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

Before
M.D. MODZELEWSKI, E.C. PRICE, R.G. KELLY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHRISTOPHER S. SEGHETTI
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200244
GENERAL COURT-MARTIAL

Sentence Adjudged: 10 February 2012.
Military Judge: Maj Brandon Bolling, USMCR.
Convening Authority: Commander, Marine Corps Base, Quantico, VA.
Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC.
For Appellant: LT David C. Dziengowski, JAGC, USN.
For Appellee: LT Ian D. MacLean, JAGC, USN.

28 March 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 military judge, sitting as a general court-martial, convicted the appellant in accordance with his pleas of three specifications of making false official statements, and contrary to his pleas of three specifications of attempted larceny in violation of Articles 107 and 80 of the Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 880, respectively. The military judge sentenced the appellant to confinement for 6 months,

reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises three assignments of error: (1) the military judge committed plain error when he considered improper testimony regarding uncharged misconduct; (2) the evidence is factually insufficient to prove Specifications 1-3 of Charge I; and (3) that his sentence was inappropriately severe.

After careful consideration of the record and the briefs of the parties, 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

After reporting aboard a command in Quantico, VA, the appellant made three separate false official statements to his Command Sergeant Major regarding his delinquent Government travel charge card account. He initially claimed that he had turned the travel charge card in prior to detaching from his previous command in California. He then falsely recounted his route of travel from California to Virginia, and, a short while later, produced a false travel charge card transaction history to support those claims.

Several months prior to making the false statements, the appellant used his travel charge card for a variety of unauthorized expenditures including personal expenses in Las Vegas, Nevada. The attempted larceny charges were based upon the appellant's attempts to pay his travel charge card bill through an automated phone payment system by using funds from his roommate's, Sergeant (Sgt) N, personal checking account without Sgt N's permission. Sgt N's financial institution generated three checks to pay the unauthorized charges but all were returned for insufficient funds.

Additional facts necessary to resolve the assigned errors are included herein.

Improper Evidence of Uncharged Misconduct

The appellant argues that the military judge committed plain error by considering evidence of uncharged misconduct without conducting the required legal analysis. The evidence at issue is Sgt N's testimony that the appellant asked him "two or

three times" to change his story and tell Government representatives that he had given the appellant permission "to borrow the money," and that the appellant later contacted him and asked that he not "mention" the appellant's earlier requests to change his story. Record at 193-94. Sgt N informed the prosecutors of both requests the night prior to his scheduled trial testimony. This testimony was received without objection from the defense. Civilian defense counsel extensively cross-examined Sgt N regarding this testimony and about whether he may have agreed to loan the appellant money while under the influence of alcohol. *Id*. at 196-203, 217-19.

Prior to argument on sentence, trial counsel indicated a desire to argue Sgt N's testimony as evidence in aggravation, and the military judge agreed that it could be "considered aggravating under [R.C.M.] 1001(b)(4)," characterizing the evidence as "an attempt to cover up or to seek some kind of relief from liability for the attempted larceny charge." *Id.* at 312. The military judge asked the defense if they wanted to "comment on that" and defense counsel replied "[n]o, sir." *Id*.

"When the defense fails to object to admission of specific evidence, the issue is waived, absent plain error." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citations omitted). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" *Id*. (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)).

"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"; however, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, [or] identity . . . ." MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Evidence of uncharged misconduct may also be admissible under MIL. R. EVID. 404(b), as evidence of a "consciousness of guilt." *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010) (citation omitted); *see also United States v. Simmons*, 54 M.J. 883, 891 (N.M.Ct.Crim.App. 2001) ("Military case law has long supported the admission of evidence of flight as evidence of consciousness of guilt") (citations omitted).

To be admissible under MIL. R. EVID. 404(b), evidence of uncharged misconduct must satisfy the three-pronged test

enumerated in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted):

> 1. Does the evidence reasonably support a finding by the court members that the appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice?"

Because the military judge did not articulate his reasoning on the record, we will apply the *Reynolds* test to determine whether "an error was committed" when the military judge considered Sgt N's testimony that the appellant requested him to change his story and claim that the appellant had his permission to borrow money and then later asked him not to disclose that request to Government representatives.

The appellant does not contest that the uncharged misconduct satisfies the first prong of the *Reynolds* test. Appellant's Brief at 11, footnote 3. We agree that Sgt N's testimony reasonably supports a finding that the appellant committed prior crimes, wrongs or acts, thus satisfying prong one. *See Reynolds*, 29 M.J. at 109.

We also conclude that Sgt N's testimony satisfies the second-prong of *Reynolds* as "fact[s] . . . of consequence" are made "more" or "less probable." *Id.* Sgt N's testimony "raises an inference from which a fact-finder could reasonably infer consciousness of guilt." *Staton*, 69 M.J. at 231. In addition, the appellant's purported request that Sgt N tell Government representatives that the appellant had his permission "to borrow the money," is directly relevant to determining whether someone attempted to steal money from Sgt N, as well as the identity of the perpetrator, two elements of the offense of attempted larceny; key "fact[s] of consequence." *Reynolds*, 29 M.J. at 109.

These facts are similar to those in *Staton*, where the military judge deemed evidence of the appellant's aggression toward the trial counsel admissible to show consciousness of guilt. *Staton*, 69 M.J. at 229-31. The probative value of this evidence is also high because it makes, if true, more probable

two elements of the crime of attempted larceny and provides evidence of the appellant's consciousness of guilt.

"The third *Reynolds* prong employs the balancing test under the M.R.E. 403: whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *United States v. Hays*, 62 M.J. 158, 164 (C.A.A.F. 2005). As previously discussed, the probative value of Sgt N's testimony was high. Likewise, in a trial by military judge alone, the "danger of unfair prejudice" is reduced as a "military judge is presumed to know the law and apply it correctly[.]" *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). In short, the risk that members "will treat evidence of uncharged acts as character evidence and use it to infer that an accused has acted in character, and thus convict" is simply not present here. *Staton*, 69 M.J. at 232. Therefore, Sgt N's testimony satisfies the third-prong of *Reynolds*, as well.

Under these circumstances we conclude that the defense has failed to establish that "an error was committed." *Maynard*, 66 M.J. at 244 (citation omitted). Even assuming that the military judge's consideration of the evidence of the appellant's uncharged misconduct constituted error, the appellant failed to establish that "the error resulted in material prejudice to [his] substantial rights." *Id*. For the reasons addressed *infra* at 5-7, we find the evidence of the appellant's culpability for the attempted larcenies overwhelming.

We hold that the military judge's consideration of Sgt N's testimony regarding uncharged misconduct does not constitute plain error.

Factual Sufficiency

The appellant claims that the evidence was factually insufficient to prove the three attempted larcenies beyond a reasonable doubt. He argues that: (1) the evidence does not establish that he had the opportunity to obtain Sgt N's checking account information; (2) Sgt N acknowledged the "possibility" that he authorized the appellant to charge his personal checking account while under the influence of alcohol; and (3) that the military judge relied upon the impermissible testimony of Sgt N "to get to beyond a reasonable doubt" as to the attempted larceny specifications. Appellant's Brief at 18-21. We disagree.

We review issues of factual sufficiency *de novo*. Art. 66(c), UCMJ. In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

First, and contrary to the appellant's assertion, the evidence establishes that he had the opportunity to obtain the information required to make the transactions: namely Sgt N's checking account number and a bank routing number. The appellant and Sgt N were friends for an extended period of time and lived in rooms that shared a bathroom for approximately 10 months prior to the transactions. Additionally, Sgt N testified that he retained copies of his banking statements in his room, albeit in a locked container; that he did his banking on a personal laptop computer that he kept in his room; that the appellant had been in his room, including while Sgt N used that computer; and that he believed that the appellant had used that computer. Record at 191-92, 205-07, 226.

More significantly, the evidence that the appellant actually used Sgt N's account information in an effort to pay his travel charge card account is overwhelming. The record reflects that payments of $808.00, $850.00, and $810.00 were credited to the appellant's Citibank travel charge card account and then returned due to insufficient funds during the charged timeframe of June – July 2011. Prosecution Exhibit 1. Three checks drawn on Sgt N's personal checking account in those amounts issued in the appellant's name and payable to his travel charge card account were returned due to insufficient funds. Prosecution Exhibit 2. All three payments were authorized through Citibank's automated telephone payment system and the appellant's personal cell phone records reflect calls to the Citibank automated phone system number shortly before or during each transaction, including one call from Las Vegas, Nevada. PE 9 and 11. Notably, the appellant made a number of unauthorized charges to his Citibank, Government travel charge card account including charges in Las Vegas, Nevada. In addition, the appellant's bank statements reflect that he had insufficient funds to settle his Government travel charge card account during the charged timeframe. PE 6 and 8.

Second, in the context of the entire record, we accord little weight to Sgt N's acknowledgement, in response to civilian defense counsel's cross-examination question, that

there is a "possibility" that he did not remember agreeing to lend the appellant money or inputting his account numbers into the appellant's phone because of the effects of consuming alcohol. Sgt N's qualified acknowledgement provides the only evidence of the appellant's authorized access to his personal checking account and is contradicted by the remainder of his testimony, and the record.

Sgt N repeatedly denied any recollection of agreeing to loan the appellant money, and repeatedly asserted that he had not authorized the subject transactions. Record at 184, 192, 201, 216-18, 228-29. He also recounted the appellant's repeated denials of taking or attempting to take the money at issue, including the appellant's offer to loan him money until Sgt N resolved his financial difficulties. *Id*. at 186-87, 191, 193, 195, 220. In addition, Sgt N acknowledged that he would have loaned the appellant, his "best friend," money if asked. *Id*. at 180, 219, 221, 224. Finally, Sgt N testified that after he reported the unauthorized transactions, the appellant asked him to say that he allowed the appellant to borrow the money and later asked that he not tell Government representatives about those requests. *Id*. at 193-96, 223, 231.

Third, the appellant has failed to establish that the military judge relied upon impermissible evidence of the attempted larcenies. Again, the appellant has not established that Sgt N's testimony that the appellant asked him to say that he had authorized the appellant to borrow the money and then later asked that he not tell the Government representatives about those requests constituted plain error. Moreover, the appellant has not established plain error where the military judge considered evidence that the appellant overdrew his own checking account as evidence of his "knowledge of what he was doing or was not making a mistake." *Id*. at 311.

After weighing all the evidence and recognizing that we did not see or hear the witnesses, we are convinced that the appellant is guilty beyond a reasonable doubt of three specifications of attempted larceny. *Turner*, 25 M.J. at 325.

Sentence Appropriateness

The appellant avers that the sentence adjudged by the military judge and approved by the CA was "excessive and should be reconsidered." We disagree.

We review sentence appropriateness *de novo*. See *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy on the accused and is the prerogative of the CA. *Healy,* 26 M.J. at 395.

During the sentencing hearing, the defense presented evidence of the appellant's good military character, superior performance of duties while deployed to Afghanistan, rehabilitative potential, strong family support and obligations, and the appellant made an unsworn statement. Defense Exhibits A-C; Record at 284-310. We note that the authorized maximum punishment included 20 years of confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge.

After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and his offenses. *Baier,* 60 M.J. at 384-85; *Healy,* 26 M.J. at 395; *Snelling* 14 M.J. at 268. Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court