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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Antoinette VANDERBILT
Hull Maintenance Technician Second Class (E-5), U.S. Navy

NMCCA 200000487 Decided 30 August 2005

Sentence adjudged 29 October 1999. Military Judge: J.P. Winthrop. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, Navy Region, Mid-Atlantic, Norfolk, VA.

LT MARCUS N. FULTON, JAGC, USN, Appellate Defense Counsel
LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LT ROSS WEILAND, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

The appellant was convicted, contrary to her pleas, at a general court-martial composed of officer and enlisted members, of conspiracy to wrongfully sell or dispose of military property of a value in excess of $100.00 and wrongfully disposing of military property of a value in excess of $100.00, in violation of Articles 81 and 108, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 908. The appellant was sentenced to a dishonorable discharge, confinement for 21 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We previously affirmed the findings and sentence in a published opinion. *United States v. Vanderbilt,* 58 M.J. 725 (N.M.Ct.Crim.App. 2003). Our superior court set aside our decision because our previous opinion included verbatim replication of substantial portions of the Government's Answer Brief without attribution. The case was remanded to our court

for a new review pursuant to Article 66(c), UCMJ, "before a panel comprised of judges who have not previously participated in this case." *United States v. Vanderbilt,* 60 M.J. 346, 347 (C.A.A.F. 2004)(summary disposition).

The appellant declined to submit any additional assignments of error or responses following remand. The original assignments of error claimed that (1) the trial counsel improperly bolstered the testimony of two witnesses and (2) the military judge did not allow the appellant the same opportunity as the Government to discover certain evidence.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply brief, we conclude that the findings and 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.

Facts

The appellant was convicted of conspiracy to wrongfully sell or dispose of 21 9mm handguns and wrongful disposition of the 21 handguns, military property of the United States. She was acquitted of larceny of the same handguns. The handguns were discovered missing from the Naval Station armory where the appellant had been assigned as an armorer. The Government relied primarily on the testimony of a civilian named Leon Hayes who testified that the appellant gave him the 21 handguns to sell on the morning that the weapons were discovered missing.

Although no one saw the appellant take the handguns from the armory, she and several other armorers had the opportunity to do so. The appellant was one of about 12 petty officers who stood rotating 12-hour watches at the station armory. The armory was open and manned 24 hours a day, 7 days a week, in order to issue to, and retrieve weapons from, station active duty and civilian law enforcement and security personnel. The handguns were kept in several drawers in two safes inside the armory.

Only the armorers and supervisors on the official access list were permitted inside the armory where the weapons were stored. All who entered the armory signed in a logbook.

Ordinarily, two armorers stood a watch together, but during manpower shortages, a petty officer would stand the watch alone.

There were procedures in place in the event a watch stander had to leave the armory during his or her tour of duty to get chow from a nearby fast food restaurant or to obtain the evening printout or for some other authorized purpose. If two armorers were standing the watch, one of them had to remain in the armory while the other was absent. If only one person was standing the watch and had to leave the armory, the armorer was supposed to close the safes where the weapons were kept, lock the outer door, and put a note on the outside stating when the armorer would return.

Armorers often brought in personal book bags or backpacks while they worked a shift. Many of the armorers also put personal items in lockers inside the armory. No one ever searched the armorers or their lockers until after the weapons were discovered missing.

Inventories were required to be taken at the beginning of each shift by personnel of both the outgoing and incoming shifts, but many inventories were delayed until well into the shift and most of the inventories were not very thorough. The 21 missing handguns were weapons that were not ordinarily issued out and might have been overlooked in a cursory inventory.

The appellant and Boatswain’s Mate Second Class (BM2) Axtell worked the shift directly before the weapons were discovered missing. They worked from 1700, Monday, 15 March 1999, until 0500, Tuesday, 16 March 1999. Former Petty Officer (PO) McCaa and Petty Officer First Class (PO1) Ebba worked the shift that relieved the appellant at 0500, 16 March 1999. During an inventory at about 0600, PO Ebba discovered that the handguns were missing.

The appellant inventoried the handguns during her shift by herself at 1830, 15 March 1999. She reported no missing weapons. Coincidentally, PO McCaa and PO1 Ebba, who discovered the weapons missing on 16 March 1999, had also worked the shift directly before the appellant's shift on 15 March and reported no discrepancies during that shift. However, the last thorough weapons inventory was conducted on 12 March 1999 by two other armorers. All weapons were accounted for during that inventory.

During her shift, the appellant left the armory alone on two occasions, once for 15-20 minutes to get food and once for 10-15 minutes to get the evening printout. She was also left alone in the armory for 10-15 minutes when BM2 Axtell left the armory to get food. BM2 Axtell did not observe the appellant

when she took the inventory, nor did he observe her when she took her breaks or when she left at the end of the shift. But, he said that she usually left with a backpack.

Once they discovered that the weapons were missing, at about 0600 on 16 March, PO McCaa and PO1 Ebba re-inventoried the weapons several more times to ensure that the weapons were actually missing before they called to report the loss to their leading petty officer (LPO) and assistant LPO. The LPO testified that he arrived at the armory between 0800 and 0830 that morning. Other supervisors soon arrived on the scene. The assistant security officer directed that all the armorers, including the appellant, be immediately recalled to the armory. Special agents from the Naval Criminal Investigative Service (NCIS) were called to investigate. NCIS found no evidence of a break-in and concluded that it was an inside theft. Searches of all of the armorers' workspaces, personal residences, and personal vehicles were negative.

Leon Hayes testified that the appellant gave him the 21 9mm handguns on the morning they were discovered missing, 16 March 1999. Hayes first met the appellant in the fall of 1998 when he was visiting with the appellant's sister, Amanda. Hayes and Amanda worked together at Hardee's. Hayes had visited Amanda at her mother's house in Norfolk on numerous occasions. He spent Thanksgiving and Christmas of 1998 with Amanda's family. There, he met the appellant 20 or 30 times. He even used the appellant's car 2 or 3 times.

In mid-March of 1999, while he was visiting at the appellant's mother's house, Hayes mentioned that he was interested in buying a handgun for his own protection. The appellant asked him if he knew anyone else who wanted a handgun. Hayes said he would find out and he asked the appellant to get as many handguns as she could.

Hayes testified that the appellant called him between 0900 and 1000, 16 March 1999, the morning the weapons were discovered missing to say that she was on her way over. The appellant did not explain why she was coming over. About 30 minutes later, the appellant drove up. She pulled the backseat back and showed a gym bag to Hayes. She told Hayes there were 21 in the bag. Hayes understood that to mean 21 handguns. She said she had to go back to work because everyone that worked that night had to go back to the armory for questioning. Hayes took the bag out of the car and the appellant left.

Hayes took the gym bag upstairs. He looked in the bag and saw that there were many Beretta and Sigsaur 9mm handguns. He did not count them. He took out 2 Sigsaurs and put them in a locked safe in the house. He left the other handguns in the bag and took it outside. He put the bag inside a drainage tube under a sidewalk behind his mother's house. Hayes periodically checked on the bag, but did not take it out of the ditch until Sunday almost a week later. Hayes told some of his associates about the handguns, but he could not find a buyer.

Hayes' cousin Bryant Williams came from North Carolina on 19 March 1999. Before Williams left that Sunday, Hayes gave him the 19 handguns and asked him to sell them in North Carolina. Hayes and the appellant later made a deal that Hayes would try to sell the handguns and that Hayes would give her $2,000.00 for them. Hayes and Williams talked over the telephone many times, but Williams never gave Hayes any money for the handguns. The appellant wanted to get paid. At one point, Hayes called Williams and then handed the telephone to the appellant who then talked directly with Williams, apparently about his unsuccessful attempts to sell the weapons. Even though Hayes did not receive any money from the sale of the weapons, Hayes believed that he owed some money to the appellant. Thus, he gave the appellant $100.00. In July, Hayes visited Williams in Raleigh and took the empty bag home with him. Williams never admitted selling any of the weapons.

In late March or April, Hayes told a civilian friend, named Antwion Lamont Perry, that he had acquired 21 handguns from his baby’s mother’s sister and needed to get rid of them quickly. He showed some of the handguns to Perry. But Perry did not find a buyer or take possession of the firearms.

Later that summer, Perry, who had a previous felony weapons conviction, was arrested for domestic violence. That arrest put him in violation of his probation. So, Perry asked his girl friend to contact the Federal Bureau of Investigation (FBI) because he had information about some stolen weapons. In exchange for his information and cooperation about the handgun larceny, the Government facilitated Perry's release from jail and gave him a cash reward of $220.00.

A few days after he was released from jail, Perry told NCIS special agent (S/A) D'Ambrosio what he knew about the weapons that were in Hayes' possession. Perry said that Hayes told him that he had received the weapons from a black female who worked at the base armory and who was his baby's mother's sister.

Hayes and Amanda Vanderbilt had a baby together. Perry said that he saw the appellant once when she visited Hayes at Hardee's and could identify her. Perry and NCIS set up a "buy" from Hayes.

As part of the undercover sting operation, Perry called Hayes on 31 July 1999 and asked if he still had the 21 handguns. Hayes said that he only had his two handguns. Perry said he had a buyer. Perry suggested that they try to fool the buyer into thinking that he had all 21 guns by putting tools in the bottom of the bag and the two handguns on top. Hayes agreed. When they met and Hayes gave Perry the two handguns, Hayes was arrested and the two handguns were seized. They were later identified as two of the missing handguns.

Hayes was immediately questioned by NCIS S/A Underwood, waived his rights, and confessed to his role in the theft, identifying the appellant as the source of the firearms. However, Hayes also gave incorrect information to NCIS. Hayes incorrectly told NCIS that the appellant had initially called him about noon before dropping off the weapons, but Hayes testified in court that the time was earlier than that. He told NCIS that at one time there was a three-way telephone conversation among the appellant, Williams, and himself, but he testified that he first talked to Williams, then he gave the phone to the appellant who talked to Williams. After NCIS retrieved the gym bag from Hayes' roommate, they showed him a photo of it, which Hayes first said was not the same bag. But when he later saw the actual bag, he identified it as the same bag that the appellant had given him.

Without assistance from the Government, Perry was later found not guilty of the domestic violence charge. Hayes did eventually plead guilty in federal court to receiving stolen Government property, i.e., the handguns in question.

Just a week before the trial started, a Raleigh police officer recovered another one of the missing Berretta pistols during the arrest of a suspect in Raleigh. No further details of the arrest or suspect were provided in court.

Bolstering Witnesses
With Prior Out of Court Statements

In his first assignment of error, the appellant contends that the military judge erred by improperly allowing the trial counsel to present two prior out of court statements to bolster the testimony of two Government witnesses. We decline to grant relief.

The appellant complains that the military judge improperly allowed the Government to (1) present testimony from NCIS S/A Underwood that Hayes told him that he had received the stolen weapons from the appellant and (2) present testimony from NCIS S/A D'Ambrosio that Perry told him that Hayes received the weapons from the appellant. Both statements were obtained during NCIS interrogations.

The military judge admitted the statements of the two NCIS special agents as prior consistent statements under MILITARY RULE OF EVIDENCE 801(d)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), which provides that:

> (d) *Statements which are not hearsay.* A statement is not hearsay if:
>
> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . .

The standard of review is abuse of discretion. In order to reverse, we must be convinced that the military judge committed a clear error of judgment. *United States v. Gore,* 60 M.J. 178, 187 (C.A.A.F. 2004). We find that the military judge did not commit a clear error of judgment and that he did not, therefore, abuse his discretion.

At trial, the appellant attacked both witness' testimony by implying that they had motives to lie at trial in order to get favorable treatment. But the appellant argues that the prior consistent statements were nonetheless inadmissible because they were made after the witnesses already had motives to fabricate. As our superior court explained in *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990):

> In the usual case where a prior consistent statement is offered -- one in which the witness has been charged by the adversary with having recently fabricated the trial testimony or with testifying while under an improper influence or motive -- the prior statement is offered to show that the same story as that given during trial testimony was given earlier by the declarant. However, to be logically relevant to rebut such a charge, the prior statement typically must have been made before the point at which the story was fabricated or the improper influence or motive arose. Otherwise, the prior statement normally is mere repetition which, if made while still under the improper influence or after the urge to lie has reared its ugly head, does nothing to "rebut" the charge. Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true.

Here, however, we find that, at the time of their prior statements, neither witness had a motive to implicate the appellant. In the case of Perry, he first approached federal agents in order to get out of jail. He clearly had a motive to make allegations of a federal crime in order to get out of jail. But he knew that his allegations against Hayes had to be corroborated by obtaining the stolen firearms or he would not get out of jail. He also had no motive to falsely state that Hayes said he obtained the weapons from the appellant. There is no evidence that Perry and Hayes ever got together to concoct a false story about the appellant. Indeed there is no evidence that Perry even talked to Hayes after he was placed in confinement.

As for Hayes, the appellant attacked his credibility by suggesting that he named the appellant in order to preserve a pretrial agreement. S/A Underwood testified that Hayes had no agreement of any kind at the time he made the statement. Hayes talked to S/A Underwood after he was arrested while attempting to transfer the two stolen firearms to Perry. He had a motive to cooperate, to tell the truth, so that he could later negotiate the best deal he could. But, he had no motive at the time of the first interview with NCIS to falsely implicate the appellant, a friend, the sister of his girlfriend with whom he had a baby. He could have just as easily said that he obtained the handguns from an unidentified man on the street.

Instead, Hayes explained in detail the circumstances of receiving the firearms from the appellant, realizing that his story would be further investigated and that, if false, he would not receive any benefit therefrom.

Further, we find that the trial defense counsel opened the door to rebuttal evidence during cross-examination of Hayes and Perry. On direct examination, the witnesses testified that they had made prior statements to NCIS, without providing any significant details of their statements. This information was properly admitted as non-hearsay evidence. But, during cross-examination, the trial defense counsel questioned the witnesses as to the details of the prior statements in order to show inconsistencies between their testimony and prior statements. Thus, we conclude that the Government was permitted to present evidence that the prior statements were generally consistent with their testimony.

Finally, we find that even if the military judge erred, the error was harmless. As reflected in the summary of facts above, the evidence of guilt was simply overwhelming. *See McCaskey,* 30 M.J. at 193.

Discovery of Statements Made to an Attorney

We find no merit to the claim by the appellant that the military judge erred by failing to order the production of all statements made by Hayes to his civilian attorney related to proffers of testimony or motives to plead guilty. The military judge properly denied this motion on the ground that this information was protected by the attorney-client privilege. *See United States v. Fair,* 10 C.M.R. 19, 25-26 (C.M.A. 1953); RULE FOR COURTS-MARTIAL 701(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.).

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court