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.

Michael G. TILMAN
Aviation Structural Mechanic Airman Apprentice (E-2), U.S. Navy

NMCCA 200100193 Decided 10 March 2005

Sentence adjudged 24 April 2000. Military Judge: W. Lietzau. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, Naval Air Warfare Center Aircraft Division, Patuxent River, MD.

LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

The appellant filed a motion with this court on 31 January 2005 for en banc reconsideration of its prior unpublished decision in *United States v. Tilman*, No. 200100193, unpublished op. (N.M.Ct.Crim.App. 19 Jan 2005). The Government did not file a responsive pleading. The motion for reconsideration en banc is denied. This court has reconsidered our decision in-panel in light of the appellant's motion. *See* N.M.Ct.Crim.App. Rule 6-1c. As a result of our in-panel reconsideration, we affirm our previous decision. It is clear from the tone and substance of the appellant's 24-page motion for reconsideration that appellate defense counsel misconstrued portions of our opinion. To ensure that there is no confusion regarding our decision, it is supplemented by this opinion.

Incomplete Record of Trial

The appellant raises no specific prejudice resulting from any of the omissions in the record of trial. In his request for reconsideration, the appellant asserts that our earlier opinion

shifted the burden with regard to prejudice to the appellant. We disagree. We find that the omissions in the record of trial are not substantial and, therefore, no presumption of prejudice exists. *United States v. Santoro,* 46 M.J. 344, 346 (C.A.A.F. 1997).

Specifically, the appellant claims that a significant portion of the testimony of a government witness is missing due to a tape change at page 472. The record does not reveal a substantial gap, however, and the missing portion appears to be limited to the trial counsel asking the witness if the victim asked some person or persons to return later that night. The thrust of the question and answer exchange is the opinion of the witness that the victim "was in no condition to ask anybody to come." Record at 472. The trial defense counsel objected to the opinion and the military judge sustained the objection. *Id.* The appellant advances no additional subject matter that is missing. Assuming *arguendo* that this omission was substantial, the presumption of prejudice is easily overcome by the extensive cross-examination and redirect examination that followed on the issues of who left the party, when they left the party, and what was said.

The appellant also claims that a substantial portion of the discussion regarding the judge's instructions on findings is missing due to a tape change on page 815 of the record. There is no indication in the appellant's briefs or in the record to suggest that the missing dialogue is substantial. Assuming *arguendo* that this omission is substantial, the presumption of prejudice is again easily overcome by the trial defense counsel's statement on page 848 and again on page 903 of the record that there were no objections to the final instructions given to the members.

The appellant cites pages 687, 692, 807, and 811 of the record of trial where the court reporter noted there were inaudible responses. There is no claim that any of these amount to substantial omissions, and, in each case, the inaudible portions are clearly minor omissions given their context in the record of trial. Of note, all four minor omissions were parts of sentences of a trial defense counsel and none were testimony.

Lack of Speedy Review

The appellant avers that this court's previous opinion is at odds with binding precedent established by our superior court in *Diaz v. Judge Advocate General of the Navy,* 59 M.J. 34 (C.A.A.F. 2003). This is a misreading of our previous opinion. Each appellant is entitled to an "appellate defense counsel who is able to represent him in both a competent and timely manner." *Diaz,* 59 M.J. at 38. Additionally, the government has a "statutory duty" to provide such counsel under Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870.

We have considered all the facts and circumstances surrounding the delay in the appellant's case in light of Articles 59(a) and 66(c), UCMJ; *United States v. Toohey,* 60 M.J. 100 (C.A.A.F. 2004); *Diaz*; and *United States v. Tardif,* 57 M.J. 219 (C.A.A.F. 2002). We do not find any prejudice or any other harm suffered by the appellant due to the delay in his case or any other basis for affording relief. There is no evidence that the appellant requested speedy review at any stage of the post-trial processing of his court-martial. We also have determined that the findings and sentence, as approved by the convening authority, should be approved in this case. While the timeliness of the post-trial processing of this case was less than optimal, we do not find the delay to be excessive considering the length and complexity of the record of trial, the issues raised by the appellant, and all other circumstances relating to appellate review of this case.

In our previous opinion, we cautioned counsel that, in advancing the issue of appellate defense attorney workload, collateral duties must give way to the ethical duty to represent an individual client. We stand by this conclusion. We also urge counsel to apprise their supervisory attorneys of their backlog in any case where they feel they cannot undertake effective representation in a timely fashion.

Trial Counsel's Closing Argument

The appellant contends that the trial counsel impermissibly commented on the appellant's silence at trial. We disagree.

The trial counsel began closing argument on the merits by stating:

> Mr. President, members, do you know why the government negotiated at all with AV3 Kepler, an accomplice of the accused, a co-conspirator of the accused? The government did because before there was any pretrial agreement, before there were any negotiations, Petty Officer Kepler talked to NCIS and told NCIS the truth.

Record at 849. Trial defense counsel objected on the grounds that the trial counsel was arguing evidence not before the court. The military judge, *sua sponte*, stated that the argument was an impermissible comment on the appellant's right to remain silent. The trial defense counsel specifically stated that the defense did not seek mistrial and instead desired a curative instruction. The military judge stated that he proposed telling the members simply to ignore the trial counsel's comments and the trial defense counsel agreed. The members were so instructed. Record at 849-50.

The trial counsel then began closing argument anew by stating:

> Mr. President, members, you heard from Petty Officer Kepler, AV3 Kepler. His testimony is essentially uncontested, or uncontradicted.

Record at 852. Not only was there no objection to this argument, but trial defense counsel later stated in argument on findings:

> [Trial counsel] said that the testimony of Petty Officer Kepler is essentially uncontroverted, uncontradicted. That is not entirely true, but for the most part there are things in his testimony that are relatively uncontradicted and uncontroverted.

Record at 877.

It is well-settled law that the failure of the trial defense counsel to object to the argument of trial counsel constitutes forfeiture of the issue on appeal in the absence of plain error. RULE FOR COURTS-MARTIAL 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see United States v. Ruiz,* 54 M.J. 138, 143 (C.A.A.F. 2000); *United States v. Ramos,* 42 M.J. 392, 397 (C.A.A.F. 1995). In order to show plain error, the appellant must demonstrate that an error was substantial and had a prejudicial impact on the outcome of the trial. *Ruiz,* 54 M.J. at 143; *United States v. Fisher,* 21 M.J. 327, 328 (C.M.A. 1986). We may award relief on an otherwise forfeited error only where the error seriously affects the fairness, integrity, or public reputation of the court-martial. *Johnson v. United States,* 520 U.S. 461, 467 (1997). This power is to be used sparingly, reserved for those cases where a miscarriage of justice would otherwise result. *United States v. Frady,* 456 U.S. 152, 163 n.14 (1982).

Plain error in this case would only be raised if the trial counsel's argument amounted to a comment on the appellant's failure to testify at trial or execution of his right to remain silent. The trial counsel's argument was neither. It was simply fair and accurate comment on the state of the evidence in the case. This is buttressed by the fact that the military judge, already sensitive to this issue, did not take action sua sponte. It is further supported by the fact that the trial defense counsel not only failed to object, but also, in argument, agreed with the trial counsel that the testimony was, for the most part, uncontradicted and uncontroverted.

Finally, in the motion for reconsideration, the appellant cites *United States v. Dennis,* 39 M.J. 623, 625 (N.M.C.M.R. 1993) as supporting authority that this court should have conducted further analysis of the argument of trial counsel in order to determine whether he was entitled to relief. However, the *Dennis* court ultimately held that the identical language used by the trial counsel in this case did not constitute a reference on the accused's right not to testify:

> Many cases support the conclusion that a bare statement to the effect that the prosecution's evidence generally, or that of a particular witness or witnesses, is uncontradicted or undenied, is not an improper reference to the accused's refusal to testify. Annotation, *Comment On Argument By Court Or Counsel That Prosecution Evidence Is Uncontradicted As Amounting to Improper Reference to Accused's Failure To Testify*, 14 A.L.R. 3rd 723, 763. Also, many state and federal courts, when confronted with a situation where an argument is made that evidence for the prosecution is uncontradicted or undenied, have found that such comments do not constitute an improper reference to the accused's failure to testify and simply reflect the prosecution's description on the weight and force of its own evidence or the credibility of its witnesses. *Id*. at 769 and August 1992 Supplement at 72-75.

Dennis, 39 M.J. at 625.

This issue was, and remains, without merit. Thus, the appellant is entitled to no relief.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority and by this court in our earlier decision, are again affirmed.

For the Court

R.H. TROIDL
Clerk of Court