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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHARLES C. HORNBACK
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201200241
SPECIAL COURT-MARTIAL

Sentence Adjudged: 16 February 2012.
Military Judge: LtCol Stephen Keane, USMC.
Convening Authority: Commanding Officer, Marine Fighter Attack Training Squadron 101, MAG 11, 3d MAW, MarForPAC, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col P.J. Betz, Jr., USMC.
For Appellant: LT David Dziengowski, JAGC, USN.
For Appellee: Maj William Kirby, USMC.

21 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.

WARD, Judge:

A special court-martial panel of members convicted the appellant, contrary to his pleas, of violating a lawful general order by using the substance known as “Spice”, signing a false official statement, and larceny of military property, in violation of Articles 92, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 921. The panel sentenced the appellant to be confined for three months and to be discharged from the Marine Corps with a bad-conduct discharge.

The convening authority (CA) approved the sentence as adjudged, and except for the punitive discharge, ordered it executed.

The appellant first alleges that prosecutorial misconduct by the trial counsel materially prejudiced his substantial right to a fair trial. Next, he argues that the evidence was both factually and legally insufficient to prove beyond a reasonable doubt that he used "Spice". Last, he cites error in the promulgating order. We find merit in the appellant's final assigned error and order appropriate relief in our decretal paragraph.[1] After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant faced a litany of offenses relating to wrongful use of prohibited substances,[2] Basic Allowance for Housing (BAH) fraud,[3] provoking speech, and communicating threats. At trial, the Government called a number of witnesses who both testified to admissions made by the appellant and to their own observations of the appellant's behavior that indicated wrongful use of a prohibited substance. On several occasions, trial defense counsel (TDC) timely objected to either the scope or substance of trial counsel's questions, necessitating Article 39(a) sessions. During these sessions, the military judge examined the witness in the context of the trial counsel's proffer of expected relevant testimony. On some of these occasions, the military judge overruled TDC's objections and allowed limited examination by the trial counsel. Other times, however, the military judge prohibited the trial counsel's intended inquiry. The military judge gave a curative instruction in the majority of instances where the witness offered improper testimony. During findings instructions, the military judge instructed the panel on the proper use of

[1] Although we find this error to be harmless, the appellant is entitled to accurate court-martial records. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

[2] Charged as general order violations, these prohibited substances included "Spice," "Bath Salts," and the prescription drug Xanax. The appellant was also charged with wrongfully soliciting another to use a prohibited substance.

[3] These specifications included signing a false official statement, larceny and presenting a fraudulent claim against the United States.

character evidence and instructed them to ignore any testimony that was the basis of a sustained objection. Last, the military judge sustained TDC's objections to trial counsel's comments during closing argument, and issued a curative instruction upon conclusion of trial counsel's argument.

Prosecutorial Misconduct

"Prosecutorial misconduct is action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006) (quoting *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997)) (internal quotation marks omitted). Appellate courts review *de novo* the question of whether prosecutorial misconduct amounted to prejudicial error. *Argo*, 46 M.J. at 457. However, we review for plain error when no objection is raised at trial. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

When analyzing allegations of prosecutorial misconduct and whether it amounts to a due process violation, this court looks at the fairness of the trial and not the culpability of the prosecutor. *Edmond*, 63 M.J. at 345 (citing *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). We must focus on the "overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citation omitted). If prosecutorial misconduct is found, this court will examine the record as a whole to determine whether the appellant was prejudiced by weighing three factors: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. *Fletcher*, 62 M.J. at 184.

Citing numerous instances in the record, the appellant argues that the trial counsel repeatedly attempted to introduce improper character evidence, solicit improper hearsay, inject unlawful command influence, and improperly vouch for the credibility of the Government's evidence at trial. Appellant's Brief of 5 Sep 2012 at 28-29. On many of these occasions, TDC raised timely objections.[4] Other times, however, TDC raised no objection.[5]

[4] Record at 163-64, 177, 183, 186, 193-94, 224, 251, 255, 310, 314, 445, 456, 533-34.

Turning now to those instances objected to at trial, even assuming without deciding that trial counsel's actions amounted to misconduct, we find no material prejudice to the appellant's substantial right to a fair trial.

1. Severity of the Misconduct

The appellant relies mostly on those instances where he argues that trial counsel injected improper character evidence into the trial, noting "[t]he dangers of improper character evidence are noteworthy and real . . . ." *Id*. at 29. We do not take issue with his point on the dangers of such evidence; however, we do take issue with his characterization of these instances in the record. On many of these occasions, TDC objected before very little, if any, improper testimony was actually elicited. Record at 163-68, 175, 185, 255. On other occasions, the military judge later allowed limited inquiry, or at least related inquiry into the subject matter objected to by TDC. *Id*. at 175, 193-94, 268. Last, our review of the record indicates that on at least three occasions, the improper character evidence was unsolicited by the trial counsel during her examination of the witness. *Id*. at 225, 251, 314. We also note that much of the dialogue from the military judge now cited to by the appellant came during Article 39a sessions out of the presence of the members. Although the military judge may have been unimpressed by the trial counsel's proffer of expected relevance, the fact remains that either through a timely objection from TDC or an interruption by the military judge, the panel never heard the proffered testimony.

We next turn to the appellant's claim that during argument the trial counsel improperly disparaged him, introduced unlawful command influence, and commented on facts not admitted during trial. Twice the military judge properly sustained TDC's objections to the trial counsel's likening the appellant to a plague or criminal infection within the Marine Corps. *Id*. at 445, 456. These comparisons, while inappropriate, amount to two limited references during an argument that spanned twelve pages of transcript. We also view trial counsel's comment "the command . . . has taken action in the form of these charges

[5] *Id*. at 114, 115, 141, 220, 456, 471-473, 535. We have reviewed these instances raised by the appellant for the first time on appeal and find no plain or obvious error.

before you,"[6] as similarly improper; but it was limited in nature and not conveyed as a desired or intended result by the convening authority.[7] Finally, a close review of the record does not support the two occasions where the military judge interrupted trial counsel for arguing facts not in evidence.[8]

2. Curative Measures

On many of the occasions when the military judge either sustained an objection from TDC, or interrupted the trial counsel, he later issued a curative instruction to the panel. *Id*. at 185, 186, 225, 251, 456. The military judge also twice instructed the panel to disregard evidence that was the subject of a sustained objection, and to not consider any of the related evidence or argument for any purpose. *Id*. at 456-57, 495-96. We find no evidence that the members failed to follow the military judge's instructions,[9] particularly in light of the fact that the panel acquitted the appellant of five of the total eight offenses submitted to them.[10]

3. Weight of the Evidence

The evidence introduced on the "Spice" use included two unbiased witnesses who both testified to the appellant smoking a

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[6] Record at 456.

[7] The military judge immediately issued a curative instruction following this comment.

[8] *Id*. at 447, 453. We disagree with the appellant's characterization that the "record is unclear whether the military judge actually struck the entirety of Corporal (Cpl) Morris's testimony." Appellant's Brief at 20. Twice when the trial counsel alluded to Cpl Morris's testimony, the military judge interrupted, stating that he previously struck Cpl Morris's testimony. During the Government's case, the military judge indicated that he would strike Cpl Morris's testimony after Cpl Morris invoked his privilege against self-incrimination. Record at 278. However, before deciding to do so, he allowed the trial counsel a recess. Following the recess, trial counsel informed the military judge that the Government had obtained immunity for Cpl Morris. The military judge reconsidered his ruling and allowed the testimony. *Id*. at 287-91. The military judge did properly sustain TDC's objection to the trial counsel's comment during sentencing argument that the appellant used "Spice" during work since the only evidence of the appellant's "Spice" use occurred at a residence. *Id*. at 533-34.

[9] We presume, absent evidence to the contrary, that members followed the military judge's instructions and disregarded this evidence. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

[10] Appellate Exhibit XXXIII.

substance that he described to them as "Spice". In addition, the members heard testimony from other witnesses that the appellant discussed his use of "Spice" and how the Navy was unable to detect it during urinalyses. *Id*. at 125-26, 131-33, 140. Most of the references to improper character evidence and related Article 39a sessions focused on the prohibited substance offenses, two of which later resulted in not guilty findings.[11] Little of the now complained of conduct by the trial counsel related to the false official statement or BAH larceny. On these latter offenses, the Government's case was much stronger.

Having balanced the *Fletcher* factors, we conclude that, taken as a whole, even if the trial counsel's actions amounted to misconduct, we are confident that the members convicted the appellant on the basis of the evidence alone. *Fletcher*, 62 M.J. at 184.

Legal and Factual Sufficiency

The appellant next argues that the evidence that he wrongfully used "Spice" was both legally and factually insufficient citing the lack of any forensic or scientific testing, and the military judge's characterization of the Government's evidence as "weak" during an Article 39a session. Appellant's Brief at 41.

Issues of factual and legal sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

Legal sufficiency, by contrast, is determined by asking "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United*

[11] At the close of evidence, the military judge entered a finding of not guilty for the specification alleging wrongful use of "Bath Salts". Record at 422. The members also found the appellant not guilty of the specification alleging wrongful use of Xanax and the specification alleging wrongful solicitation of another to use "Bath Salts". AEs XXXIII and XXXV.

States v. Dobson, 63 M.J. 1, 21 (C.A.A.F. 2006) (citation omitted). When testing for legal sufficiency, we must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty,* 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker,* 32 M.J. 281, 284 (C.M.A. 1991)).

We have summarized above much of the evidence for this offense. We also note that in prosecutions for use of a controlled substance, forensic or scientific testing to confirm the identity is not required to sustain a conviction. *See generally United States v. Tyler,* 17 M.J. 381, 386-87 (C.M.A. 1984) (holding witness's opinion corroborated by circumstantial evidence can be sufficient to identify a drug); *United States v. Jessen*, 12 M.J. 122, 126 (C.M.A. 1981) (holding testimony from undercover investigator familiar with drug sufficient to prove its identity); *United States v. White*, 9 M.J. 168, 169-70 (C.M.A. 1980) (finding admission by appellant corroborated by other witnesses' testimony to be sufficient).

Based on the evidence in the record before us, we are convinced that a reasonable factfinder could have found all the essential elements of this offense beyond a reasonable doubt. These circumstances include the appellant's description of the substance as "Spice," testimony that the appellant removed a substance resembling marijuana from a small container and then smoked it through a glass pipe, his repeated statements to others that "Spice" could not be detected through urinalysis, and his soliciting others to use "Spice" with him.[12] Furthermore, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

The findings of guilty and the sentence are affirmed. The supplemental court-martial order will reflect that as to Specification 1 of Charge I the appellant was found guilty except for the words "on divers occasions."[13]

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[12] It is these additional circumstances that distinguish this case from *United States v. Nicholson*, 49 M.J. 478 (C.A.A.F. 1998) (conviction of marijuana possession relying solely upon one witness's brief observation insufficient.)

[13] We note that the military judge granted the Government's motion to amend the date specified in Charge I, Specification 1. Record at 441. However, the cleansed charge sheet provided to the members also removed the phrase "on divers occasions". AE XXXV; Record at 443-44. This appears to have been an oversight as the military judge declined to strike this language. Record at 420. However, as the members' finding was based on the charge sheet

Senior Judge PAYTON-O'BRIEN and Judge MCFARLANE concur.

For the Court

R.H. TROIDL
Clerk of Court

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submitted without the phrase, the court-martial order does not currently reflect the guilty finding.