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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Gabriel A. CHAVEZ
Torpedoman's Mate Seaman Apprentice (E-2), U.S. Navy

NMCCA 200000198 Decided 5 March 2004

Sentence adjudged 26 July 1999. Military Judge: K.J. Allred. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS FITZGERALD (DDG 62).

Maj CHARLES HALE, USMC, Appellate Defense Counsel
Maj PATRICIO TAFOYA, USMC, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of using provoking words and gestures, and aggravated assault, in violation of Articles 117 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 917 and 928. A special court-martial consisting of officer and enlisted members sentenced the appellant to restriction for 45 days, reduction to pay grade E-1, forfeiture of $630.94 pay per month for one and one-half months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.[1]

[1] The court-martial promulgating order erroneously states that the amount of the adjudged forfeiture was $632.94. Since the convening authority stated that he considered the record of trial in taking his action, we presume that he approved only that amount specified in the record.

We have carefully considered the nine assignments of error,[2] the Government's response, and the record of trial. We conclude that, as modified, 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.

Background

The charges originated from an altercation between two shipmates in their berthing compartment on board USS FITZGERALD (DDG 62). Then-Seaman (SN) D.R. Overby, U.S. Navy and the appellant worked together in the same division and lived together in the same berthing compartment. They were friends at work and often exchanged joking, even sarcastic banter with one another and their shipmates in the division. Before 11 June 1999, they had not had any problems getting along with one another.

On that date, SN Overby spotted the appellant in berthing and said, "Hey, what's up, you little bitch?" or words to that effect, in a joking manner. Record at 350. Unbeknownst to SN Overby, the appellant had received some bad news about his ill grandmother earlier in the day and was not in a joking mood. The appellant moved towards SN Overby and silently nudged him with his elbow. The appellant then walked away. SN Overby then called the appellant by his surname, and asked him if he minded being called "Chay-vez" with a long "a" sound, contrary to the customary pronunciation of this Hispanic surname. *Id.* at 351. SN Overby testified he was still just kidding with his shipmate.

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[2] A summary of the assignments of error follows:

I. The record is incomplete because the legal officer's recommendation is missing and the convening authority designated a place of confinement when no confinement was adjudged.

II. The convening authority erred by not recusing himself from the post-trial process.

III. The military judge erred by denying a motion to produce a character witness.

IV. The military judge erred by not *sua sponte* asking for a race-neutral reason for trial counsel's peremptory challenge of Ensign Pradia.

V. The military judge erred by denying a motion to dismiss for selective prosecution.

VI. The military judge erred by denying a motion to suppress the appellant's statements made to Chief Machinist's Mate Steele.

VII. A sentence of 1 and ½ months forfeitures is contrary to the military judge's instructions and ambiguous.

VIII. The evidence of provoking speech and gestures is legally insufficient.

IX. A sentence including a bad-conduct discharge is inappropriately severe.

A few minutes later, the appellant approached SN Overby with an object hidden in his hand. Seeing this, SN Overby asked him to show it to him. The appellant then stuck the knife blade of a Gerber multi plier tool against SN Overby's chest and held it there for one or two seconds, without saying anything. Angered by this, SN Overby asked him what he was doing. SN Overby felt like hitting the appellant. The appellant lowered the knife and SN Overby turned to go into the shower. Within moments, the appellant approached him again and held the knife back up to SN Overby, about five inches from his neck. Thinking that he would stab him, SN Overby was scared and angry, and told the appellant to put the knife down. The appellant did so, then said, "You don't hear me saying Over-bye," or words to that effect, referring to the pronunciation of SN Overby's name. *Id.* at 363. SN Overby told him to leave, but the appellant stood his ground. The appellant then said, "Do you think I'm afraid to stab you? I'm not afraid to stab you, mother f---, ask Harbor, I've done it before, and I'll do it again." *Id.* at 364. SN Overby jumped into the shower to avoid the appellant, and the altercation ended. Minutes later, aided by a petty officer in the division, Torpedoman's Mate Third Class (TM3) Paul Chinn, SN Overby and the appellant talked it over, shook hands, and the appellant apologized.

The convening authority, Commander (CDR) James S. Grant, U.S. Navy, was Commanding Officer of the FITZGERALD. The evening of the incident, the ship's Command Duty Officer (CDO) called and briefed CDR Grant on the incident and discussed an appropriate command response. CDR Grant told the CDO that anybody on his ship that pulled a knife on a shipmate should go to the brig, or words to that effect. Accordingly, the appellant was immediately placed in pretrial confinement, where he remained until trial.

Selective Prosecution

The appellant contends that he proved a colorable claim of selective prosecution at trial, and that the military judge abused his discretion in denying the motion to dismiss the charges on that ground. We disagree.

Our superior court has set forth the law of selective prosecution:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while

> others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.

United States v. Garwood, 20 M.J. 148, 154 (C.M.A. 1985)(citations omitted). Moreover, convening authorities are presumed to act without bias in disposing of charges. *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997). In reviewing rulings by a military judge on a motion to dismiss for selective prosecution, we review the findings of fact under a "clearly erroneous" standard, while we review the conclusions of law *de novo. See United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000).

Before the court-martial was assembled, the trial defense counsel made a motion to dismiss the charges based on selective prosecution. The specific basis for the motion was that the charges against the appellant represented the first FITZGERALD assault case in about three years to be referred to a court-martial. As many as 15 previous cases had all been resolved through nonjudicial punishment, including one involving an assault and battery on the Officer of the Deck and two other watchstanders. The motion also suggested that the decision to refer the charges in this case to a special court-martial was based on the appellant's Hispanic ethnicity.

We conclude that the appellant did not bear his heavy burden of establishing sufficient facts comprising a *prima facie* case of selective prosecution. We note that the convening authority squarely confronted this issue in his testimony on the motion. CDR Grant stated that, as Commanding Officer, this was his first encounter with a disciplinary problem involving a knife. In the three previous assault cases presented to him for resolution, CDR Grant imposed nonjudicial punishment. The three Sailors punished in those cases were of African-American, Caucasian, and Asian-Pacific race or ethnic origin. CDR Grant specifically and adamantly denied ever considering race or gender in deciding how to resolve charges brought before him.

The military judge obviously found the convening authority's testimony to be credible on this significant point,

as well as his explanation for disparate treatment of other assault suspects under his command. We hold that the military judge's findings of fact are not clearly erroneous, and his conclusions of law are correct. This assignment of error is without merit.

Legal Sufficiency of Evidence of Provoking Speech and Gestures

The appellant further argues that the evidence is legally insufficient to support a conviction of provoking words and gestures. Specifically, he contends that SN Overby was not actually provoked to violence, and that SN Overby, not the appellant, used the only provoking words in the altercation. We disagree.

The latter contention resembles the selective prosecution argument we just disposed of and warrants no additional discussion. As to SN Overby's reaction to the appellant's speech and behavior, taken as a whole, we conclude that the evidence tends to negate the appellant's argument.

Article 117, UCMJ, prohibits "those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 42c. The appellant placed a knife against SN Overby's chest, suggested he wasn't joking, and with an angry look on his face, asked SN Overby if he thought the appellant was afraid to stab him. He then yelled, "I'm not afraid to stab you, mother f--- ask Harbor. I've done it before, and I'll do it again." Record at 364. Throughout the confrontation, SN Overby was angry and scared, and momentarily felt like hitting the appellant. Given all the facts and circumstances, we conclude that SN Overby's predictable response was the type of reaction that a reasonable person would expect as a result of the appellant's speech and behavior. Notwithstanding the appellant's legal sufficiency argument, we hold that the appellant exhibited a classic case of provoking words and gestures under Article 117, UCMJ.

Missing Legal Officer's Recommendation

The record of trial was properly authenticated on 23 September 1999, about two months after sentencing. The only post-trial document to be found in the allied papers attached to the record is the court-martial promulgating order dated 24 January 2000. According to the order, the convening authority

approved the sentence as adjudged. In doing so, he states that a copy of the legal officer's recommendation (LOR) was submitted to the trial defense counsel on 3 January 2000. Counsel then submitted a clemency request on 10 January 2000. We note that the convening authority specifically states that in taking his action, he considered the record of trial, the results of trial, the LOR and the clemency request. However, the LOR, proof of service of the LOR, and the clemency request are not attached to the record. On 29 July 2002, we ordered the Government to produce those documents. On 6 August 2002, the Government notified this court that it was unable to locate any of the documents.

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). If the presumption is not rebutted, we cannot affirm a sentence that includes a bad-conduct discharge. RULE FOR COURTS-MARTIAL 1103(b)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.).

We must decide whether the absence of the LOR, its proof of service upon the trial defense counsel, and the responsive clemency request constitutes a substantial omission from the record of trial. If so, we must then decide whether the Government has rebutted the presumption of prejudice that flows from such a substantial omission.

First, exercising our fact-finding power under Article 66, UCMJ, we find that the LOR existed, was served upon the trial defense counsel on 3 January 2000, that the trial defense counsel received it and responded with a clemency petition on 10 January 2000, and that the convening authority considered each of those documents in taking his action on the sentence, as stated in the court-martial order. *See United States v. Stoffer,* 53 M.J. 26, 27-28 (C.A.A.F. 2000). This is not a case where the LOR was never produced or served upon the trial defense counsel. Nevertheless, we conclude that the failure to include these documents represents a substantial omission from the record of trial. *United States v. Mark*, 47 M.J. 99, 102 (C.A.A.F. 1997). As indicated previously, such a substantial omission creates a presumption of prejudice.

As we consider whether the Government has rebutted this presumption of prejudice, we note that in taking his action, the convening authority considered the record of trial in addition to the missing LOR, and clemency request. The record consists

of a complete and verbatim transcript, the original charge sheet, the original convening order with original amendments, and all exhibits. Another significant point is that the appellant has not provided us with any indication of any extra-record material that he may have provided the convening authority in his clemency petition. Thus, we presume that the convening authority was fully aware of the proceedings at trial, including all evidence offered in extenuation and mitigation of the appellant's offenses, and that he was not provided with any information outside the record that we would need to have at our disposal to permit a full appellate review. Therefore, we know what the convening authority knew in taking his action, permitting us to conduct a full review of his action. Accordingly, we conclude that the Government has rebutted the presumption of prejudice. While we do not condone the Government's failure to produce a record with all required documents, we hold that the appellant is not entitled to any relief.

Suppression of Appellant's Statement to Master-at-Arms

The next assignment of error addresses a written statement the appellant gave Chief Machinist's Mate (MMC) Steele, the acting Chief Master-at-Arms on the ship. The appellant now argues that the military judge abused his discretion in denying a motion to suppress that statement. We conclude that the military judge did not abuse his discretion.

Aided by the military judge's comprehensive findings of fact, we summarize the factual background for the motion. Immediately following the altercation, SN Overby told TM3 Chinn what happened. At TM3 Chinn's suggestion, the two Sailors then reported the matter to Petty Officer First Class (PO) Wehrman, their leading petty officer, who said he would take care of it and left. TM3 Chinn then ordered the appellant to come and talk with him and SN Overby. At the time, TM3 Chinn was the senior petty officer on deck in the area. Without advising him of his rights, TM3 Chinn asked the appellant what happened. Both the appellant and SN Overby described what happened. TM3 Chinn counseled both Sailors, the appellant and SN Overby shook hands, and the conversation ended. TM3 Chinn intended to resolve the altercation peaceably and tried to ensure there would be no further problems between the two Sailors. At that point, TM3 Chinn thought he had done all that was necessary, and went back to work. Of particular note, TM3 Chinn did not discuss his counseling interview with anyone else in the chain of command or ship's master-at-arms force.

In the interim, PO Wehrman had reported the incident. The CDO summoned MMC Steele, who met Petty Officer Powell (an assistant to MMC Steele) in the Master-at-Arms office. At this point, MMC Steele had no knowledge of the counseling TM3 Chinn conducted with SN Overby and the appellant. Out of an abundance of caution, MMC Steele advised SN Overby of his rights, then interviewed him about the incident. MMC Steele next brought the appellant into his office and read him his rights from a small card he kept in his pocket. After the appellant described the incident, MMC Steele took the appellant to the wardroom and read him his rights again. He gave the appellant a voluntary statement form to use, and then realized he had the wrong form. Leaving the appellant in the wardroom, MMC Steele went to his office, obtained the correct form for a suspect, and returned to the wardroom. MMC Steele read the appellant his rights a third time, using the standard Military Suspect's Acknowledgement and Waiver of Rights form. The appellant initialed each numbered right, then waived his rights and wrote his statement in his own handwriting. This written statement, Prosecution Exhibit 4, was the subject of the motion to suppress, along with the oral statements made to TM3 Chinn. At no time did MMC Steele give cleansing warnings to the appellant.

After hearing testimony from TM3 Chinn, MMC Steele, and the appellant, the military judge granted the motion to suppress as to the oral statements made to TM3 Chinn, but denied the motion as to Prosecution Exhibit 4. The military judge concluded that the statement given to MMC Steele was voluntary, preceded by three sets of rights advisements, and not tainted by the previous, unwarned statements given to TM3 Chinn.

In determining whether the military judge abused his discretion in that ruling, we accept his findings of fact unless they are clearly erroneous. However, his conclusions of law are subject to *de novo* review. *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999).

Our superior court recently summarized the law applicable to this assignment of error:

> A confession that follows an earlier confession obtained due to actual coercion, duress, or unlawful inducement is presumptively tainted. However, a confession taken in compliance with Article 31(b) and Mil.R.Evid. 305 that follows an earlier unwarned confession obtained in violation of Article 31(b) and Mil.R.Evid. 305 is not presumptively tainted.

> It is admissible if the subsequent confession is determined to be voluntary "by the totality of the circumstances." "The earlier, unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent confession." The fact that the subsequent confession was preceded by adequate warnings is one of the circumstances to be considered.
>
> Finally, while a cleansing warning is not a prerequisite to admissibility, an earlier unwarned statement and the lack of a cleansing warning before the subsequent statement are also part of the "totality of the circumstances."

United States v. Benner, 57 M.J. 210, 213 (C.A.A.F. 2002)(internal citations omitted). Thus, we must decide whether Prosecution Exhibit 4 was a voluntary statement, taking into account the totality of the circumstances.

Initially, we accept the findings of fact of the military judge because they are amply supported by the record. The most significant finding is that when MMC Steele obtained the appellant's statement, MMC Steele had no knowledge of the prior statement given to TM3 Chinn. Since he had no knowledge of the prior statement, he could not have used that prior statement in any way to induce the appellant to provide a confession. The other important fact is that the appellant's admission in his own handwriting was preceded by not less than three separate recitations of rights by MMC Steele. Moreover, there is no evidence of any coercion, duress or any other unlawful inducement employed by MMC Steele, TM3 Chinn or anybody else. The fact that there was no cleansing warning given by MMC Steele is regrettable, but of no consequence in this case because the appellant surely understood through the repeated rights warnings and the absence of any reference to his admissions to TM3 Chinn that he was free to remain silent and contact a lawyer if he chose to do so. We conclude that the appellant voluntarily wrote his statement to MMC Steele, and that the military judge did not abuse his discretion in admitting that statement on the merits.

Production of Character Witness

The appellant asserts that the military judge committed prejudicial error by denying a motion to produce a character witness on the merits. We disagree.

The appellant requested that the Government produce Mr. Joe Urias, of El Paso, Texas, to offer an opinion of the appellant's peacefulness and law-abidingness. The Government refused to do so. The appellant then moved the court to produce the witness. In litigating the motion, the military judge received telephonic testimony from Mr. Urias, and then entered specific findings of fact and conclusions of law.

The military judge found that Mr. Urias was the appellant's high school football coach for two seasons and his baseball coach for one season. He was not one of the appellant's academic instructors and did not have any significant interaction with the appellant off the playing field. At no point in time did Mr. Urias have an in-depth personal conversation with the appellant. Mr. Urias had had limited contact with the appellant for one or two years since his graduation from high school. Significantly, the military judge ended his findings of fact by stating that "Mr. Urias has not observed him or his character for peacefulness off the football field." Appellate Exhibit V. The military judge then concluded, as a matter of law, that Mr. Urias did not know the appellant well enough to offer an opinion regarding his character for peacefulness.

In reviewing the military judge's decision for an abuse of discretion, we will not grant relief "unless [we have] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)(quoting Judge Magruder in The New York Law Journal at 4, col.2 (March 1, 1962)).

We hold that the military judge did not abuse his discretion in refusing to order the production of Mr. Urias. Accepting his findings of fact as being substantiated by the record, we concur in his conclusion that Mr. Urias could not offer an opinion on the issue of the appellant's peacefulness and law-abidingness for lack of foundation. The assignment of error is without merit.

Trial Counsel's Use of the Peremptory Challenge Against a Minority Member

The appellant contends that the military judge erred by not inquiring as to a race-neutral reason for the trial counsel's exercise of his peremptory challenge. In essence, since the trial defense counsel offered no objection or request for

explanation, the appellant would have us impose a requirement upon military judges to raise the issue *sua sponte*. We decline to do so.

If the trial counsel uses his peremptory challenge against a member of the same racial group as the appellant, *upon objection or request by the trial defense counsel*, the trial counsel must offer a relevant, legitimate, and race-neutral explanation. *United States v. Moore*, 28 M.J. 366, 368-69 (C.M.A. 1989). However, if no objection or request is made, the appellant waives the issue on appeal. *United States v. Walker*, 50 M.J. 749, 750 (N.M.Ct.Crim.App. 1999). In *Walker,* the military judge chose to intervene after the trial defense counsel offered no objection or request for explanation. Here, the military judge did not *sua sponte* ask the trial counsel for an explanation. Nevertheless, we conclude that our decision in *Walker* was well reasoned and should be followed in this case. The assignment of error is without merit.

Conclusion

We have considered the remaining assignments of error of sentence appropriateness and that the convening authority was an accuser and find them to be lacking in merit. As to the assignment of error regarding the irregular punishment of forfeitures for a term of one and one-half months, we note that the Government concedes that the amount and duration is ambiguous. We concur. We conclude that approval of forfeitures for a month and a half would lead to ambiguous and uncertain calculations depending on the number of days in the month in question. Unless a total forfeiture is adjudged, we hold that forfeitures must be adjudged for a term of whole months, just as the amount of forfeiture must be stated in whole dollars. *See* RULE FOR COURTS-MARTIAL 1003(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1998 ed.). Thus, the members in this case should have chosen between forfeitures for one month or for two months. We will rectify the error, along with their error in adjudging forfeitures in dollars and cents, instead of whole dollars.[3]

[3] Our discussion and holding should not be read as criticism of the members. On the contrary, we believe that the military judge's instructions on forfeitures led them to believe that they could properly adjudge a forfeiture in dollars and cents.

The findings are affirmed. We affirm only so much of the sentence extending to restriction for 45 days,[4] reduction to pay grade E-1, forfeiture of $630.00 pay per month for one month, and a bad-conduct discharge.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court

[4] Here again, the members did not receive appropriate guidance regarding their deliberations on the sentence. Although the military judge's instructions were correct, the sentence worksheet did not provide for a statement of the limits of restriction. Without that space to fill in, the members neglected to state the limits of restriction. However, the appellant has not asserted any prejudice, and we find no prejudice in the record.