UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN C. CALHOUN
United States Air Force

ACM 37274

10 June 2010

Sentence adjudged 30 March 2008 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Stephen Ehlenbeck.

Approved sentence: Dishonorable discharge, confinement for 11 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Lance J. Wood, Major Imelda L. Paredes, and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

Contrary to the appellant's pleas, a panel of officer members sitting as a general court-martial convicted him of one specification of rape, one specification of aggravated assault by means likely to produce death or grievous bodily harm, one specification of aggravated assault with a dangerous weapon, four specifications of assault consummated by a battery, and two specifications of indecent assault, in violation of Articles 120, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 928, 934. The adjudged and approved sentence

consists of a dishonorable discharge, eleven years of confinement, and reduction to the grade of E-1. On appeal the appellant asks the Court to: (1) set aside his findings of guilt and the sentence; (2) set aside his rape conviction, aggravated assault by means likely to produce death or grievous bodily harm conviction, aggravated assault with a dangerous weapon conviction, one of his assault consummated by a battery convictions, and indecent assault convictions; and, alternatively, (3) affirm only so much of his sentence that provides for a bad-conduct discharge and five years of confinement.

The basis for his request is that he opines: (1) the evidence is legally and factually insufficient to support his rape conviction, aggravated assault by means likely to produce death or grievous bodily harm conviction, aggravated assault with a dangerous weapon conviction, one of his assault consummated by a battery convictions, and indecent assault convictions; (2) the military judge abused his discretion in sua sponte excusing a member after assembly but prior to deliberations on findings; (3) that portion of his sentence which provides for a dishonorable discharge and eleven years of confinement is inappropriately severe; and (4) he received ineffective assistance of counsel.[1] We disagree, and finding no prejudicial error, we affirm the findings and the sentence.

Background

During the late evening hours of 7 April 2007, the appellant was at a downtown bar, and while there, he physically assaulted two patrons. After Mr. ID declined the appellant's offer to fight, the appellant struck Mr. ID in his face, lacerating his lip. Later that night, the appellant struck Staff Sergeant (SSgt) JJ in his face, breaking SSgt JJ's cheekbone, splitting SSgt JJ's lip, and chipping SSgt JJ's teeth, after the appellant erroneously assumed that SSgt JJ was "mouthing off."

In May 2007, the appellant physically assaulted another individual. He punched Mr. BW six to nine times in his face after Mr. BW told him he did not like one of the appellant's friends. On 27 May 2007, Ms. LL, an acquaintance of the appellant, was removing clothes from her vehicle when the appellant approached her, placed his groin between her outstretched legs and told her "she wanted it." Ms. LL rebuffed the appellant's advances and the appellant left. That same night, the appellant physically assaulted two other individuals. Ms. RC and Mr. FB were in a truck outside a downtown bar waiting to give a friend inside the bar a ride home. The appellant and his friends were blocking the exit door to the bar and Ms. RC asked one of the appellant's friends if they could move away from the bar so that their friend could exit. The appellant became angry and struck Ms. RC approximately five times in her face, and struck Mr. FB in his nose, thereby bruising and cutting Ms. RC's face, "popping her jaw out," and giving Mr. FB a bloody nose and lip. Ms. RC, afraid for her safety, departed with Mr. FB in the truck and the appellant, following the truck in his vehicle in hot pursuit, attempted to run

[1] Issues 3 and 4 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

the truck Ms. RC was driving off the road. Ms. RC eventually escaped and reported the incident to local law enforcement authorities. The appellant returned to Ms. LL's residence. She was on a bed and he approached her, grabbed her breasts, and told her "she wanted it." Ms. LL again rebuffed the appellant's advances and the appellant left.

In late May 2007, the appellant made sexual advances toward Ms. TS, a female with whom he had previously had a brief sexual relationship. When Ms. TS rebuffed his advances, the appellant shoved her onto a bed, took her pants off, held her hands down, and raped her. At trial, Mr. ID, SSgt JJ, Mr. BW, Ms. RC, Mr. FB, Ms. LL, and Ms. TS testified against the appellant. The appellant testified in his own defense and told the members that he struck Mr. ID, SSgt JJ, and Mr. BW in self-defense. He also testified that another individual struck Ms. RC and Mr. FB and denied knowingly pursuing Ms. RC and Mr. FB. Lastly, the appellant testified that he rebuffed Ms. LL's sexual advances and that Ms. TS consented to the sexual intercourse with him. The appellant's trial defense counsel requested and the military judge gave the members a spillover instruction. Prior to deliberations, one of the members, First Lieutenant (1st Lt) SO, informed the military judge that she had scheduled leave for the weekend and if the court-martial proceeded into the weekend she would suffer a financial loss of approximately $600 on airline tickets she had purchased. Over the appellant's trial defense counsel's objection and fearing that 1st Lt SO would rush the deliberations because she would be more preoccupied with her leave plans than the court-martial, the military judge, finding actual and implied bias, excused 1st Lt SO.

Legal and Factual Sufficiency of the Findings

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

"[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specifications in question.

Concerning the rape conviction we note that Ms. TS's testimony that the appellant raped her sufficiently supports the appellant's conviction. The appellant, in his brief,

impugns Ms. TS's credibility, but the trier-of-fact heard both testimonies and believed her over him. With respect to the appellant's convictions for assaulting Mr. ID, SSgt JJ, Mr. BW, Ms. RC, and Mr. FB, the members likewise heard the victims' testimony and the appellant's testimony and believed the victims. Moreover, the admitted photographs of Mr. ID, SSgt JJ, and Mr. FB, as well as SSgt JJ's medical records, all showed significant injuries and legally support the appellant's assault convictions.[2] Concerning the appellant's indecent assault convictions, the members heard Ms. LL's testimony and the appellant's testimony and likewise believed Ms. LL over the appellant. Her testimony legally supports the appellant's indecent assault convictions.

Lastly, the test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of the offenses of which he has been found guilty.

Excusal of Court Member

An accused has a constitutional and regulatory right to a fair and impartial panel. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie." Rule for Courts-Martial (R.C.M.) 912(f)(4). A member must 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." R.C.M. 912(f)(1)(N). A military judge's "decision whether or not to excuse a member sua sponte is . . . reviewed for an abuse of discretion." *Strand*, 59 M.J. at 458 (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)).

"Because 'a challenge for cause for actual bias is essentially one of credibility,' the military judge's decision is given 'great deference' because of his or her opportunity

[2] We find the appellant's argument that a single blow to the head or face cannot constitute a means likely to produce death or grievous bodily injury unpersuasive. Staff Sergeant JJ's photographs and his medical records obviously depict a battered individual, and his fractured cheekbone is precisely the type of injury that falls within the definition of grievous bodily injury.

to observe the demeanor of court members and assess their credibility . . . ." *United States v. Miles*, 58 M.J. 192, 194-95 (C.A.A.F. 2003) (quoting *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)). However, we give less deference to a military judge's finding of implied bias because a finding on implied bias is objectively "viewed through the eyes of the public. . . focusing on the appearance of fairness." *Strand*, 59 M.J. at 458 (citations omitted). "[I]mplied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased].'" *Id*. at 459 (second alteration in original) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)).

We find that the military judge did not abuse his discretion in excusing 1st Lt SO for actual bias. The record makes clear that 1st Lt SO was concerned about proceeding into the weekend, and the military judge had a legitimate concern that 1st Lt SO would rush the deliberations to take leave. Allowing 1st Lt SO to potentially rush the deliberations would have created a substantial doubt as to legality and fairness of the appellant's court-martial and the military judge was wise to excuse 1st Lt SO. Moreover, allowing 1st Lt SO to remain on the panel would have created doubts about the fairness of the appellant's court-martial. Accordingly, the military judge did not abuse his discretion in finding implied bias.

Lastly, assuming, arguendo, the military judge abused his discretion, we find no prejudice. The appellant asserts that by excusing 1st Lt SO, the military judge gave the government a mathematical advantage on findings. We disagree. Prior to 1st Lt SO's removal, the appellant's court-martial panel consisted of six members and the government was obliged to receive four votes (66%) for any finding of guilty. *See* R.C.M. 921(c)(2)(B); Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, Table 2-1 (1 Jan 2010). After 1st Lt SO's removal, the appellant's court-martial panel consisted of five members and the government was obliged to receive four votes (80%) for any finding of guilty. R.C.M. 921(c)(2)(B); D.A. Pam. 27-9, Table 2-1. Thus from a mathematical perspective, 1st Lt SO's removal made it more difficult for the government to convict the appellant of the offenses. This hardly qualifies as a disadvantage to the appellant and does not rise to level of prejudice.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v.*

Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant victimized seven individuals, several of them severely. He is violent and his crimes are among the most serious crimes recognized by society. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find the appellant's sentence, one which includes a dishonorable discharge and 11 years of confinement, inappropriately severe.

Ineffective Assistance of Counsel

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent and we will not second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the heavy burden of establishing that his trial defense counsel were ineffective. *See United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient, and, if so (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant asserts that one of his trial defense counsel, Mr. JT, was ineffective because he failed to: (1) adequately investigate the rape and indecent assault charges; (2) file a motion to sever the rape and indecent assault charges from the remaining charges; and (3) call several witnesses whose testimony could have exonerated him of the rape charge, specifically Senior Airman (SrA) TH, Ms. CK, Mr. MG, and Ms. HC.

In response to the appellant's ineffective assistance of counsel assertion, the government submitted post-trial affidavits from the appellant's trial defense counsel, Mr. JT and Captain (Capt) KP. Both Mr. JT and Capt KP aver they thoroughly investigated all charges, to include the rape charge, by reviewing the report of investigation and police reports and interviewing all the potential witnesses listed in the aforementioned documents or suggested by the appellant or other witnesses. Concerning their failure to move for a severance, Capt KP asserts they considered making such a motion but opted not to because they believed such a motion would have been futile, and they did not want to expose the appellant to two courts-martial and two sentences. Lastly, concerning the

alleged failure to call witnesses, Mr. JT and Capt KP aver Mr. JT interviewed Ms. HC and that Ms. HC was uncooperative, hostile, and would have provided damaging testimony to the appellant's case. As a result, they made a tactical decision not to call her as a witness. They also aver that they called SrA TH, Ms. CK, and Mr. MG as witnesses, and while they did not provide the information highlighted in the appellant's affidavit, they did provide favorable testimony to the appellant.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations or when the record as a whole compellingly demonstrates the improbability of the asserted facts. *Id*. at 248. Such is the case here.

In the case at hand, the affidavits conflict in two aspects—whether the appellant's trial defense counsel adequately investigated the rape charge, and whether they called SrA TH, Ms. CK, and Mr. MG as witnesses. Concerning the alleged failure to investigate the rape charge, we find this assertion to be speculative, conclusory and without merit. Moreover, the record as a whole compelling demonstrates Mr. JT and Capt KP adequately investigated the charges. Concerning the failure to move for a severance and the failure to call Ms. HC as a witness we find that these were sound, tactical decisions we will not second guess. Lastly, with respect to the appellant's assertion that his trial defense counsel failed to call SrA TH, Ms. CK, and Mr. MG as witnesses, the record as a whole compellingly demonstrates the improbability of this assertion. The appellant's trial defense counsel called these individuals as witnesses during its case-in-chief and these witnesses provided favorable testimony for the appellant. In short, the appellant's trial defense counsel's conduct was not deficient.

Moreover, even assuming deficient conduct, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. On this point we note that the appellant's trial defense counsel asked for and received a spillover instruction and such an instruction mitigated any harm by failing to move for a severance of the charges.

Unlawful Command Influence

While not raised as an assignment of error, the appellant, in his affidavit asserts he was a victim of unlawful command influence because following his trial, his flight supervisor, Mr. KK, spoke negatively about him, his character, and how he hurt his victims. The appellant asserts that these comments hindered his efforts to obtain clemency statements from his co-workers. The prohibition against unlawful command

influence arises from Article 37(a), UCMJ, 10 U.S.C. § 837(a), which provides, in part, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case." Article 37(a), UCMJ. Additionally, the burden of production on unlawful command influence issues is on the party raising the issue; here the burden rests with the appellant. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). In determining whether or not the appellant has met his burden, "[t]he test is [whether there exists] 'some evidence' of 'facts which, if true, constitute unlawful command influence, and [whether] the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.'" *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).

Once the appellant has met the burden of production and proof, the burden shifts to the government to "prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence." *Id.* (quoting *Biagase*, 50 M.J. at 151). Here, the appellant has failed to meet his burden of production. At best he offers a general allegation of unlawful command influence and while the threshold for triggering an unlawful command influence is low, bare allegations or mere speculation are not sufficient to warrant an inquiry. *Stombaugh*, 40 M.J. at 213. There is simply no evidence that Mr. KK's post-trial actions hindered the appellant's ability to obtain clemency letters. As such, we find no unlawful command influence.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[3] This Court notes the court-martial order (CMO), dated 8 August 2008, contains incorrect language in Specification 1 of Charge II. This specification should contain the language "in the jaw with his fist" instead of the phrase "on the face with his fist." We order the promulgation of a corrected CMO.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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