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.

Isaac D. ROBERSON
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200301539 Decided 14 March 2006

Sentence adjudged 10 January 2002. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Service Battalion, 2d FSSG, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel
LT JESSICA M. HUDSON, JAGC, USNR, Appellate Government Counsel

GEISER, Judge:

The appellant was convicted, pursuant to mixed pleas, by a special court-martial with officer members of unauthorized absence (UA), larceny, and two specifications of forgery, in violation of Articles 86, 121, and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 921, and 923. The appellant was sentenced to a bad-conduct discharge, confinement for one month, forfeiture of $737.00 pay per month for a period of one month, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. First, he asserts that the military judge abused his discretion by excluding substantial testimony supporting a defense theory of duress. Second, the appellant avers that the military judge abused his discretion by granting a continuance on the eve of trial when the prosecution discovered new evidence against the appellant. Next, the appellant argues that the military judge abused his discretion by not tailoring an adequate remedy and refusing to give jury instructions after ruling that certain evidence was lost due to Government incompetence. Finally, the appellant states that the military judge abused his discretion

when he refused to abate the proceedings after the Government failed to produce requested and promised witnesses on the eve of trial. The appellant requests that this court set aside the findings and the sentence.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Evidentiary Rulings

The appellant pled guilty to UA, but was convicted contrary to his pleas of larceny and two specifications of forgery by stealing and forging checks belonging to his roommate, Lance Corporal (LCpl) John Abrenica. Prior to trial, the appellant admitted to a command investigator that he and a friend, Mr. Dominique Matson, jointly decided to steal some checks from the appellant's roommate, that Mr. Matson took the checks from the victim's desk, that the appellant forged his roommate's signature on two of the stolen checks and that the checks were deposited into the appellant's credit union account. The appellant told the investigator that Mr. Matson would later withdraw money from the appellant's account and they would split it between themselves. No mention was made of force or the presence of a weapon. Record at 688-98; Prosecution Exhibit 4.

At trial, the Government solicited testimony from the victim regarding prior inculpatory statements made by the appellant. Specifically, LCpl Abrenica testified that subsequent to the larceny and forgery of his checks, the appellant approached him, apologized about the checks, and indicated that Mr. Dominique Matson had been involved in the theft. Record at 677. During cross-examination, the defense raised the specter of duress to the members by soliciting additional portions of the hearsay statements made by the appellant. The Government objected to this additional hearsay but the defense, citing the "rule of completeness," was permitted to proceed.[1] Record at 678. The witness expanded his earlier testimony stating that the appellant told him that Mr. Matson believed the appellant owed him a significant amount of money; that Mr. Matson had a handgun; that Mr. Matson took the checks from the victim's desk; and that Mr. Matson forced the appellant at gunpoint to forge the victim's signature. Record at 678-81.

During their case-in-chief, the defense attempted to lend further weight to their duress theory through the testimony of Mr. Mathas, a former service member who knew both the appellant and Mr. Matson. The defense intended for the witness to detail certain threatening out of court statements made by Mr. Matson

[1] MILITARY RULE OF EVIDENCE 304(h)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

against the appellant. The defense further intended for the witness to testify regarding Mr. Matson's character for violence and to the fact that Mr. Matson owned a handgun. Record at 826-38.

The prosecution raised objections to all three lines of inquiry based variously on hearsay and relevance. Outside the hearing of the members, the defense averred that the testimony was not offered for the truth of the matter asserted but rather to evidence the intent, motive, and plan underlying Mr. Matson's subsequent threatening actions *vis-a-vis* the appellant. Record at 828. The military judge sustained all three objections, observing that there had been no credible evidence adduced of any subsequent actions, violent or otherwise, by Mr. Matson. The military judge expressly noted that the prior cross-examination testimony permitted under the rule of completeness, while admissible on the merits, was still hearsay and in his mind was "unpersuasive" standing alone to reasonably raise a duress defense. Record at 829. The military judge offered, however, to revisit his rulings should additional evidence of duress be presented on the merits. He indicated that should the defense of duress be adequately raised, he would permit the excluded hearsay testimony. Record at 829. Our careful review of the record revealed no subsequent evidence detailing violent or threatening actions by Mr. Matson towards the appellant. We further note that the appellant elected not to testify on the merits.[2]

On appeal, the appellant argues that the military judge erred when he excluded this "substantial testimony" of a witness regarding the motives, inclination and opportunity of a third party to harm the appellant. The appellant impliedly asserts that the cross-examination testimony permitted by the military judge pursuant to the rule of completeness was sufficient to reasonably raise a duress defense. Appellant's Brief and Assignments of Error of 25 Mar 2005 at 4-5.

A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion. His or her ruling will not be overturned on appeal "'absent a clear abuse of discretion.'" *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F 1997)(quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F 2000). A military judge's ruling on admissibility of evidence will only be overturned if it is "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). In conducting our review, we are required to consider the evidence "in the light most favorable"

[2] Since the appellant's personal apprehension of harm is inherent to the duress defense, it will generally be difficult for the appellant to successfully raise the defense without testifying. *See* RULE FOR COURT-MARTIAL 916(h), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). *See also United States v. Rockwood*, 52 M.J. 98, 112 (C.A.A.F 1999), *United States v. Barnes*, 60 M.J. 950, 955 (N.M.Ct.Crim.App. 2005).

to the "prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

The crux of the issue is whether the appellant's exculpatory hearsay statements to the victim, LCpl Abrenica, admitted during cross-examination pursuant to MIL. R. EVID. 304(h)(2), are sufficient to reasonably raise a defense of duress. We begin our analysis by looking to the purpose underlying MIL. R. EVID. 304(h)(2).[3] As articulated by our superior court, the rule was enacted because "'[i]t would be manifestly unfair to an accused to permit the prosecution to pick out the incriminating words in the statement or discussion and put them in evidence while at the same time excluding the remainder of the statement or conversation, in which the accused seeks to explain the incriminating passages.'" *United States v. Rodriguez*, 56 M.J. 336, 341 (C.A.A.F 2002)(quoting *United States v. Harvey,* 25 C.M.R. 42, 50 (C.M.A. 1957)). Thus, the purpose of admitting what would otherwise be self-serving, inadmissible and unreliable hearsay evidence under this rule is to ensure members are not misled as to the nature and quality of other portions of an appellant's out-of-court statement being used against him by the prosecution. *United States v. Benton*, 57 M.J. 24, 33 (C.A.A.F. 2002)(citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72, n.14 (1988)). It is important to note, however, that other exculpatory out-of-court statements made by an accused relating to the same issues but separated in time from the statement offered by the government are not admissible. *Harvey,* 25 C.M.R. at 50.

In the instant case, the military judge correctly permitted the defense to solicit exculpatory portions of the appellant's out of court statement offered by the Government to ensure the members were not misled regarding the nature and quality of the statement as a whole. The military judge also correctly permitted the defense to argue those exculpatory statements during closing argument. Record at 881-89. Finally, the military judge properly instructed the members on the defense of duress. Record at 894-95. We concur with the military judge, however, that application of the MIL. R. EVID. 304(h)(2) doctrine of fairness does not in any way enhance the reliability or credibility of the appellant's self-serving out of court statements. The military judge's determination that the nature and quality of the exculpatory portion of the statement was insufficiently reliable to reasonably provide a basis for

[3] MIL. R. EVID. 304(h)(2) applies (1) to oral as well as written statements; (2) governs the timing under which applicable evidence may be introduced by the defense; (3) permits the defense to introduce the remainder of a statement to the extent that the remaining matter is part of the confession or admission or otherwise is explanatory of or in any way relevant to the confession or admission, even if such remaining portions would otherwise constitute inadmissible hearsay; and (4) requires a case-by-case determination as to whether a series of statements should be treated as part of the original confession or admission or as a separate transaction or course of action for purposes of the rule.

additional hearsay or character evidence was reasonable.[4] Record at 829. We do not find the military judge abused his discretion when he excluded subsequent hearsay and character evidence regarding Mr. Matson absent additional evidence of duress.

Granting a Continuance For Newly Discovered Evidence

The appellant also argues that the military judge abused his discretion when he granted a continuance on the "eve of trial" when the prosecution discovered new relevant evidence. The pertinent facts are that shortly before trial, the prosecution learned of statements made by the appellant to a fraud investigator from the Navy Federal Credit Union to the effect that his ATM card had been stolen and that he did not make certain transactions relevant to the charged offenses. Record at 505, Appellate Exhibit LXII. The military judge noted that after becoming aware of the statements, the prosecution immediately provided notice to the defense via e-mail. Record at 505; Appellate Exhibit LIX.

The defense argued that the notice was untimely and denied them an opportunity to conduct relevant discovery and effectively confront the new evidence. The defense moved that the evidence be excluded. Record at 506-07. The defense, however, alleged no bad faith on the part of the prosecution. *Id*. at 507. On the record, the military judge considered and solicited input from counsel regarding possible remedies ranging from wholesale exclusion of the evidence for all purposes, including impeachment, to granting a continuance to permit the defense to conduct additional discovery. We find that the military judge did not abuse his discretion by choosing to grant a continuance as the appropriate remedy in this instance.

Conclusion

We have carefully considered the remaining two assignments of error and decline to grant relief. We affirm the findings and the sentence approved by the convening authority.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court

[4] The accused must present more than a scintilla of evidence that demonstrates that he can satisfy the legal requirements for asserting the proposed defense. *Barnes,* 60 M.J. at 956.