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

**BEFORE**

**C.L. CARVER** **D.A. WAGNER** **R.W. REDCLIFF**

**UNITED STATES**

**v.**

**Bruce A. BOYD**
**Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200200733 Decided 15 November 2004

Sentence adjudged 4 December 2000. Military Judge: D.K. Margolin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 9th Communication Battalion, I Marine Expeditionary Force Headquarters Group, I MEF, Camp Pendleton, CA.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel



REDCLIFF, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of disrespect toward a commissioned officer, willful disobedience of a commissioned officer, wrongful use and possession of marijuana, and breach of the peace in violation of Articles 89, 90, 112a, and 116, Uniform Code of Military Justice, 10 U.S.C. §§ 889, 890, 912a, and 916. The appellant was sentenced to a bad-conduct discharge, confinement for 90 days, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant contends that the evidence is factually insufficient to sustain the findings of guilty to several charges, and that the trial counsel engaged in improper argument. *See* Appellant's Brief and Assignments of Error of 11 Jul 2002.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the evidence is factually deficient to support the appellant's conviction for wrongful possession of marijuana,

but that the remaining findings, as well as the sentence, are correct in law and fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.[1]

**Sufficiency of Evidence**

The appellant maintains that the evidence is factually insufficient to support the findings of guilty to the disrespect, willful disobedience, and drug charges. Appellant's Brief at 13-16. We agree, in part.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, 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. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

**A. Disrespect and Willful Disobedience**

The appellant was charged with two offenses arising from his interaction with Captain Rector, the commanding officer of a military police unit. As an altercation broke out at a barracks building, Captain Rector arrived on the scene and attempted to defuse the situation. Although Captain Rector was not wearing his rank insignia at the time, several witnesses testified that he repeatedly and loudly identified himself as an officer to the altercation's participants. After the crowd began to disperse, Captain Rector ordered one of the participants to stop as he was leaving the area. That person responded with a profane retort and ignored the order to stop by continuing to walk toward the parking area adjacent to the barracks. Captain Rector followed the person to a black car, which attempted to leave the scene but was prevented from doing so by the arrival of additional security personnel.

The contested issue at trial was the identity of this individual. The appellant testified at trial, denying that he confronted Captain Rector, or disobeyed any order. Conversely, Captain Rector and another witness positively identified the

[1] The appellant's motion for expedited appellate review of 24 August 2004 and his renewal of that motion on 28 September 2004 are hereby rendered moot by this decision.

appellant as the individual who refused to stop and used contemptuous language. Several other witnesses heard or saw the altercation, but could not specifically identify the individual. Several of those witnesses also identified the appellant as an instigator of the altercation, and recognized him as the only person requiring medical attention after it was over. Captain Rector testified that the person who confronted him had a severe cut over the eye, and later received medical attention. Other testimony established that the appellant drove a Black Infiniti, matching Captain Rector's description of the vehicle that attempted to flee the scene.

We begin our analysis by noting that this court is free to disbelieve the appellant's testimony and believe that of Captain Rector. *See United States v. Williams*, 21 M.J. 360, 362 (C.M.A. 1986). Likewise, we are free to believe one part of Captain Rector's testimony and disbelieve other aspects. *See United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). We find the appellant's version of the facts to be highly implausible, and the testimony of Captain Rector credible. Considering the confusion and excitement of the situation, it is not surprising that eyewitness accounts vary. However, we do not regard any inconsistencies in Captain Rector's testimony to be material and are satisfied with his identification of the appellant. Accordingly, we are convinced beyond a reasonable doubt that the appellant committed the offenses of disrespect and willful disobedience. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶¶ 13b and 15b.

**B. Marijuana Use and Possession Offenses**

The appellant was convicted of both use and possession of marijuana. The Government offered urinalysis results in support of the use specification, which the appellant stipulated to be accurate. Prosecution Exhibit 1. The appellant asserted an affirmative defense of innocent ingestion, relying almost exclusively upon the testimony of Mr. Warren Biggs. Mr. Biggs, a former Marine, claimed to have secretly "loaded" a cigar with marijuana (a process commonly known as "freaking") and smoked it at a dance club with the appellant to celebrate the appellant's 21st birthday. Record at 361-62. He further testified that the appellant was unaware of the drug's presence. *Id.*

After carefully reviewing the record, we are convinced beyond a reasonable doubt that the appellant knowingly and wrongfully used marijuana. The sole issue at trial was whether the appellant innocently ingested the marijuana. Mr. Biggs' credibility was all but destroyed by the trial counsel's cross-examination. His account of the events was internally inconsistent and inherently implausible. Moreover, a letter supposedly from Mr. Biggs to the appellant's commanding officer, taking responsibility for the appellant's positive urinalysis result, bore the ZIP code not for Mr. Biggs' hometown but rather for the appellant's home of record. Additionally, the signature

on the letter did not match other examples of Mr. Biggs' signature. These facts not only severely damaged Mr. Biggs' credibility, but also implicated the appellant in an attempt to fabricate an innocent ingestion defense. While Mr. Biggs may well have provided the marijuana that ultimately triggered the appellant's positive urinalysis result, we are convinced beyond a reasonable doubt that the appellant was a knowing and willing participant in using marijuana.

On the other hand, we are not reasonably convinced of the appellant's guilt to wrongful possession. The possession offense was based solely upon a search of the car the appellant was driving, performed after the barracks altercation. A small amount of marijuana residue was found on the floor adjacent to the back seat of the vehicle. The Government offered no additional evidence as to how it got there. Evidence was developed, however, demonstrating that the car was registered to the appellant's wife. Further, unrebutted testimony at trial established that the appellant and his wife allowed others to use the vehicle, including Mr. Biggs. We cannot conclude, from this evidence alone, that the appellant exercised effective control over the marijuana. Where a person does not exercise sole control over a location, we will not infer that he knew of the presence of drugs or that he had control of them unless there are other incriminating statements or circumstances tending to buttress such an inference. *See United States v. Wilson*, 7 M.J. 290, 295 (C.M.A. 1979); *see also United States v. Adam*, 20 M.J. 681, 683 (A.F.C.M.R. 1985)(holding that eyewitness accounts that the accused had processed methamphetamine were sufficient corroboration for constructive possession of paraphernalia associated with that specific drug). Although we are convinced that the appellant wrongfully used marijuana, we find no persuasive evidence on this record tying the appellant to the marijuana residue seized from the back seat of his wife's vehicle. We are thus not convinced of the appellant's guilt beyond a reasonable doubt with regard to this specification and will provide relief in our decretal paragraph.

**Argument by Trial Counsel**

The appellant asserts several errors relating to the trial counsel's arguments on the merits and on sentencing, two of which merit discussion.[2] First, the appellant claims that the trial counsel injected his own personal opinions into his closing argument on findings. Second, he alleges that references to "hoodlums" and "gangs" in the trial counsel's sentencing argument were inflammatory and implied racial animus. Appellant's Brief at 4-12. Finding no prejudice, we hold that the appellant is not entitled to relief on this basis.

[2] We have considered the appellant's other assertions of error regarding the trial counsel's argument, and find them to be without merit.

A trial counsel has a duty to be a zealous advocate for the Government. *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003)(citing *United States v. Nelson*, 1 M.J. 235, 238 (C.M.A. 1975)). Trial counsel may not, however, "seek unduly to inflame the passions or prejudices of the court members." *Id.* (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). It is likewise improper for a trial counsel to argue his personal opinions or beliefs. *See United States v. Young*, 470 U.S. 1, 10 (1985); *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977).

We begin by noting that the appellant never objected to any portion of the trial counsel's arguments at trial. By failing to raise any objection so the military judge could rule on it, the appellant did not preserve this issue for appellate review. Therefore, we must test it for "plain error." *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999); *United States v. Ibarra*, 53 M.J. 616, 618 (N.M.Ct.Crim.App. 2000); MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). To establish plain error, the appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *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). We hold that the trial counsel's references to "hoodlums" and "gangs" were fair comment on the evidence and thus not error. As discussed below, we further conclude that the trial counsel's injection of personal opinion was improper, but not obvious error. Moreover, we conclude that in total the comments did not materially prejudice any substantial right of the appellant. *See* Art. 59(a), UCMJ.

**A. Argument on Findings**

In his closing argument on findings, the trial counsel made the unfortunate choice of styling several of his comments in the first person. *See generally United States v. Zeigler*, 14 M.J. 860, 863-64 (A.C.M.R. 1982). In particular, the trial counsel, referring to part of Mr. Biggs' testimony, stated, "He's lying about that. I wonder what else he could be lying about?" Record at 567. Later, in referring to part of the appellant's testimony, the trial counsel stated, "I guarantee you that's what [the appellant] was hoping." Record at 572. We agree that these comments crossed the line into improper argument. *See Knickerbocker*, 2 M.J. at 129.

Finding improper argument, however, does not end our inquiry, because a prosecutor's comments must be evaluated in their proper context. *See Young*, 470 U.S. at 12. "The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." *Id*. at 7. In this case, the trial counsel's first-

person assertions flowed from a detailed account of the testimony presented at trial. We do not find, in this context, that the trial counsel's remarks somehow implied that he knew of additional evidence, not presented to the members, which supported a finding of guilty. *Id.* at 19. Additionally, the nature of the personal opinions expressed in *Young,* which the U.S. Supreme Court held did not rise to the level of plain error, was far more egregious than that of the present case. Thus, we do not believe the trial counsel's comments constituted "plain or obvious" error.

Finally, we are convinced that these comments were not prejudicial. The trial counsel's argument carefully laid out the evidence against the appellant. With regard to Mr. Biggs' credibility, or lack thereof, we find that evidence to be overwhelming, regardless of the improper comments. *See Young*, 470 U.S. at 20. With regard to trial counsel's "guarantee" of what the appellant was thinking when he spoke to Captain Rector, we conclude that any such error, given the strong testimony of Captain Rector and the corroboration of several other witnesses, was harmless. *See* Art. 59(a), UCMJ.

**B. Argument on Sentence**

In his sentencing argument, the trial counsel referred to two of the appellant's friends as "hoodlums," and later asked about the barracks altercation, "How safe can people feel if we've got a group on group or gang or [sic] gang or whatever it is you want to call it?" Record at 624, 626. The appellant complains that the word "hoodlum" or "gang" was an implicit reference to the race of the appellant and his friends. We disagree.

Without question, a trial counsel must avoid references to race in argument, absent a "logical basis for the introduction of race as an issue, and strong evidentiary support for its introduction." *United States v. Lawrence*, 47 M.J. 572, 575 (N.M.Ct.Crim.App. 1997). This concern is magnified in a trial before members, regardless of whether the comments were motivated by any sort of racial animus. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004). Such comments may violate an appellant's constitutional right to a fair trial. *See United States v. Diffoot*, 54 M.J. 149, 150 (C.A.A.F. 2000).

Against that backdrop, we find no veiled or implicit reference to race in the words "hoodlum" or "gang." Either word can apply equally to members of any number of racial or ethnic groups. "Hoodlum" is defined as one who commits an act of violence, or a "young ruffian." *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 597 (11th ed. 2003). There is nothing about the term "hoodlum," in our experience, uniquely identified with any particular group. *Cf. Lawrence*, 47 M.J. at 574 (holding term "Jamaican brothers" was pejorative reference to race); *Diffoot*, 54 M.J. at 151 (holding "amigo" and "compadre" were improper

references to the appellant's race). Similarly, the word "gang" transcends racial or ethnic parameters. In this case, given the facts of the barracks altercation adduced at trial, the trial counsel's characterization of the appellant's associates and the other Marines involved in that altercation is far from inaccurate. There was ample evidence of record that the barracks altercation was basically a "brawl" between two groups of Marines. Thus, trial counsel's argument was a fair reflection of the evidence by referring to the brawl participants as two "gangs." Although the appellant and many of the others involved in the brawl were identified as African-Americans, other participants were Caucasian. There is simply no reference to gang membership affiliated with a particular race or ethnic group. Additionally, the trial defense counsel raised the issue of potential "gang" violence in his individual voir dire of the prospective members and later asserted that the appellant was not a "gang bang[e]r." Record at 91-93, 111.

Even if the trial counsel's references were improper, any possible prejudice from his remarks was cured by the military judge's *sua sponte* curative instruction. Record at 631. The military judge, in an abundance of caution, expressly told the members to disregard any references to "hoodlums" or "gangs". *Id*. Following instructions, at an Article 39(a), UCMJ, session, the military judge provided the trial defense counsel an opportunity to request a more specific limiting instruction, which the defense affirmatively waived. *Id*. at 642-43. On these facts, we find absolutely no possibility of prejudice. *See* Art. 59(a), UCMJ. Accordingly, we decline to grant the requested relief.

**Conclusion**

The finding of guilty to Specification 2 under Charge III is set aside. The remaining findings of guilty are affirmed. We have reassessed the sentence in accordance with the principles announced in *United States v. Cook,* 48 M.J. 434, 437-38 (C.M.A. 1998), *United States v. Peoples,* 29 M.J. 426, 427-29 (C.M.A. 1990), and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986). Having done so, we conclude that the adjudged sentence is both appropriate for the remaining offenses and free from all

possible prejudice. Accordingly, the sentence, as approved by the convening authority, is affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court