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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant HOWARD D. CHATMAN
United States Air Force

ACM 36037 (f rev)

11 July 2006

Sentence adjudged 2 July 2004 by GCM convened at Lajes Field, Azores, Portugal. Military Judge: William M. Burd, Thomas W. Pittman, and Barbara E. Shestko (*DuBay* hearing).

Approved sentence: Dishonorable discharge, confinement for 7 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, and Captain Jefferson E. McBride.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial consisting of officer and enlisted members, of one specification each of rape and disorderly conduct, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934.[1] His approved

[1] The appellant was acquitted of one specification of indecent exposure, in violation of Article 134, UCMJ.

sentence consists of a dishonorable discharge, confinement for 7 years, and reduction to E-1. On appeal, he contends, inter alia, that the trial counsel improperly exercised his peremptory challenge to strike Master Sergeant (MSgt) M, a member of the appellant's ethnic group, from the panel.

On 3 January 2006, this Court ordered a post-trial hearing pursuant to *United States v. Hurn*, 55 M.J. 446, 449 (C.A.A.F. 2001), *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), and *United States v. DuBay*, 37 C.M.R. 411, 412 (C.M.A. 1967) for an inquiry into the trial counsel's reasons for exercising his peremptory challenge. The trial counsel testified at the post-trial hearing and was cross-examined by the appellant's counsel. The military judge who presided at the post-trial hearing found the trial counsel's testimony to be "credible and candid."

Parties may not exercise their peremptory challenges to exclude prospective court members on the basis of race or gender. *Hurn*, 55 M.J. at 448 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988)). When, as here, a timely objection is lodged to a peremptory challenge, the burden shifts to the challenging party to provide a race-neutral explanation. *United States v. Moore*, 28 M.J. 366, 368-69 (C.M.A. 1989). The explanation may not be "unreasonable, implausible, or . . . otherwise make[] no sense." *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997).

MSgt M, in addition to being a member of the appellant's ethnic group, knew the appellant, had reviewed the appellant's performance reports and certified them for use as exhibits at the appellant's court-martial and knew that the appellant was married. The military judge at the appellant's trial was sufficiently concerned about this last fact that he *sua sponte* asked the appellant if he was comfortable with having MSgt M remain on the panel. The appellant responded that he was.

The trial counsel made passing reference to this exchange when exercising his peremptory challenge: "I'll note for the record . . . there are non-discriminatory reasons. They are the reasons you talked about." During the post-trial hearing, the trial counsel elaborated further:

> I have had 14, at that point 13 years of trial experience and people bring stereotypes into cases and one of those being that sometimes it is difficult for someone to understand why someone who is married would rape someone else. I didn't want [MSgt M] in there thinking about that question, "Well, he is married, why would he need to rape somebody?"

At trial, the trial counsel provided an additional explanation for his peremptory challenge, noting that both the appellant and MSgt M were married to foreign nationals from the same country. During the post-trial hearing, the trial counsel explained that he anticipated introducing evidence of a rape allegation levied against the appellant by his

spouse, but later recanted.[2] The government's theory about the recantation was that the appellant's spouse was fearful she would be deported to her home country unless she recanted. Trial counsel noted such a theory "could offend [MSgt M]."

The appellant argues that the trial counsel's stated reasons for challenging MSgt M are not true; that, in fact, they are merely a pretext for eliminating a member of a racial minority. We disagree. Like the military judge who presided at the post-trial hearing, we find the trial counsel's testimony credible. Although he readily conceded that his explanations at trial were "not the most artfully stated . . . and . . . not the clearest thing in the world," we find them to be plausible, consistent with his post-trial testimony, and, more importantly, consistent with the record of the contemporaneous proceedings. We conclude that the trial counsel's peremptory challenge of MSgt M was made for a legitimate, race-neutral reason, and we resolve this assignment of error against the appellant.

We likewise find the appellant's remaining assignments of error without merit. The military judge did not abuse his discretion by permitting the trial counsel to cross-examine a defense sentencing witness about the prior rape allegation. *See United States v. Becker*, 46 M.J. 141, 143 (C.A.A.F. 1997). Nor were the appellant's trial defense counsel ineffective in putting that particular witness on the stand. On the contrary, they made a tactical decision that the witness's favorable testimony was more helpful than the recanted allegation was harmful. Such tactical decisions are well within the province of competent counsel and are not ordinarily subject to second-guessing on appeal. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). The appellant's rape and disorderly conduct specifications were not multiplicious because they were based on separate facts. *See United States v. Britton*, 47 M.J. 195, 197 (C.A.A.F. 1997); *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997). Finally, we conclude that the evidence was legally and factually sufficient to sustain the appellant's conviction for both offenses. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

The 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 findings and sentence are

AFFIRMED.

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LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[2] In fact, the prosecution did raise this allegation during cross-examination of one of the appellant's character witnesses during sentencing.