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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Matthew W. MAZZA
Boatswain's Mate Second Class (E-5), U.S. Navy

NMCCA 200400095 Decided 29 August 2005

Sentence adjudged 8 August 2002. Military Judge: D.K. Margolin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA.

PHILIP D. CAVE, Civilian Appellate Defense Counsel
Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

WAGNER, Judge:

The appellant was tried before officer and enlisted members sitting as a general court-martial. The members convicted the appellant, contrary to his pleas, of committing indecent acts upon a female under 16 years of age and communicating indecent language to a child under 16 years of age, both in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The members sentenced the appellant to a dishonorable discharge, confinement for 108 months, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant advances seven assignments of error.[1] We address two of the assignments of error below, involving

[1] I. The appellant was denied effective assistance of counsel by trial defense counsel's failure to investigate and present evidence of the appellant's good military character and reputation for truthfulness and because of a "constellation" of trial defense counsel errors.

challenges for cause and sufficiency of evidence. We agree that the military judge erred in denying a defense challenge for cause of a member. We, therefore, address the assignment of error regarding sufficiency of the evidence, but find no need to address the remaining five assignments of error.

Challenges for Cause

The appellant alleges that the military judge erred to his substantial prejudice by denying the defense challenge for cause of two members, Captain (Capt) S and Chief Dental Technician (DTC) D. We agree that the military judge erred in denying the challenge to Capt S.

During en banc voir dire, the military judge admonished the members, in part, as follows: "If you know of any matter that you believe might affect your impartiality or ability to sit as a member in this case, you must disclose that matter when asked to do so." Record at 71. Later, Capt S responded affirmatively to the following question posed by the military judge:

> Is there anything at all in your past education, training, or experience, or any other matter that you feel that you would not be able to set aside and it would make it difficult or impossible for you to conduct your deliberations in a completely fair, impartial, and unbiased manner?

Record at 79.

II. The military judge abused his discretion by denying a defense motion to depose two witnesses. Summary assignment of error raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

III. The convening authority abused his discretion by failing to order a post-trial Article 39(a), UCMJ, session to allow the appellant access into the trial defense counsel's case files in order to determine whether the appellant had been denied the effective assistance of counsel. Summary assignment of error raised pursuant to *Grostefon, Id*.

IV. The evidence adduced at trial was legally and factually insufficient to sustain the findings of guilty.

V. The military judge erred to the substantial prejudice of the appellant when he denied two defense challenges for cause.

VI. The trial counsel made improper argument on findings to the appellant's substantial prejudice.

VII. The appellant was substantially prejudiced by excessive post-trial delay, to include delay in forwarding the record of trial in response to this court's order.

Capt S subsequently responded affirmatively to the following question posed by the trial counsel during en banc voir dire: “Does any member feel uncomfortable or reluctant to sit on a jury involving this type of crime?” Record at 81.

The trial counsel also asked the following question during en banc voir dire: "Has any member ever known a victim of child sexual abuse?" Record at 83. Capt S answered in the affirmative.

During individual voir dire, Capt S revealed that she and her god-sister had been touched inappropriately by an uncle and that she had reported the incident right away. Capt S went on to state:

> So I am just being honest with you as far as if -- if -- if there was a finding of guilty, about how I would deal with it. If there were, I'd think that -- I would do my best to be impartial or whatever, but I remember how I felt when we went through that.

Record at 99. Capt S went on to indicate her agreement with the military judge who inquired as to whether she could follow his instructions, apply the law objectively, and sit impartially as a member in the appellant's case.

In response to questions by the trial defense counsel, Capt S indicated that, although she and her god-sister had told Capt S's mother about the incidents, her uncle denied the allegations and nothing more was done about them. Capt S denied being more cynical of any story the appellant may tell and denied that she would tend to believe a child making a similar allegation. Record at 101.

The trial defense counsel challenged Capt S for cause on the basis that she would not be able to sit as a fair and impartial member based on her answers during voir dire. In denying the challenge, the military judge disagreed with the trial defense counsel's characterization of Capt S as "fighting back tears" during voir dire. The military judge also cited to *Batson v. Kentucky*, 476 U.S. 79 (1986), in support of a court member's right to serve on a court-martial if properly selected.

First, Article 25, UCMJ, cannot be read to give any individual or group the right to serve on a court-martial. *United States v. Ruiz*, 46 M.J. 503, 508-09 (A.F.Ct.Crim.App.

1997)(citing *United States v. Santiago-Davila*, 26 M.J. 380, 389 (C.M.A. 1988)), *aff'd,* 53 M.J. 122 (C.A.A.F. 2000). The military judge's determination as to whether to excuse a challenged member for cause falls squarely on two required analyses.

The first is whether the member exhibited actual bias, either through answers to questions during voir dire or by their statements or actions before, during, or after trial. Because the military judge has the opportunity to observe the demeanor of the court members in the course of assessing their fitness to serve on the court-martial, the military judge is given "great deference" in making that determination. *United States v. Daulton,* 45 M.J. 212, 217 (C.A.A.F. 1996)(citing *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)). Therefore, we review the military judge's ruling on the issue of actual bias under an "abuse of discretion" standard. *White*, 36 M.J. at 287.

The second involves the question of implied bias, i.e., whether the general public viewing the court-martial process would be moved to find prejudice in allowing the challenged member to remain on the court-martial panel. *Daulton,* 45 M.J. at 217 (citing *United States v. Dinatale*, 44 M.J. 325, 328 (C.A.A.F. 1996)); *United States v. Glenn*, 25 M.J. 278, 280 (C.M.A. 1987); *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985). In reviewing the military judge's ruling on the issue of implied bias, because we view the issue objectively through the eyes of the public observer of the trial, we must give less deference to the military judge's discretion. *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999)(citing *Daulton,* 45 M.J. at 217; *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997); and *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)).

In applying the required standard of review to the specific circumstances of this case, we must consider the overall perception of the military justice system in the eyes of the public. *Dale,* 42 M.J. at 386. To that end, military judges are urged to follow the liberal-grant mandate when deciding challenges for cause. *Id*.

In the instant case, we will not disturb the military judge's conclusions as to actual bias. The military judge made lengthy findings in support of his denial of the challenges that the appellant fails to overcome in establishing actual bias.

The issue of implied bias under the circumstances of this case is, however, more troublesome. RULE FOR COURTS-MARTIAL, 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) requires that a court member "be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This rule encompasses both actual bias and implied bias. *Napoleon*, 46 M.J. at 283.

Our superior court has stated that "mere declarations of impartiality" by the member are not sufficient to rule out bias. *United States v. Harris*, 13 M.J. 288, 292 (C.M.A. 1982). Especially when dealing with implied bias, the court above us has stated that, where the circumstances raise "an appearance of evil" in the public observer's eye, simple declarations of impartiality are insufficient." *Id*. (quoting *United States v. Deain*, 17 C.M.R. 44, 53 (C.M.A. 1953)).

In a case where our superior court upheld the military judge's denial of a defense challenge for cause on both actual and implied bias grounds, the court commented specifically on the fact that the member "did not provide monosyllabic responses acquiescing to leading questions from trial counsel or the military judge." *Schlamer*, 52 M.J. at 93. In that case, the court focused on the fact that the member was not pushed by questioners to provide "correct" answers and was able to provide thoughtful answers in a give-and-take exchange with the military judge and counsel. *Id.*

Unfortunately, we cannot say the same about the exchange between Capt S and her questioners in the instant case. Capt S obviously had some concern that her own history as a victim of sexual abuse might be a cause for concern regarding her ability to remain impartial. She acknowledged that concern by volunteering the information without being asked specifically if she had been the victim of a similar crime. Her initial response indicated she would have to "deal with" her past during the trial, and she did not exude confidence when she stated "I would do my best to be impartial or whatever, but I remember how I felt when we went through that." Record at 99. Capt S was never given the opportunity to discuss or explain this comment, other than to agree with the military judge's questions indicating she could remain impartial. To the in-court observer, there would have been great concern about her ability to remain impartial, and, therefore, grave concern regarding the fairness of the military justice system.

The military judge erred in denying the defense challenge for cause against Capt S. We, therefore, must test for prejudice. In this case, although Capt S was subsequently excused from the panel by a peremptory challenge, the military judge's denial of the challenge for cause against her prejudiced the appellant's right to exercise a peremptory challenge against another member of his choice. *United States v. Weisen,* 56 M.J. 172, 177 (C.A.A.F. 2001).

Sufficiency of Evidence

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. *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.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

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).

We are convinced that a rational trier of fact could have found all the elements of the offenses beyond a reasonable doubt based on the evidence produced at trial. We are also, ourselves, convinced beyond a reasonable doubt of the appellant's guilt based on the evidence presented at trial. This assignment of error is without merit.

Conclusion

The findings of guilty and sentence are set aside. A rehearing is authorized.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court