

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**JESIKA I. JENKINS
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200600989

Decided 5 December 2006

Sentence adjudged 12 August 2005. Military Judge: B.D. Landrum. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.

Capt SRIDHAR KAZA, USMC, Appellate Defense Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel
CAPT THOMAS J. DEMAY, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant following mixed pleas of willful dereliction of duty, making a false official statement, and aggravated assault, in violation of Articles 92, 107, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 928¹. The appellant was sentenced to a dishonorable discharge, four years confinement, total forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises two related assignments of error. She asserts that the evidence at trial was legally and factually insufficient to establish either her intent to commit aggravated assault or that she took any affirmative steps to assist in the aggravated assault. We have examined the record of trial, the assignments of error and Government's response. We conclude that

¹ The appellant pled not guilty to premeditated murder in violation of Article 118, UCMJ, and was convicted contrary to her plea of the lesser included offense of aggravated assault.

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.

Background

The appellant was assigned as part of the guard force at Camp Hansen, Okinawa shortly after her arrival in May 2004. She met Dentalman (DN) Audley Evans in October 2004 and the two began a romantic relationship in December 2004. Shortly after the start of the relationship, Evans was apprehended for shoplifting at the Army Air Force Exchange Service (AAFES) and was placed in the liberty risk program.

Evans had, in fact, been part of a shoplifting ring engaged in the theft and resale of thousands of dollars worth of AAFES merchandise. Prosecution Exhibit 2 at 4. On 1 February 2005, Evans was informed that another Sailor, DN Palecco, had been apprehended for shoplifting and was engaged in negotiations with authorities to obtain a lighter sentence in return for identifying other shoplifters including Evans and his accomplices. Evans was very agitated at the news. He and his three accomplices discussed the matter and quickly determined to murder Palecco.

On 2 February 2005, Evans asked the appellant to "get him off base" in her capacity as a gate guard. The appellant asked Evans why he wanted to leave. Evans revealed to the appellant the extent of his shoplifting activities and told her that Palecco was "a snitch" and that Evans wanted to "have some fun" with him and "shut him up." PE 1 at 3. The appellant asked how Evans was going to do that and he replied by making a hand gesture across his throat which the appellant took to mean he would kill Palecco. Although the appellant claimed both in the statement and at trial not to believe Evans, she nonetheless told him that she would not let him off base "to do something stupid." *Id.*

That evening, the appellant went up to Evans' room where she found him watching television with one of his shoplifting accomplices. While the appellant was in the room, she heard Evans ask his accomplice if he could borrow some black clothes. Evans then told the appellant that he was going to come down and come through her front door so that people would see him coming to her room and also see that he was wearing cammies. PE 2 at 5. Evans indicated that he would change into civilian clothes and depart her room through the window. He also indicated that he had a mask and gloves. The appellant acknowledged in a statement to Naval Criminal Investigative Service (NCIS) investigators that she knew Evans was going to cut Palecco's throat and that he was using her and her room as an alibi so he could say he was there during the time of Palecco's murder. *Id.* She expressly acknowledged to NCIS that she agreed to lie for Evans and that

she allowed him to use her room to change into civilian clothes so that he could go out and murder Palecco. *Id.* at 10.

The appellant left Evans' room and approximately fifteen minutes later, he came back to her room carrying a bag. He changed into dark clothing and departed through her window. A friend of the appellant's testified that she saw Evans putting on a shirt and subsequently depart from the appellant's room through the window. Record at 289-90. The appellant saw Evans depart in a car owned by one of the other shoplifting accomplices. Shortly thereafter, the appellant departed her room to get dinner. On her way back, she again encountered Evans and one of his accomplices in a car. Evans asked the appellant where she'd been and reiterated that she'd better be in her room when he got back. The appellant acknowledged to NCIS investigators that she knew Evans wanted her in her room "so I could say he was with me." PE 2 at 2. "At that point I knew I was Evans' alibi for the night." PE 2 at 5-6.

Later that evening, Evans returned through the appellant's window wearing dark clothes. He changed back into his cammies and left the room through the door. He came back about 20 minutes later, showered, and climbed into bed with the appellant. Evans then confessed to her that Palecco had been murdered. About 10 minutes later, the two other murderers came to the appellant's room. One told everyone that she'd bleached the clothes and dumped them with some Japanese trash. The appellant noticed bleach spots on the woman's pants. The other murderer described how he threw the knife down a drain or sewage pipe near Camp Courtney. The two accomplices left shortly thereafter. *Id.* at 7.

Legal and Factual Sufficiency

In the instant case, there is no dispute that Evans and his accomplices planned and carried out the brutal murder of DN Palecco or that the appellant was fully aware of the plan prior to its execution. The appellant argues on appeal that the evidence adduced at trial was legally and factually insufficient to prove beyond a reasonable doubt that she had the specific intent to have Palecco assaulted or that she took any affirmative steps to assist in the assault. We disagree.

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 offense beyond a reasonable doubt. *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.Crim.Ct.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, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

To be a principal under Article 77, UCMJ, an accused must (1) "[a]ssist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense"; and (2) "[s]hare in the criminal purpose of (sic) design." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 1b(2)(b). Case law has generally interpreted Article 77, UCMJ, to require an affirmative step on the part of an accused. *United States v. Gosselin*, 62 M.J. 349, 352 (C.A.A.F 2006). The specific intent required is to "facilitate the commission of a crime by another." *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A. 1990).

In the instant case, there is evidence that the appellant freely agreed to provide an alibi for Evans. PE 2 at 10. Consistent with Evans' direction and with knowledge of the intended crime, the appellant was present in her room both when he arrived through the door and departed through the window to establish the alibi and later when he returned through the window and departed through the door following the murder in order to be seen leaving her room. *Id.* at 2, 8. The appellant also permitted Evans to use her room to change from his cammies into dark clothes and later back into cammies. *Id.* While she was Evans' girlfriend and had previously permitted him to spend the night in her room, the fact remains that the barracks room was assigned to her alone and it was her option to grant or deny access to others, including Evans.

We find that a rational trier of fact could have found beyond a reasonable doubt that the appellant's agreement to provide an alibi assisted and encouraged Evans to commit aggravated assault and that the appellant had the requisite intent to facilitate the commission of Evans' offense. A reasonable trier of fact could, therefore, have found her, under Article 77, UCMJ, guilty beyond a reasonable doubt of the aggravated assault alleged under Charge III. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Conclusion

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court