M.A. 1984) (citing *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977)).

The major premise of the defense at trial was that the government witnesses had motives to lie about the appellant's use and possession of marijuana. The issue thus framed for the court members by the defense was whether the witnesses or the appellant were telling the truth or lying. Therefore, one would expect the trial counsel to confront this premise by arguing that the appellant was not telling the truth. Because the issue of whether the witnesses were telling the truth was first raised by the defense, it would be unusual for the trial counsel not to address the issue of the relative credibility of the witnesses and the appellant in his findings argument. Moreover, the trial counsel never asserted his own personal opinion of the appellant's honesty (or dishonesty), but rather based his arguments on a fair reading of the testimony. Accordingly, we find no plain error.

IV. Conclusion

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

ANGELA M. BRICE
Clerk of Court