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

BEFORE

C.L. CARVER **W.L. RITTER** **R.W. REDCLIFF**

UNITED STATES

v.

Jessie R. CAPERS
Interior Communications Electrician First Class (E-6), U.S. Navy

NMCCA 200300245 Decided 22 February 2005

Sentence adjudged 18 December 2001. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel

RITTER, Senior Judge:

A general court-martial of officer members convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for three years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged. As an act of clemency, the convening authority suspended forfeiture of pay for six months, and waived automatic forfeitures for six months on the condition that the money be paid to the appellant's wife. Because the appellant was already past the expiration of his enlistment at the time of trial and thus not entitled to pay, the attempted clemency had no effect.

The appellant alleges that: (1) the military judge erred by admitting hearsay statements on the merits; (2) the evidence is factually and legally insufficient to sustain the finding of guilty; (3) the military judge erred by allowing the trial counsel to publish to the members a pair of bloody shorts worn by the appellant during the incident; (4) three of the members

should have been excused for cause; and (5) the convening authority erred by granting an "impossible" form of clemency.

We have carefully considered the record of trial, the appellant's seven 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 substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of the Evidence

The appellant contends that the evidence is both factually and legally insufficient to support his conviction for rape. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd,* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. There is no question that the Government presented legally sufficient evidence on the rape charge. There are only two elements to the offense of rape: 1) sexual intercourse, and 2) that the intercourse occurred by force and without consent. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 45b(1). The alleged victim, JN, testified that the appellant threw her onto a bed, held her down, and penetrated her despite her efforts to resist. She also stated that she did not consent to any act of sexual intercourse with the appellant. This testimony alone provided legally sufficient evidence to establish the elements of the offense.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty of rape.

It is undisputed that JN, a student at the Navy's Service School Command, was invited to an informal barbecue outside Petty Officer Wilson's barracks. Several other individuals, including the appellant, also attended the barbecue. The appellant's barracks room was very close to the picnic area where the barbecue took place, and the attendees were in and out of his room to use the bathroom and refrigerator. JN had never met the appellant prior to that evening. She was nervous about a test

scheduled for the next day, so she had only one beer and was attempting to study at the barbecue. It is also undisputed that JN is a lesbian and had never had sexual relations with a man. During the barbecue, the appellant propositioned her, at which point she disclosed that she was a lesbian and thus not interested. At some point later in the evening, JN and the appellant were alone in the appellant's room, and that is where the testimony diverges.

JN's testimony is both credible and supported by the physical evidence. She testified that the appellant cornered her when she went into his room to discard some trash, and forcibly raped her. During the attack, the appellant held JN's wrists, grabbed her by the throat, ripped her bra, and pulled her hair as she struggled with him. A medical examination of JN conducted later that evening revealed a small laceration to JN's labia majora, bruising on her wrists, red marks on her breasts and neck, swelling on her cheek, and tenderness on her scalp. JN's bra, offered into evidence, was ripped. All of this evidence is consistent with the details of her account.

Several individuals seated at the picnic table outside the appellant's barracks room observed JN leave the area, and testified that she appeared upset, angry and hurried. She rushed back to her own barracks and called her partner in California, who told her to contact the authorities immediately. JN then went down the hall to see Petty Officer McLean, a classmate, and described what had happened. Petty Officer McLean summoned the duty officer, who then contacted the local police. The time of the alleged rape was approximately 2130. By 2207, the Great Lakes Police Department had responded to JN's barracks.

The appellant, conversely, testified that after JN disclosed her sexual orientation and told him "she didn't like guys," the appellant asked "Well, why not? You know, why don't you like guys, and would you like me?" Record at 437. The appellant testified that not only did JN accept this implied offer, but during sexual intercourse, also told him that she "liked it rough," encouraged him to "fuck her, fuck her," and called him "big daddy." Record at 440-442. The appellant stated that he and JN initially engaged in foreplay for several minutes prior to intercourse, and then each removed all of their clothing. The appellant denied grabbing her wrists or throat, however, and had no explanation for those injuries to JN. Notwithstanding that both JN and the appellant were supposedly nude during the intercourse, the appellant's sweatshirt and boxer shorts were stained with JN's menstrual blood.

While the defense pointed out some minor inconsistencies in JN's account of the evening, none of them were material. We find that the appellant's version of the events is simply not credible, and that JN's testimony is both credible and consistent with other credible evidence. Thus, we are convinced beyond a reasonable doubt that the appellant is guilty of rape.

Admissibility of Hearsay Statements

The appellant asserts that the military judge erred in admitting two hearsay statements by the alleged victim, JN, under the excited utterance exception. *See* MILITARY RULE OF EVIDENCE 803(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). We disagree.

An excited utterance is admissible under the rules of evidence because persons are deemed less likely to have concocted an untruthful statement when they are responding to the sudden stimulus of a startling event. *See United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003)(quoting *United States v. Lemere*, 22 M.J. 61, 68 (C.M.A. 1986)). Our superior court has set forth a three-part test to determine admissibility under the excited utterance exception: (1) the statement must relate to a startling event, (2) the declarant made the statement while under the stress of excitement caused by the startling event, and (3) the statement was "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003)(internal quotations and citations omitted). We review a military judge's ruling on the admissibility of evidence for abuse of discretion. *See United States v. Moolick*, 53 M.J. 174, 176 (C.A.A.F. 2000)(citing *United States v. Hyder*, 47 M.J. 46, 48 (C.A.A.F. 1997)).

In determining whether a declarant was under the stress of a startling event at the time of his or her statement, courts have looked to a number of factors. These may include: the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement. *Donaldson*, 58 M.J. at 483 (quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)). A lapse of time between a startling event and an utterance, while a factor in determining whether the declarant was under the stress of excitement caused by the event, is not dispositive of that issue. *Id.*; *see also United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987).

In this case, the statements in question were JN's conversation via telephone to her partner, Ms. C, followed by her disclosures to Petty Officer McLean. Both statements occurred within 30 minutes of the alleged rape. Both statements were spontaneous, rather than in response to any specific inquiry. Both Ms. C and Petty Officer McLean testified that JN was crying and obviously upset during the conversations.

The facts of this case are very similar to those in *Feltham*. In *Feltham*, the declarant victim was assaulted, drove home, and disclosed the assault to a roommate approximately 20 minutes after it had occurred. As in this case, the military judge made a finding that the declarant was still under the stress of the

startling event. Our superior court held that there was no abuse of discretion in admitting the statement under MIL. R. EVID. 803(2). 58 M.J. at 475-76. Applying *Feltham*, we likewise conclude that this record supports the military judge's ruling in admitting the statements of JN following the rape. Accordingly, we find no abuse of discretion.

Publication of Bloody Clothing

The appellant also contends that the trial counsel engaged in misconduct by publishing a pair of bloody boxer shorts to the members. We disagree.

The appellant never objected to the admissibility or publication of the boxer shorts at trial. MIL. R. EVID. 103(a)(1) requires that a timely objection include "the specific ground of objection, if the specific ground is not apparent from the context." By failing to raise any objection so the military judge could rule on it, the appellant did not preserve this issue for appellate review. Therefore, we must test it for "plain error." *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999); *United States v. Ibarra*, 53 M.J. 616, 618 (N.M.Ct.Crim.App. 2000); MIL. R. EVID. 103(d).

To prevail under a plain error analysis, the appellant must persuade this court that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *See United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999)*; United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). We conclude that publishing the appellant's boxer shorts was not error. Nor do we believe that publication materially prejudiced any substantial right of the appellant. *See* Art. 59(a), UCMJ.

Even relevant evidence must be excluded if its tendency to inflame the passions of the court substantially outweighs the probative value. *See United States v. Pearson*, 17 M.J. 149, 153 (C.M.A. 1984); MIL. R. EVID. 403. Such evidence can "quickly exceed the limits of propriety and equate to the bloody shirt being waved." *United States v. Fontenot*, 29 M.J. 244, 252 (C.M.A. 1989)(quoting *Pearson*, 17 M.J. at 153). Although the military judge did not perform a MIL. R. EVID. 403 balancing test, undoubtedly because the issue was not raised at trial, we conclude the probative value of the boxer shorts is high and the risk of unfair prejudice was extremely low.

The appellant maintains that the probative value of the boxer shorts is low because it was undisputed that the appellant and JN had sexual intercourse, and that JN was menstruating at the time. This argument ignores the appellant's claim that he was not wearing the shorts at the time of the intercourse. Accordingly, the location of the bloodstains on the boxer shorts (and also on the appellant's sweatshirt) is probative of whether

the appellant's testimony in this regard was truthful.[1] Moreover, the evidence was merely published as one of several exhibits at the end of a session of court. There is nothing in the record reflecting that the trial counsel in any way attempted to draw attention to the bloody clothing or misuse it to inflame the passions of the members.

We likewise disagree with the appellant that the risk of prejudice was high. Although one of the members did raise a concern about handling the bloody clothing, which the military judge then addressed by providing gloves, we do not believe that the members would hold this against the appellant. To the contrary, the military judge's comments make it clear that the trial counsel offered this exhibit, and should have employed better evidence handling procedures for it. Record at 385. We also believe there is a qualitative difference between a garment stained with menstrual blood and one stained by, for example, a gunshot or knife wound. The blood in this case was merely incidental to the crime, not caused by it. Neither side maintained that JN was bleeding profusely as a result of the rape; rather, the blood was due to her menstrual cycle. Although dealing with any bodily fluids in an evidentiary context is seldom pleasant for any of the participants, there is no *per se* rule excluding evidence merely because it is stained with blood.

We find no basis for the military judge to have addressed this issue *sua sponte*. Accordingly, we find no plain error and no prejudice as a result of publishing the bloody clothing to the members. *See* Art. 59(a), UCMJ.

Voir Dire and Challenges

The appellant complains that the military judge erred by denying a challenge for cause against two members. He also alleges, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the military judge erred by not removing a third member for cause, *sua sponte*. We disagree.

A. Legal Standard

A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." RULE FOR COURTS-MARTIAL 912(f)(1)(n), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Military judges are enjoined to be liberal in granting challenges for cause. *See United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003). This rule includes challenges for actual bias as well as implied bias. *United States v. Schlamer*, 52 M.J. 80,

[1] We granted the appellant's motion to produce the actual evidence, rather than the photograph attached to the record. This court has viewed this evidence, and hereby directs the Clerk of Court to return it to the Government for proper disposition.

92 (C.A.A.F. 1999)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997).

Actual bias and implied bias are separate tests, but not separate grounds for a challenge. *See Miles*, 58 M.J. at 194. There is implied bias "`when most people in the same position would be prejudiced.'" *See United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)(quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985). The focus for implied bias is on the perception or appearance of fairness of the military justice system. *See United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). When there is no actual bias, "implied bias should be invoked rarely." *United States v. McDonald*, 57 M.J. 747, 752 (N.M.Ct.Crim.App. 2002)(quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).

We review rulings on challenges for cause for abuse of discretion. *See United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997). On questions of actual bias, we give the military judge "great deference because we recognize that he has observed the demeanor of the participants in the voir dire and challenge process." *Id*. (quoting *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)). This is because a challenge for cause for actual bias is essentially one of credibility. *See Miles*, 58 M.J. at 194-95. We are less deferential on questions of implied bias. *See Lavender*, 46 M.J. at 488. Implied bias is reviewed through the eyes of the public and reviewed under an objective standard. *See Miles*, 58 M.J. at 195.

B. Waiver

A challenge for cause must be properly preserved for appellate review. The Manual for Courts-Martial provides:

> When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

R.C.M. 912(f)(4). "Absent specifying the intent to exercise a different peremptory challenge, we are left to assume that counsel was satisfied with the remaining members on the court-martial panel." *United States v. Eby*, 44 M.J. 425, 427 (C.A.A.F. 1996). There is logic to this rule. If the defense would have challenged another member had the challenge for cause been granted, counsel should state as much so an appellate court can

consider whether any error prejudiced appellant's substantial rights. *Id.*; *see also* Art. 59(a), UCMJ.

In this case, the appellant challenged two members for cause: CDR Mathews and LT Caswell. Both challenges were denied and neither challenge was properly preserved for appellate review. The appellant used his peremptory challenge on CDR Mathews and did not indicate that the peremptory would have been used on another member had the challenge for cause been granted. *See Eby*, 44 M.J. at 427. Thus any error resulting from the denial of the challenge for cause was waived and any error was harmless since we "assume that counsel was satisfied with the remaining members." *Id*.

C. CDR Mathews

Even if we were to find that this issue was properly preserved, we would find no abuse of discretion with respect to CDR Mathews. The appellant objected to CDR Mathews because of her medical training. Record at 149. The military judge denied the challenge because the medical evidence introduced at trial was straightforward, and because CDR Mathews understood that she was not to employ outside knowledge in her deliberations. This was a sufficient basis to deny the challenge. Likewise, we find no implied bias. There is no *per se* rule that a member of the medical profession cannot sit as an impartial member just because there would be some medical-related testimony or evidence. We do not believe CDR Mathews' presence on the panel would have diminished the public's perception of the proceedings in any way.

D. LT Caswell

Similarly, we conclude that the military judge did not abuse his discretion in denying the challenge of LT Caswell. Although the member's sister had allegedly been the victim of a rape, his answers during voir dire established that he was not closely involved with that case and had minimal contact with his family during that time. In fact, LT Caswell did not find out about the alleged rape until several years later, and had never spoken to his sister about it. A member is not *per se* disqualified if he or she or a close relative has been a victim of a similar crime. *See Miles*, 58 M.J. at 195. The military judge's statements in the record clearly demonstrate that he made a credibility determination, specifically commenting on LT Caswell's demeanor, body language, and lack of any hesitation during his responses. Accordingly, we find no abuse of discretion. Additionally, we do not believe the appearance of the proceedings was rendered unfair by LT Caswell's presence on the panel. LT Caswell's answers during voir dire do not reflect any emotional involvement with his sister's situation, nor indicate that he would have any difficulty impartially weighing the evidence presented.

E. LCDR Tiernan

Finally, the appellant maintains that LCDR Tiernan should have been excused because he was assigned to the school that JN had attended. There was no challenge for cause against LCDR Tiernan at trial. However, the record shows that LCDR Tiernan was not assigned there until after the rape occurred, and did not know JN. We see no evidence for either actual or implied bias, and thus find no basis in the record for the military judge to have *sua sponte* excused LCDR Tiernan.

Convening Authority's Grant of Clemency

The appellant claims that he was prejudiced by the convening authority's act of "impossible" clemency and erroneous post-trial advice. We disagree.

The convening authority's action states that:

> . . . the execution of that part of the sentence extending to forfeiture of pay is suspended for a period of six months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. All automatic forfeitures of pay and allowances required by UCMJ Article 58b(a) shall be waived in accordance with UCMJ Article 58b(b) for a period of six months and paid to the wife of IC1 Capers.

General Court-Martial Convening Authority's Action of 26 Sep 2002. This action was in accordance with the recommendation of the Staff Judge Advocate. *See* SJAR Addendum of 25 Sep 2002. Unfortunately, at the time of court-martial the appellant was past the end of his enlistment and thus his pay stopped on the date he was sentenced. *See* Department of Defense Financial Management Regulation, Chapter 7A, Paragraph 480802; *see generally United States v. Williams*, 53 M.J. 293, 294-95 (C.A.A.F. 2000); *United States v. Hardcastle*, 53 M.J. 299, 302 (C.A.A.F. 2000).

Ironically, the suspension and waiver of forfeitures was at the specific request of the trial defense counsel. *See* Supplemental Clemency Request of 25 Sep 2002. Even though the convening authority gave the appellant precisely what he requested, the appellant now claims error.

As the appellant obviously did not object to this portion of the SJAR, we must employ a plain error analysis. *See* R.C.M. 1106(f); *see also United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003). In our view, the error is both "clear" and "obvious." *Id*. (quoting *Powell*, 49 M.J. at 460). The only question is whether the error resulted in material prejudice to the appellant's substantial right to have a request for clemency

judged on the basis of accurate advice. *Id*. On the specific facts of this case, we find no prejudice.

The appellant initially requested that the finding of guilty be set aside, or that the convening authority suspend all confinement in excess of one year, the reduction in rate, and forfeitures. *See* Clemency Request of 16 May 2002. After receiving the original SJAR, which recommended no clemency, the appellant submitted a supplemental request, detailing the financial difficulties for the appellant's dependents and asking for forfeiture relief. *See* Supplemental Clemency Request of 25 Sep 2002. It is quite clear from these submissions, as well as the SJAR and convening authority's action, that the convening authority was attempting to ease the burden on the appellant's family, rather than the appellant himself. In this regard, the convening authority's options were quite limited. The appellant would not be entitled to any back pay had the convening authority reduced the approved confinement. *See United States v. Globke*, 59 M.J. 878, 884 (N.M.Ct.Crim.App. 2004).

We are reluctant to speculate how a convening authority would have acted in a particular instance. *See Wellington*, 58 M.J. at 427. However, this is not the case of a pretrial agreement and the appellant not receiving the benefit of his bargain. *See, e.g.*, *Hardcastle*, 53 M.J. at 302; *United States v. Williams*, 55 M.J. 302, 307 (C.A.A.F., 2001)(holding that no relief required where there was no representation that pay would continue beyond the appellant's end of obligated service). The appellant received confinement for only three years and no punitive discharge after being convicted of a violent, forcible rape. On these facts, we conclude that there is no reasonable probability that there would have been a different result, even absent the erroneous advice by the staff judge advocate. *Cf. United States v. Gilley*, 56 M.J. 113, 125 (C.A.A.F. 2001); *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F., 1998)(holding that an appellant must establish some colorable showing of possible prejudice)). We therefore deny the requested relief.

Conclusion

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

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court