

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

**Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RORY J. MITCHELL
ELECTRICIAN'S MATE FIREMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 201200455
GENERAL COURT-MARTIAL**

Sentence Adjudged: 25 July 2012.

Military Judge: CDR Lewis Booker, JAGC, USN.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: LCDR D.E. Reike,
JAGC, USN.

For Appellant: LT Jared Hernandez, JAGC, USN.

For Appellee: LT Ann Dingle, JAGC, USN.

17 October 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.**

PER CURIAM:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of distribution of amphetamine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to confinement for one year, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and,

except for the punitive discharge, ordered the sentence executed.

On appeal, the appellant argues that the evidence adduced at his trial failed to disprove the affirmative defense of entrapment. Having reviewed 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 error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The subject offenses stem from two undercover drug buys between the appellant and another Sailor from the USS ABRAHAM LINCOLN (CVN 72), Aviation Boatswain's Mate (Aircraft Handler) Airman (ABHAN) JF. While investigating suspected drug-related activity on board the LINCOLN, agents from the Naval Criminal Investigative Service (NCIS) learned that ABHAN JF was rumored to be connected to narcotics use and distribution on board the ship. They then decided to approach him to see if he could be "flipped" and cooperate in their efforts to investigate others involved in narcotics use and distribution.

In May of 2011, NCIS agents met with ABHAN JF and informed him that they had information linking him to narcotics and "Spice." ABHAN JF admitted to using Spice and agreed to cooperate. He identified the appellant along with approximately fifteen other Sailors on board the ship known to be associated with using and distributing narcotics, to include Adderall¹ and other prescription pills.

With this information, NCIS agents set about arranging a controlled buy between ABHAN JF and the appellant. At the suggestion of the agents, ABHAN JF concocted a cover story where he would tell the appellant that he needed some Adderall because his own prescription had been stolen. ABHAN JF then contacted the appellant twice during a three-day period asking if he could get any Adderall. On 24 May 2011, the two met at a pre-determined location where the appellant gave ABHAN JF 15 pills of Adderall in exchange for \$80.00 cash. NCIS agents then recovered the pills from ABHAN JF and sent them to the U.S. Army Criminal Investigation Laboratory (USACIL) where the pills were confirmed to contain amphetamine.

¹ Adderall is a trade name for a specific formulation of amphetamine. Record at 315.

Over the next several months, ABHAN JF continued to contact the appellant seeking to arrange another buy. Between 25 May 2011 and 25 August 2011, ABHAN JF contacted the appellant five or six more times attempting to arrange another purchase of Adderall.² Some of these contacts were by text message and others were in person. At trial, ABHAN JF testified that the appellant actually approached him on board the ship several times discussing the possibility of getting him some Adderall. However, no distribution resulted from these conversations.³

On 25 August 2011, the appellant again contacted ABHAN JF to set up a buy. The two later met in the ship's berthing spaces where the appellant gave ABHAN JF five pills of Adderall. No money was exchanged. NCIS later recovered these pills and sent them to USACIL where they tested positive for amphetamine.

At trial, the appellant testified that when ABHAN JF initially approached him in May 2011 he seemed "anxious" and "almost desperate." *Id.* at 340-41. He also testified that after the initial exchange in May ABHAN JF continued to contact him approximately five or six times, usually by text, asking for more. On each of these occasions, the appellant told him "no". *Id.* at 345-49. Finally, in August, when ABHAN JF approached him again asking for more Adderall, the appellant described how several days later he finally agreed and provided ABHAN JF with five more pills of Adderall. *Id.* at 348-49.

Analysis

At trial, the military judge instructed the members on the affirmative defense of entrapment. Specifically, he told them that the defense exists if "the original suggestion and initiative to commit the [distribution] originated with the government . . . and the [appellant] was not predisposed or

² These additional contacts occurred on 2 June, 3 June, 23 June, 5 August, and 12 August 2011. *Id.* at 246, 301.

³ At trial, ABHAN JF and the appellant offered differing accounts of these conversations. ABHAN JF testified that the appellant approached him on board the ship telling him that he was going to get some more Adderall from his supplier. However, when ABHAN JF would later contact him, the appellant would say that "he couldn't get a hold of the [supplier]." *Id.* at 273, 295. The appellant testified, however, that it was ABHAN JF who approached him approximately five or six times asking if he could obtain Adderall to which he told him "no". The appellant testified that he only agreed to provide him with Adderall on the two occasions where he actually distributed the drug to ABHAN JF. *Id.* at 357.

inclined to commit the drug distributions alleged." *Id.* at 407. Further, he explained that the prosecution carried the burden of not only proving the elements of the crime, but also proving that the defense of entrapment did not exist. *Id.*

The appellant argues that the evidence at his trial is both legally and factually insufficient to prove beyond a reasonable doubt that he was not entrapped. Specifically, he claims that ABHAN JF's "relentless pursuit" of him over three months improperly induced him to commit the offenses. Appellant's Brief of 12 Mar 2013 at 8-10. Furthermore, he maintains it was ABHAN JF who "planted the idea to distribute [Adderall] and then convinced him to do so through appeals to sympathy and friendship." *Id.* at 10. We disagree.

We review the legal sufficiency of the evidence by determining "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 States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In reviewing the factual sufficiency of the evidence, we must determine 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 [] convinced of the accused's guilt beyond a reasonable doubt." *Id.* at 325. 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). We review questions of legal and factual sufficiency *de novo*. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

To disprove the affirmative defense of entrapment, the Government must prove beyond a reasonable doubt that either; 1) it did not induce the appellant to distribute Adderall, or 2) that the appellant was predisposed to committing the offense. See RULE FOR COURTS-MARTIAL, 916(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); *United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002). On the former element, "a government agent's repeated requests for drugs do not in and of themselves constitute the required inducement." *Hall*, 56 M.J. at 437 (internal quotation marks and citation omitted). Furthermore, merely "provid[ing] the opportunity or facilities to commit the crime or use artifice and stratagem" likewise alone is not enough to show improper inducement. *Id.* at 436-37 (internal quotation marks and citation omitted). By committing a crime without extraordinary inducement, one demonstrates a

predisposition to commit the crime. *United States v. Lubitz*, 40 M.J. 165, 167 (C.M.A. 1994).

We find the record does not support the appellant's allegation of improper inducement. In this case, ABHAN JF approached the appellant in person twice over a three-day period before the appellant facilitated the first distribution of Adderall. Over the next three months, ABHAN JF contacted the appellant again five or six more times before the latter distribution of Adderall occurred. Even if we assume that these contacts were, as the appellant testified, solely initiated by ABHAN JF, our review of the record indicates that the frequency and nature of these communications fall far short of the inducement necessary under R.C.M. 916(g).⁴

The record also contains sufficient evidence of the appellant's predisposition to distribute Adderall. A person without predisposition can take a variety of actions, "including just telling [ABHAN JF] no." *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992). By his own admission, after ABHAN JF's initial request for Adderall, the appellant "told him I would see what I could do and I would get back to him[.]" Record at 340. The appellant did not hesitate to facilitate the first transaction. He knew who to contact on the ship to obtain Adderall and did so. *Id.* at 341. For this initial purchase, the appellant spoke to his contact on two separate occasions - first to set-up the exchange, then to actually obtain the pills. *Id.* at 341-43. These admissions sufficiently demonstrate that the appellant was merely afforded the opportunity to distribute Adderall and no entrapment occurred. *Whittle*, 34 M.J. at 208.

Based on the *de minimis* nature of the communications between ABHAN JF and the appellant, and the appellant's own admissions, we conclude that the appellant was not induced and was predisposed to commit the crime. Accordingly, we find the evidence to be legally and factually sufficient to support the conviction.

Conclusion

⁴ Compare *Lubitz*, 40 M.J. at 166-68 (holding that a cooperating source approaching the appellant six to twelve times over a three to seven day period did not constitute inducement), with *United States v. Daniels*, 39 M.J. 789, 792 (N.M.C.M.R. 1993) (holding in a guilty plea case that an agent approaching the appellant "relentlessly, 25 times at least, day after day," to get him marijuana indicated an improper inducement by the Government and required reopening the providence inquiry to explore defense of entrapment).

The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court