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.

Franklin OWENS, Jr.
Aviation Boatswain's Mate (Launching and Recovery Equipment)
First Class (E-6), U.S. Navy

NMCCA 200100297 Decided 17 June 2005

Sentence adjudged 21 June 2000. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS GEORGE WASHINGTON (CVN 73).

LCDR ROBERT EVANS, JAGC, USNR, Appellate Defense Counsel
LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of assault consummated by a battery, unlawful entry, and communicating indecent language, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934.[1] The members sentenced the appellant to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's eleven assignments of error,[2] and the Government's

[1] The appellant was also convicted by the members of disorderly conduct, in violation of Article 134, UCMJ. This offense was dismissed by the military judge prior to sentencing.

[2] The appellant has raised the following assignments of error (AOEs):

> I. THE CONVENING AUTHORITY WAS DISQUALIFIED BY HIS PERSONAL FEELINGS ABOUT THE OUTCOME OF THE CASE AND BY THE BIASED ADVICE OF HIS JUDGE ADVOCATE.

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. *See* Arts. 59(a) and 66(c), UCMJ.

Background

At about 0930 on the morning of 3 January 2000, the appellant, a first class petty officer, went uninvited to the off-base apartment of a female shipmate, Airman Apprentice (AA) "H." After being denied entry by AA H, the appellant forced his way into her apartment. He screamed at her, calling her a "bitch," a "white slut," and a "tease," and said that he hadn't had sex in a month-and-a-half. He then struck her repeatedly with his hands, causing her to fall down. As she lay on the floor, the appellant got on top of her, hitting and scratching her. When she tried to get up, he pushed her head forcefully against the floor. Then he pulled out an unknown metal object (described by AA H as possibly a nail file or nail clippers), pushed up her shirt, and scratched

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II. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S PRETRIAL MOTION TO DISMISS ON GROUNDS OF DUE PROCESS, EQUAL PROTECTION, AND DOUBLE JEOPARDY.

III. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDECENT LANGUAGE SPECIFICATION FOR FAILURE TO STATE AN OFFENSE.

IV. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS AA H[]'S TESTIMONY.

V. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE EVIDENCE OF OTHER ACTS.

VI. THE COURT WAS IMPROPERLY INFLUENCED BY OJAG'S DECISION AUTHORIZING ACTION AGAINST APPELLANT.

VII. THE MILITARY JUDGE ALLOWED THE GOVERNMENT TO MANIPULATE THE SELECTION OF THE PANEL.

VIII. THE COURT'S INSTRUCTION DID NOT CURE THE GOVERNMENT'S IMPROPER CLOSING ARGUMENT.

IX. THE CONVENING AUTHORITY'S ACTION INCORRECTLY REPORTS THE RESULTS OF TRIAL.

X. THE SENTENCE CANNOT BE APPROVED, AS THE GOVERNMENT HAS FAILED TO INCLUDE A COMPLETE ARTICLE 32, UCMJ, REPORT IN THE RECORD OF TRIAL.

XI. THERE IS INSUFFICIENT FACTUAL AND LEGAL SUPPORT FOR THE FINDINGS OF GUILTY, AS AN AFRICAN-AMERICAN MALE WHO WAS RAISED IN THE CITY OF CHICAGO, ILLINOIS, WOULD NOT REFER TO A WOMAN AS A "WHITE SLUT" OR A "TEASE." *See record at 155.* IF HE WERE DIRECTING DERISIVE COMMENTS TO A WOMAN, APPELLANT WOULD NOT USE THAT TYPE OF SLANG, THUS, AA H[]'S IDENTIFICATION OF APPELLANT AS THE PERPETRATOR WAS AN OBVIOUS FABRICATION.

For the sake of convenience and clarity, we will address several AOEs out of order.

AA H's face and stomach areas with this object. The appellant then left the apartment.

After the attack, AA H contacted a friend, who drove her to her command, the USS GEORGE WASHINGTON (CVN 73). An examination of AA H by the ship's medical personnel disclosed numerous fresh bruises and cuts, but no serious injuries. Although she was initially reluctant to discuss the assault, later that day AA H identified the appellant as her attacker.

The case was initially prosecuted by civilian authorities in Norfolk, Virginia. The case was charged as a misdemeanor, and no prosecutor was assigned to the case. After AA H testified, the state court judge dismissed the case for lack of jurisdiction--on the motion of the appellant's civilian defense counsel--apparently because AA H failed to state where the assault had occurred and also failed to make an in-court identification of the appellant as her assailant.

After the conclusion of the state court proceeding, the appellant's command ordered the charges investigated pursuant to Article 32, UCMJ. The investigating officer recommended that the charges be disposed of by special court-martial. As required by section 0124 of the Manual of the Judge Advocate General,[3] the command judge advocate then requested permission from the Judge Advocate General of the Navy to refer the charges to a court-martial. The package forwarded to the Judge Advocate General included letters from the appellant's defense counsel, the assigned trial counsel, the convening authority, and the command judge advocate. Based upon this input, the Judge Advocate General approved the request, specifically finding that "the interests of justice and discipline require further action under the Uniform Code of Military Justice against ABE1 Owens." (Appellate Exhibit XXIX at 1).

BIAS OF THE CONVENING AUTHORITY AND THE COMMAND JUDGE ADVOCATE

The appellant's first assignment of error contends that both the convening authority and his command judge advocate were biased against the appellant, and that this bias disqualified the convening authority from convening the court-martial. We disagree.

As evidence of this purported bias, the appellant points to the following remarks contained in the letters submitted to the Judge Advocate General:

1) The command judge advocate explained that the ship's Naval Criminal Investigative Service (NCIS) special agent initially assumed responsibility for this case, and, without consulting with the command, told AA H to file a complaint with the civilian

[3] Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7c § 0124 (CH-3, 27 Jul 1998).

authorities. When the command judge advocate learned of the assault, "I immediately directed our Security Division conduct a full investigation into what I considered a potentially serious crime." (Appellate Exhibit XXIX at 3.)

2) When the civilian authorities assumed jurisdiction, the command judge advocate "continued processing our investigation to preserve the information for any subsequent action the command might have desired." (Appellate Exhibit XXIX at 3).

3) After the civilian authorities brought charges, the command decided not to postpone any further decisions about the case until after the civilian charges had been resolved. The command judge advocate commented: "At this point in the process, I felt, even though we were dealing with a serious assault, the commonwealth attorney's office would handle it sufficiently." (Appellate Exhibit XXIX at 3).

4) While the ship began to prepare for an upcoming deployment, the command judge advocate noted that: "My office continued to track the case and coordinated with the civilian courts to ensure the victim and accused would be available for appearances during underway periods." (Appellate Exhibit XXIX at 3.)

5) The command judge advocate's letter then explained that no prosecutor was assigned to the case (a fact of which he was not aware until after the conclusion of the proceedings), and the case was dismissed on jurisdictional grounds. The letter goes on to comment: "I am confident, had the government's interests been properly represented by a prosecutor there would have been a different result. In light of the outcome, I discussed options with the Commanding Officer and he decided to refer the case to an Article 32 Investigation." (Appellate Exhibit XXIX at 3-4).

6) The convening authority provided a brief endorsement to the defense counsel's letter to the Judge Advocate General. In this endorsement, he challenges an assertion by the appellant’s counsel that the command had allowed the civilian authorities to handle the case, pointing out that the latter had assumed jurisdiction and that he had merely awaited disposition of the offenses as required by policy issued by higher authority. He then commented: "I believed at the time, the incident would be fairly adjudicated in the civilian court system." (Appellate Exhibit XXIX at 5).

On appeal, the appellant asserts that these remarks show that both the command judge advocate and the convening authority had more than an official interest in his case, and that this disqualified the convening authority from convening the court-martial. The appellant did not raise this issue at trial.

Article 23(b), UCMJ, prohibits an officer from convening a special court-martial in which he is also an accuser. Instead,

such an officer must refer the case to higher authority, and should advise the superior authority of his disqualification. Art. 23(b), UCMJ; *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Article 1(9), UCMJ, defines an "accuser" as:

> a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

A staff judge advocate can be similarly disqualified from participating in the review of a case if he has more than an official interest in the case. Art. 6(c), UCMJ; *United States v. Sorrell*, 47 M.J. 432, 433 (C.A.A.F. 1998).

However, the disqualification of a convening authority as an accuser under Article 23(b), UCMJ, is not jurisdictional, and the error must be raised in the trial court to be preserved for appeal, absent plain error. *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994).[3] After considering the challenged comments and actions discussed above, we find no error, let alone "plain error." Thus, no relief is appropriate.

On this record, the evidence does not establish that either the command judge advocate or the convening authority had "other than an official interest" in this case. In context, the remarks cited by the appellant appear to reflect these officers' official interest in seeing that justice was done and that good order and discipline was preserved, as well as a perception that these interests may not have been adequately protected by the civilian proceeding. We perceive no improper action or improper motives in their written remarks, and we will not impute improper motives to the command judge advocate or the convening authority on the basis of the evidence presented in this record. We conclude that this assignment of error is without merit.

DOUBLE JEOPARDY, DUE PROCESS, AND EQUAL PROTECTION

In his second assignment of error, the appellant asserts that his prosecution and punishment in a military court-martial after his acquittal in Virginia Commonwealth criminal court is a violation of his double jeopardy and due process rights under the Fifth Amendment, and his Fourteenth Amendment right to equal protection of the law. The appellant raised each of these contentions at trial, and now reasserts them before this court. We concur with the ruling of the military judge that the appellant's rights to due process and equal protection, as well as his rights against double jeopardy, were not abridged via trial by court-martial.

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[3] The majority in *Shiner* held that the failure to raise the error in the trial court waives the error. However, Judge Wiss, in his concurring opinion, declined to endorse the doctrine of waiver in such cases, preferring to test the error for prejudice.

The law is well-settled that multiple prosecutions of an accused by different sovereigns -- in this case, the Commonwealth of Virginia and the United States -- does not violate either double jeopardy or due process. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982). The continuing vitality of this "dual sovereignty doctrine" has recently been reaffirmed by the United States Supreme Court in *United States v. Lara*, 541 U.S. 193 (2004).

The appellant claims that the Supreme Court has carved out an exception to the dual sovereignty doctrine in *Bartkus* in that "federal and state authorities may not manipulate a system to achieve the equivalent of a second prosecution," and contends that his prosecution before a court-martial constitutes such a case. (Appellate Exhibit VIII at 6). Contrary to the appellant's contention, we find no such language or support for his position in *Bartkus*. The Supreme Court did state in *Bartkus* that "at some point the cruelty of harassment by multiple prosecutions by a State would offend due process. . . ." *Bartkus*, 359 U.S. at 127. However, this is not such a case. And even if the appellant was correct that a "manipulation" exception to the dual sovereignty doctrine does or should exist, we do not find that such an exception would apply in this case on the record before us. Instead, the evidence of record establishes that the military authorities prosecuted the appellant because they believed that Virginia's civilian authorities failed to protect important military's interests.

The appellant also asserts that the multiple prosecutions in this case deprived him of equal protection of the law, because if the appellant had been a civilian -- or a service member serving in a foreign country -- he would have been protected against the multiple prosecutions by double jeopardy or by a status of forces agreement (SOFA). However, the appellant ignores that he could be prosecuted twice because his offense violated both State and military law. He is therefore in a wholly different situation from a civilian who violates only State law. The resulting "disparity of treatment" cited by the appellant is rationally related to the military's interest in maintaining good order and discipline among its service members -- a consideration entirely absent from the case of a civilian. Similarly, the disparate treatment of the appellant from that of a service member who might be protected from multiple prosecution under a SOFA finds a rational basis in the Government's need to protect its service members who are stationed in foreign countries and to maintain positive relations with those foreign countries.

Finally, there is no evidence, and the appellant does not claim, that he was singled out for multiple prosecutions contrary to military policy or practice. Section 0124 of the Navy's JAGMAN sets forth a procedure which permits multiple prosecutions in some cases, and that procedure was followed in this case. Simply put, the appellant has not averred or proven that he was treated differently in this regard than other Sailors similarly situated.

We, therefore, find no violation of equal protection in this case and conclude that this assignment of error is without merit.

UNLAWFUL COMMAND INFLUENCE

In his sixth assignment of error, the appellant claims that the military judge, in ruling on the appellant's double jeopardy and due process claims, as discussed above, was improperly influenced by the decision of the Judge Advocate General to permit a court-martial pursuant to the provisions of JAGMAN § 0124. In support of this contention, the appellant points to the following comment by the military judge during consideration of the motion:

> Don't get me wrong. I'm not trying to —- I'm not trying to supplant this court's interpretation for the Judge Advocate General of the Navy's decision, but just rather, what was the process. That's all I'm looking to see.

Record at 13. The appellant contends that this remark demonstrates that "the military judge gave undue weight to the Judge Advocate General's decision authorizing the court-martial, and he allowed that decision to intrude upon and influence his rulings on Appellant's pretrial motions." Appellant's Brief at 13.

We recognize that unlawful command influence is the "mortal enemy" of military justice, and therefore cannot be tolerated. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998)(quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). We also recognize that military judges can be the targets of unlawful command influence. *United States v. Mabe*, 33 M.J. 200, 205 (C.M.A. 1991).

However, the initial burden is upon the defense to produce "some evidence" in support of a contention of unlawful command influence; mere allegation or suspicion is not sufficient. *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003). We conclude that the appellant has failed to carry this burden.

Taken in its proper context, we are convinced that the military judge's remark does not reflect unlawful command influence. The remark occurred during a discussion of the due process aspects of the appellant's motion. The Government had presented the letter from the Judge Advocate General of the Navy authorizing prosecution of the appellant, and this letter referenced a letter from the convening authority. The military judge simply asked to see a copy of the convening authority's letter, pointing out that it could be relevant to the court's determination of the appellant's procedural due process claim. The trial counsel apparently misinterpreted the military judge's request as expressing an intention to reconsider the wisdom of the Judge Advocate General's decision, and responded by questioning the judge's authority to do so. This was the context of the

military judge's remark quoted above. It is clear to us that this remark was made, not as an indication of any type of unlawful command influence, actual or apparent, but merely as a clarification of the military judge's motive for requesting to review the documents considered by the Judge Advocate General.[4]

Thus, we perceive nothing improper in the actions of the military judge or the Judge Advocate General in this case, and conclude that the appellant's claim of unlawful command influence is without any evidentiary support. This assignment of error is without merit.

FAILURE TO STATE THE OFFENSE OF INDECENT LANGUAGE

In his third assignment of error, the appellant contends that the trial court erred by denying his motion to dismiss Specification 2 of Charge I, which alleges that the appellant communicated indecent language by calling AA H a "white slut." [5] At trial, and now on appeal, the appellant urges that the specification fails to state an offense because the language used was not indecent under the circumstances, and because the appellant's conduct was neither prejudicial to good order and discipline nor service-discrediting. We disagree.

We begin by noting at the outset that the nature of the appellant's argument seems more consistent with an attack on the sufficiency of the evidence than on the sufficiency of the specification. In any event, since we have a duty to affirm only those findings that we determine to be correct in law and fact (Art. 66(c), UCMJ), we will consider the sufficiency of both the specification and the evidence. [6]

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[4] The military judge was subsequently provided with those documents prior to ruling on the appellant's motion.

[5] Specification 2 of Charge I reads as follows:

> In that Aviation Boatswain's Mate (Launching and Recovery Equipment) First Class Franklin Owens, Jr., U.S. Navy, USS George Washington (sic), on active duty, did, at or near Norfolk, Virginia, on or about 3 January 2000, orally communicate to Airman Apprentice H[], U.S. Navy, certain indecent language, to wit: "You white slut," or words to that effect.

[6] The appellant's eleventh assignment of error also challenges the sufficiency of the evidence in support of Specification 2 of Charge I, in these terms:

> THERE IS INSUFFICIENT FACTUAL AND LEGAL SUPPORT FOR THE FINDINGS OF GUILTY, AS AN AFRICAN-AMERICAN MALE WHO WAS RAISED IN THE CITY OF CHICAGO, ILLINOIS, WOULD NOT REFER TO A WOMAN AS A "WHITE SLUT" OR A "TEASE." *See Record at 155.* IF HE WERE DIRECTING DERISIVE COMMENTS TO A WOMAN, APPELLANT WOULD NOT USE THAT TYPE OF SLANG, THUS, AA H[]'S IDENTIFICATION OF APPELLANT AS THE PERPETRATOR WAS AN OBVIOUS FABRICATION.

The appellant's contention in this regard is unsupported by the record, is clearly superfluous, and does not merit further discussion.

"A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL (2000 ed.). The specification must be sufficient to "give the accused notice and protect him against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994).

The elements of the offense of communicating indecent language are:

> (1) that the accused orally or in writing communicated to another person certain language;
> (2) that such language was indecent; and
> (3) that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 896. Language is "indecent" if it is:

> grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

Id., ¶ 89c. "Whether or not specific language is 'indecent' for purposes of this offense is a question of fact and largely depends on the context in which it is uttered." *United States v. Caver*, 41 M.J. 556, 559 (N.M.Ct.Crim.App. 1994)(footnote omitted). Thus, profanity-laced language uttered by an accused while being apprehended and handcuffed, but which clearly had no sexual connotations, was not deemed "indecent." *United States v. Brinson*, 49 M.J. 360 (C.A.A.F. 1998). On the other hand, an adult male's request to climb into bed with his 15-year-old step-daughter was held to be indecent under the circumstances. *United States v. French*, 31 M.J. 57 (C.M.A. 1990).

Turning now to Specification 2 of Charge I, we find that it does state an offense. All of the elements of the offense are stated either expressly or by fair implication, and the specification provides the appellant with adequate notice of the charge as well as protection against double jeopardy.

We also find that under the facts of this case, the evidence was legally and factually sufficient to establish the offense of indecent language. The evidence shows that the appellant, a married E-6, went uninvited to the apartment of an E-2 whom he appears to have had a romantic interest--an interest which she did not reciprocate. He then forced his way into her apartment, became verbally abusive, and attacked her physically. The term used by the appellant, "slut," commonly refers to a prostitute or

a woman of loose morals, and certainly carries sexual connotations. In addition, the appellant's remark, made in conjunction with the unprovoked attack, that he had not had sex for a month-and-a-half, and his lifting of the victim's shirt to expose her abdomen, add sexual connotations to his use of the term, "slut."

The facts of this case are analogous to those in *Caver*, in which this Court held that the use of the term, "bitch," was indecent when a male E-5 used the term toward a female E-3 to imply that she "would sleep around." *Caver,* 41 M.J. at 560-61. We stated in *Caver* that:

> The language was part and parcel of a violent disturbance in a military barracks. It was communicated during an abusive, degrading episode. [citation omitted] It was not innocuous. It was clearly calculated to offend, shock, and carry an indecent message. [citation omitted] Applying community standards, the language was grossly offensive to modesty, decency, and propriety because of its vulgar and disgusting nature. The use of the word employed in this case might not constitute an offense under other circumstances. However, considering the factors set forth in the record, including the context of the utterance, the intent and effect of the communication, and applying community standards, we conclude in this case the language was "indecent" within the meaning of the Manual for Courts-Martial.

Id. (footnote omitted).

Many of the factors that we considered relevant in *Caver* are also present here, such as the disparity in rank between the appellant and the victim, the abusive and degrading context in which the remark was made, and the sexual implications of the language used.

We find that the members' finding of guilty as to Specification 2 of Charge I was correct in law and fact. This assignment of error, therefore, is without merit.

PEREMPTORY CHALLENGES

The appellant's seventh assignment of error alleges that the military judge erred by allowing the trial counsel to exercise the Government’s peremptory challenge after the trial defense counsel had exercised a peremptory challenge. We find no prejudice to the appellant from the process employed by the military judge and, therefore, decline to grant relief based on this assignment of error.

Six members, including three enlisted members, were detailed to the appellant's court-martial by the convening authority. Upon completion of voir dire, the military judge granted a

defense challenge for cause of one of the enlisted members. Record at 132. The government peremptorily challenged one of the officer members, LCDR Koach, and the appellant peremptorily challenged another of the officer members, LT Essenmacher. Record at 132. This left a panel of one officer and two enlisted members.

The appellant's counsel did not initially object to the Government's peremptory challenge of LCDR Koach. However, upon completion of the challenges, the military judge asked, "Defense, did you have any objections against the peremptory challenge by the government?" Record at 133. The assistant defense counsel took advantage of this opportunity by entering an untimely objection to the Government's peremptory challenge on the basis that the Government had stricken a person who appeared to favor leniency in the appellant's case. Before the military judge could rule on the defense objection,[7] the Government voluntarily withdrew its peremptory challenge of LCDR Koach, to which the appellant made no objection. Record at 133.

Based on the Government's withdrawal of its challenge, the military judge reinstated LCDR Koach to the panel, and then gave the Government an opportunity to exercise its peremptory challenge against another member. The appellant objected to this procedure, pointing out that the military judge was effectively allowing the Government to exercise its peremptory challenge after the defense. Record at 134. The military judge overruled the defense objection, and the Government peremptorily challenged one of the remaining enlisted members.[8]

"Ordinarily," the government's peremptory challenge must be made and decided prior to the defense peremptory challenge. R.C.M. 912(g)(1); *United States v. Newson*, 29 M.J. 17, 20 (C.M.A. 1989); *see also* Art. 41(a), UCMJ. The military judge cannot change this procedure "without a sound basis." *Newson,* 29 M.J. at 19.

On the facts of this case, we conclude that the military judge had a sound basis for departing from the "ordinary" procedure. This departure was prompted by the appellant's untimely objection to the Government's peremptory challenge of LCDR Koach. That objection should have been made prior to the defense entering its peremptory challenge. If the defense had done so, the Government could have withdrawn its challenge—-or the military judge could have ruled on the defense objection—-prior to the defense exercising its peremptory challenge. In either approach, the prosecution would have been able to assert

[7] The military judge later stated on the record that he probably would have overruled the defense objection, had not the Government promptly withdrawn its challenge to LCDR Koach.

[8] This left a panel consisting of two officers, including LCDR Koach, and one enlisted member.

an alternate peremptory challenge before the defense made its peremptory challenge.

However, even if we were to decide that the military judge committed error in the approach he took, that error would not result in relief for the appellant unless the error materially prejudiced his substantial rights. Art. 59(a), UCMJ; *Newson,* 29 M.J. at 21. We find no such prejudice. The appellant obtained the relief he initially desired, which was to have LCDR Koach serve as a member of his panel. As was the case in *Newson*, "[t]here is no reason to suspect that a different mix of members would have produced results more favorable to appellant." *Newson,* 29 M.J. at 21. We find it odd indeed that the appellant now asserts as error a process prompted by his own trial defense counsel's tardy objection to the prosecution's exercise of its peremptory challenge, especially in view of the fact that the member the defense desired to retain on the panel was actually retained.

We conclude that this assignment of error lacks merit and decline to grant relief.

REMAINING ASSIGNMENTS OF ERROR

We have also carefully considered the appellant's remaining assignments of error, including his contention that the record of trial is incomplete (because it does not contain a verbatim Article 32, UCMJ, investigation), that the military judge should have excluded the victim's testimony, that the military judge should have granted a mistrial based on the trial counsel's closing argument, and that the military judge erred by admitting the appellant's uncharged misconduct. We find no merit in these contentions and decline to provide the requested relief.

We do concur with the appellant that his court-martial promulgating order is inaccurate. Specifically, the court-martial order fails to state that the military judge dismissed Additional Charge II and its single specification prior to sentencing. While we find no prejudice to the appellant from this scrivener's error, he is entitled to correction of his official records. Art. 59(a), UCMJ; *United States v. Glover*, 57 M.J. 696, 697-98 (N.M.Ct.Crim.App. 2002). Thus, we will provide appropriate relief in our decretal paragraph.

CONCLUSION

Accordingly, we affirm the findings and sentence as approved by the convening authority. We direct that the supplement court-

martial promulgating order reflect that Additional Charge II and its single specification were dismissed by the military judge.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court