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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Joshua P. COOK
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200100254 Decided 28 February 2005

Sentence adjudged 1 September 1999. Military Judge: E.B. Stone. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3rd Marine Division (-)(Rein), Okinawa, Japan.

LT MARCUS N. FULTON, JAGC, USN, Appellate Defense Counsel
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel
LT C.C. BURRIS, JAGC, USNR, Appellate Government Counsel

SUSZAN, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for 6 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant asserts three assignments of error: (1) trial counsel committed plain error under MILITARY RULE OF EVIDENCE 408, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), by introducing the appellant's agreement to settle a claim by Navy Federal Credit Union; (2) trial counsel committed plain error by impermissibly stating to the members that he had personal knowledge of the appellant's guilt during his opening statement to the members; and (3) the court-martial was not properly convened because the convening authority did not receive the advice required by Article 34, UCMJ. 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 appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

Evidence of Attempt to Settle Claim

During its case-on-the-merits, the Government presented the testimony of Richard Thomas, a Navy Federal Credit Union (NFCU) Senior Manager. Mr. Thomas testified that he met with the appellant after learning that the appellant had admitted to investigators that he had taken funds from Lance Corporal (LCpl) Tapia's NFCU account. Mr. Thomas further testified that the purpose of the meeting with the appellant was to recover the funds that NFCU had reimbursed LCpl Tapia's account. The appellant did not deny his culpability and acquiesced to a proposed agreement to reimburse NFCU for its loss. The trial defense counsel did not object to the testimony. The appellant now asserts trial counsel committed plain error.

"Evidence of (1) . . . promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . ." MIL. R. EVID. 408. Because there was no objection at trial to the evidence of the settlement of the claim, the appellant must show plain error. Plain error is proven if the error was plain or obvious, and the error materially prejudiced the appellant's substantial rights. *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998).

Having carefully examined the record of trial, we find the appellant did enter an agreement to settle a claim with NFCU within the purview of MIL. R. EVID. 408. *See United States v. Jensen,* 25 M.J. 284, 287-89 (C.M.A. 1987). The appellant agreed to allow NFCU to deduct funds from his account to repay NFCU for the money reimbursed to LCpl Tapia in the amount taken from LCpl Tapia's account. As evidence of this agreement, the Government introduced the testimony of Mr. Thomas. On direct examination by the trial counsel Mr. Thomas was asked and responded:

> Q. When you spoke to Lance Corporal Cook, what did you speak about?
> A. When I spoke with Lance Corporal Cook, it was after the investigative agency had completed the investigation and I had been advised that Lance Corporal Cook had admitted taking funds from PFC Tapia's account and my concern was in that we had reimbursed or were going to reimburse PFC Tapia, then Navy Federal had to recover the funds from Joshua Cook, Lance Corporal Cook.
>
> Q. And is that what you spoke with Lance Corporal Cook about?

A. That is correct.

Q. What was his reaction to that?
A. Lance Corporal Cook did not deny the fact to me in my presence that he had taken the funds.

Q. Did he agree to the funds being -- did he agree to pay back?
A. I spoke to Lance Corporal Cook from the view point that he had admitted taking the funds and therefore, Navy Federal having reimbursed Tapia the $2,700 that was missing from Tapia's account, that we would be taking funds from Lance Corporal Cook's account as he accrued those funds through direct deposit.

Q. Did he object to that?
A. He did not object to that.

Record at 218-19. Mr. Thomas continued to testify giving the details of the agreement between the appellant and NFCU on reimbursement of the disputed funds, covering number of pay periods, amounts to be withdrawn and amounts to be given to the appellant to cover health and comfort expenses.

Assuming, without deciding, that the military judge erred in admitting the disputed testimony of Mr. Thomas, we conclude that the error does not require reversal. Despite the inadmissibility of that portion of testimony about the appellant's agreement with NFCU, Mr. Thomas' testimony recounting the appellant's admission that he had, in effect, tricked NFCU into transferring the funds to his account, was otherwise admissible. In view of the overwhelming and unrebutted admissible evidence presented to the members in the form of the appellant's admissions to the Naval Criminal Investigative Service, NFCU, and the financial transaction records of NFCU, we conclude that the error did not result in an unfair prejudicial impact on the members' deliberations and did not materially prejudice the substantial rights of the appellant. *Powell*, 49 M.J. at 463 (citing *United States v. Fisher,* 21 M.J. 327, 328 (C.M.A. 1986)).

Improper Argument

During opening statements prior to trial on the merits, trial counsel stated in reference to how the appellant was able to steal funds from the victim's NFCU account: "Now, how do I know this? I know this because I read his confession, and you will, too." Record at 138. The trial defense counsel did not object to the statement. The appellant now asserts plain error. We do not concur.

Opening statements are not evidence. *United States v. Turne*r, 39 M.J. 259, 262-63 (C.M.A. 1994)(citing *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983)). Absent an objection at trial, an issue is deemed waived, unless the appellant shows

plain error. *United States v. Causey*, 37 M.J. 308, 311 (C.M.A 1993).

The appellant has not shown obvious error or that his substantial rights were materially prejudiced. The trial defense counsel did not find the trial counsel's remarks sufficiently offensive to warrant an objection. The military judge properly instructed the members that opening statements and argument of counsel were not evidence. Record at 137, 233. We find no plain error in the trial counsel's comments and conclude that the military judge's instruction cured any possible error. *See United States v. Jenkins,* 54 M.J. 12, 20 (C.A.A.F. 2000).

Court-Martial Not Properly Convened

In a summary assignment of error the appellant asserts that the court-martial was not properly convened because the convening authority did not receive advice from the staff judge advocate as required by Article 34, UMCJ. The trial defense counsel did not raise the issue prior to appeal.

A convening authority may not refer a specification under a charge to a general court-martial unless his staff judge advocate has advised him in writing that the specification alleges an offense, the specification is warranted by the evidence indicated in the investigation report, and the court-martial would have jurisdiction over the accused. Article 34, UCMJ. Referral of a case to general court-martial is erroneous, if there was no Article 34 advice prepared by the staff judge advocate. However, before a case referred without Article 34 advice will be reversed the appellant must show he suffered actual prejudice. *United States v. Blaine*, 50 M.J. 854, 856 (N.M.Ct.Crim.App. 1999).

Although, the Government has not offered any evidence that an Article 34, UCMJ, advice was prepared and considered prior to referral, the appellant does not assert specific prejudice arising from this issue and, after careful review of the record, we find there was none. Therefore, the error was harmless.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court