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

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

Verdell R. LONDON
Aviation Electrician's Mate Airman (E-3), U. S. Navy

NMCCA 200500323 Decided 30 November 2006

Sentence adjudged 13 May 2004. Military Judge: C.L. Reismeier. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel

VINCENT, Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant, contrary to his pleas, of conspiracy to commit an assault consummated by a battery and assault consummated by a battery, in violation of Articles 81 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 928. The appellant was sentenced to a bad-conduct discharge and confinement for nine months. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. In his first assignment of error, the appellant asserts that the convening authority failed to timely consider his initial request for clemency. The appellant's second assignment of error contends that the military judge abused his discretion by permitting testimony that the appellant informed the victim that he had "some heat" under his mattress. His third assignment of error alleges excessive post-trial delay.

We have carefully reviewed the record of trial, the appellant's three 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.

However, the appellant is entitled to official records that accurately depict the findings and sentence of his court-martial conviction. In his case, although not raised by the appellant, there is a scrivener's error in the promulgating order. Specifically, the specification of Charge I in the convening authority's action erroneously lists the date of the conspiracy as "17 October 2003" rather than "17 January 2004". We note that the staff judge advocate's recommendation lists the correct date for the specification of Charge I. Although we find that this error is harmless, the appellant is entitled to a corrected court-martial order. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Timely Action on Clemency Requests

Clemency requests should be submitted and forwarded to the convening authority in sufficient time to allow the possibility of favorable action. *United States v. Bell*, 60 M.J. 682, 685 (N.M.Ct.Crim.App. 2004). In this case, on 22 June 2004, the appellant's trial defense counsel submitted a clemency petition to the convening authority requesting a one-month reduction in the appellant's sentence. The convening authority denied this request on 4 August 2004. Although 43 days passed between the appellant's clemency request and the convening authority's denial of the request, the convening authority acted on the request approximately 30 days prior to the appellant's release from confinement on 2 September 2004. Therefore, the convening authority, had he chosen to do so, could have granted the entire one-month reduction in confinement requested by the appellant. This assignment of error is without merit.

Admission of 404(b) Evidence

In his second assignment of error, the appellant contends that the military judge abused his discretion by admitting evidence that the appellant threatened his victim by bragging that he had "some heat" under his mattress. We disagree.

On the evening of 16 January 2004, the appellant and Aviation Electronics Technician Airman [H], the victim, were engaged in a verbal altercation in a third party's barracks room. During this altercation, both the appellant and the victim discussed the use of firearms and argued over which one could shoot the fastest. The appellant also informed the victim that he possessed a gun, which he kept under his mattress. On the morning of 17 January 2004, the appellant and his three co-conspirators entered the victim's barracks room and physically assaulted him.

In granting the Government's Motion in Limine to admit this evidence, the military judge explained:

> Both [the victim] and the accused made references to firearms and shooting; each boasted about who would shoot whom the fastest in another confrontation. At some point the accused referred to having a gun claiming that he kept it under his mattress. . . .
>
> I conclude that a [sic] probative value of these facts is not substantially outweighed by the danger of unfair prejudice and they will be admitted. These events provide the underlying favor [sic] of the case as well as the course of events leading us here.
>
> The evidence offered by the government pursuant to M.R.E. 404(b) is not, in my view, other acts evidence; it is part and parcel to the charged offenses. It is part of the *Res gestae*, the continuing interaction between the accused and [the victim]. It completes the story of the alleged crimes. The events immediately surrounding the charged 16 and 17 January offenses to include the word "exchange" before the alleged altercations are all part of this interaction.
>
> However, assuming that the evidence is properly considered as other act evidence, it is being offered for a proper non-character purpose, that is, to show motive of the accused to conspire with others to assault [the victim]. The exchange of menacing words regarding firearms provides motive for the charged offenses.

Record at 214-15.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *Thompson*, 63 M.J. at 230. We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004).

Although we do not concur with the military judge's conclusion that the appellant's statement that he possessed a gun, which he kept under his mattress, was part of the *res gestae*, we agree with his alternative ruling that the statement was admissible as uncharged misconduct under MILITARY RULE OF EVIDENCE, 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

In order to determine if evidence of uncharged acts of misconduct is admissible under MIL. R. EVID. 404(b), we ascertain whether that evidence is "offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged,

because he is predisposed to commit similar offenses." *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006)(quoting *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989)).

This determination is made using the three-prong test articulated in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). The first prong asks whether the evidence reasonably supports a determination by the fact-finder that the appellant committed the misconduct. *Id.* at 109 (citing *United States v. Mirandez-Gonzalez*, 26 M.J. 411 (C.M.A. 1988)). This is a low standard. *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993). The second prong of the test asks what fact of consequence is made more or less probable by the existence of this evidence. *Reynolds*, 29 M.J. at 109 (citing MIL. R. EVID. 401 and *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989)). The third prong requires the application of the balancing test under MIL. R. EVID. 403. *Id.*

We agree with the military judge's determination that the evidence of uncharged misconduct met the first prong of the test. Specifically, the appellant's statement reasonably supported a conclusion that he communicated a threat, a violation of Article 134, UCMJ. We also conclude that the military judge correctly determined that the evidence satisfied the second prong of the test. We agree with the military judge's alternate finding that the appellant's statement was offered for a non-character purpose. The military judge concluded in his findings of fact that both the appellant and the victim made statements about shooting each other with a firearm. This was illustrative of the level of hostility the two felt for each other hours before the assault and provided evidence concerning the appellant's motive. We note that the offenses that the appellant was convicted of did not involve firearms. Finally, we concur with the military judge's determination that the admission of the appellant's statement was more probative than prejudicial. *See* MIL. R. EVID. 403.

Post-Trial Delay

In his third assignment of error, the appellant asserts excessive post-trial delay. We disagree. This record of trial was docketed with this court 303 days after the appellant was sentenced. We find that this delay is not facially unreasonable for a five-volume, 746-page contested general court-martial involving serious offenses. See *United States v. Moreno,* 63 M.J. 129, 135 (C.A.A.F. 2006); *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004). Accordingly, we do not need to conduct a due process analysis.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

Accordingly, we affirm the finding of guilty and the sentence, as approved by the convening authority. We also direct that the supplemental court-martial order correctly reflect the date of 17 January 2004 in the specification of Charge I.

Senior Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court