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

BEFORE

C.A. PRICE **E.E. GEISER** **D.O. VOLLENWEIDER**

UNITED STATES

v.

George THOMAS III
Operations Specialist Seaman Recruit (E-1), U.S. Navy

NMCCA 200201613 Decided 27 December 2005

Sentence adjudged 18 July 2001. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

LT ROBERT E. SALYER, JAGC, USNR, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of attempted murder, conspiracy (two specifications), violation of a general regulation, assault (three specifications), burglary, carrying a concealed weapon, and obstruction of justice in violation of Articles 80, 81, 92, 128, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, 928, 929, and 934. A general court-martial consisting of officer and enlisted members sentenced the appellant to confinement for 16 years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant asserts that: (1) the military judge erred by failing to order discovery; (2) unreasonable post-trial and appellate delay warrants relief; (3) the evidence is factually insufficient for attempted murder, conspiracy, assault, and burglary; (4) the evidence is legally and factually insufficient for assault with a dangerous weapon because the gun was unloaded; and (5) the sentence is inappropriately severe. Except for the fourth issue, we conclude that these assignments of error lack merit.

We have considered the record of trial, the assignments of error, the Government's response, and the appellant's reply. As modified, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

On the evening of 18 November 2000, the appellant and a co-conspirator, Fire Control Seaman (FCSN) James J. Bradley, agreed to break into the barracks room of Gunner's Mate Seaman (GMSN) David B. Bierowski and assault him. When they knocked on GMSN Bierowski's door, he cracked it open to see who it was. FCSN Bradley and the appellant tried to enter the room, but GMSN Bierowski pushed against the door to prevent them from doing so. Despite his efforts, FCSN Bradley and the appellant broke into the room.

GMSN Bierowski saw a pistol in the hand of one of his assailants and grabbed it. During the struggle, he was stabbed in the arm with a knife. After falling to the floor, he was hit and kicked. At about the same time, a female companion of GMSN Bierowski, Ms. Susana Wagner, was struck on the head by a telephone receiver. Looking up from the floor, GMSN Bierowski saw the appellant holding the knife. The appellant leaned down and stabbed him in the side, puncturing a lung and inflicting a life-threatening wound. FCSN Bradley then beat him on the head with the butt of the pistol and the assailants fled.

Later, the appellant and FCSN Bradley made various incriminating statements to other Sailors. They also made several telephone calls to a female friend of FCSN Bradley asking her to provide a false alibi and to arrange to dispose of the weapons.

Because of the nature of the evidence, the military judge instructed the members that they should consider three alternative theories of culpability: (1) the appellant personally perpetrated the offenses; (2) he aided and abetted FCSN Bradley in perpetrating the offenses; and (3) he was vicariously liable for FCSN Bradley's offenses as a co-conspirator.

Discovery of Notes of Interrogation of Co-Conspirator

The appellant contends that the military judge abused his discretion when he denied a motion to compel the Government to disclose notes taken during an interview of FCSN Bradley, the appellant's co-conspirator. We disagree.

The interview occurred during negotiations for a pretrial agreement for FCSN Bradley. Present at the interview were FCSN Bradley, his trial defense counsel, a defense paralegal, the

trial counsel, assistant trial counsel, and a prosecution paralegal. FCSN Bradley answered several questions during the interview but no written statement was prepared. However, the prosecution paralegal took extensive notes capturing FCSN Bradley's oral statements. These notes were the subject of the motion filed by the appellant's civilian defense counsel (CDC).

The CDC relied on RULES FOR COURTS-MARTIAL 701(a)(2)(A) and 701(g)(3)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) in moving for disclosure of the notes. The Government responded by saying that FCSN Bradley provided no exculpatory information in the interview and that the notes were protected under R.C.M. 701(f) as the work-product of the prosecution team. Pursuant to MILITARY RULE OF EVIDENCE 304(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), the Government also provided a typed list summarizing several statements made by FCSN Bradley during the interview. Finally, the Government provided the military judge with a copy of the notes, which the military judge examined *in camera.*

The military judge ruled that the Government had disclosed everything in the notes that could be considered exculpatory for the appellant, that much of the content of the notes was work-product, and that the remainder was not discoverable. Relying on the Government's proffer that FCSN Bradley would not testify as a Government witness, the military judge sealed the notes as an appellate exhibit and denied the motion. We note that the military judge also stated that he would revisit the motion if FCSN Bradley testified at trial. As proffered, FCSN Bradley did not testify at trial.

We conclude that the military judge did not abuse his discretion. Rather, he followed our superior court's suggestion to examine the disputed notes *in camera,* properly evaluated the notes for relevance and work-product privilege, and conditioned his ruling upon FCSN Bradley not testifying for the Government. *See United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997); *United States v. Vanderwier,* 25 M.J. 263, 268-69 (C.M.A. 1987). This assignment of error has no merit.

Sufficiency of Evidence

The appellant asserts that the evidence is factually insufficient to sustain the convictions of attempted murder, conspiracy, assault and burglary. Except as discussed below with respect to assault with a dangerous weapon, we disagree.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Applying these tests, we conclude that the Government presented credible evidence that established beyond a reasonable doubt the appellant's guilt of the offenses specified above except for assault with a dangerous weapon. This assignment of error is without merit.

Sufficiency of Evidence - Aggravated Assault With Unloaded Gun

We now address the exception. The appellant contends that his conviction of assault under Charge IV, Specification 1 cannot stand. Specifically, he argues that the evidence is legally and factually insufficient to support the conviction of assault with a dangerous weapon by pointing a dangerous weapon, a gun, at GMSN Bierowski, because the gun was not loaded. We agree.

Article 128(c)(1), UCMJ, prohibits assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. In explaining this offense, the President states that "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of [sic] force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 54c(4)(a)(ii).

As the appellant emphasizes in his brief, the Government offered no evidence that the gun was loaded. GMSN Bierowski testified that he assumed it was loaded, but provided no other testimony on point. When the gun was seized soon after the incident, it was not loaded, nor was any ammunition found in the area. Regardless of a victim's apprehension that a gun pointed at him/her may be loaded, "an unloaded weapon is not a dangerous weapon under the President's interpretation of Article 128 [,UCMJ]." *United States v. Davis*, 47 M.J. 484, 485 (C.A.A.F. 1998).

Given the absence of evidence that the gun was loaded, we conclude that the evidence was legally and factually insufficient to sustain the conviction. *Id.* We would normally reassess the sentence. However, we note that the military judge instructed the members that they should consider this offense and the assault by striking GMSN Bierowski with the gun as multiplicious for sentencing. Accordingly, reassessment is unnecessary. *United States v. Wheatcraft*, 23 M.J. 687 (A.F.C.M.R. 1986).

Unreasonable Post-Trial Delay

Citing the fact that he has been confined since his sentencing of 18 July 2001, the appellant argues that he has been deprived of speedy post-trial and appellate review and deserves relief against the approved confinement. We decline to grant relief.

The following chronology aids our analysis of the post-trial and appellate processing of this 939-page record of trial:

18 Jul 01	Sentencing
11 Dec 01	Authentication
27 Mar 02	First clemency submission
09 Apr 02	Staff judge advocate’s recommendation (SJAR)
10 Apr 02	SJAR served upon CDC
17 Apr 02	CDC request for 20-day extension of time to respond to SJAR granted
10 May 02	Second clemency submission
24 May 02	Convening authority action
19 Aug 02	Record docketed at this court
09 Feb 05	Defense brief submitted
09 May 05	Government brief submitted
18 May 05	Defense reply submitted

We consider first the appellant’s due process right to speedy review. Specifically, we look to four factors in determining if the delay has violated the appellant’s due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant’s assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further

inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id*. (quoting *Toohey*, 60 M.J. at 102).

Here, we conclude that the delay is facially unreasonable. The Government offers no explanation for the delay. There is no indication that the appellant complained of the delay until his brief was filed. However, we note that, in some of the earlier motions for enlargement of time to file a brief, appellate defense counsel asserted that the appellant desired to have the brief filed as soon as possible. The appellant does not claim or demonstrate prejudice, nor do we find any evidence of prejudice suffered by the appellant from the delay in this case. Thus, we conclude that there has been no due process violation due to the post-trial delay.

Next, we are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey,* 60 M.J. at 102; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Applying the factors set forth in *United States v. Brown,* __ M.J.__, No. 200500873 (N.M.Ct.Crim.App. 30 Nov 2005)(*en banc*), we conclude that, while the delay in this case is extremely unfortunate, relief is inappropriate.

Conclusion

The finding of guilty of Charge IV, Specification 1, is set aside. That specification is dismissed. The remaining findings are affirmed.

We have considered the remaining assignment of error of sentence severity and find it lacking in merit. After reviewing the entire record, we specifically conclude that the approved sentence, as reassessed, is appropriate for this offender and his heinous offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268

(C.M.A. 1982). Accordingly, the sentence, as approved by the convening authority, is affirmed.

Judge GEISER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court