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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **W.F. L. RODGERS**

UNITED STATES

v.

Benjamin A. MICHAEL
Corporal (E-4), U.S. Marine Corps

NMCCA 200300821 Decided 12 December 2005

Sentence adjudged 16 August 2001. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3d Battalion, 4th Marines, 1st Marine Division (Rein), FMF, Twentynine Palms, CA.

LT JENNIE L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
LT STEVEN M. CRASS, JAGC, USNR, Appellate Government Counsel

RODGERS, Judge:

Pursuant to his pleas, the appellant was found guilty by a military judge of reckless operation of a vehicle, being drunk and disorderly, and leaving the scene of an accident, in violation of Articles 111 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 911 and 934. In addition, contrary to his pleas, the appellant was convicted by a special court-martial, composed of officer and enlisted members, of two specifications of attempted larceny, assault with a dangerous weapon, and burglary, in violation of Articles 80, 128, and 129, UCMJ, 10 U.S.C. §§§ 880, 928, and 929. The appellant was sentenced to a bad-conduct discharge, confinement for 6 months, forfeiture of $695.00 pay per month for 6 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant presents four assignments of error, arguing that: (1) the military judge erred by admitting into evidence an identification of the appellant made under circumstances that were unduly suggestive to the witness; (2) the military judge compounded the foregoing error by allowing an in-court identification of the appellant by the same witness; (3) the

evidence was factually insufficient to find the appellant was the intruder who perpetrated the contested offenses; and, (4) there was unreasonable delay in the post-trial processing of the case.

After carefully considering the record of trial, the appellant's assignments of error and the Government's response, we find no error in the case of assigned errors (1)-(3) above. We do, however, find a defect not assigned as error, namely, insufficient evidence to establish an element of the burglary charge, and, particularly in light of that finding, agree with appellant's contention that one stage of the post-trial delay in this case was unreasonable. We will take corrective action in our decretal paragraph.

Facts

Our review focuses on the charges to which the appellant pleaded not guilty. The appellant was charged with and convicted of attempting to steal electronic items belonging to two Marines. Charge Sheet. The members found that the appellant broke and entered into an open squad-bay-style-barracks to attempt these thefts. The appellant was also convicted of assaulting a Sergeant (Sgt) Winborne, who witnessed the attempted thefts and who challenged the appellant. Charge Sheet, Record at 26, 159. Those additional facts necessary to address the assigned errors appear *infra*.

Admissibility of Identifications and Sufficiency of Evidence that the Appellant was an Intruder

In his first assignment of error, the appellant contends that the military judge erred by denying a defense motion to suppress an identification of the appellant made shortly after the attempted thefts. Record at 11-12. Specifically, the appellant argues that the circumstances surrounding that identification made its reliability suspect.

The record indicates that Sgt Winborne interrupted two men as they were attempting to remove items from a squad-bay-style-barracks they had entered at night. Sgt Winborne was face to face and about a foot or so away from one of the men, who he described as having a "chiseled" face, "glassy" eyes, and "reeking of alcohol". *Id.* at 24-26. Shortly thereafter, military police challenged two suspects in a parking lot adjacent to the barracks. One man ran; the other, the appellant, stayed. *Id.* at 191-92. The appellant was placed in restraints by the military police because he was agitated and appeared to be a danger to himself and others. *Id.* at 280. Less than ten minutes later, Sgt Winborne was summoned to meet military police and the appellant. He promptly and emphatically identified the appellant based on his facial features, glassy eyes and alcohol-smelling breath. *Id.* at 29, 282.

The appellant argues that the circumstances of this identification made it suspect, to wit, the fact that the appellant, the sole person in the company of the military police, in handcuffs[1], was presented for identification to Sgt Winborne as the only suspect.[2] The appellant further points to inconsistencies between the witness' descriptions of the appellant made in a written statement at the time of the incident and in court, principally concerning clothing and height. Finally, the appellant argues that the lighting in the barracks was poor, and the witness' eyesight was such that identification of facial features would have been difficult. Appellant's Brief of 30 Nov 2004 at 7-10.

Before trial, the military judge denied a motion to suppress, ruling that under the totality of the circumstances the identification was reliable and not unnecessarily suggestive. Record at 65-69; Appellate Exhibit VII at 7-11.

This court will only disturb the military judge's decision in this instance if it constituted an abuse of his discretion. *United States v. Webb,* 38 M.J. 62, 67-68 (C.M.A. 1993). We review the conclusions of law in that decision *de novo*, but will set aside the findings of fact therein only if they are clearly erroneous. *United States v. Khamsouk,* 57 M.J. 282, 286 (C.A.A.F. 2002).

MILITARY RULE OF EVIDENCE 321(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), provides that an identification is unreliable if the process "under the circumstances, is so suggestive as to create a substantial likelihood of misidentification."

In *Neil v. Biggers*, 409 U.S. 188 (1972), the United States Supreme Court set forth factors to evaluate the likelihood of misidentification, to include: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200; *see also United States v. Rhodes,* 42 M.J. 287, 290 (C.A.A.F. 1995).

The military judge applied these factors to the facts and found: the witness was able to view the appellant for several seconds up close; the witness' attention was acutely focused on the appellant; the initial description given by the witness generally matched the description of the appellant at time of confrontation; the witness, a former law enforcement officer, was trained in the art of observation and absolutely certain of his

[1] Significantly, Sgt Winborne stated he did not remember whether the appellant was in handcuffs at this time. Record at 186.

[2] Such presentation of a suspect is generally referred to as a "show-up" identification procedure. *United States v. Rhodes*, 42 M.J. 287, 289 n.4 (C.A.A.F. 1995).

identification due to the appellant's facial features, his glassy eyes, and the smell of alcohol he exuded; and the length of time between the crime and the identification was very brief. Record at 66-68, Appellate Exhibit VII at 1-11. In addition, the military judge found the witness' need for immediate medical attention justified the admittedly suggestive circumstances of the identification. Record at 67. Accordingly, the military judge ruled the "show-up" identification admissible (though he ruled that a second identification made hours after the crime could not be admitted). *Id.*

Although not required to accept these findings, after due consideration we find that they are not clearly erroneous. Therefore, we adopt them. The alleged inconsistencies in the witness' testimony to which the appellant refers are so minor in nature and readily explainable as to not warrant discussion. Accordingly, we decline to find that the military judge abused his discretion in reaching his ruling or that he based that ruling on any clearly erroneous findings of fact.

The appellant also objects to an in-court identification Sgt Winborne made of the appellant, apparently solely because it came on the heels of the show-up identification. Appellant's Brief at 12-13. *A priori*, as we have found that show-up identification proper, the appellant's argument of improper bootstrapping of the second identification becomes groundless. So too, with the identifications proper, his argument that the evidence is factually insufficient to support the conclusion that the appellant was one of the intruders must fail unless this court were to conclude that the identifications were outweighed by contrary evidence rendering them unreliable. We find no such contrary evidence. Thus, the appellant's second and third assignments of error are without merit.

Insufficient Evidence of the "Breaking" Element to Burglary Charge

Although not assigned as error, we find that there was insufficient evidence to support one of the elements of Charge III, burglary. There are three elements to the offense of burglary: (1) that the accused unlawfully broke and entered the dwelling house of another; (2) that both the breaking and entering were done in the nighttime; and (3) that the breaking and entering were done with the intent to commit an offense punishable under Articles 118 through 128, except Article 123a. MCM, Part V, ¶ 55b.

The record clearly indicates that the appellant entered a barracks at night with the intent of stealing, but the record does not detail his specific method of entry to the barracks. A mere entry through an open door does not constitute a breaking, but opening a closed or partially closed door would be sufficient. MCM, Part V, ¶ 55c (2). Here the record never reveals whether the door through which the appellant and his

accomplice entered the squad bay was closed.[3] The members apparently noticed this omission, for during their deliberations they posed this very question to the military judge. Record at 327; Appellate Exhibit XVIII. The military judge denied the members' request to recall Sgt Winborne to answer this question and instructed them to reach their own decision on that point based on the evidence they remembered. Record at 328.

We find insufficient evidence to support the proposition that the hatch in question was closed enough so that opening it would constitute a "breaking." Similarly, we find no evidence that the appellant had to open any other barracks door before reaching the squad bay. For these reasons, there is insufficient evidence to support an essential element of the burglary offense.[4]

Post-Trial Delay

The appellant asserts the delay in the post-trial processing of his case was "unexplainable and unreasonably excessive". Appellant's Brief at 15. While he asserts no prejudice resulting from this delay, he correctly recites the current case law that provides we need not find prejudice to afford relief for excessive delay in appropriate circumstances (citations omitted).

We consider four factors in determining whether post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) reasons for the delay, (3) the appellant's assertion of the right to a timely appeal or the lack thereof, 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 cases of extreme delay, that delay itself may "'give rise to a strong presumption of evidentiary prejudice '" *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here the appellant's focus is on the entire period of delay, but most particularly the 7-month delay between the date the

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[3] To the contrary, Sgt Winborne testified "neither hatch was secured" (Record at 154-55)(referring to the hatch through which the intruders entered and the hatch next to Sgt Winborne's rack, which he stated had been propped open with the fire extinguisher eventually used to strike him). From the context, it appears that Sgt Winborne understood "secured" to mean opened or unopened, not locked or unlocked, and therefore if anything the record suggests the hatch in question was open.

[4] Indeed, there is not even evidence to support the lesser included offenses of housebreaking or unlawful entry (Articles 130 and 134, UCMJ) as those offenses both contain an "unlawful entry" requirement. While the record indicates the appellant himself did not reside in the barracks from which he attempted to steal items (Record at 270), there is no such information provided as to his accomplice.

convening authority took action and the date the case was received by this court for review. We find no stage of post-trial processing up to the point of the convening authority's action to be facially unreasonable. We note that the original convening authority deployed during the post-trial period. Staff Judge Advocate's Recommendation of 3 Jul 2002 at ¶ 4. We also disagree with appellate defense counsel's characterization of the case as "predominately a guilty plea [that] did not require an inordinate amount of time to review." Appellant's Brief at 15. In fact, there were more not guilty pleas than guilty pleas in this case and we find the amount of time it took to prepare a 352 page record of trial, authenticate it, review it and prepare a staff judge advocate's recommendation reasonable.

We agree, however, with the appellant's contention that the 7-month delay in forwarding this case to this court after the convening authority action was facially unreasonable, triggering a due process review. Proceeding to the second factor, we find no good reason for this specific delay. Moreover, while the appellant did not assert any right to a timely appeal before this juncture, we do find prejudice resulting from the delay.

Specifically, in instances where, as here, this court finds factually unreasonable error requiring relief, an appellant is prejudiced merely by the delay in the granting of that relief. This court's relief has been denied the appellant for longer than it should have been, to his detriment.

Conclusion

The findings of guilty of Charge III, burglary, and its specification are set aside and dismissed. The remaining findings are affirmed. We reassess the sentence in accordance with *United States v. Cook,* 48 M.J. 434, 438 (C.A.A.F. 1998). After reassessment, based on the error noted, the post-trial delay, and the entire record, we affirm only so much of the sentence as provides for confinement for 5 months, reduction to pay grade E-1, and a bad-conduct discharge.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court