UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman LAWRENCE M. ROGERS
United States Air Force

ACM 37376

19 March 2010

Sentence adjudged 06 August 2008 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Le T. Zimmerman.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Judge:

On a spring weekend night in downtown Augusta, Georgia, two soldiers, Sergeant G and Specialist D, walked down a sidewalk. From the opposite direction the appellant and his friends, a male and two females, approached. As they passed, Sergeant G greeted them with words to the effect of "Good night, ladies" and kept walking. The appellant responded to this innocuous statement by pulling a knife and threatening Sergeant G: "This isn't the first time I've pulled out a knife and I'm not afraid to use it." The appellant, holding the knife out in his right hand, came "face-to-face" with Sergeant G.

As his companion, Specialist D, reached for Sergeant G to pull him away, the appellant raised the knife. Sergeant G threw two punches, and they fell to the ground. While both were on the ground, the appellant began stabbing Sergeant G. Specialist D pulled Sergeant G up and away as the appellant continued to stab Sergeant G in the chest. Sergeant G thought he was going to die.

For his conduct that night the appellant faced a general court-martial on charges of intentionally inflicting grievous bodily harm and wrongfully communicating a threat, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. A panel of officer and enlisted members convicted him, contrary to his pleas, of assault with a dangerous weapon[1] and communicating a threat. The panel sentenced the appellant to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E-1.[2] The convening authority approved the sentence adjudged. The appellant now challenges the instructions provided by the military judge regarding self-defense, the staff judge advocate's (SJA's) post-trial recommendation, and the sufficiency of the evidence on both charges. We find no error prejudicial to the rights of the appellant and affirm.[3]

The Instructions on Self-Defense

The appellant asserts that the military judge committed plain error in her instructions on self-defense. He lodged no objections to the instructions at trial; in fact, the military judge instructed on self-defense substantially as requested by the appellant's trial defense counsel, a senior defense counsel. We review instructional issues de novo and recognize that, while giving due consideration to the input of counsel, the military judge bears ultimate responsibility for properly instructing on the elements of charged offenses, applicable defenses, and other matters of law. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). Absent objection at trial, allegations of instructional error on appeal are analyzed under the plain error doctrine. Rule for Courts-Martial (R.C.M.) 920(f). In this case we find no error, plain or otherwise, in the instructions provided by the military judge.

Explaining to the members the application of self-defense to the charge of communicating a threat, the military judge instructed, in part, as follows: "An accused who reasonably fears an imminent attack is allowed to display or threaten the use of an ordinarily dangerous weapon even though the accused does not have a reasonable fear of

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[1] Assault with a dangerous weapon is a lesser included offense of the charged assault under Article 128, UCMJ, 10 U.S.C. § 928.

[2] The military judge merged the two offenses for sentencing purposes, thereby reducing the maximum confinement from six to three years.

[3] The Court notes the Court-Martial Order (CMO), dated 15 December 2008, fails to note the pen and ink changes made to the Specification of Charge II prior to the court-martial, and improperly lists the sentence date as 8 August 2006 instead of 6 August 2008. We order the promulgation of a corrected CMO.

serious harm *as long as he does not actually use the weapon, or attempt to use it in a manner likely to produce death or produce grievous bodily harm.*" Emphasis added. The appellant now argues, as he did in post-trial submissions, that the instructions "could have" confused the members into thinking that the appellant's later actual use of his knife as alleged in the aggravated assault charge prevented a finding of self-defense to the earlier communication of a threat by brandishing the same knife. In retrospect, the appellant now argues that the instructions he agreed to at trial required further clarification: "A tailored instruction could have informed the members that an accused may subsequently use a lawfully brandished weapon if attacked, and lawful use of the weapon in self-defense does not negate the lawfulness of the original brandishing." We find that the instructions provided by the military judge properly defined the application of self-defense to each charge.

First, the military judge distinguished the application of self-defense to each charge in her discussion of instructions with counsel. Finding self-defense applicable to both charges, she explained to counsel that self-defense applied to the Article 134, UCMJ charge of communicating a threat because the specification included language analogous to an offer type of assault. Additionally, she highlighted the separate and sequential acts alleged in the two charges by agreeing to trial defense counsel's request to instruct on accident as a defense to the charged assault. She also declined to include simple assault as a lesser included offense of the charged assault because it did not allege "brandishing a knife," as it did in the separate charge of communicating a threat. The trial defense counsel lodged no objections to the proposed instructions and requested no additions.

Second, consistent with the proposed instructions discussed with the counsel, the military judge fully instructed the members on the application of self-defense to each charge. She first described for the members the application of self-defense to the charged aggravated assault and its lesser included offenses, then instructed on the application of self-defense to the charged threat of brandishing a knife. The trial defense counsel referenced the military judge's instructions in arguing the application of self-defense to the charge of communicating a threat by brandishing a knife, specifically stating that the defense applies to this charge "as long as [the accused] does not actually use the weapon." Like the military judge, the trial defense counsel distinguished the application of self-defense to the sequential events separated in the two charges: "What you have is, is that at this point, in this charged time frame, with what the government has put in front of you, that the threat didn't work as a deterrent." The trial defense counsel then moved to the application of self-defense to the aggravated assault charge. Again, at the conclusion of the instructions, the trial defense counsel neither objected to the instructions given nor requested additional instructions.

Members who are properly instructed are presumed to follow the law. *United States v. Henley*, 53 M.J. 488, 492 (C.A.A.F. 2000). The military judge in this case properly instructed the members using input from the trial defense counsel that tailored

the instructions regarding self-defense and accident to the facts of the case and the defense theory. The trial defense counsel even used a PowerPoint presentation in argument that highlighted the instructions on self-defense as applied to each offense. The claim on appeal that these tailored instructions could have confused the members is mere speculation unsupported by the record. Such speculation does not carry the appellant's burden of showing either unfair prejudicial impact on the members' deliberations or material prejudice to his substantial rights. *Ober*, 66 M.J. at 406 (citing *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998)).

The Staff Judge Advocate's Recommendation

Similar to the claim of instructional error on appeal, the trial defense counsel discussed in his clemency submission how the instructions "may have misled the members" concerning the application of self-defense to the respective charges and, on that basis, requested that the convening authority set aside the findings. In an addendum to his recommendations, the SJA did not characterize this as an allegation of legal error but nevertheless advised the convening authority that he must consider all matters submitted. The convening authority did so.

When an accused alleges legal error in matters submitted to a convening authority, the SJA must state whether corrective action is required on the findings or sentence. R.C.M. 1106(d)(4). If the SJA does not respond to allegations of legal error, a reviewing court may nevertheless affirm without remand if the alleged error would not "foreseeably" have resulted in a recommendation more favorable to the appellant or corrective action by the convening authority. *United States v. Hill*, 27 M.J. 293, 296-97 (C.M.A. 1988). Here, the SJA did not view the trial defense counsel's speculation that the members were possibly confused by the instructions as an allegation of error. We agree with that view.

The trial defense counsel acknowledges in his clemency submission that the military judge gave the requested instructions on self-defense and brandishing from the Military Judges' Benchbook. He argues that these instructions, based in part on the trial defense counsel's own input, created a possibility of confusion that supports setting aside the findings. We find that such speculation on the impact of admittedly proper instructions does not rise to the level of an allegation of legal error. Even if it did, we find such a speculative allegation would not forseeably lead to a more favorable recommendation or corrective action by the convening authority.

Legal and Factual Sufficiency

The appellant disputes the legal and factual sufficiency of his conviction. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), 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 factfinder 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, 324 (C.M.A. 1987)). In 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). 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. *See* Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We find the evidence legally and factually sufficient to support the appellant's conviction of both charges.

Regarding the charge of communicating a threat, the appellant first argues that "only two" of five witnesses heard the threat. The members saw and heard all five witnesses, and obviously accorded greater credibility to those who heard the threat. The appellant next argues that the threat, if made, was not wrongful. The members rejected the appellant's theory of self-defense at trial regarding communicating a threat, and the record supports that finding. Even the appellant's companion testified that the appellant pulled the knife before the victim ever came close to him and that the appellant did not seem scared or threatened but just "really pissed off."

Regarding his conviction for assault with a dangerous weapon, the appellant renews his defense of accident and self-defense which was argued, instructed upon, and rejected at trial. The surgeon who treated the victim testified concerning his injuries, particularly describing a three-inch stab wound that collapsed his lung as well as other punctures caused by a sharp object such as a knife or glass bottle. She offered her expert opinion that the victim's wounds were the result of a knife or sharp object being pushed into the victim's body. By comparison, the appellant had only minor injuries from the scuffle on the ground. The medical evidence alone is sufficient for the members to reject the appellant's claim of accident and self-defense. Based on our review of the evidence, we likewise reject the appellant's claims.

The appellant acknowledges that the evidence is sometimes in conflict, as it is in most cases. What is not in conflict is that only the appellant had a knife, only the appellant threatened to use it, and only the appellant repeatedly stabbed an unarmed man. We find the evidence legally and factually sufficient to support his conviction of aggravated assault with a dangerous weapon and communicating a threat by brandishing

a knife and threatening to use it against a man who had done nothing more than wish a couple of women a good night.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court