

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
M.D. MODZELEWSKI, R.G. KELLY, C.K. JOYCE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL S. CARRICO
INFORMATION SYSTEMS TECHNICIAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201200098
GENERAL COURT-MARTIAL**

Sentence Adjudged: 18 November 2011.

Military Judge: CAPT Carole J. Gaasch, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

For Appellant: LT Jared Hernandez, JAGC, USN; LT Daniel C. LaPenta, JAGC, USN.

For Appellee: Maj Paul M. Ervasti, USMC.

14 February 2013

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

MODZELEWSKI, Senior Judge:

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of conspiracy to commit larceny, two specifications of making a false official statement, one specification of wrongful disposition of military property, and one specification of larceny, in violation of Articles 81, 107, 108, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 908, and 921. The members sentenced the appellant to

18 months confinement, a fine of \$12,000 (enforceable by an additional six months of confinement), and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant assigns five errors: (1) that the military judge improperly admitted hearsay testimony by the Government's key witnesses; (2) that the trial counsel's findings argument was improper; (3) that the stolen property was not military property; (4) that one of the false official statement convictions was legally insufficient; and (5) that the trial counsel's sentencing argument was improper.

After considering the record of trial and the parties' pleadings, we conclude that the findings and the sentence are correct in law and fact and that no errors materially prejudicial to the substantial rights of the appellant were committed. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant was assigned to Naval Beach Group ONE. As the command's senior information technology (IT) petty officer, he was responsible for determining the command's computer needs and requesting the purchase of new computers, laptops, and related items when necessary. His friend, Logistics Specialist Second Class Santee (Santee), worked in the Supply Department and was authorized to make purchases with the Government Purchase Card (GPC). In the normal course of business, the appellant would request the purchase of electronics or endorse a request made by another division, and would then route the request to Santee's office. Santee would then purchase the electronic and computer equipment, usually at either of two local merchants.

In early 2008, the appellant and Santee became aware there was no genuine oversight or accountability for purchases: no one was really watching either the purchase requests or the distribution of the items after purchase. Although there was a formal approval process, it had become common for the purchase requests to be made informally, with no paperwork. The appellant and Santee took advantage of this lax situation to purchase computers and other electronic equipment for themselves with command funds. The appellant and Santee kept some items, sold others, and gave some to their friends.

Later in 2008, the appellant and Santee stumbled upon a slightly different method of profiting from their unfettered

access to the GPC. They would purchase items with the GPC and then return the items, receiving store gift cards for the value of those items. They then used those gift cards to buy items for personal use. Santee testified at trial for the Government, and documentary evidence corroborated his account of the appellant's role in this particular aspect of the conspiracy. Invoices established that the appellant used store credit originally acquired with command funds to purchase a stereo for himself in December 2008.

In January 2009, Chief D, a new supervisor in the Supply Department, reviewed recent GPC purchases and was surprised to discover that eleven laptops (MacBooks) had been purchased in the prior month. Chief D discussed the purchases with the two co-conspirators, but that conversation did not allay her concerns. She directed that Santee and the appellant produce the MacBooks for her inspection on the following Monday. Over the weekend, the two men scrambled to find eleven MacBooks to show Chief D as proof that the laptops were properly procured and in command spaces. Santee asked for several back that he had given to others, and bought several more with fraudulently-obtained gift cards. The appellant went to the Navy Exchange (NEX) and bought MacBooks with his personal NEX credit card. Santee, who accompanied him, later told the investigating agent that the appellant bought three or four tablets; Santee testified to the same at trial. NEX records verify that the appellant bought three MacBooks on 29 January 2009, the day before the supervisor's inspection, and that he returned them one week later.

Additional facts relevant to particular assignments of error are developed below.

II. Admissibility of Hearsay Evidence

The appellant alleges that the military judge erred in allowing testimony about various prior consistent statements by Santee, and that her error was compounded by other unrelated hearsay errors. First, we consider the prior consistent statements.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011). When a party offers prior consistent statements to rebut a charge of recent fabrication or improper motive or influence under MILITARY RULE OF EVIDENCE 801(d)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) several questions inevitably arise: did opposing counsel imply

one or more improper motives; when did those improper motives arise; and does the prior consistent statement pre-date the improper influences or motives? See *United States v. Faison*, 49 M.J. 59, 61 (C.A.A.F. 1998); *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998).

In response to these questions, *Faison* and *Allison* provide two clear rules. First, concerning the fabrication, motive or influence, "the point in time to be ascertained for purposes of rebuttal is the fair implication of the **charge**, not the arguable underlying event." *Faison*, 49 M.J. at 61. The determining factor is the language of cross-examination, not when the alleged motive or influence actually occurred as a matter of historical record. *Id.* Second, when counsel explores multiple motives and influences, the prior consistent statement must precede only one of those implied motives or influences. *Allison*, 49 M.J. at 57.

Here, when trial defense counsel cross-examined Santee, he implied several improper motives and influences, spanning from the beginning of the conspiracy, when Santee committed the offenses, all the way to the time period in which Santee was negotiating with the Government and preparing to testify in the appellant's trial. Following *Faison*, we consider the fair implication of this latter charge to be that the Government induced Santee to testify to its preferred version of events rather than the truth, and that the trial counsel instructed Santee to "waffle" when answering the defense counsel's questions. Record at 442, 465-66, 483. This implied charge would be rebutted by any statement consistent with Santee's trial testimony that occurred before he ever negotiated or prepared with the Government, which is precisely what the Government offered and what the appellant now assigns as error. The military judge was therefore well within her discretion to admit these statements, as they rebutted the implication of recent fabrication and pre-dated the charged improper motive or influence.

In this same assignment of error, the appellant also challenges the admission of purportedly hearsay testimony, but none of the rulings amounts to prejudicial error.¹ Moreover, the

¹ First, there was no Confrontation Clause issue with respect to any hearsay statements by Santee, because he testified. *Crawford v. Washington*, 541 U.S. 36, 58 n.9 (2004). Second, Santee's statement concerning the name of RC on a receipt had the legitimate nonhearsay purpose of explaining one of the NCIS agent's investigative steps. Third, the agent's comment about the store receipts—that he did not know whether returns required a signature—was not an

lack of a MIL. R. EVID. 403 balancing on the record with respect to any of these statements does not affect our analysis, since the appellant made no objection under this rule, and none of this testimony is the type of inflammatory evidence typically associated with unfair prejudice. See *United States v. Long*, 574 F.2d 761, 766 (3d Cir. 1978) (requiring specific 403 objection); see also *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009) (explaining "prejudice" under MIL. RULE EVID. 403).

III. Trial Counsel's Arguments on Findings and on Sentence

Because the appellant did not object to the trial counsel's arguments at trial, we review the arguments for plain error. *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004). The majority of the errors assigned by the appellant are neither plain nor obvious, with one exception each at findings and sentencing.² We will not parse the arguments any further, because even if we agreed with the appellant that more of the trial counsel's arguments were erroneous, it is clear to us that he suffered no prejudice. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

Our assessment of prejudice involves three factors: (1) the severity of the misconduct, (2) curative measures taken at trial, and (3) the overall weight of the evidence. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). All three factors weigh against the appellant. First, there was nothing "severe" about these arguments. The "raw numbers" (*i.e.*, the instances of misconduct as compared to the overall length of the argument) are nothing approaching what was at issue in *Fletcher*, 62 M.J. at 184, and taken individually, the comments are benign.

assertion for hearsay purposes. Finally, any comments about the naval audit, even if erroneously admitted, could not have prejudiced the appellant, who later introduced testimony and evidence of the same audit.

² At findings, it was error for the trial counsel to refer to the fact that the appellant actively assisted his counsel throughout the trial. Record at 1276. "A trial counsel who comments on the demeanor of a non-testifying accused in his closing argument is 'strolling in a minefield.'" *United States v. Kirks*, 34 M.J. 646, 653 (A.C.M.R. 1992) (quoting *Borodine v. Douzanis*, 592 F.2d 1202, 1209 (1st Cir. 1979)). These comments directly implicated the appellant's right to participate in his defense. At sentencing, the trial counsel erred by "blurring the distinction" between punitive discharges and administrative discharges brought about by budget cuts, but those comments alone do not rise to the level of prejudicial plain error. See, *e.g.*, *United States v. Howard*, No. 9900699, 2000 CCA LEXIS 101, unpublished op. (N.M.Ct.Crim.App. 10 Apr 2000); *United States v. Garrison*, No. 9800745, 1999 CCA LEXIS 275, unpublished op. (N.M.Ct.Crim.App. 13 Oct 1999).

See also *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (declining to find severity even though the trial counsel called the appellant "evil" and argued that the proper place for him was "hell"). Second, the only reason that there were no specific curative measures here was that the appellant never objected, which fact buttresses our conclusion that neither argument was particularly provocative.

Finally, the evidence against the appellant is convincing, and the arguments here did nothing to distort it. The case against the appellant was largely a paper case, with evidence of the fraud well-documented. At findings, the paper trail of his crimes established the appellant's guilt of the gravamen offenses: trial counsel's arguments about witness credibility and other circumstantial evidence were relatively collateral to the great weight of the paper case. At sentencing, the essential facts were even less disputed. It was clear that the appellant had abused his rank and positional authority to conspire to steal \$36,000 from his command. Still, the members fined the appellant only one-third of that amount and sentenced him to 18 months' confinement, a fraction of the maximum of 40 years. Nothing about this record raises questions about the members' decisions or the role that the trial counsel's arguments may have played in them. The appellant has failed to carry his burden to show prejudice.

IV. The Falsity of the Appellant's Statement.

The appellant argues both that the evidence at trial did not prove the falsity of the statement charged in Specification 2 of Charge II, and that the Government's charging language did not match his actual statement. As a consequence, he contends that the evidence was legally insufficient. Alternatively, he argues that the evidence is factually insufficient.

The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if a rational trier of fact could have found the essential elements of the crime, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ. In contrast, when we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our factual

sufficiency review with the understanding that we did not personally observe the witnesses. *Turner*, 25 M.J. at 325.

Naval Criminal Investigative Service (NCIS) Special Agent (SA) Braatz began investigating the fraudulent purchases in May 2009. When SA Braatz interviewed Santee, Santee told him about the purchase of MacBooks in January to fool the supervisor. When SA Braatz later interviewed the appellant, the appellant denied any wrongdoing. SA Braatz then asked him, "Did you ever use your personal credit card to buy four laptops so the command would have the right number when [Chief D] started asking about it?" Prosecution Exhibit 8. The appellant answered, "No." SA Braatz continued, "So when I look at your credit card record or your wife's or whatever . . . it's not going to show anything like that?" The appellant again answered, "No." *Id.* SA Braatz subsequently obtained records from the Navy Exchange which revealed that the appellant purchased three laptop computers with his Military Star Card on 25 January 2009. PE 10.

The members convicted the appellant of a specification of false official statement that read as follows:

Specification 2: In that [Appellant] did, at or near San Diego, CA, on or about 4 June 2009, with intent to deceive, make to [NCIS SA] Robert Braatz, an official statement, to wit; there would be no credit card statements indicating he had purchased several MacBook computers from the Navy Exchange, or words to that effect, which statement was false in that there were credit card records showing such purchases from the Navy Exchange, and was then known by [Appellant] to be so false.

The appellant has seized on two issues to contest the sufficiency of the evidence on this specification. First, the charge sheet alleges that a specific set of words was false, and the recording of the appellant's words reveals that he actually did not make that statement but instead answered "No" in response to two questions. Secondly, the falsity of the appellant's response to the question was not proven with his or his wife's personal credit card records. Instead, the Government offered records from the Navy Exchange, showing that the appellant had used his personal credit card to buy the laptops in question.

We are convinced that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt.

First, the records from the Navy Exchange were sufficient to support a determination beyond a reasonable doubt that the appellant's statement to NCIS (i.e., his two "No" answers) was false. A statement may be false in certain particulars. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 31b(2). It need not be totally false, and, in fact, parts of it may be literally true. *United States v. Wright*, 65 M.J. 373, 374 n.1 (C.A.A.F. 2007). *Wright* is an illuminating example of these principles in practice. There, a soldier told investigators that several computers were missing from the spot where he had left them. It was literally true that the computers were missing from that spot, but the statement was still held false *in that* it implied that Wright had no explanation for their absence, when in fact he had stolen them. *Id.* at 374

This appellant, like *Wright*, implied a total lack of involvement with the laptops in question. Although one of his "No" statements can be read more narrowly because the NCIS agent specified "four" laptops, *Wright* shows that our review should not be so myopic. In context, the appellant's two consecutive "No" answers embraced far more than the purchase of a precise number of laptops. The "No" response also answered questions about the manner of purchase (his credit card) and the specific occasion (the supervisor's inspection). This was therefore a more general denial of guilt, an assertion that there would be no records of the appellant using his credit card to temporarily acquire laptops and fool his supervisor. That assertion was proven false through the Navy Exchange records. Those records fairly fell within the NCIS agent's question, which included the phrase "anything like that" after he used "your credit card records or your wife's" as an example. We disagree with the appellant that the question only referred to the accused's personal credit card statements, which the Government never introduced at trial.

Although the Government used the word "statement" instead of "record" in its specification, we find no error because the word "statement" was enough to place the accused on notice that his "No" responses during the NCIS interview were the basis for the charge. The words in the specification are closely linked to the NCIS agent's question.³ This case is therefore unlike *United States v. McMillan*, 59 M.J. 872 (N.M.Ct.Crim.App. 2004), on which the appellant relies. There, the appellant's actual

³ Compare, the charged language, "there would no credit card *statements* . . . or words to that effect," with the agent's question that referenced "credit card records . . . or anything like that."

words, as proved at trial, were categorically different than what was alleged in the specification. McMillan was charged with falsely denying that he personally used drugs and that he had ever seen "anyone" using, possessing, or buying drugs. 59 M.J. at 877 (emphasis added). At trial, the Government proved only that McMillan had said that he never saw "any *Marines*" use drugs, and offered no evidence that he was ever asked about his own use of drugs, let alone that he denied it. *Id.* Essentially, the Government in *McMillan* charged two statements and only proved a fraction of one. Here, in contrast, there was a single statement alleged, and the Government fully proved that the appellant made the statement and that it was false.

After reviewing the record, we find that a rational trier of fact could have found that the essential elements of false official statement were satisfied, and we are ourselves convinced beyond a reasonable doubt as to the appellant's guilt on this specification.

V. Conclusion

The remaining assignment of error, in which the appellant disputes whether the property he stole was military property, is also without merit.⁴ The findings and the sentence as approved by the CA are affirmed.

Judge KELLY and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court

⁴ "We may presume that items purchased with funds appropriated by Congress to a military department fall within the definition of 'military property.'" *United States v. Simonds*, 20 M.J. 279, 280 (C.M.A. 1985). The property in this case is materially indistinguishable from the property in *United States v. Russell*, 50 M.J. 99 (C.A.A.F. 1999), among other cases. The members were properly instructed by the military judge that military property is that which has a "uniquely military nature or is used by an armed force in furtherance of its mission." Record at 1298.