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

BEFORE

CHARLES WM. DORMAN **W.L. RITTER** **J.D. HARTY**

UNITED STATES

v.

Kykaiya A. WILLIAMS
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200202264 Decided 19 October 2005

Sentence adjudged 27 September 2001. Military Judge: R.C. Harris. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

Col KATHERINE GUNTHER, USMCR, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

Contrary to his pleas, the appellant was found guilty by a general court-martial, comprised of officer and enlisted members, of one specification of maiming in violation of Article 124, Uniform Code of Military Justice, 10 U.S.C. § 924. The adjudged sentence includes 5 years confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but reduced the post-confinement forfeitures to "two-thirds pay per month."

We have carefully considered the record of trial, the appellant's 6 assignments of error and his declaration under penalty of perjury dated 29 December 2003, 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.

Effective Assistance of Counsel

In his first assignment of error, the appellant asserts that his defense team provided ineffective assistance by advising him not to testify on the merits, not informing him of his right to submit post-trial clemency matters, by not providing him a copy of his record of trial as requested, and by requesting that the military judge not instruct the members of certain lesser included offenses of maiming. Appellant's Brief of 31 Mar 2004 at 5; Appellant's Motion to Attach of 31 Mar 2004. For his second assignment of error, the appellant asserts that he was denied effective assistance of counsel because his defense team failed to convince the court that he acted in self-defense. Appellant's Brief at 9. We do not find any deficient performance by counsel.

The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel -- deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* This constitutional standard applies equally to military cases. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). In order to show ineffective assistance, however, an appellant must surmount a very high hurdle. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). We do not look at the success of a trial theory or tactical decision, but whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). The appellant's assertions of ineffective assistance of counsel appear to be nothing more than displeasure with the trial outcome. We need not order a hearing pursuant to *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), since these matters may be resolved based on the "appellate filings and the record." *Id.* We will address each of the appellant's concerns.

The appellant contends that trial defense counsel "[r]efused to allow LCpl Williams to testify in his own defense." Appellant's Brief at 6. An accused has the constitutional right to testify in his own defense. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Nix v. Whiteside*, 475 U.S. 157, 162 (1986); *Harris v. New York*, 401 U.S. 222, 225 (1971). The appellant states in his sworn declaration, however, that he wanted to testify but his counsel advised him not to testify. This is qualitatively different than being denied the opportunity to testify, as the appellant now represents. Whether an accused accepts his counsel's advice or not is completely up to that accused. The appellant does not state that he insisted on testifying against his counsel’s advice. Now, the appellant is unhappy with that advice. The appellant has not shown that counsel's advice was an

objectively unreasonable strategic decision chosen from the alternatives available at the time.

The appellant also asserts that he was not informed of his right to submit post-trial matters in clemency, and that counsel failed to provide him with a copy of the record of trial. On 27 September 2001, the appellant signed an Appellate and Post-Trial Rights acknowledgement that states in pertinent part as follows:

> I acknowledge: (1) that prior to adjournment of my court-martial, I was provided with the above written advice; (2) **that I have read and understand my post-trial and appellate rights**; (3) **that I have discussed them with my lawyer prior to signing this form**; and (4) that the military judge will discuss my appellate rights with me on the record prior to adjournment of the court, if I so desire.

Appellate Exhibit XXXII at 2. (Emphasis added).

AE XXXII states in part that the appellant understood and discussed with his counsel the following: "You have the right to submit matters to the convening authority before that officer takes action on your case." *Id*. at 1. The military judge confirmed that before signing the AE XXXII the appellant and his counsel had discussed the contents of the document and that the appellant understood the contents of the document. Record at 405. That same document states, and the military judge confirmed, that the appellant wanted his copy of the record of trial served on his individual military counsel. *Id*.; AE XXXII. The record on appeal clearly disputes the appellant's declaration under penalty of perjury on these issues.

As to his counsel's tactical decision to ask the military judge not to instruct on lesser included offenses of maiming, we merely note that this "all or nothing" approach is squarely within the realm of trial tactics which we will not second guess without a clear showing that it constitutes deficient performance. We find no merit in the appellant's contention that this was a "failure" on the part of his counsel.

Finally, the appellant asserts as his second assignment of error that "[b]ecause the defense team failed to act in [the appellant's] best interests, the evidence presented at trial . . . failed to convince the members that [the appellant] was acting in his own defense." Appellant's Brief at 9. The appellant then recites evidence from the record of trial that argues his self-defense theory.[1] *Id*. at 9-11. The evidence of self-defense was clearly presented, and the military judge instructed the members on self-defense. Appellate Exhibit XX at

[1] The appellant also provides evidence found in the Article 32, UCMJ, hearing record that was not submitted at trial.

5. The appellant has not shown that his defense team's performance was objectively unreasonable in strategy, tactics, or presentation. We will not speculate or assume that any prejudice could have resulted from the defense team's performance in this matter. We find that the appellant has not met his burden of demonstrating ineffective assistance of counsel and decline to grant relief on this basis.

Legal and Factual Sufficiency

For his third assignment of error, the appellant asserts the evidence in this case is factually and legally insufficient to support a conviction for maiming. Specifically, the appellant asserts that the evidence does not support the specific intent to injure and the extent of injuries falls short of that required for maiming. Appellant's Brief at 11-13. We disagree.

We are charged with determining both the legal and factual sufficiency of the evidence presented at trial. Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Id*. In contrast, the factual sufficiency test is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the [members of the reviewing court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Id*. at 325. In making these determinations, we are mindful that reasonable doubt does not mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). Furthermore, as "factfinders [this court] may believe one part of a witness' testimony and disbelieve another." *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

There are three elements to maiming:

(1) That the accused inflicted a certain injury upon a certain person;
(2) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and
(3) That the accused inflicted this injury with an intent to cause some injury to a person.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 50b. The appellant asserts the evidence falls short as to the second and third elements. We will discuss each of these elements in reverse order.

1. Intent to Cause Some Injury

The appellant asserts that, as to the third element, the evidence is legally and factually insufficient to establish that he intended to injure Lance Corporal (LCpl) P. Instead, he asserts the evidence establishes that he merely intended to "extricate himself from the grasp of [LCpl P] who . . . had thrown him over his shoulder and was spinning him around and slamming him into a brick wall." Appellant's Brief at 11 (citing Record at 219, 222, 239, 273, 289). A reading of the entire record paints a different picture.

LCpl P was fond of wrestling and shadow boxing with other unit members, and that was his manner of playful interaction. He had wrestled and shadow boxed with the appellant before, and it was always in fun. While waiting in line outside the call center, LCpl P playfully pushed or tapped the appellant on the shoulder from behind and said "I told you to watch your back." In what appeared to be playful interaction, the appellant knocked LCpl P's cigarette out of his hand or mouth twice, and the two Marines began to shadow box - neither actually touched the other. Everyone present took this as two Marines just having fun. LCpl P went into a wrestling stance and the appellant went into a warrior stance. LCpl P picked the appellant up and either put him on his shoulder, put him in a fireman's carry, or held him cross-body. LCpl P had a big smile on his face but the appellant did not. Here, the testimony diverts. LCpl P testified that he put the appellant up against a brick wall to get a better grip. Eye witnesses confirm LCpl P’s version of events. However, one eye witness, Private First Class (PFC) W, testified that LCpl P "banged" the appellant's back against the brick wall six or seven times. Record at 289. It was during the contact with the brick wall or shortly thereafter that the appellant pulled a knife and stabbed LCpl P twice in the back. LCpl P spun the appellant around once or twice then safely put him down on his feet. Only when he saw the blood did LCpl P realize he had been stabbed.

Lieutenant Commander (LCDR) K, a general surgeon with five years of surgical experience, testified that:

> In this patient, the -- [the knife] went through the fat, through the muscle, in between the ribs, and ventured into the lung cavity. So my estimation, is that the knife was *pushed with a significant amount of force*. That's my estimate based on the nature of the injury, such that *it went deep enough to at least go to the hilt of the blade*.

Record at 196. (Emphasis added).

Considering this evidence in the light most favorable to the prosecution, a reasonable factfinder could have found beyond a reasonable doubt that the appellant stabbed LCpl P with the intent to cause some injury. While the appellant wanted out of

LCpl P's grasp, he attempted to achieve that end by inflicting sufficient injury to force his release. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the accused's guilt as to this element beyond a reasonable doubt.

2. Measure of the Injury

The appellant asserts that, as to the second element, the evidence is legally and factually insufficient to establish that the injury was serious enough to qualify as maiming. The appellant claims that if the victim makes a full recovery from the injuries or if the scars are not easily detectable to the casual observer the injury is not sufficient. Appellant's Brief at 12-13. We disagree.

LCpl P was taken by an emergency helicopter to a local hospital where he remained for five days. LCpl P then went on 30 days of convalescent leave followed by 30 days of limited duty. LCDR K testified concerning LCpl P's injuries based on a personal examination of the LCpl and review of the LCpl's medical records. He testified in part that:

> [LCpl P] sustained two stab wounds, one directly to the back on the right side . . . [I]n terms of the internal damage . . . one knife wound went through the chest wall, through the muscles that make up the abdominal wall and in between the ribs and punctured the diaphragm and entered into the liver. . . . In addition to that . . . he punctured his lung. He collapsed his lung . . . The lung has now been scarred. Its been damaged. *So there's always the potential that the lung could collapse again*.

Record at 194-99 (emphasis added). On cross-examination, LCDR K admitted that LCpl P had made a full recovery, could stay in the Marine Corps, and could perform his military duties. *Id*. at 200-01.

LCpl P stated that he continued to have problems in the form of swollen scaring, trouble breathing, and "real bad cramps in the side." *Id*. at 231. He had attempted to participate in field exercises but collapsed from an inability to breath. He was evacuated from the field and it was determined the lung scar tissue had stretched, causing the problem. Although he was returned to full duty, LCpl P still could not participate in physical training with his unit. *Id*. at 232. LCpl P's doctor told him that he "should make a full recovery." *Id*. 400. As to LCpl P's scaring, he displayed those scars to the members. However, there is no description or photographs of the scars in the record. *Id*. at 233-34. LCpl P stated that he will not be embarrassed to go out in public with his scars or to take his shirt off at the beach or pool. *Id*. at 240-41.

The appellant seeks to have this court apply the holding of *United States v. McGhee*, 29 M.J. 840 (A.C.M.R. 1989), *reversed on other grounds*, 32 M.J. 322 (C.M.A. 1991), to his case. In *McGhee*, the Army Court of Military Review made a factual determination that the impact scarring on the child victim's back and buttocks was not easily detectable to the casual observer. Applying that fact to its perception of the meaning of "disfigure", the court determined that the evidence of injuries in that case "fell beneath the threshhold for maiming." 29 M.J. at 841. This court later found the *McGhee* analysis to be fact-based and, therefore, limited in its application. *See United States v. Outin*, 42 M.J. 603, 607 (N.M.Ct.Crim.App. 1995). In *Outin*, we found based on photographs and testimony in the record that "the scars are clearly visible to a casual observer, they detract from [the victim's] comeliness and they are substantially permanent in nature." *Id.* at 607-08 (footnote omitted). In *United States v. Spenhoff*, 41 M.J. 772 (A.F.Ct.Crim.App. 1995), an accused found guilty of maiming argued that although permanent, the victim's injuries were not disfiguring because they were on a body part usually covered by clothing. An expert witness testified that the burned area was lighter than the surrounding skin and would probably never regain its natural color. Our sister court held that the law of maiming protects the integrity of the victim's entire body, not just those parts routinely exposed to public view. *Id.* at 774.

When it comes to scarring or other permanent marks resulting from the injury, courts have consistently looked to the evidence of record to determine both visibility and permanency. Here, there is no evidence to review. There is no description of the scars and no photographs admitted as exhibits. Without such evidence we must hold that any external scarring resulting from the injury are insufficient to establish the second element of maiming based on disfigurement. That, however, does not end our analysis.

Disfigurement is only one of 3 alternative forms of maiming. As the elements of the offense make clear, an injury to an internal organ that seriously diminishes the victim's physical vigor is sufficient for maiming. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. MCM, Part IV, ¶ 50c(1).

The lung scarring resulting from the stab wound has diminished LCpl P's vigor, partially disabled that organ, and is a serious injury and of a substantially permanent nature. MCM, Part IV, ¶ 50c(1). LCDR K testified that LCpl P's lung could collapse again as a result of the scar tissue left from the injury inflicted by the appellant. LCpl P collapsed during a field exercise after being determined fit for duty. That incident was the result of the lung scar tissue.

Considering this evidence in the light most favorable to the prosecution, a reasonable factfinder could have found that the lung injury was of a substantially permanent nature, and that the appellant was guilty of maiming beyond a reasonable doubt. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt as to this element and this offense beyond a reasonable doubt.

Speedy Post-Trial Review

For his fourth assignment of error, the appellant asserts that he was denied speedy post-trial review. The appellant avers that this court should disapprove the adjudged punitive discharge and any confinement not served. Appellant's Brief at 13-14. We disagree.

In determining if post-trial delay violates the appellant's due process rights, we consider four factors: (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). 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 *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004).

We accept the appellant's chronology and find that it took 329 days from date of trial to the convening authority's action and an additional 77 days before the case was docketed with this court. Appellant's Brief at 14. The Government's explanation for this delay includes the length of the record of trial, the nature of the charges, and the delay resulting from a misplaced appellate rights statement. This is not a sufficient explanation and we find that the delays are facially unreasonable, triggering a due process review.

Because we find the delays unreasonable and the explanations unacceptable, we look to the third and fourth *Jones* factors. The appellant did not assert his right to speedy post-trial review. His only suggestion of prejudice is that he will have served his confinement before this court acts. Our own review of the record does not reveal any evidence of prejudice to the appellant. While we do not condone the unexplained delays in this case, we conclude that there has been no due process violation resulting from the post-trial delay.

We are aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *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).

Failure to Give Instructions

For his final assignment of error,[2] the appellant asserts the military judge erred by denying the defense-requested instruction on the use of excessive force to deter, and by failing to give lesser included offense (LIO) instructions even though the appellant requested they not be given. Appellant's Brief at 17. The Government takes the position that the "excessive force to deter" instruction was not raised by the evidence and therefore inappropriate to be given. As to the LIO instructions, the Government asserts they were affirmatively waived on the record and therefore the military judge had no *sua sponte* obligation to give those instructions. Government Answer of 18 Jan 2005 at 18-20. We find no merit in the appellant's argument.

1. Excessive Force to Deter Instruction

"The military judge shall give the members appropriate instructions on findings." R.C.M. 920(a). This duty includes "[s]uch other explanations, descriptions, or directions *as may be necessary* and which are properly requested by a party or which the military judge determines, sua sponte, should be given." R.C.M. 920(e)(7); *United States v. Poole*, 47 M.J. 17, 18 (C.A.A.F. 1997); *see United States v. Sellers,* 33 M.J. 364 (C.M.A. 1991). Instructions on findings must include a description of any special defenses under R.C.M. 916. *Poole*, 47 M.J. at 17, 18. Any doubt concerning the giving of an instruction should be resolved in favor of the accused. *United States v. McMonagle*, 38 M.J. 53, 58 (C.M.A. 1993)(citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)). The military judge's refusal to give a requested instruction is reviewed for an abuse of discretion. *Poole*, 47 M.J. at 19 (citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)); *United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996).

The party claiming abuse of discretion bears the burden of presenting conclusive argument on the claim. *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995)(citing *United States v. Mukes*, 18 M.J. 358, 359 (C.M.A. 1984)). Application of the doctrine of abuse of discretion is to be used sparingly and only in those cases where "'a miscarriage of justice would otherwise

[2] We have considered the appellant's fifth assignment of error and find the transcript is verbatim. The appellant asserts that an Article 39(a), UCMJ, session is missing on page 301 of the record. We find from reviewing the entire record that there was a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), conference to discuss instructions rather than an Article 39(a) session. See Record at 301, 314. This assignment of error has no factual basis.

result.'" *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986)(quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). In testing for abuse of discretion where the military judge refuses to give a requested instruction, our superior court has held the question turns on "whether (1) the charge [proposed instruction] is correct; (2) 'it is not substantially covered in the main charge'; and (3) 'it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'" *Damatta-Olivera,* 37 M.J. at 478 (quoting *United States v. Winborn*, 34 C.M.R. 57, 62 (C.M.A. 1963)).

The appellant's defense team requested the military judge to give the "excessive force to deter" instruction. The military judge denied that request. Record at 301. The Military Judge's Benchbook provides guidance on the use of this instruction and the content of the instruction, stating in pertinent part as follows:

> There is evidence in this case that the accused (displayed) (brandished) (_____) the (*state the object used*) solely to defend (himself) (herself) by deterring (*state the name of the alleged victim*) rather than for the purpose of actually injuring (*state the name of the alleged victim*). (Evidence has been offered tending to show (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for* both sides).)
>
> A person may, acting in self-defense, in order to (frighten)(or)(discourage) an assailant, threaten more force than (he) (she) is legally allowed to actually use under the circumstances.
>
> An accused who reasonably fears an immediate attack is allowed to ((display) (threaten the use of)) ((an ordinarily dangerous weapon) (an object likely to produce grievous bodily harm) (_____)) even though the accused does not have a reasonable fear of serious harm, as long as (he) (she) does not actually use the (weapon) (means) (_____) (or attempt to use it) in a manner likely to produce grievous bodily harm.

Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 757-58 (1 Apr. 2001).

This instruction was completely inappropriate in this case. The evidence is clear that the appellant did not threaten the force before using the force in a manner that could result in grievous bodily harm. This instruction (1) would not have been correct; (2) the topic of self-defense was covered by another instruction; and (3) the failure to give the instruction did not deprive defendant of a valid defense. We find that the military

judge did not abuse his discretion by not giving the excessive force to deter instruction.

2. Lesser Included Offense Instructions

A military judge has a well-established duty to *sua sponte* instruct on lesser included offenses. *United States v. Jackson*, 12 M.J. 163, 166 (C.M.A. 1981); R.C.M. 920(e)(2). Furthermore, if there are any doubts concerning whether the evidence of record contains some evidence to which the members could attach credit and return a finding on a lesser included offense, those doubts are to be resolved in favor of giving the instruction. *United States v. Rodwell*, 20 M.J. 264, 267 (C.M.A. 1985). Nevertheless, the defense can affirmatively waive the instruction. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000)(citing *United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992)). Even where the defense does not want the instruction given, however, the military judge can still give the instruction where the evidence raises the issue. *United States v. Emmons*, 31 M.J. 108, 110-11 (C.M.A. 1990); *United States v. Frye*, 33 M.J. 1075, 1078 (A.C.M.R. 1992).

The appellant's defense team affirmatively waived the military judge's offer to give LIO instructions on attempted maiming, battery, or simple assault even though he affirmatively requested those instructions not be given. The following inquiry occurred:

> MJ: Captain Chaney, do you and your client affirmatively waive the court giving those instructions?
>
> IMC: Yes, sir.
>
> MJ: Is it a specific request on your part then that the court not give those instructions?
>
> IMC: Yes, sir.
>
> MJ: Fully understanding that normally those instructions are given?
>
> IMC: Yes, sir.
>
> MJ: Very well. And you've discussed this with your client obviously?
>
> IMC: Yes, sir.
>
> MJ: Very well. And with [detailed defense counsel]?
>
> DC: Yes, sir.
>
> IMC: Yes, sir.

Record at 313-14. The question here is whether the military judge abused his discretion by not giving the LIO instructions the appellant affirmatively waived. We find that he did not. This assignment of error has no merit.

Conclusion

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

Chief Judge DORMAN and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court