IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER **J.F. FELTHAM** **E.S. WHITE**

UNITED STATES

v.

Hubert A. LUCAS
Gunnery Sergeant (E-7), U.S. Marine Corps

NMCCA 200600564 Decided 15 May 2007

Sentence adjudged 12 October 2005. Military Judge: R.H. Kohlmann. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel
LCDR JORDAN THOMAS, JAGC, USN, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel

WHITE, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial, with enlisted representation, of conspiracy, effecting unlawful enlistments, willful dereliction of duty, failure to obey a lawful general order, wrongfully possessing and transferring fraudulent identification documents in violation of 18 U.S.C. § 1028, and obtaining, receiving, possessing and accepting fraudulent Alien Registration cards in violation of 18 U.S.C. § 1546. His conduct violated Articles 81, 84, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 884, 892, and 934. He was sentenced to confinement for 12 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but waived execution of automatic forfeitures for six months.

On appeal, the appellant assigns three errors. First, he argues the convening authority (CA) erred in three ways: (a) by forwarding a record of trial without a correct, original charge

sheet; (b) by approving a finding of guilty to language of which the appellant had been acquitted; and (c) by acting after receiving a staff judge advocate's recommendation (SJAR) that incorrectly stated the findings. Second, the appellant contends the evidence on the sole specification of Charge I (conspiracy) was legally insufficient. Finally, he contends he was prejudiced by the trial counsel's argument on findings, which, he argues, vouched for the credibility of the witnesses and described physical mannerisms of the witnesses which purported to show the witnesses were being truthful.[1]

After carefully considering the record of trial, the appellant's brief and assignment of errors, the Government's answer, and the appellant's reply, we conclude there is partial merit in the appellant's contentions that there was insufficient evidence of conspiracy, and that the convening authority erred. We will take remedial action in our decretal paragraph. After our corrective action, we conclude the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. *See* Arts. 59(a) and 66(c), UCMJ.

We address the appellant's assigned errors out of order. First, we take up the question of the sufficiency of the evidence. Second, we discuss the trial counsel's argument on findings. Finally, we turn to the alleged errors in the post-trial phase.

I. Sufficiency of the Evidence of Charge I

The sole specification under Charge I alleged the appellant conspired with Mr. Anthony Arzu, Mr. Fitzroy Goldson, and Staff Sergeant (SSgt) Carlos A. Latorre, U.S. Marine Corps, to effect unlawful enlistments. The court-martial found the appellant guilty, excepting "Anthony Arzu." The appellant argues the evidence is insufficient to prove an agreement existed between him, Mr. Goldson, and SSgt Latorre. After carefully reviewing the record and the arguments of the parties, we are convinced the evidence is both legally and factually sufficient to prove conspiracy between the appellant and Mr. Goldson. We agree with the appellant, however, that the evidence is insufficient to establish an agreement between SSgt Latorre and the appellant.[2]

[1] There is also pending an appellant's motion for relief from post-trial processing errors. That motion is hereby denied.

A. The Law To Be Applied

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Thompson*, 50 M.J. 257, 258 (C.A.A.F. 1999); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing all of the evidence in the record, and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *United States v. Hildebrandt,* 60 M.J. 642, 644 (N.M.Ct.Crim.App. 2004).[3]

The term "reasonable doubt" does not mean the evidence must be free of 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). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). The Government must, however, prove every element beyond a reasonable doubt, *United States v. Harville*, 14 M.J. 270, 271 (C.M.A. 1982), and the proof must be such as to exclude every fair and rational hypothesis except that of guilt. *United States v. Gray*, 51 M.J. 1, 56-57 (C.A.A.F. 1999); *United States v. Meeks*, 41 M.J. 150, 155-57 (C.M.A. 1994).

To prove conspiracy, the Government must prove, *inter alia,* that the accused entered into an agreement with one or more persons to commit an offense under the Code. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 5(b)(1). The agreement "need not be in any particular form or manifested in any formal words." *Id.* at ¶ 5(c)(2). A conspiracy is "generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves." *United States v. Barnes*, 38 M.J. 72, 75 (C.M.A. 1993). Conduct alone is sufficient to show an agreement. *Id.* (citing *United States v. Layne*, 29 M.J. 48, 51 (C.M.A. 1989)). The minds of the parties must, however, arrive at a common understanding to accomplish the object of the conspiracy, MCM, Part IV, ¶ 5(c)(2), as the

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[2] There is no evidence, nor does the Government argue, that there was any agreement between SSgt Latorre and Mr. Goldson that would serve to draw SSgt Latorre into the conspiracy between Mr. Goldson and the appellant.

[3] The appellant does not assign factual insufficiency as an error, but we are obliged by Article 66(c), UCMJ, to review the record for factual sufficiency.

agreement is the essential element of the crime. *Iannelli v. United States*, 420 U.S. 770, 778 n.10 (1975); *United States v. Jones*, 36 M.J. 778, 779 (A.C.M.R. 1993).

B. Conspiracy with Mr. Goldson

Around May 2005, Mr. Anthony Arzu asked Mr. Fitzroy Goldson if he was interested in having his son enlist in the Marine Corps. Mr. Goldson was. His son had spoken with him about enlisting, and had been turned away by a Brooklyn, New York, recruiting station because he did not have an I-551, Alien Registration Receipt Card (hereinafter "green card"). Mr. Goldson told Mr. Arzu his son did not have a green card, but Mr. Arzu told Mr. Goldson he could supply that if Mr. Goldson provided two photographs and $120.00. Mr. Goldson brought his son to Mr. Arzu's home. From there, the future Lance Corporal (LCpl) Sharma Goldson telephoned the appellant, a recruiter assigned to Marine Corps Recruiting Station Ft. Lauderdale, Florida. The appellant asked LCpl Goldson if he had a green card. LCpl Goldson said "no." The appellant repeated the question. Sensing the appellant wanted him to reply in the affirmative, LCpl Goldson then responded "yes." The appellant then told LCpl Goldson to send him photographs.

LCpl Goldson took the required photographs and gave them to his father. Mr. Goldson gave the photographs and $120.00 to Mr. Arzu, and received back from him a Social Security card and a green card in his son's name. The last name on the green card, however, was misspelled. Concerned, in light of the mistake on the green card, about whether his son should travel to Miami to take a recruiting entrance test for which he was scheduled, Mr. Goldson telephoned the appellant in Florida. The appellant told Mr. Goldson his son should come to Miami, and that Mr. Arzu would send a corrected green card to the appellant. Mr. Goldson then gave Mr. Arzu an additional $10.00 to cover overnight mail postage. Subsequently, the appellant handed LCpl Goldson a corrected green card while they were both at the appellant's Florida home.

While Mr. Goldson testified he did not know whether the cards Mr. Arzu provided were fraudulent, that testimony is simply incredible. Likewise, his testimony that he did not have an agreement with the appellant to effect an unlawful enlistment is also unbelievable. The factual circumstances clearly establish, beyond a reasonable doubt, an agreement between Mr. Goldson and the appellant to effect the unlawful enlistment of Mr. Goldson's son. While there apparently was not an explicit,

spoken or written agreement, the evidence proves the minds of Mr. Goldson and the appellant arrived at a common understanding to accomplish the object of the conspiracy.

C. Conspiracy with SSgt Latorre

We cannot conclude, however, that the evidence, even taken in the light most favorable to the Government, established beyond a reasonable doubt that there was an agreement between the appellant and SSgt Latorre.

1. Legal Sufficiency

SSgt Latorre was a canvassing recruiter who worked for the appellant at Recruiting Sub-Station (RSS) Perrine, Florida, while the appellant was the noncommissioned officer-in-charge (NCOIC) of that office. While NCOIC of RSS Perrine, and for a time after he transferred to Camp Lejeune, the appellant referred some number of alien applicants for enlistment to the canvassing recruiters at RSS Perrine. The appellant referred at least three alien applicants to SSgt Latorre -- the future LCpl Agapito Ogaldez, the future Private First Class (PFC) Russel Nuñez, and the future LCpl Alisa Carr. The first two were natives of Belize, as is the appellant; the third is Jamaican. The appellant had supplied all three, as well as a number of other applicants, with fraudulent green cards and Social Security cards.

SSgt Latorre testified the green cards presented to him by all three were suspicious. The green cards LCpl Ogaldez and PFC Nuñez presented indicated they had been issued in 1997, yet showed no signs of wear, contained photographs that appeared to be current, and had signatures that did not match signatures the two individuals made in SSgt Latorre’s presence. LCpl Ogaldez also told SSgt Latorre the middle initial on his green card was incorrect, that he had told the appellant it was incorrect, and that the appellant had told him to just use the middle initial on the card, as it did not matter it was incorrect. Further, LCpl Ogaldez told SSgt Latorre he had entered the United States in 1995, received the green card in 1997, and then traveled back and forth between the United States and Belize until 2003, when he took up residence in the United States. SSgt Latorre told LCpl Ogaldez to tell anyone who asked he had been residing in the United States since 1997. Sometime after SSgt Latorre had enlisted LCpl Carr in the Delayed Entry Program, he took her to the Florida Department of Motor Vehicles (DMV) to get a state identification card. When she presented the DMV with her green

card, they confiscated it.[4] Finally, SSgt Latorre was under pressure to meet his quota of enlistments for the month and he was counting on getting LCpl Ogaldez enlisted. The appellant's referral of applicants made life easier for the canvassing recruiters, since they did not have to work as hard to find applicants.

The evidence establishes SSgt Latorre knew, or was willfully ignorant of the fact, LCpl Ogaldez, PFC Nuñez and LCpl Carr did not have valid green cards, and that he unlawfully effected their enlistments. The evidence also clearly establishes the appellant provided ineligible alien applicants with fraudulent green cards and Social Security cards to facilitate their unlawful enlistment. The evidence, however, falls short of proving SSgt Latorre and the appellant were collaborating, pursuant to a tacit understanding, in the unlawful enlistment of these ineligible aliens. While the Government is free to prove an agreement by circumstantial evidence, it must, nonetheless, prove an agreement. To do so beyond a reasonable doubt, the Government's evidence must exclude every other fair and rational hypothesis.

The evidence leaves open the reasonable possibility SSgt Latorre could have assumed the appellant was simply referring possible leads he ran across, without necessarily having any knowledge of their immigration status. SSgt Latorre could then have acted as he did without having reached a tacit agreement with the appellant to effect unlawful enlistments.

Because the evidence fails to exclude a fair and rational hypothesis inconsistent with guilt, a rational factfinder could not have found, beyond a reasonable doubt, that an agreement existed between the appellant and SSgt Latorre. Consequently, the evidence is legally insufficient.

2. Factual Sufficiency

In considering the factual sufficiency of the evidence, we are not constrained to consider the evidence in the light most favorable to the Government. We may, after making allowances for not having personally observed the witnesses, weigh all of the evidence in the record. On the evidence presented, it is entirely possible SSgt Latorre was unlawfully enlisting these

[4] The military judge sustained an objection to testimony by SSgt Latorre that his point of contact at the Florida DMV told him the reason they confiscated Alisa Carr's card was because it "didn't match in the system."

ineligible aliens for his own independent reasons, and, while the appellant was counting on SSgt Latorre's lack of scruples, the appellant did not need any agreement with him in order to produce his desired result of getting these ineligible applicants enlisted. Accordingly, the evidence is factually, as well as legally, insufficient to prove the appellant conspired with SSgt Latorre.

II. Improper Argument on Findings

The appellant also contends he was prejudiced by the trial counsel's argument on findings. He argues the trial counsel vouched for the credibility of the witnesses and described physical mannerisms purporting to show the witnesses were truthful. The trial defense counsel did not, however, object at trial. The appellant, therefore, has forfeited this issue, absent plain error. RULE FOR COURTS-MARTIAL, MANUAL FOR COURTS-MARTIAL 919(c), UNITED STATES (2005 ed.); *see United States v. Diffoot*, 54 M.J. 149, 151 (C.A.A.F. 2000); *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999); *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993). To demonstrate plain error, the appellant must show: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005); *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

A trial counsel may not give assurances of a witness' veracity to the members. Such assurances "could be perceived as putting the weight of the Government behind the statements," which could make the government's evidence appear stronger than it is. *Fletcher*, 62 M.J. at 180. This "is a dangerous practice because 'when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be.'" *Id.* (quoting *United States v. Modica*, 663 F.2d 1173, 1178-79 (2d Cir. 1981)).

In his closing argument, the trial counsel encouraged the members to "go back and think about the details because that's what's important. That's how you know that each one of these witnesses were telling the truth because of the details." Record at 453. He also urged the members to consider the demeanor of the witnesses, and to ask themselves, "Did it look like they were hiding something? Were they fidgeting around or were they direct in answering their questions?" *Id*. at 456.

Noting the consistency of the testimony from various Government witnesses, the trial counsel argued, "These are detailed testimonies. What are they hiding? Were they trying to avoid any questions? Were they looking around? Were they fidgeting? No, they were being very direct. They knew their answers because that's what happened." Record at 457-58.

Turning to the testimony of the sole Government witness on Specifications 2 and 3 under Charge III (fraternization/orders violation), LCpl T. Martinez, the trial counsel said:

> -- and this was the exciting testimony we were all waiting for, was she going to show up? We weren't sure because she just gave birth last week and showed up the night before; and I thought she did pretty well. She was direct in her answers, and again, a very credible witness. She told you some important things. She could recall the details as well, . . .

Id. at 459.

With the exception of the trial counsel's comment that he thought LCpl Martinez "did pretty well," and was "a very credible witness," the trial counsel's arguments were proper comment on the evidence. He did not vouch for the truthfulness of the witnesses, but rather argued facts relevant to determining credibility.

Further, while the trial counsel should not have injected his personal assessment of LCpl Martinez, his error was not so obvious the military judge should have acted to correct it *sua sponte*. *See United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001). Further, taken in context, the comments did not substantially prejudice the appellant's substantial rights. First, the comments were brief and passing. Second, the comment LCpl Martinez "did pretty well" is not clearly a comment on her credibility. Rather, it appears to refer to her ability to testify cogently after just giving birth the prior week, and arriving at the site of the trial from out of town the prior night. The trial counsel also emphasized appropriate factors for the members to consider, such as that the witness was direct in her answers and provided details of how she came to obtain a green card from the appellant. Accordingly, the appellant has failed to demonstrate "plain error."

III. Convening Authority Errors

Finally, the appellant argues the CA erred in three ways: (a) by forwarding a record of trial without a correct, original charge sheet; (b) by approving a finding of guilty to language of which the appellant had been acquitted; and (c) by acting after receiving an SJAR that incorrectly stated the findings.

First, it is apparent on its face that the charge sheet in the record of trial is the original. While the withdrawal of certain words and phrases by the trial counsel, and the dismissal of others by the military judge, during the course of trial is not reflected on that document, such an omission does not render the document something other than what it clearly is, i.e. the original charge sheet. Further, as the withdrawal and dismissal of the language at issue was done on the record, it cannot be said the record of trial, as a whole, is incomplete simply because the trial counsel neglected to annotate those changes on the original charge sheet.

The second and third issues are related to each other. During the course of trial, the Government struck the words "Martha Lesley" and the words "and a person referred to as 'Leroy'" from the specification under Charge I. Pursuant to an R.C.M. 917 motion, the military judge dismissed the overt act identified as "b.2" in the same specification.[5] Additionally, trial counsel struck the words "and by willfully failing to follow the NCOIC quality assurance and screening procedures set forth in the Guidebook for Recruiters (Volume I), promulgated by MCO 1130.76 (Conduct of Recruiting Operations), dated 16 February 1990" from Specification 1 under Charge III.

Both the SJAR and the court-martial promulgating order, however, misstate these two specifications. Both the SJAR and promulgating order included the deleted language noted above in their recitations of the specification under Charge I. In reciting Specification 1 under Charge III, both left out the words "applicant screening procedures set forth in MCO P1100.72B (Military Personnel Procurement Manual), dated 10 December 1997", and instead included the language noted above concerning MCO 1130.76, which had been stricken from the specification by the trial counsel.

[5] The language at b.2 that was dismissed was "2) instruct the said Mr. Olgadez [sic] to say that he had been in the United States since 1999 and that he had been traveling back and forth from Belize, when, in fact, he had only been in the United States since September 2003."

In arguing he is prejudiced by these errors, the appellant confuses the promulgating order, issued pursuant to R.C.M. 1114, with the convening authority's action, issued in accordance with R.C.M. 1107 and incorporated in the promulgating order. While the promulgating order misstates the findings, the CA's action itself does not address the findings; it simply states the sentence is approved. The convening authority did not, therefore, approve findings of guilty to language of which the appellant had not been convicted. Rather, the promulgating order erroneously stated the specifications. We find that this error in the promulgating order is harmless, but that the appellant is entitled to a corrected court-martial order. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will order corrective action in our decretal paragraph.

While misstating two of the specifications in the promulgating order is itself harmless, it points to a more troubling problem, also raised by the errors in the SJAR, which is whether the convening authority misunderstood the conduct of which the appellant had been convicted when he took action on the sentence.

The trial defense counsel submitted clemency matters following his receipt of the SJAR, but made no objection to the errors in the SJAR. Consequently, the appellant has forfeited that issue, absent plain error. R.C.M. 1106(f); *see United States v. Capers*, 62 M.J. 268 (C.A.A.F. 2005); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000).

Clearly the SJAR was erroneous. The appellant, however, fails to make a colorable showing of possible prejudice. *United States v. Wheelus*, 49 M.J. 283, 288-89 (C.A.A.F. 1998). With respect to the error in reciting the specification under Charge I, the gravamen of the offense of conspiracy is the agreement, *Ianelli,* 420 U.S. at 778 n.10, rather than the number of conspirators. Further, the error in reciting Specification 1 under Charge III merely substituted one Marine Corps order (MCO 1130.76 dated 16 February 1990) for another (MCO P1100.72B dated 10 December 1997) as the order that was violated.

IV. Failure to Enter Findings

The cleansed charge sheet given to the members to use during deliberations failed to include the words "and MCO P1100.72C (Military Personnel Procurement Manual), dated 10

February 2004" in Specification 1 under Charge III. That language, alleged on the original charge sheet, had not, however, been withdrawn by the Government or dismissed by the military judge. Accordingly, that language was part of the charge against the appellant. Nevertheless, since it was not before the members when they deliberated and rendered their verdict, it cannot be considered to be among the allegations of which they convicted the appellant. We will, therefore, treat that language as if the members had excepted it from the specification, and, for the record, enter a finding of "not guilty" to those words.

V. Sentence Reassessment

Having found the evidence legally and factually insufficient to prove the appellant conspired with SSgt Latorre, as alleged in the specification under Charge I, we must reassess the sentence. Applying the analysis set forth in *United States v. Sales,* 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after carefully considering the entire record, we are satisfied beyond a reasonable doubt that, even if error had not occurred, the members would not have adjudged a sentence less than that approved by the convening authority in this case.

Conclusion

For the foregoing reasons, the findings are affirmed, except for the words, "and Staff Sergeant Carlos A. Latorre, U.S. Marine Corps," and "b. The said Staff Sergeant Latorre did: Instruct Agapito Ogaldez to use 'Anthony' as his middle name instead of 'Bernard'" in the sole specification under Charge I, and the words, "and MCO P1100.72C (Military Personnel Procurement Manual), dated 10 February 2004" in Specification 1 under Charge III. The findings of guilty as to the excepted words are set aside and the excepted words are dismissed. The sentence, as approved by the convening authority, is affirmed.

The supplemental court-martial order shall correctly reflect the charges and specifications, pleas, and findings.

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court