UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major GREGORY K. MCMILLION
United States Air Force

ACM 36516

12 June 2008

Sentence adjudged 20 May 2005 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Ronald Gregory (sitting alone).

Approved sentence: Dismissal and confinement for 8 months.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Brendon K. Tukey.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Senior Judge:

A military judge sitting alone as a General Court-Martial convicted the appellant, contrary to his pleas, of two specifications of violating lawful general orders on divers occasions, one specification of failing to give notice and turn over to proper authority captured or abandoned property that had come into his possession, one specification of wrongfully and dishonorably directing the help of subordinates in furthering his actions to ship certain items from Iraq to the United States in violation of a lawful general order, one specification of wrongfully and dishonorably ordering members of his squadron to leave crates containing illicit items unopened until his return from Iraq, and one specification of wrongfully and dishonorably transporting firearms in interstate or foreign

commerce, in violation of Articles 92, 103, and 133, UCMJ, 10 U.S.C. §§ 892, 903, 933. The appellant was acquitted of two specifications of making false official statements in violation of Article 107, UCMJ, 10 U.S.C. § 907. He was sentenced to a dismissal, confinement for 12 months, and a reprimand. The convening authority approved the findings and only so much of the sentence as called for a dismissal and confinement for 8 months. On appeal, the appellant asserts 10 assignments of error. Finding no merit in any of the appellant's assigned errors, we approve the findings and sentence.

Background

The appellant was assigned to the 728th Air Control Squadron at Eglin Air Force Base, Florida. In April 2003, he deployed with his unit to Baghdad International Airport in Iraq. In October 2003, his unit sent him home early. In the findings phase of trial, the government presented numerous witnesses, many physical exhibits, and several documentary exhibits in its attempt to describe what the appellant had been doing during those six months in Iraq. Essentially, the government evidence showed that the appellant, while deployed with his unit, collected a wide variety of items that could be characterized as "war trophies" and shipped them home via government-owned aircraft. The appellant's booty included several dozen fully functional AK-47 rifle variants, rocket propelled grenade launchers, parts of an antiaircraft gun, hundreds of Iraqi combat knives, many Iraqi Army uniforms, approximately 1000 Iraqi Army berets, and a similar number of Iraqi Army socks. He also obtained a piece of Iraqi art, what appeared to be Iraqi Imperial Guard ledgers, and numerous other items. He packed his goods in crates and added the crates to a shipment of equipment scheduled to be returned to Eglin Air Force Base.

The appellant ordered his subordinates at Eglin to secure the shipment but not unpack it until he returned to Eglin to supervise. This order, according to testimony adduced at trial, raised concerns and suspicions among the Eglin-based senior Non-Commissioned Officers (NCOs) in the unit who knew that the standard practice was to unpack shipments within a few days of arrival in order to protect them from the Florida climate. Via e-mail and phone calls, the NCOs urged the appellant to allow them to unpack the crates and return the "equipment" to its proper place. When the appellant continued to refuse (asserting that it was his responsibility to protect the contents of the crates and make sure the contents got to the right places), the captain who had accompanied the crates back from Iraq decided to open them anyway. The captain and the NCOs assisting him quickly discovered items that were not supposed to be in the shipment. At that point they stopped opening crates and called in U.S. Customs authorities and the OSI. A thorough search of the crates revealed the items listed above. The appellant was then sent home from Iraq and was escorted directly to the local Air Force Office of Special Investigations (AFOSI) Detachment for questioning. His responses during the interrogation, earlier statements made by him to various individuals,

the observations of numerous witnesses, and the items discovered during the search became the basis for the charges levied against him.

At trial, the appellant made timely but unsuccessful motions to suppress many of the statements as well as the physical evidence obtained in the search. He resurrects several of these motions before us, arguing the military judge's rulings were in error. We address some of the appellant's assignments of error below and treat the others summarily at the conclusion of this opinion.

Unreasonable Multiplication of Charges

We review issues of multiplicity under a de novo standard. *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006). Claims of unreasonable multiplication of charges are reviewed for an abuse of discretion by the military judge. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). In the case sub judice, the appellant does not claim any of the charges are multiplicious for purposes of the findings phase of trial. He does argue, however, as he did at trial, that certain specifications represent an unreasonable multiplication of charges and therefore "artificially inflate the apparent nature of Appellant's criminal actions." He claims what "is essentially one transaction was made the basis for an unreasonable multiplication of charges against Appellant." The appellant made a timely motion at trial requesting the military judge combine the two Specifications of Charge I, the Specification of Charge II, and the three Specifications of Charge IV into a single Charge and Specification. Again on appeal, the appellant argues the military judge should have "dismissed the offenses as being an unreasonable multiplication of charges in accordance with this Court's opinion in *Roderick* and combined them into a single Article 92 offense." The military judge considered the defense motion and ultimately decided to combine Specification 1 of Charge I with the Specification of Charge II and combine Specification 2 of Charge I with the Specifications of Charge IV for sentencing purposes. This decision, in essence, first combined all the specifications related to obtaining and possessing the illicit goods, and then combined the specifications related to transporting those goods back to Eglin AFB.

We find the military judge did not abuse his discretion by combining the specifications in this way. First, we note that the specifications in question are not multiplicious. Each represents a distinct crime, each with its own distinct elements. *See, generally, United States v. Roderick*, 62 M.J. at 432-33. Second, in reviewing the specifications in accordance with the framework approved by our superior court in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), we agree with the military judge that the separate specifications do not represent an unreasonable multiplication of charges for the purposes of sentencing. The judge's decision to group the specifications as he did for purposes of "fairness" was certainly a logical choice clearly within his discretion. The appellant's assertion of error is therefore without merit.

Whether the Military Judge Erred by Failing to Recuse Himself

On the eve of trial, the appellant requested to release his defense counsel. The request was granted and two new defense attorneys were assigned to the appellant's case. Approximately five weeks later, the trial resumed, presided over by the same military judge. The appellant argues that the military judge should have excused himself from the case sua sponte because of information he received during the session five weeks earlier. Essentially, the appellant argues that the military judge was made aware the appellant's original attorneys did not believe his story, and that the military judge's statements during the earlier hearing indicated that he did not find the appellant credible, thus depriving him of a fair trial.

A judge's decision not to recuse himself is reviewed for plain error if the issue was not raised at trial. *United States v. Kawai,* 63 M.J. 591, 597 (A.F. Ct. Crim. App. 2006) (citing *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001)). Rule for Courts-Martial (R.C.M.) 902(a) states a military judge "shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Our superior court, in *United States v. Quintanilla,* 56 M.J. 37 (C.A.A.F. 2001) explained "[t]here is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *Id.* at 44. In *United States v. Robbins,* 48 M.J. 745 (A.F. Ct. Crim. App. 1998), this court posited "[w]hether a military judge's impartiality might reasonably be questioned is an objective test. Would a reasonable person, with knowledge of *all* of the applicable facts, have a reasonable doubt regarding the military judge's impartiality?" *Id.* at 753-54 (citing *United States v. Kincheloe,* 14 M.J. 40, 50 (C.M.A. 1982)). We have also pointed out that a military judge has an "equally weighty responsibility not to recuse himself or herself unnecessarily." *Kawai*, 63 M.J. at 597 (citing *Kincheloe*, 14 M.J. at 50 n. 14)

In the case at bar, the appellant has utterly failed to overcome the presumption that the military judge was biased in any way. The appellant rests his argument on the interaction between himself, the judge, and counsel during the hearing that occurred approximately five weeks before the trial began in earnest. We have examined the interaction between the parties at this hearing and disagree with the appellant's interpretation that the military judge somehow became so biased during this brief exchange that he could not be impartial five weeks later at trial. The appellant's own actions in the intervening period belie his current claims. According to an affidavit supplied by his trial defense counsel in response to a separate assigned error, the appellant "suggested that I needed to do what I could to maintain Col Gregory as the military judge in his case" and "essentially instructed me to ensure that any trial date . . . include . . . Colonel Gregory." Additionally, the appellant elected to be tried by a military judge sitting alone approximately four weeks after the conclusion of the earlier hearing. When the trial began about a week later, the appellant confirmed this choice,

informing the military judge that he (the appellant) desired to be tried by Judge Gregory alone. When the military judge invited questions or challenges to his service as military judge for the trial, the appellant and his counsel remained silent. Further, a careful examination of the record reveals the trial was conducted in a fair, impartial manner. The facts and law supported the military judge's rulings, no statements were made on the record indicating bias on his part. The judge ruled in favor of the appellant on several motions, acquitted him of two specifications, and exercised his discretion in combining many of the specifications in sentencing, thus significantly reducing the appellant's punishment exposure. We see no evidence indicating "a reasonable person, with knowledge of *all* of the applicable facts [would] have a reasonable doubt regarding the military judge's impartiality[.]" *Robbins*, 48 M.J. at 754.

We note the appellant cites *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001) for the proposition that a military judge's failure to disqualify himself is reviewed for an abuse of discretion. As stated above, we believe that the proper standard of review on this issue, given there was no objection at trial, is a "plain error" standard. However, in an abundance of caution we have also examined the judge's decisions for an abuse of discretion and find none. The appellant's argument of bias is so tenuous that the military judge's decision to not sua sponte recuse himself was soundly within his discretion.

Incomplete Record of Trial

We review issues of whether omissions from the record of trial are "substantial" under a de novo standard. *United States v. Stoffer,* 53 M.J. 26, 27 (C.A.A.F. 2000).

The prosecution used slide presentations during opening statement, closing argument, and during the questioning of two government witnesses. None of these slide presentations are included in the record of trial. The appellant argues the absence of these slide presentations from the record are "substantial omissions" necessitating that we set aside the findings and sentence.

Neither party disputes the absence of the slides or the appellant's right to a complete record of trial under the circumstances of this case. *See* Articles 19 and 54, UCMJ, 10 U.S.C. §§ 819, 854; R.C.M. 1103(b)(2)(A); *United States v. Henry,* 53 M.J. 108 (C.A.A.F. 2000). The issue is whether the omission of the slides from the record is substantial. "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut." *Henry,* 53 M.J. at 111 (citing *United States v. McCullah,* 11 M.J. 234, 237 (C.M.A. 1981)). However, "[i]nsubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript." *McCullah,* 11 M.J. at 236-37 (quoting *United States v. Donati,* 14 U.S.C.M.A. 235, 34 C.M.R. 15 (1963)). Whether a given omission is substantial or not is a fact specific question that must be approached on "a case-by-case basis." *United States v. Abrams,* 50 M.J. 361, 363 (C.A.A.F. 1999).

We have carefully examined the record of trial and find the omission of the government's slides to be insubstantial. The slides used by government counsel during opening statement and closing argument seem to be outlines of what counsel was saying, designed to help the factfinder follow the statement and argument, respectively. The appellant and his counsel were able to view the slides and offered no objection to their content. Further, as the government points out, opening statements and closing argument are not evidence. Finally, we note the factfinder in this case was a military judge, not a panel of members. If inappropriate material had been present in the slides, we are confident the military judge would have excluded or ignored it. (*See, generally, United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) ("[M]ilitary judges are presumed to know the law and to follow it, absent clear evidence to the contrary.") If substantial information had been included in the slides, we are also confident that this highly experienced judge would have insisted they be included in the record. As for the slides used by government counsel when questioning the two witnesses, a close examination of the record reveals that these slides were simply enlarged versions of items already admitted into evidence. No new evidence was included in the slides. Since the items were properly included in the record as prosecution exhibits, failure to include the enlarged versions of the same exhibit is not a substantial omission. We therefore find no merit in this assignment of error.

While we find no reversible error today under the facts of this particular case, we point out that failure to include demonstrative aids in the record, under different facts and circumstances, could easily lead to a "substantial omission" necessitating corrective action by this court. The better practice is to attach such aids as appellate exhibits and eliminate possible assertions of error.

Assignments of Error Submitted Pursuant to United States v. Grostefon[1]

We have carefully examined the assignments of error set forth by the appellant pursuant to *United States v. Grostefon* and find them to be without merit.

Cumulative Error Doctrine

Having found no error in the appellant's submitted assignments of error or during our own, independent review of the record, we find the cumulative error doctrine does not apply to the appellant's case.

Conclusion

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);

[1] *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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

AFFIRMED.

Judge THOMPSON did not participate.

OFFICIAL

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