**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman MIKEL D. BROWN**
**United States Air Force**

**ACM 37333**

**24 July 2009**

Sentence adjudged 23 September 2008 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Charles E. Wiedie.

Approved sentence: Bad-conduct discharge, confinement for 90 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, Major Michael A. Burnat, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges



PER CURIAM:

Consistent with his pleas, a military judge found the appellant guilty of one specification of larceny and one specification of housebreaking, in violation of Articles 121 and 130, UCMJ, 10 U.S.C. §§ 921, 930. A panel of officer members sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, 90 days confinement, and a reduction to the grade of E-1. The convening authority approved the adjudged sentence. On appeal, the appellant asks this Court to set aside the sentence. The appellant asserts that he was denied the right to a fair and impartial jury when a member indicated that stealing, even for life and death purposes, was never justified and that the member's opinion was, at a minimum, evidence of an implied bias that the

member had an inelastic predisposition toward punishment.* Finding no prejudicial error, we affirm.

*Background*

The appellant elected to plead guilty to the charges and specifications and to be sentenced by officer members. Following the acceptance of the appellant's guilty plea, trial counsel conducted voir dire and asked the prospective members whether stealing may seem justified for purposes of life or death, to which Lieutenant Colonel (Lt Col) RS replied "no." The military judge conducted individual voir dire on Lt Col RS but did not ask him any additional questions on whether stealing was ever justified. Trial counsel and trial defense counsel did not conduct individual voir dire on Lt Col RS, nor did they exercise a challenge against Lt Col RS. He was ultimately selected as a panel member.

*Right to Fair and Impartial Jury*

An accused has a constitutional and a statutory right to a fair and impartial jury. *United States v. Downing*, 56 M.J. 419, 421 (C.A.A.F. 2002). Absent an objection at trial to the impaneling of a member, we apply a plain error analysis to determine if an accused's right to a fair and impartial jury has been violated. *United States v. Nieto*, 66 M.J. 146, 149 (C.A.A.F. 2008); Mil. R. Evid. 103(d). To prevail under a plain error analysis, the appellant bears the burden of showing that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). Here the appellant did not object, at least not at trial, to the impaneling of Lt Col RS as a member. Thus we will apply a plain error analysis to determine whether the impaneling of Lt Col RS deprived the appellant of his right to a fair and impartial jury.

A member shall 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." Rule for Courts-Martial 912(f)(1)(N). This rule applies to both implied and actual bias. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). With implied bias, the focus is on the perception or appearance of fairness of the military justice system, as viewed through the eyes of the public. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). Simply stated, implied bias exists when most people in the same position would be prejudiced. *Daulton*, 45 M.J. at 217 (quoting *United States v. Smart,* 21 M.J. 15, 20 (C.M.A. 1985)).

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* This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Here we find no error and certainly no plain error. The appellant has not met his burden of establishing that Lt Col RS's comments evinced an inelastic predisposition toward punishment. Arguably, Lt Col RS's comments evinced an opinion on his part that those who commit crimes, even for life and death reasons, should be held accountable. Accountability and punishment are not synonymous. However, even if they are, Lt Col RS's comments do not evince an inelastic predisposition toward a particular sentence. Moreover, during voir dire Lt Col RS stated under oath that he: (1) did not have an inelastic predisposition toward a particular sentence; (2) could consider the full range of punishment from no punishment up to the maximum punishment; and (3) could be fair, impartial, and open-minded in his consideration of an appropriate sentence. There has simply been no evidence that Lt Col RS was biased against the appellant. Nor did Lt Col RS's presence on the panel raise the specter of implied bias. Finally, assuming for the sake of argument that it was error to keep Lt Col RS on the panel, such an error was not obvious and the appellant has failed to establish material prejudice to a substantial right. At the end of the day, we find the appellant was not denied his right to a fair and impartial jury.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL


STEVEN LUCAS, YA-02, DAF
Clerk of the Court