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

BEFORE

W.L. RITTER **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Christopher D. MORA
Aviation Storekeeper Airman Recruit (E-1), U.S. Navy

NMCCA 200100234 Decided 16 November 2004

Sentence adjudged 31 May 2000. Military Judge: C.R. Hunt. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

A panel of officer members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of use of provoking words and assault with intent to inflict grievous bodily harm, in violation of Articles 117 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 917 and 928. The members sentenced the appellant to confinement for 5 years and 6 months, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's four assignments of error, the Government's response, and the appellant's reply brief. We conclude that the findings and the 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.

Background

In the late evening of 18 January 2000, the appellant got into a verbal confrontation with Aviation Ordnanceman Third Class (AO3) Jeffery A. Houlemard, U.S. Navy, in the military barracks at Naval Air Station, North Island, CA. The verbal confrontation escalated into a physical altercation, during which the appellant stabbed AO3 Houlemard with a pocketknife five times—-once in the head and four times in the upper abdomen. One of the knife wounds to the abdomen punctured AO3 Houlemard's diaphragm and liver, which required surgery to repair.

Convening Authority's Action

In the appellant's first assignment of error, he asserts that the CA failed to personally sign the CA's action (CAA), as required by RULE FOR COURTS-MARTIAL 1107(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), and that the CAA is instead signed by the staff judge advocate (SJA). The appellant avers that this court should remand his case for a new CAA. We disagree.

The appellant is mistaken. The original record of trial contains an original CAA, dated 12 December 2000, which is signed by the CA. The document to which the appellant refers--and which is signed by the SJA--is the court-martial promulgating order (CMO). However, the CMO may be signed by "the convening or other competent authority acting on the case, or a person acting under the direction of such authority." R.C.M. 1114(e). The SJA's signature block on the CMO states that it is signed "By direction" of the CA. Accordingly, we decline to grant relief.

Actions of the Military Judge

In the appellant's second assignment of error, he asserts that the military judge abandoned his neutral role and became an advocate for the Government during a hearing on the appellant's motion to suppress statements made by the appellant to agents of the Naval Criminal Investigative Service (NCIS). The appellant avers that this court should set aside the findings and the sentence. We disagree.

On the morning of 19 January 2000, NCIS agents apprehended the appellant. After being advised of his rights under Article 31(b), UCMJ, the appellant agreed to waive his rights. He made a sworn, typewritten statement concerning the events of 18 January 2000. The appellant's motion claimed that these statements were coerced and involuntary. The motion set forth the following factual assertions, among others:

> The majority of the taking of the statement involved NCIS asked [sic] general and leading questions to which they would type a response. During the taking of the statement, AKAR Mora told the agents that AO3 Houlemard had attempted to pull AKAR Mora into the room

> prior to the stabbing. AKAR Mora told the agents this several times and had asked for it to be included in his statement. They did not include it in the statement. There were several other exculpatory details that NCIS did not put in the written statement despite being asked by the [sic] AKAR Mora.
>
> At the end of the interrogation, AKAR Mora felt coerced into signing the confession as written due to the refusal of the NCIS agents to include his statements, the coercive atmosphere of the interview room, the junior rank of AKAR Mora, and the length of the interview.

Appellate Exhibit II at 2-3.

At the hearing on the motion, the Government called three NCIS agents to testify about the circumstances surrounding the appellant's apprehension and the taking of his statement. These agents testified that the appellant was apprehended on board his ship, led off the ship in handcuffs, and taken to an interview room, where he was advised of his rights under Article 31(b), UCMJ. The appellant acknowledged in writing that he understood his rights and voluntarily waived them. One of the NCIS agents then took a written statement from him, which the agent typed at the request of the appellant. Record at 38. The agent testified that he typed exactly what the appellant said, and that the appellant was given the opportunity to add, delete, or change anything in the statement. *Id*. at 39. The agent also testified that the appellant did request a few changes, and that "everything he said he wanted to change we changed." *Id*. The appellant then initialed each paragraph of the statement and signed it at the end.

The appellant testified that "I felt that there was things missing in the statement when I signed it," and that he twice requested the NCIS agents to add some things to the typed statement, but that they did not do so. *Id*. at 61-62. The military judge asked the appellant "what was it that you asked the agents to put in the statement that they wouldn't put in?" *Id*. at 64. The appellant replied that he had wanted them to add that AO3 Houlemard had grabbed him and tried to pull him into the petty officer's barracks room, but that the appellant had struggled away. *Id*.

At the conclusion of the appellant's testimony, neither side offered any further evidence on the motion. However, the military judge, acting *sua sponte*, suggested recalling the agents "to see what their response would be to what the accused is telling us here." *Id*. at 65. Neither the government nor the appellant voiced any objection to this suggestion. Two of the NCIS agents were then recalled and provided testimony, which was inconsistent with the testimony of the appellant. Specifically, they testified that the appellant had not told them that the victim, AO3

Houlemard, had grabbed him and tried to pull him into the victim's room, nor had the appellant requested to include such information in his written statement. *Id*. at 66-69. The appellant contends that the military judge abandoned his neutral role and became an advocate for the Government by suggesting that the two agents be recalled as witnesses. Appellant's Brief of 30 May 2003 at 4.

A military judge is permitted to call or recall witnesses, *sua sponte*, and has wide latitude to question witnesses. Art. 46, UCMJ; MILITARY RULE OF EVIDENCE 614, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); R.C.M. 801(c); *see also United States v. Acosta*, 49 M.J. 14, 17 (C.A.A.F. 1998); *United States v. Sowders*, 53 M.J. 542, 545 (N.M.Ct.Crim.App. 2000). He must remain impartial, but he does not "lay aside impartiality when he asks questions in the appropriate case to clarify factual uncertainties." *United States v. Reynolds*, 24 M.J. 261, 264 (C.A.A.F. 2000). The legal test is whether, from the viewpoint of a reasonable person and "'taken as a whole in the context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt by the military judge's questions.'" *Acosta*, 49 M.J. at 18 (quoting *United States v. Ramos,* 42 M.J. 392, 396 (C.A.A.F. 1995); *see also United States v. Schember*, 50 M.J. 670, 673 (N.M.Ct.Crim.App. 1999)(quoting *Reynolds*, 24 M.J. at 265), *rev. denied*, 52 M.J. 416 (C.A.A.F. 1999).

We find that the military judge did not abandon his neutral role in this case. The contention that the NCIS agents had refused to include matters in the appellant's statement, which he had requested them to include was raised by the appellant, both in his pretrial motion and in the appellant's testimony on the motion. The motion explicitly stated that the agents had refused to include the appellant's contention that the victim had attempted to drag him into the victim's barracks room. The military judge's actions in recalling the two NCIS agents--or in suggesting that the government do so--was no more than an attempt to clarify the factual matters initially raised by the appellant. He did nothing improper.

We are satisfied that a reasonable person observing the appellant's court-martial would not have doubted its fairness or the impartiality of the military judge. In addition, we perceive no prejudice to the appellant, since the NCIS agents had testified earlier in the hearing that the appellant was given the opportunity to add, delete, or change anything in the statement, and that all requested changes were made. The testimony requested by the military judge added little to that previous testimony. Accordingly, we decline to grant relief.

Cross-Examination of the Appellant

In the appellant's third assignment of error, he asserts that the military judge violated the provisions of MIL. R. EVID. 304(f) by allowing the appellant to be cross-examined regarding testimony he gave during the hearing on the motion to suppress his NCIS

statement. The appellant avers that this court should set aside the findings and the sentence. We disagree.

Before the appellant testified in the suppression hearing, his defense counsel stated that the appellant would testify "for the limited purposes of this motion." Record at 60. Subsequently, during the trial on the merits, the appellant also testified during the defense case on the merits. The appellant claimed that AO3 Houlemard had started the fight by grabbing the appellant and repeatedly punching him, and that the appellant had used the knife in self-defense, out of fear that he would be seriously injured.[1] During cross-examination, the trial counsel attempted to impeach the appellant in various ways. The appellant's typed statement was admitted during this cross-examination as Prosecution Exhibit 21, but the appellant's testimony at the motion hearing was not mentioned.

Following redirect examination, the trial counsel elicited an admission from the appellant that he had initialed and signed Prosecution Exhibit 21. However, in response to the trial counsel's question about whether his memory was better at the time of trial or at the time he signed Prosecution Exhibit 21, the appellant responded, "At that time I was really nervous, sir, and there were corrections that I needed to make in the statement that weren't made." *Id*. at 559. When trial counsel essentially repeated his previous question, the appellant again responded, "There was changes that I needed to make." *Id*. at 560.

On redirect examination, the appellant's counsel elicited the appellant's version of the facts surrounding his apprehension and interrogation by the NCIS agents-—i.e., that the appellant had been led off the ship in handcuffs, taken to a small interview room for interrogation, and denied Band-Aids for cuts on two of his fingers. *Id*. at 561-62. The appellant further testified on redirect that he was "shaken up" and "shocked" at the time he made the statement, that he requested some additions and corrections to the statement, and that he signed the statement when his requests for additions and changes were ignored. *Id*. at 574-75.

In response to a question from the military judge, the appellant explained that he had asked the NCIS agents ". . . to put in where Petty Officer Houlemard had hit me and then I pulled my knife. And I also asked them to put in some other stuff that I really don't remember right now, sir." *Id*. at 563.

At this point, the military judge held an Article 39(a), UCMJ, session, at the request of the trial counsel, to consider whether the Government could try to impeach the appellant with

[1] There was testimony that AO3 Houlemard outweighed the appellant by about 40 pounds. In addition, the altercation occurred on the fourth deck of the barracks, on a 3-foot to 4-foot wide outdoor landing, so a fall from the landing could certainly have resulted in serious injuries.

questions concerning his testimony at the suppression motion hearing. Over defense objections, the military judge ruled that MIL. R. EVID. 304(f) does not bar the use of the appellant's testimony in the suppression hearing for impeachment. *Id*. at 568. The trial counsel was therefore permitted to ask the following questions and elicit the following testimony:

> Q. Airman Mora, do you remember at a prior session of this court where we discussed what evidence you claimed that the NCIS excluded from your confession?
> A. Yes, sir.
>
> Q. And in that statement, in that session, you said that NCIS didn't put in that Petty Officer Houlemard tried to pull you into his lounge room; do you remember that?
> A. Yes, sir. There's a number of things that weren't put in.
>
> . . . .
>
> Q. Just a "yes" or "no" answer: Do you remember that?
> A. Well, there really is no "yes" or "no" answer for this.
>
> Q. Do you remember that taking place, yes or no?
> A. Yes, I remember that, but there was----
>
> Q. Thank you. Just please answer "yes" or "no." You'll be given a chance to answer through the defense counsel's questions.
> And in that time, you said that Petty Officer Houlemard tried to pull you into his lounge room. Do you remember that?
> A. Yes, sir.
>
> Q. But you didn't say that today, did you?
> A. No, sir.
>
> Q. You didn't testify to that?
> A. No, sir.
>
> Q. And you were adamant at that prior session that that be included?
> A. Yes, sir.
>
> Q. But today you've mentioned nothing about that.
> A. Yes, sir.
>
> Q. Now, this--and the judge asked you specifically, "Is there anything else that was not included in that statement?" Do you remember that?

A. I don't recall that, sir, no.

Q. And you answered, "That is everything I wanted entered into statement [sic]."
A. I don't recall that, sir.

Q. But now you are saying additional things that you say that NCIS didn't put in that statement?
A. Yes, sir.

Q. But you've never mentioned these prior to this session in court?
A. No, sir.

Q. So your story is now changing again.
A. There were a number of things, sir, that were----

Q. Please answer. Is your story now being changed again? Yes or no.
A. No.

Q. No, it's not changing?
A. I don't have a "yes" or "no" answer for that question, sir.

Q. You never talked about this event in the prior motion, in the prior hearing session?
A. No, sir.

Id. at 570-72.

MIL. R. EVID. 304 sets forth rules for the admission or exclusion of confessions and admissions by an accused. MIL. R. EVID. 304(f) provides, in part:

> An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

The plain language of MIL. R. EVID. 304(f) appears to preclude the use of an accused's testimony from a hearing regarding suppression of a confession or admission for any purpose in the subsequent

trial of that accused, including impeachment. This interpretation is reinforced by pertinent language in the Analysis:

> *Testimony given under this subdivision may not be used at the same trial at which it is given for any other purpose to include impeachment*. . . . *See*, *e.g.*, [Mil. R. Evid.] 607-609; 613.

Appendix 22, Analysis of MIL. R. EVID. 304(f)(emphasis added); *see also United States v. Martinez,* 28 M.J. 56, 59 (C.M.A. 1989), *cert. denied*, 493 U.S. 814 (1989); *United States v. Dennis*, 16 M.J. 957, 966 n.4 (A.F.C.M.R. 1983).

We, therefore, conclude that the military judge erred in allowing the appellant to be impeached with his previous testimony in the suppression hearing. We now turn to the question of whether the appellant was prejudiced by this error. We conclude that he was not.

The test for constitutional error is whether the error was harmless beyond a reasonable doubt. *United States v. Walker,* 57 M.J. 174, 178 (C.A.A.F. 2002)(citing *Chapman v. California,* 386 U.S. 18, 24 (1967)). The test for nonconstitutional error is "whether the error itself had substantial influence" on the findings. *Id*. (quoting *Kotteakos v. United States,* 328 U.S. 750, 765 (1946)). "If so, or if one is left in grave doubt, the conviction cannot stand." *Id*.

The Constitution precludes the use of testimony given by an accused at a suppression hearing as evidence of guilt on the merits. *Simmons v. United States,* 390 U.S. 377, 394 (1968). However, the Supreme Court has not decided whether the Constitution precludes use of such testimony for impeachment. *United States v. Salvucci*, 448 U.S. 83, 93-94 (1980). The federal courts that have considered this issue have concluded that the Constitution does <u>not</u> bar the use of suppression hearing testimony for impeachment. *See United States v. Jaswal*, 47 F.3d 539, 543-44 (2nd Cir. 1995); *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1291 (9th Cir. 1994); *United States v. Quesada-Rosadal,* 685 F.2d 1281, 1283 (11th Cir. 1982); *see also Salvucci*, 448 U.S. at 94 n.8, and cases cited therein; *United States v. Kahan,* 415 U.S. 239, 243 (1974)(reasoning that "[t]he protective shield of *Simmons* is not to be converted into a license for false representations. . . .").

Based on these authorities, we do not believe this error is of constitutional dimensions, and therefore the proper test for prejudice is "whether the error itself had substantial influence" on the findings. *Walker*, 57 M.J. at 178 (quoting *Kotteakos*, 328 U.S. at 765. We find that it did not.

The appellant's theory of the case was that he acted in self-defense, when AO3 Houlemard attacked him. We agree with the appellant that his credibility was critical to the defense theory

of the case. Unfortunately for the appellant, the members chose the credibility of the victim and others who witnessed his offenses over his credibility. So do we. Art. 66(c), UCMJ.

When a person uses deadly force, the defense of self-defense does not apply unless both of the following are true:

> (1) the person must have apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on him; and
>
> (2) the person must have subjectively believed that the force he used was necessary for protection against death or grievous bodily harm.

R.C.M. 916(e)(1). The use of a knife to stab a person constitutes the use of "deadly force." *United States v. Regalado*, 33 C.M.R. 12, 16 (C.M.A. 1963).

In addition, R.C.M. 916(e)(4) provides that:

> The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

"We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F. 1999).

As can be seen from the record, the government's case was very strong. Every witness, including the appellant, stated that the appellant was arguing with AO3 Houlemard and that they both advanced toward each other. The appellant admitted that during the argument he said to AO3 Houlemard, "Fxxx you" and "What's your fxxxing problem?"[2] Even the testimony of the defense witness, Seaman (SN) Montoya, demonstrates that the appellant was belligerent toward AO3 Houlemard, and appears to indicate that the appellant was at least a willing participant in mutual combat, which is inconsistent with self-defense.

The defense case, on the other hand, relied almost entirely on the credibility of the appellant. The trial counsel aggressively attacked the appellant's credibility in various ways. For example, the trial counsel asked the appellant about discrepancies between his trial testimony and the testimony of other witnesses, such as that of AO3 Houlemard, AW3 Connell, and

[2] The members convicted the appellant of uttering provoking words ("fxxx you" and "fxxx your mama") to AO3 Houlemard prior to the beginning of the fight.

AO3 Littledale that the appellant was disruptive and annoying, rather than friendly, when he stuck his head in their window; the appellant's comment, "fxxx your mom," which the appellant denied making, but which AO3 Houlemard and Aviation Warfare Systems Operator Third Class (AW3) Connell both testified about; and the many people who heard his remark in reference to "East L.A.," but which the appellant denied making.

The trial counsel also used his cross-examination of the appellant to highlight inconsistencies between his trial testimony and his previous written statement to NCIS, including: (1) his relationship with SN Montoya ("friend" who "always gives me haircuts" vs. "acquaintance" who has cut his hair only twice); and (2) the timing of when he pulled his knife (before the fight began, as in his statement, or after it began, as in his testimony). The trial counsel further focused on the appellant's drinking that evening; his belligerent attitude and profanity toward AO3 Houlemard; the fact that AO3 Houlemard was obviously unarmed; and the fact that the appellant continued to stab AO3 Houlemard until SN Montoya broke up the fight. Additionally, the trial counsel focused on the appellant's pre- and post-fight behavior: his failure to walk away or yell for help; his failure to notify the authorities or seek help for AO3 Houlemard; his flight from the barracks after the fight; and his hiding of the knife.

Finally, in the government's case in rebuttal, the trial counsel called one of the NCIS agents to testify about how the appellant's statement was taken, and to rebut the appellant's contention that exculpatory events had been deliberately ignored and omitted from the statement.

From the foregoing, it is obvious that the appellant had serious credibility problems without reference to the testimony from the suppression hearing. But, we also conclude from the record that the cross-examination regarding that testimony added nothing significant to the government's case.

First, we note that the appellant's prior testimony was not actually admitted into evidence. The trial counsel merely questioned the appellant about this previous testimony. When the appellant failed to remember what he told the military judge during the earlier hearing, the trial counsel made no effort to introduce a transcript of that testimony into evidence.

Significantly, the only new material information that came from the trial counsel's cross-examination was the appellant's admission that he had previously claimed that AO3 Houlemard tried to drag him into the Room 406 lounge--a fact to which the appellant did not testify at trial. The members were already aware that there were discrepancies between the appellant's trial testimony and his statement to NCIS, and they had heard the appellant's testimony that the NCIS agents had refused to add some information to his statement, which the appellant felt was

exculpatory. The members would also learn from the Government's case in rebuttal that the NCIS agent denied the appellant's claims of unfair treatment. The cross-examination regarding the appellant's suppression hearing testimony was simply insignificant in the overall context of this case. We, therefore, conclude that it did not have "substantial influence" on the findings, or the sentence, in this case. Furthermore, even if we were to apply the standard for constitutional error, we would still find this error to be harmless beyond a reasonable doubt.

Therefore, although we find error in allowing the trial counsel to cross-examine the appellant about his testimony in the pretrial hearing, we find that the error was harmless beyond a reasonable doubt. Accordingly, we decline to grant relief.

Limitation Upon *Voir Dire* Examination

In the appellant's fourth assignment of error, he asserts that the military judge erred by refusing to allow his defense counsel to ask certain questions during *voir dire*. The appellant avers that this court should set aside the findings and the sentence. We disagree.

The scope and nature of the *voir dire* examination of the members is within the discretion of the military judge. R.C.M. 912(d). A military judge's limitations on *voir dire* will result in reversal "'only when a clear abuse of discretion, prejudicial to a defendant, is shown.'" *United States v. Loving,* 41 M.J. 213, 257 (C.A.A.F. 1994)(quoting *United States v. Smith,* 27 M.J. 25, 28 (C.M.A. 1988), *aff'd*, 517 U.S. 748 (1996)).

The appellant's defense submitted a list of proposed *voir dire* questions for the military judge to approve. Appellate Exhibit 15. The military judge questioned the relevance of proposed questions #21 and #22, which read as follows:

21. Do all members understand that it is my job as defense counsel to make tactical decision [sic] in this case and that Airman Recruit Mora may not agree with all of my tactical decisions?; and

22. If you disagree with or dislike a tactical decision which has been made, will you hold that against me and not Airman Recruit Mora?

As justification for these questions, the appellant's counsel stated that the questions were included,

> to filter out those members which would be prejudiced, say, for example, if the defense counsel asked harsh questions against the victim, whether or not they would be predisposed to dislike the accused based on the

counsel's own actions, his counsel's actions.

Record at 134. The military judge refused to allow the defense counsel to ask these two questions during *voir dire*.

We find no abuse of discretion by the military judge in this case. The questions proposed by the appellant's counsel were vague in the extreme. "Tactical decisions" can refer to a wide range of decisions made by counsel, many of which are not even apparent to the members--or indeed, to the court. Allowing these two questions would likely have served no purpose other than to confuse the members. We express no opinion about whether a properly worded question about the impact of harsh questioning of the victim might have been permissible, since the appellant's counsel did not propose such a question. As such, we decline to grant relief.

Conclusion

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

Senior Judge RITTER and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court