UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain JASON M. FYE
United States Air Force

ACM 36476

26 November 2007

Sentence adjudged 29 June 2005 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Adam Oler.

Approved sentence: Confinement for 6 months and a dismissal.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Robert V. Combs, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his plea, of one specification of wrongfully and knowingly possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. His adjudged and approved sentence consists of a dismissal and confinement for 6 months.

On appeal, the appellant alleges error in that the military judge denied the defense's challenge for cause against Lt Col C; the military judge erred by not granting[1] a mistrial after he allowed improper rebuttal testimony and waited several hours before

[1] The appellant asserted error by the military judge's failure to "grant" a mistrial, even though one was never requested. The proper issue is whether the military judge's failure to sua sponte "declare" a mistrial was error.

giving a curative instruction to members; and the appellant's sentence to a dismissal and 6 months confinement is inappropriately severe.[2]

Background

At trial, the appellant entered a provident plea and elected to have his pre-sentencing case heard by officer members. The appellant possessed in excess of 30,000 images of child pornography, including pictures of children as young as 8 or 9. He was an exceptional performer who was awarded a four-year scholarship to Virginia Military Institute while enlisted.

During voir dire, the trial counsel asked members if any member would be unable to view images of child pornography. Lt Col C answered that he would be concerned. During individual voir dire, this concern was explored and it was apparent that Lt Col C was not interested in viewing any pornography and if the judge determined it was pornography that was adequate for him. It was explained by the military judge that Lt Col C would be required to view all the evidence and give it the weight he felt it deserved. Lt Col C indicated he would follow the judge's instructions and that he could be impartial. The trial defense counsel made a challenge for cause asserting bias against Lt Col C, the military judge denied it, and explained his denial on the record. The liberal mandate and the appearance of unfairness were discussed by counsel and the military judge throughout voir dire.[3]

During presentation of the sentencing evidence, a number of character statements and the testimony of two character witnesses were offered by the trial defense counsel. The witnesses were questioned about their opinions and the basis of those opinions. Specifically, they were asked if they knew that the appellant had lied on his AF Form 1168s. The AF 1168s had been admitted in the government's case. In rebuttal, the trial counsel called the OSI agent to further explain the statements given by the appellant.

After an extended recess and several Rule for Courts-Martial (R.C.M.) 802 sessions, the military judge determined, sua sponte, that the testimony of the OSI agent on rebuttal was not admissible.[4] With the concurrence of all parties, the military judge determined he would inform the members that he had allowed impermissible testimony and he would give a strongly worded curative instruction. Both counsel agreed, had no objections to the instruction, and at no time was a mistrial requested. In fact, when specifically asked if there was a "[R.C.M.] 915 issue," the trial defense counsel responded negatively. The instruction was given at the very next session with members and again, during the sentencing instruction phase.

---

[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] Another member was challenged for cause by the trial defense counsel and the challenge was granted.
[4] Whether the testimony was or was not admissible is not a question in front of this Court.

Challenge for Cause

A military judge's denial of a challenge for cause is reviewed for abuse of discretion. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (citing *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). Any member whose presence on the court conflicts with the "interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality" must be removed for cause. R.C.M. 912(f)(1)(N). This rule encompasses both actual and implied bias. *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). Determinations of member bias, whether actual or implied, must be based on the totality of the surrounding circumstances, with due recognition that "challenges for cause are to be liberally granted." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007).

"Challenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations." *Clay*, 64 M.J. at 276-77. Whether implied bias exists is determined by objectively viewing the issue "through the eyes of the public, focusing on the appearance of fairness." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007); *Clay*, 64 M.J. at 276. "Accordingly, a military judge's ruling on implied bias, while not reviewed de novo, is afforded less deference than a ruling on actual bias." *Clay*, 64 M.J. at 276. Moreover, we accord the military judge no deference at all when he fails to indicate on the record the basis for his ruling, either as to the legal standard applied or the relevant facts upon which he relied. *Briggs*, 64 M.J. at 287. In this regard, "[w]e do not expect record dissertations but, rather, a clear signal that the military judge applied the right law." *Terry*, 64 M.J. at 305 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). In this case, the military judge explained the basis for his ruling, did not abuse his discretion, and applied the correct law.

Declaring a Mistrial

"The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). A mistrial is a drastic remedy which should only be granted in extraordinary cases. *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999). We review a military judge's ruling on the decision whether to grant a mistrial for an abuse of discretion. *See United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997). "As a matter of military law, the decision to declare a mistrial is within the sound discretion of the military judge." *United States v. Rosser*, 6 M.J. 267, 270 (C.M.A. 1979). There was no request for a mistrial and there was no reason for the military judge to sua sponte grant a mistrial. This issue is without merit.

Sentence Appropriateness

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We conclude that appellant's sentence, including the dismissal and confinement for 6 months, is not inappropriately severe.

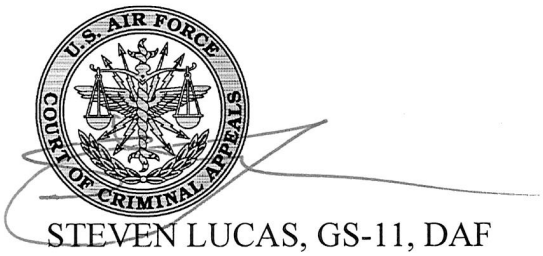
Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Judge WISE did not participate.

OFFICIAL



STEVEN LUCAS, GS-11, DAF
Clerk of the Court