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

BEFORE

J.D. HARTY **K.K. THOMPSON** **R.G. KELLY**

UNITED STATES

v.

Thomas M. LEROUX , Jr.
Aviation Structural Mechanic (E-4), U. S. Navy

NMCCA 200201145 Decided 21 December 2006

Sentence adjudged 25 October 2001. Military Judge: J.D. Parr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Strike Fighter Squadron ONE TWO FIVE, Lemoore, CA.

LT STEPHEN C. REYES, JAGC, USN, Appellate Defense Counsel
CDR ROBERT A. SANDERS, JAGC, USN, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USN, Appellate Government Counsel

HARTY, Senior Judge:

A special court-martial comprised of officer and enlisted members convicted the appellant, contrary to his plea, of wrongful use of ecstasy,[1] in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 60 days, forfeiture of $695.00 pay per month for two months, reduction to pay grade E-1, and a bad-conduct discharge. Upon initial review of this case we determined that the convening authority's (CA) action was ambiguous as to whether he intended to approve the bad-conduct discharge. The record was returned for a new CA's action. In his new CA's action, the CA approved the findings and sentence as adjudged.

We have considered the record of trial, the appellant's assignments of error alleging that the military judge erred by not determining if the members employed an improper voting procedure and that the evidence is legally and factually insufficient to support his conviction, and the Government's

[1] "Ecstasy" is the common name for methylenedioxymethamphetamine, or MDMA.

response. We conclude that the findings and sentence are correct in law and fact, and that no error materially prejudiced the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Voting Procedure

For his first assignment of error, the appellant claims that the military judge erred by not conducting an inquiry into whether the members conducted oral votes, rather than secret written ballots, on findings. He claims the appropriate remedy is for this court to set aside the findings of guilty. We disagree.

During their deliberations on findings, the members posed the following written question to the military judge: "How many time [sic] can we vote prior to giving a finding[?] Please look @ 2nd to last page last ¶." Appellate Exhibit XXXVII. The second sentence in the members' question refers to the section on reconsideration in the written instructions provided by the military judge. AE XXXV. The military judge then called the members into open session, again advised them on the voting procedures, and informed them that once a vote had been conducted and tallied, it could only be changed via the reconsideration process. Record at 511-12. The trial defense counsel agreed to this approach. Record at 509-10. The members then resumed deliberations, and reached a verdict shortly thereafter. At the express request of the defense, the military judge subsequently inquired in writing whether more than one written ballot had been completed, and if only one, what was the result. Record at 516-19; AE XXXVIII. The members responded in writing that there had only been one secret written ballot and the vote was four for guilty and one vote for not guilty. *Id*.

A court-martial shall vote by secret written ballot. Art. 51(a), UCMJ; *United States v. Martinez*, 17 M.J. 916, 919 (N.M.C.M.R. 1984). Failure to instruct the members on this procedure is error. *United States v. Greene*, 41 M.J. 57, 58 (C.M.A. 1994). However, oral "straw polls," while not encouraged, do not violate the requirements of Article 51(a), UCMJ. *United States v. Lawson*, 16 M.J. 38, 41-42 (C.M.A. 1983); *United States v. Sanchez*, 50 M.J. 506, 510 (A.F.Ct.Crim.App. 1999). The reason for the requirement of a written, secret ballot is the prevention of "unlawful influence or use of superiority in rank to influence the vote of junior members." *Greene*, 41 M.J. at 58 (citation omitted).

Initially, we disagree with the appellant regarding the appropriate standard of review in this case. The trial defense counsel twice had the opportunity to object to the military judge's proposed jury instructions and did not do so. Record at 464, 499. The trial defense counsel likewise lodged no objection to the military judge's response to the members' question on voting procedure. *Id*. at 510. Finally, at the specific request of the defense, the military judge submitted the written follow-

up questions about how the voting on findings was conducted. *Id*. at 516-19. After the military judge did exactly what the appellant requested, there was no subsequent objection, motion for appropriate relief, or motion for a mistrial. *Id.* We therefore find that the appellant forfeited the right to have this issue reviewed on appeal, absent plain error. *United States v. Brewer*, 61 M.J. 425, 430 (C.A.A.F. 2005). We will find plain error only when there is a clear, obvious error which materially prejudices the substantial rights of the appellant. *Id*.

The military judge instructed the members that voting on findings must be "accomplished by secret ballot." Record at 497. The verbal instructions given by the military judge in this case are similar to those reviewed by our superior court in *Greene*. Inexplicably, the word "written" was omitted in both cases. *Compare Greene*, 41 M.J. at 58, *with* Record at 497-99. However, the military judge's written instructions state that the secret ballot must be in writing. Appellate Exhibit XXXV. A written ballot, even if not specifically directed by the military judge in his oral instructions, is implied. It would be impossible for the junior member to "collect[] and count[]" the votes, or for the vote to be "secret" if such voting were performed verbally or by a show of hands. Record at 497, 511.

The members' question clearly shows that they read the written instructions, because the question references a specific paragraph within those instructions. Appellate Exhibit XXXVII. Further, the members' written response to the question posed by the military judge in Appellate Exhibit XXXVIII conclusively demonstrates that only one written ballot was conducted. If an earlier, oral vote did occur, we consider that a permissible "straw poll" and find no prejudicial error. *See Lawson*, 16 M.J. at 41.

We conclude that any presumption of prejudice that could flow from the military judge's failure to speak the word "written" in association with the phrase "secret ballot" is rebutted by compelling evidence to the contrary, because the record demonstrates the members read the written instructions, which were correct on the issue of voting. *See United States v. Boland* 42 C.M.R. 275, 278 (C.M.A. 1970)(compelling evidence can rebut the presumption of prejudice flowing from an erroneous reconsideration voting instruction). Additionally, there is no evidence that the influence of superiority in rank was present in the deliberation room. We conclude, therefore, that the military judge's failure to read the voting instruction verbatim was not plain error. *See Greene*, 41 M.J. at 58. Nor did he commit plain error by not *sua sponte* inquiring further into the members' voting procedure used prior to taking the secret written ballot. Accordingly, we decline to grant the requested relief.

Sufficiency of the Evidence

In his second assignment of error, the appellant claims that the evidence is factually insufficient to sustain the conviction for wrongful use of ecstasy. In his third assignment of error, summarily assigned, the appellant contends that the evidence is not legally sufficient to support his conviction because the Government did not disprove the possibility of unknowing ingestion.[2] Appellant's Brief of 30 Jul 2004 at 8 and 10. We find that the evidence is both legally and factually sufficient.

The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the Government, any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The urinalysis in question was not a seamless operation, notably in the command's failure to use tamper-resistant tape on the individual sample bottles as required by the governing instruction. *See* Chief of Naval Operations Instruction 5350.4c (Ch-1, 19 Apr 2000). However, after reviewing all of the testimony, we are convinced that a proper chain-of-custody was maintained for the appellant's sample throughout the testing process. *Id*. With regard to the urinalysis results themselves, the Government expert testified that Methylenedioxy-methamphetamine (MDMA), also known as ecstasy, has a 500 nanogram per milliliter of urine (ng/ml) testing cutoff level. When someone takes MDMA, the human body metabolizes part of that into Methylenedioxyamphetamine (MDA). The appellant’s sample contained 120,000 ng/ml of MDMA and 7,900 ng/ml of MDA. Record at 376-77. The expert found the appellant’s concentration level to be in the upper range of all ecstasy cases he has seen. *Id*. at 384.

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[2] In support of his summary assignment of error, the appellant claims there was no evidence that the appellant’s nanogram level was “high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the appellant at some time would have ‘experienced the physical and psychological effects’ of the drug,” citing our decision in *United States v. Barnes*, 53 M.J. 624, 629 (N.M.Ct.Crim.App. 2000). Appellant's Brief at 10. That decision, however, was set aside by our superior court, in light of its decision in *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001). *United States v. Barnes*, 55 M.J. 236 (C.A.A.F. 2001)(summary disposition). We caution counsel to properly validate their cited authority before submitting briefs to this court. *See generally United States v. McQuinn*, 47 M.J. 736, 738 n.3 (N.M.Ct.Crim.App. 1997).

With regard to the appellant's character defense, only one witness had observed the appellant in a social setting, and those observations were made largely prior to the appellant joining the Navy. Moreover, several portions of that witness' testimony are inconsistent with the appellant's own written statement regarding his positive urinalysis result. *Compare* Record at 453-54, *and* Prosecution Exhibit 14. The appellant gave conflicting statements about his positive urinalysis, first advancing the theory that dietary supplements and prescription painkillers were to blame. PE 12. This theory was discounted by the Government's expert. Record at 394. The appellant also described how he had attended a party with his wife, passed out, and had no recollection of the events. PE 14. The Government expert acknowledged that the appellant's claim may impact whether there was a knowing ingestion but not whether ecstasy was found in the appellant's urine. Record at 395. At the appellant's concentration level, the Government expert opined that there was "a very good probability of experiencing the effects of the drug," and that the ecstasy was probably ingested within 48 hours of the urinalysis. *Id*. at 403-04. However, alcohol could mask the effects of the drug to the point that the user did not recognize the effects. *Id*. at 407.

"A urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the interpretation required . . . provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use, without testimony on the merits concerning physiological effects." *United States v Green*, 55 M.J. 76, 81 (C.A.A.F. 2001)(citation omitted). We find that the Government adequately established the reliability of the chain of custody and the urinalysis test. We further conclude that the evidence presented was sufficient to create the permissive inference of a knowing and wrongful use. Viewing the evidence in the light most favorable to the Government, we conclude that a rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. The evidence is, therefore, legally sufficient. After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. The evidence is, therefore, factually sufficient. This assignment of error is without merit.

Legal Officer's Recommendation

Although not raised by the appellant, we address two errors in the legal officer's recommendation (LOR). First, we note that the legal officer who prepared the recommendation also testified as a prosecution witness at trial. If a legal officer testifies as a witness concerning a contested matter, he may be disqualified from preparing the post-trial recommendation. *United States v. Gutierrez*, 57 M.J. 148, 149 (C.A.A.F. 2002); RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES

(2000 ed.). The appellant did not object to the legal officer's preparation of the recommendation, thus forfeiting any objection in the absence of plain error. R.C.M. 1106(f)(6). The legal officer's testimony centered on his actions in taking the two written statements from the appellant. Record at 325-38; PE 11-14. The only area of contention on cross-examination appears to have been whether the appellant gave an inconsistent verbal statement at a nonjudicial punishment proceeding. The legal officer, however, did not recall such facts, and testified that the written statement was consistent with any prior oral statement. Given the largely uncontroverted and noncontroversial nature of the testimony, and the appellant's failure to raise this issue or allege any prejudice, we decline to grant relief on this basis.

We also note that the LOR states that the appellant was not authorized to wear any awards or decorations. This is inconsistent with the listing of awards introduced at trial. *Compare* LOR of 29 Mar 2002 *and* PE 17. Those awards include the Good Conduct Medal, Armed Forces Expeditionary Medal, Sea Service Deployment Ribbon, Navy Unit Commendation, and Meritorious Unit Commendation.

The omission of certain awards from the post-trial recommendation, particularly those relating to combat service, has been held to constitute plain error. *See United States v. Demerse*, 37 M.J. 488, 492-93 (C.M.A. 1993)(holding plain error to omit Vietnam campaign decorations); *United States v. Sanders*, 61 M.J. 837 (N.M.Ct.Crim.App. 2005)(holding plain error to omit Desert Storm decorations); *United States v. Barnes*, 44 M.J. 680 (N.M.Ct.Crim.App. 1996)(holding that failure to include Navy Commendation Medal for service as Assistant Operations Chief for a ground combat element, Marine Forces, Somalia, among list of citations in SJAR constituted plain error). For non-combat awards, however, the hurdle is higher. *See United States v. Lynch*, 39 M.J. 37 (C.M.A. 1993)(summary disposition)(holding that omission of the Sea Service Deployment Ribbon was not plain error); *United States v. Brewick*, 47 M.J. 730, 734 (N.M.Ct.Crim.App. 1997)(holding omission of Southwest Asia Service Medal was not plain error); and *United States v. Thomas*, 39 M.J. 1078, 1082 (C.G.C.M.R. 1994)(holding that the rule in *Demerse* is limited to decorations for service related to armed conflict, and does not apply to unit commendation medals).

We find no prejudice on these facts. First, the convening authority indicated that he considered the record of trial prior to taking action, which included the accurate recital of the appellant's awards. Second, none of the omitted awards were combat-related. Third, like in *Brewick*, most of the appellant's awards were unit-based, rather than due to individual accomplishments. The omission of the Good Conduct Medal is mitigated by an accurate description of the appellant's disciplinary history in the LOR. While we again note our displeasure with such sloppy post-trial work, we are satisfied

that no substantial right of the appellant was materially prejudiced.

Conclusion

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

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court