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

BEFORE

W.L. RITTER **K.K. THOMPSON** **A. DIAZ**

UNITED STATES

v.

Rodney D. BANKS
Engineman Third Class (E-4), U. S. Navy

NMCCA 200401015 Decided 31 May 2006

Sentence adjudged 8 May 2003. Military Judge: C.J. Gaasch. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan.

LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
LT ROSS WEILAND, JAGC, USN, Appellate Government Counsel

DIAZ, Judge:

Pursuant to his pleas, the appellant was convicted by a general court-martial, composed of a military judge alone, of unauthorized absence, larceny, arson, and unlawful entry, in violation of Articles 86, 121, 126, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 921, 926, and 930. Contrary to the appellant's pleas, the military judge convicted him of two specifications of wrongfully hazarding a vessel, and three additional specifications of arson, in violation of Articles 110[1] and 126, UCMJ, 10 U.S.C. §§ 910 and 926.

The appellant was sentenced to confinement for twenty years, total forfeitures, a $50,000.00 fine (and to serve an additional five years of confinement if the fine is not paid), reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the adjudged sentence, but suspended all

[1] A violation of Article 110, UCMJ, is punishable by death. The convening authority, however, referred the charge and specifications to trial as non-capital offenses.

confinement in excess of seven years for 12 months from the date of sentencing.

We have carefully considered the record of trial, the appellant's 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 materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Summary of the Facts

From November 1999 until the date of his court-martial, the appellant was a member of the crew of USS KITTY HAWK (CV 63), home-ported in Yokosuka, Japan. On 19 June 2001, the appellant failed to report to his ship for duty, and he remained away until he voluntarily returned on 21 June 2001.

On 12 December 2001 shortly after 1900, a fire broke out on the 4th floor of the Transient Personnel Unit barracks (the "TPU") on board Fleet Activities Yokosuka, Japan. The appellant was on watch at the TPU that day from 0700 to 1900. During his tour, he had access to the location where the fire began. The appellant arrived on the scene shortly after the fire alarm was sounded and assisted others in securing the area.

Naval Criminal Investigative Service (NCIS) Special Agent (SA) Roger Ball (Ball) was assigned to investigate the TPU blaze. Ball determined that the fire was suspicious but he was unable to identify the perpetrator. Over 300 Sailors and Marines lived in the TPU at the time. The TPU fire caused approximately $500.00 in damage.

On or about 26 July 2002, the appellant unlawfully entered the off-base apartment of Information Systems Technician Third Class Richard Curry, USN, and stole a variety of personal items worth approximately $1,800.00. The appellant left the apartment, but returned the next day to cover up his crimes. The appellant took a newspaper that was on the floor of the apartment, rolled it up, doused it with lighter fluid, and set it on fire. He then placed the burning paper in a closet containing clothes and a box of magazines. After confirming that the fire had spread through the closet, he left. The fire caused approximately $74,000.00 in damage to the apartment, as well as to the structure of the building. The appellant pled guilty to these offenses at trial.

During the early morning hours of 2 April 2002 (a few months before the apartment fire), two fires were intentionally set on board the KITTY HAWK, close to several inhabited berthing spaces. SA Ball was one of several law enforcement officers assigned to investigate the fires. Ball examined the two areas for possible natural or mechanical causes of the fires and found none. As a result, he concluded that the fires on board the ship were intentionally set.

On 2 April 2002, the appellant was on security detail on board the ship. Shortly before the first fire, the appellant and a fellow watch-stander were on an adjoining pier taking a smoke break. They returned to the ship, but were separated for approximately 30-40 minutes, when the first alarm sounded sometime between 0400 and 0430.

The appellant, along with other members of the ship's security detail, responded to the first alarm. The appellant was assigned to secure the forward boundary of the first fire, an area approximately 400 feet from where the second fire began. As the ship's company worked to contain the first fire, another alarm sounded, and additional ship's personnel were summoned to battle this second blaze. The fires caused approximately $57,500.00 in damage to the ship's infrastructure (including damage to one of the ship's four aircraft arresting wires) and $22,506.67 in individual property damage.

The appellant initially denied any involvement in the TPU and KITTY HAWK fires. He was in the brig on the afternoon of 14 September 2002 when SA James Atkinson (Atkinson) brought him to the NCIS offices for further questioning. Over the course of the nearly six-hour interview, the appellant appeared calm and seemed alert and sharp. The appellant's restraints were removed during the interview, he was provided food, and he took four breaks.

Atkinson read the appellant his rights; the appellant indicated that he understood and wished to waive his rights and proceed with the interview. The appellant admitted that he had not been truthful in earlier interviews regarding his involvement in the KITTY HAWK fires. He confessed to setting both shipboard fires, provided specific details of how they occurred, and prepared sketches of the areas where he set them.

The appellant told Atkinson that he was on security detail when he set the KITTY HAWK fires. As part of his orientation for shipboard security duty, the appellant had been briefed on areas of the ship that the general crew would not be aware of. The appellant walked to one of those areas, where he grabbed some papers and used a cigarette lighter to set them on fire underneath some sea bags. As the ship's alarm sounded and personnel arrived to fight the first fire, the appellant admitted that he walked to the forward area of the ship where he again wadded some papers, lit them with a cigarette lighter, and set another fire.

The appellant also confessed to setting the TPU fire. He explained that, while on security detail, he walked to the 4th floor of the TPU, where he took some paper towels, placed them near a curtain and set them ablaze. As for why he set all of these fires, the appellant stated that, "My hope, as in other times I've started fires, was to assist in extinguishing the

fires and receive recognition for my efforts." Prosecution Exhibit 47 at 2.

At trial, however, the appellant denied culpability for the TPU and KITTY HAWK fires. He testified that he confessed to these crimes only because NCIS agents advised him that he would get less prison time by doing so. The agents denied making any such promises. Although the appellant did not move to suppress his confession, the military judge specifically rejected his explanation, and concluded that his confession was voluntary.

Over the appellant's objection, SA Ball was tendered at trial as an expert in arson investigations. He opined that the TPU fire and the two KITTY HAWK fires appeared to be intentionally set. Ball had never before testified in court as an expert witness and he had only investigated three fires in the past five years. Additionally, Ball was not published on the subject of arson investigations, held no memberships in professional organizations related to the field, and was not familiar with certain publications that the appellant's trial defense counsel asserted were the standards in the area of arson investigations.

At the time of his testimony at trial, however, Ball had over 23 years of experience in law enforcement, and had investigated approximately 50 suspicious fires. Although he had never been formally certified as an arson investigator, and held no current licenses in the field, Ball had himself been a firefighter for eight years, and had completed a number of college level and continuing education courses in fire investigation.

In accepting SA Ball as an expert, the military judge acknowledged that Ball's credentials were less than overwhelming:

> . . . I think it is a close--close one, but I do believe [SA Ball] meets the relatively low threshold requirement of M.R.E. 702. That said, "I've heard everything that was presented here, am aware of recent training or lack thereof and his experience and will give his testimony the weight I believe it warrants."

Record at 91. The military judge later provided a further explanation for her ruling:

> I believe that there was an adequate factual basis for the expert's testimony. It wasn't based on just his bare opinion. It was an area of specialized knowledge that maybe he's not totally up to date on the latest—latest knowledge in the area, but that he does have—in terms of what's expressed in the literature, but that based on his training and experience, he was qualified to testify.

> . . . I don't find that the expert unjustifiably extrapolated the facts to support his conclusions. I do find that his testimony was based on his objective observations and objective standards.
>
> Again, although there appears to be a body of learning in the literature that this witness is not totally up to date on, it's my determination that his practical experience was sufficient to meet the reliability standards expressed in *Kumho Tire* and *Daubert.*[2]

Record at 181-82.

Admission of SA Ball as an Expert

In his first assignment of error, the appellant asserts that the military judge erred when she allowed SA Ball to testify as an expert regarding fire investigations. We disagree.

We review a military judge's decision to admit expert testimony for an abuse of discretion. *See United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005). MILITARY RULE OF EVIDENCE 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2002 ed.) provides that a witness qualified as an expert may testify as to scientific, technical, or other specialized knowledge if it will assist the factfinder in understanding the evidence or determining a fact at issue.

Our superior court asks the proponent of expert testimony to demonstrate an expert's qualifications by establishing the following six factors: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) that the probative value of the expert's testimony outweighs the other considerations outlined in MIL. R. EVID. 403. *United States v. Houser,* 36 M.J. 392, 397 (C.M.A. 1993). *Accord*, *United States v. Dimberio*, 56 M.J. 20, 26-27 (C.A.A.F. 2001).

The appellant's appeal focuses on the first prong of this test, that is, he contends that SA Ball was not qualified to testify as an expert. The appellant, however, incorrectly assumes that there is some heightened level of credentialing that a witness must satisfy before he can testify as an expert. To the contrary, as the appellant himself points out in his brief, "'[a]nyone who has substantive knowledge in a field beyond the ken of the average [fact-finder] arguably is an expert within that field.'" Appellant's Brief of 14 Jul 2005 at 6 (quoting *United States v. Stark,* 30 M.J. 328, 330 (C.M.A. 1990)). *See*

[2] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

also United States v. Harris, 46 M.J. 221, 224 (C.A.A.F. 1997)("The witness need not be 'an outstanding practitioner,' but only someone who can help the [fact-finder].")(quoting *United States v. Mustafa*, 22 M.J. 165, 168 (C.M.A. 1986)).

SA Ball clearly had "specialized knowledge" regarding fire investigations that was beyond the ken of the military judge. At least with respect to an expert's qualifications, the law requires no more. *See e.g., Billings,* 61 M.J. at 167 (rejecting challenge to qualifications of jeweler called as an expert because of his lack of formal training, stating that it is enough that the expert was "a jeweler, and the panel members presumably are not.").

The military judge acknowledged that SA Ball's formal training and practical experience were somewhat dated, and we are confident that she considered these deficiencies in weighing the expert's testimony. *See United States v. Prevatte,* 40 M.J. 396, 398 (C.M.A. 1994)(stating that military judges are presumed to know the law and to act according to it). Moreover, we have carefully reviewed SA Ball's testimony in this case, and are satisfied that (1) it was relevant to the disputed issues at trial; (2) SA Ball had a sufficient basis for rendering his opinions; (3) his opinions were reliable; and (4) the testimony was otherwise admissible under MIL. R. EVID. 403. *See Houser,* 36 M.J. at 397. We hold that the military judge acted well within her discretion on this evidentiary issue. This assignment of error is without merit.

Factual and Legal Sufficiency

The appellant also contends that the evidence presented at trial was factually and legally insufficient to support his convictions for the three contested specifications alleging arson (for the fires on board the KITTY HAWK and at the TPU) and for the two contested specifications alleging the wrongful hazarding of a vessel.[3] We disagree.

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court [of Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Id*. at 325.

As he did at trial, the appellant insists that he did not set the TPU fire, or the two fires on board his ship. The

[3] Charge III, Specifications 1 and 2; Charge V, Specifications 2-3, and 5.

appellant admits, however, that he signed a statement confessing to the offenses. He unsuccessfully attempted to retract his confession at trial, and now argues that the Government failed to corroborate his admissions. We disagree.

While it is true that a confession must be corroborated by independent evidence that raises an inference of the truth of some of the essential facts admitted, *see* MIL. R. EVID. 304(g), the quantum of evidence needed is "very slight." *United States v. Melvin,* 26 M.J. 145, 146 (C.M.A. 1988). We find ample corroboration in this record to support the admission of the appellant's confession including, but not limited to, the fact that (1) expert testimony established that all three fires were intentionally set; (2) the appellant was alone and in the immediate vicinity of all three fires when they were set; and (3) the appellant provided investigators with a plethora of details regarding the locations and circumstances of the fires, which the Government corroborated through independent evidence. Based on this record, "[a] factfinder could reasonably conclude . . . that the appellant had told the truth at the time he gave his confession." *Id.* at 147. We also agree with the military judge's finding that the appellant's confession was voluntary.

After carefully reviewing the entire record, we conclude that the evidence is legally sufficient to support the appellant's convictions for the contested offenses. Additionally, we are personally convinced of the appellant's guilt of these offenses beyond a reasonable doubt. Accordingly, we decline to grant relief.

Conclusion

For the reasons set forth above, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge RITTER and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court