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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Carlos A. MOSQUEDA
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200500140 Decided 28 August 2006

Sentence adjudged 8 May 2003. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 9th Communication Battalion, Marine Expeditionary Force Headquarters Group, I Marine Expeditionary Force, FMFPac, Camp Commando, Kuwait.

LT JAMES GOLLADAY, JAGC, USN, Appellate Defense Counsel
LCDR JASON A. LIEN, JAGC, USNR, Appellate Government Counsel

GEISER, Judge:

Contrary to his pleas, the appellant was convicted by a special court-martial with enlisted representation of wrongful use of MDMA[1] (Ecstasy), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. First, he asserts that the evidence was factually insufficient to prove knowing use of MDMA (Ecstasy). Second, the appellant argues that the trial counsel improperly argued facts not in evidence and effectively shifted the burden to the defense. Finally, the appellant avers that the members considered an improper factor in determining the appellant's guilt.

We have examined the record of trial, the assignments of error, and Government's response. We concur with the appellant's contention that the trial counsel improperly argued facts not in

[1] Methylenedioxymethamphetamine.

evidence. We will take appropriate action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

On Friday, 17 January 2003, members of the appellant's command were preparing to depart on a long holiday weekend. Prior to departure, personnel were told to muster at the command on Monday morning. Informally members were given to understand that the return was for a urinalysis test. Those not randomly selected on Monday morning would be permitted to immediately re-commence liberty. Those, like the appellant, selected to participate would provide a sample and immediately re-commence liberty. The appellant mustered on Monday morning and provided a sample which tested positive for MDMA.

At trial, the Government's case-in-chief consisted of the standard drug lab package, relevant custody documents, a stipulation of fact relating specifically how the appellant's urinalysis was conducted, and a stipulation of what the parties agreed would be the testimony of a generic "expert witness in the field of pharmacology and forensic and analytical toxicology" regarding the San Diego Navy Drug Lab testing procedures. The stipulation further indicated that, although circumstances vary, as a general rule, MDMA stays in a user's system for 3-5 days after use. The Government then rested, offering no live witnesses.

The defense case-in-chief did not attack the urinalysis result, *per se*, but did contest application of the permissive inference of wrongfulness provided for in Article 112a, UCMJ.[2] The appellant testified under oath that he did not knowingly ingest the MDMA found in his urine sample. He further stated that he was at a loss to explain how the drug got into his system. He related that during the weekend prior to the urinalysis, he and a fellow Marine attended a dance party at a club near their home in Los Angeles. The appellant indicated, and his companion, Lance Corporal C.R. Coronel, confirmed, that the club did not serve alcohol but did sell bottled water, juice, and other non-alcoholic beverages. The appellant testified that he left his partially consumed bottle of water on the table while he was dancing and offered, as a possible explanation, that the water could have been adulterated or that he could have drunk out of someone else's water by mistake.

Following the appellant's testimony, the defense offered multiple witnesses who testified to the appellant's good military character generally, and more specifically, to his character for

[2] "[U]se... of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence... shall be on the person claiming the benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use was wrongful." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 37(c)(5).

truthfulness and law abidingness. The defense obtained strongly favorable testimony from the appellant's platoon commander, platoon sergeant, fire-team leader, squad leader, and maintenance chief, as well as a number of his peers.

The Government cross-examined each witness vigorously. One witness, LCpl Coronel, testified that he accompanied the appellant to a dance club on Saturday night. He also testified that earlier that same day he had gone to San Bernardino with a girl to see a waterfall. During cross-examination, the trial counsel attempted to get LCpl Coronel to agree that San Bernardino was "the meth capital of the U.S." The witness stated that he was not aware of that fact. Record at 86. The trial counsel went on to ask the witness if the party that he attended at the dance club with the appellant was a "rave."[3] The witness disagreed with the trial counsel's characterization. Record at 87. The trial counsel attempted to get a second witness to agree to his characterizations of San Bernardino and the party but was unsuccessful. Record at 123.

Prosecutorial Misconduct

The appellant contends that the prosecutor committed misconduct when, during argument on findings, he stated that San Bernardino was the "meth capital of the United States" and when he characterized the party the appellant and LCpl Coronel attended as a "rave." Record at 155. The defense, outside the hearing of the members, objected to the trial counsel's unsupported characterizations. The military judge agreed that the prosecutor was arguing facts not in evidence and, with the consent of the defense, immediately issued a cleansing warning to the members.[4] When proper objection was made at the trial level, an appellate court reviews for prejudicial error. Art. 59, UCMJ; *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005)

It has long been held that a court-martial must reach a decision based only on the facts in evidence. It is also well established that arguments made by counsel are not evidence. When a counsel argues facts not in evidence, he violates both of these principles. *Id*. at 183. An appropriate remedy in such cases is not based on the legal norm(s) violated but rather on the impact of those violations on the trial. Our superior court has held that the best approach involves the balancing of three

[3] RAVE (PARTY) noun - an event where young people dance to modern electronic music and sometimes take illegal drugs: an all-night/open-air rave/rave music. Cambridge Dictionary, Cambridge University Press, 2006.

[4] The members were instructed by the military judge as follows: "Members, when you deliberate, you may not consider the trial counsel's statement that San Bernardino is the meth capital of the United States since no evidence was presented in the court showing that to be true. Further, you may not consider that the gathering at the Orion was a quote, rave, unquote, party because no evidence was presented to you of what constitutes a rave party." Record at 162.

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. Prosecutorial misconduct by a trial counsel will require reversal when trial counsel's comments, taken as a whole, were so damaging that the court cannot be confident that the members convicted the appellant on the basis of the evidence alone. *Id.* at 184.

In determining the severity of the misconduct, we note that the trial counsel's argument on findings was of moderate length covering 4 pages of transcript. The trial counsel invested one-half page of argument to the uncontested fact that the urinalysis test was valid. He then spent the remainder of his argument contesting the defense theory of innocent ingestion. It was during this portion of his argument that the trial counsel asserted as fact that San Bernardino was the meth capital of the United States and that the party attended by the appellant and LCpl Coronel was a rave.

The trial counsel attempted to discredit LCpl Coronel by asserting inconsistencies in the witness' testimony where none existed. The prosecutor stated that the witness had first said he went to San Bernardino to see a girl and then later said he'd gone to see a waterfall. Record at 155. This was an inaccurate recitation of the evidence. The appellant testified that LCpl Coronel was not home when he arrived on Saturday afternoon because he had taken "a girl to see a waterfall." Record at 61. LCpl Coronel testified that he went to San Bernardino "with a girl," later adding that they went to "watch a waterfall." Record at 86, 90.

Having created a discrepancy where none existed, the trial counsel argued that, contrary to LCpl Coronel's testimony, the witness had actually gone to the meth capital of the United States to purchase drugs for the rave party that evening. Thus, the trial counsel not only misstated evidence and argued facts not in evidence but combined the two in order to create the wholly unsupported argument that LCpl Coronel was, himself, guilty of wrongful use of Ecstasy and, therefore, should not be believed. In fact, the trial counsel went so far as to state that, "Corporal Coronel got lucky. He didn't take the test. He never took the same test that Lance Corporal Mosqueda took. He may have gotten away with it." Record at 157. A trial counsel may invite the members to draw reasonable inferences from evidence in the record but may not invite the members to draw inferences based on "evidence" the trial counsel, himself, interjected into the proceedings.

The trial counsel's misstatement of evidence, argument of facts not in evidence and unsupported assertions of criminal complicity between the appellant and LCpl Coronel permeated all of the trial counsel's argument after his brief statement that the urinalysis test was valid. We, therefore, conclude that the prosecutorial misconduct was extensive and severe.

The military judge sustained the defense objection that the trial counsel was arguing facts not in evidence and, with the consent of the defense, gave the members a cleansing instruction. The adequacy of this remedy must be assessed, however, in the context of the weight of the Government case against the appellant. As noted above, the Government offered an entirely paper case. While this is certainly permissible and legally sufficient to cover all the elements of the offense, it adds nothing to the members decision whether to apply the permissive inference of wrongfulness provided for in Article 112a, UCMJ. During the defense case-in-chief, the appellant took the stand and vehemently denied knowingly using Ecstasy. The appellant's entire immediate chain of command followed him to the stand and one after another stated unequivocally that he had a reputation for truthfulness and law abidingness. The Government offered no evidence whatsoever to challenge the witnesses' assessment of the appellant's truthfulness and probity.

When the three factors above are weighed against one another, the balance is in the appellant's favor. We find that the military judge's curative effort was minimal and insufficient to overcome the severity of the trial counsel's misconduct. We further find that the evidence against application of the permissive inference of wrongfulness was strong and, absent the trial counsel's misconduct, could well have prevailed. Accordingly, we find that the errors here were materially prejudicial to the appellant's substantial rights under Article 59(a), UCMJ. We further find that, even absent a timely objection by the trial defense counsel, the prosecutorial errors would still require reversal under a plain error analysis.

Conclusion

In view of our findings above, the remaining assignments of error are moot. The findings and sentence are set aside and the record of trial is returned to the Judge Advocate General of the Navy. A rehearing is authorized.

Judge VOLLENWEIDER concurs.

CARVER, Senior Judge (dissenting):

I respectfully dissent. I agree with the majority opinion that the trial counsel erred when he argued facts not in evidence during his closing argument. But, contrary to the majority opinion, I find that the error was properly cured by the military judge's instructions to the court members. Upon review of all the factors, I conclude that the trial counsel's error was not materially prejudicial to any substantial right of the appellant.

I agree that the facts are generally as set forth in the majority's opinion. The trial counsel's closing argument on findings covered 4 full pages of text in the record of trial. He

initially argued that the good character evidence should receive little weight since many of the witnesses did not observe the appellant during off duty hours. The majority of his argument was devoted to pointing out inconsistencies and illogical statements in both the appellant's testimony and that of his witness, Lance Corporal (LCpl) Coronel.

At one point during closing argument, the trial counsel rhetorically asked the court members, "Why did he go to San Bernadino [sic]? Why did he go down to the meth capital of the U.S.? What was he doing there?" Record at 155. The trial counsel answered his own questions:

> During that same day Lance Corporal Mosqueda was buying tickets to a special party. He was buying tickets to a rave. Let me give you an alternate version of what happened. Let me give you another possibility of what really happened.
>
> During the day, Corporal Coronel went down to San Bernadino [sic] from LA. He knows where he can get drugs. He went to San Bernadino [sic] and bought ecstasy. At the same time, Lance Corporal Mosqueda bought tickets to the rave.

Id. Two full pages of text later, the trial counsel ended his argument:

> He went to San Bernadino [sic], got the drugs, went to the rave, partied it up right before they deployed. He did anything to meet the girls. He met the girls, eight in one night. He took the ecstasy. He is guilty of wrongfully using a controlled substance.

Record at 157. At an Article 39a, UCMJ, session, the trial defense counsel objected to the trial counsel's use of the phrase "meth capital of the U.S." and the word, "rave" because they were not supported by any facts in evidence. The trial defense counsel asked for a "cleansing order" to the court members. Record at 158.

The military judge sustained the objection as to the comment that San Bernardino was the "meth capital of the U.S." and proposed a limiting instruction which was essentially the same as the first sentence in the instruction quoted in footnote 4 of the majority's opinion. He asked the trial defense counsel, "Major Beal, would this cleansing warning satisfy you as far as regard [sic] in your objection?" Record at 159. The trial defense counsel responded, "That should work, sir. Thank you." *Id.*

Then the military judge sustained the objection as to the trial counsel's use of the word, "rave." He proposed instructing the court members as set forth in the second sentence of the

instruction in footnote 4. The military judge asked the trial defense counsel, "Does that satisfy the defense objection?" Record at 161. The trial defense counsel replied, "Yes, sir." *Id.* Then, the military judge said, "If these two cleansing warnings are given, do you agree that that satisfies all your concerns regarding those statements from trial counsel." *Id.* The trial defense counsel answered, "Yes, sir." *Id.*

The military judge gave the two tailored, specific limiting instructions to the court members who all said that they could follow his instructions. The trial defense counsel then gave his closing argument which was reflected in 5 and one-half pages in the record. There were no further objections regarding the trial counsel's argument.

Discussion

The trial counsel is not permitted to argue facts not in evidence, although he may argue inferences that can logically be drawn from the facts:

> It has long been held that a court-martial must reach a decision based only on the facts in evidence. It is also well established that arguments made by counsel are not evidence. When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles.

United States v. Fletcher, 62 M.J. 175, 183 (C.A.A.F. 2005)(internal citations omitted). Here, there was no evidence presented to be able to claim that San Bernardino was the methamphetamine capital of the United States. Further, there was no evidence presented that the party that the appellant and LCpl Coronel testified that they attended was a "rave," party since the word "rave" had not been defined in court. Under those facts, it was clear error for the trial counsel to argue either of those propositions. Assessing prejudice requires a balancing of several factors:

> [CAAF] believe[s] the best approach involves balancing of 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. In other words, prosecutorial misconduct by a trial counsel will require reversal when trial counsel's comments, taken as a whole, were so damaging that [the court] cannot be confident that the members convicted the appellant on the basis of the evidence alone.

Fletcher, 62 M.J. at 184. Examining the factors listed above, I find, first, that the instances of misconduct were quite mild in light of the entire argument and that the trial defense counsel had the opportunity to argue after the errors were made. Second,

and most importantly, the military judge gave appropriately tailored curative instructions unlike the generalized instructions criticized in *Fletcher*, 62 M.J. at 185; the trial defense counsel specifically stated that he was satisfied with the instructions; and the court members said that they could follow those instructions. Even if the court members had not specifically stated that they could follow the instructions, we ordinarily presume that court members will follow the instructions of the military judge. *United States v. Holt,* 33 M.J. 400, 407 (C.M.A. 1991). Third, admittedly, the weight of the evidence was a close question as I discuss below.

The appellant complains for the first time on appeal that the curative instructions were insufficient to rectify the erroneous argument and that in another portion of the argument, the trial counsel impermissibly attempted to shift the burden of proof. I find that the instructions were appropriate and adequate to cure the error. I further find no evidence that any portion of the trial counsel's argument attempted to shift the burden of proof from the Government to the appellant. Assuming arguendo that there were other errors in the trial counsel's argument, they did not constitute plain error because they were not materially prejudicial to any substantial right of the appellant.

I have also reviewed the remaining two assignments of error. I find them to be without merit. The appellant first asserts that the evidence was factually insufficient to prove knowing use of MDMA. The appellant also contends that the court members considered an improper factor in determining his guilt.

The sufficiency of the evidence of guilt is always a close question in a urinalysis case in which there are no Government witnesses who saw the appellant wrongfully use a prohibited drug. But, upon review of all the evidence, I am convinced beyond a reasonable doubt of the appellant's guilt for a number of reasons, including, but not limited to the following: most of the good character witnesses were peers, the other good character witnesses did not know the appellant outside his duty hours, one of those said he had been surprised before when he learned that one of his good Marines had committed misconduct, there were several inconsistencies in the testimonies of the appellant and LCpl Coronel, it was illogical that the appellant and LCpl Coronel could have spent virtually every minute of that evening together as they alleged, and it was unlikely that a stranger would place MDMA in the appellant's drink and then not say anything about it later.

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

For the Court

R.H. TROIDL
Clerk of Court