UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN R. VASQUEZ, JR.
United States Air Force

ACM 38192

18 November 2013

Sentence adjudged 23 May 2012 by GCM convened at Misawa Air Base, Japan. Military Judge: Vance H. Spath.

Approved Sentence: Bad-conduct discharge, confinement for 120 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEBER, Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer members at a general court-martial of aggravated sexual assault and an indecent act, both in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 120 days, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

[1] The members acquitted the appellant of three additional specifications of aggravated sexual assault.

The appellant alleges that the military judge abused his discretion by failing to sua sponte dismiss a panel member on the basis of his niece being a recent sexual assault victim, and also based on the panel member's friendship with the wing staff judge advocate (SJA). We disagree, and affirm.

Background

The appellant pled not guilty before officer members to five specifications under Article 120, UCMJ. Four specifications alleged that he engaged in sexual intercourse with three different female Airmen on a total of four occasions while they were substantially incapacitated. The remaining specification alleged that he committed indecent conduct by having sexual intercourse with one of these female Airmen in a public setting.

During group voir dire, Lieutenant Colonel (Lt Col) JM responded affirmatively to a question about whether a family member had ever been a victim of sexual assault. During individual voir dire, he explained that his four-year-old niece had been victimized approximately one month earlier. He stated that he did not know many details of the incident, and that law enforcement authorities were still investigating the matter. He repeatedly stated that it would not affect his judgment in the instant case, that he saw no similarities between the two situations, and that he recognized the appellant's presumption of innocence until proven guilty beyond a reasonable doubt.

Lt Col JM also disclosed during individual voir dire that he and the wing SJA "are neighbors and pretty good friends." He stated that he saw the wing SJA three or four times per week, and that he saw her children "quite often." He stated that he did not discuss cases with the wing SJA, that they had never discussed the instant case, and that his actions in this case would not be affected by his relationship with the wing SJA.

Neither the Government nor the defense challenged Lt Col JM for cause. The defense did not exercise a peremptory challenge in this case, and the military judge did not sua sponte excuse Lt Col JM, who served on the panel throughout the court-martial.

Discussion

The appellant alleges that the military judge erred by failing to sua sponte excuse Lt Col JM, based on his niece's recent experience and his personal connection to the wing SJA. We disagree.

"An accused enjoys the right to an impartial and unbiased panel." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012) (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994)). As a result, members are scrutinized for both actual and implied bias. *Id.* Actual bias is personal bias which will not yield to the military judge's

instructions and the evidence presented at trial. *Id.* (citing *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Appellate courts grant the military judge "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000).

Implied bias, conversely, is "viewed through the eyes of the public, focusing on the appearance of fairness." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). Therefore, appellate courts employ an objective standard when reviewing a military judge's decision regarding implied bias, resulting in less deference to the military judge. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances. *Id.* at 459.

Where the parties at trial have not challenged a member for cause, "the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie." Rule for Courts-Martial 912(f)(4). A military judge's decision whether to excuse a member sua sponte is subsequently reviewed for an abuse of discretion. *Id.* at 458.

We find no abuse of discretion in the military judge's decision to not sua sponte excuse Lt Col JM. After examining the entire record of trial, we see no evidence of actual bias by Lt Col JM. Lt Col JM affirmatively stated that he viewed the sexual assault incident involving his niece and the instant case as "completely separate events." He also stated that the wing SJA did not discuss cases with Lt Col JM outside the office, she did not discuss the instant case with him, and that he had "no idea" what the wing SJA's thoughts were about this case. He further stated that he could not envision her questioning his actions in this case and that "it wouldn't really matter" to him if she did. Lt Col JM repeatedly stated that he would decide this case based on the military judge's instructions and the evidence at trial. There is no basis to conclude that Lt Col JM was actually biased in this matter.

Similarly, we find that Lt Col JM's service on the panel in this case raises no concerns about implied bias. The military judge and both parties conducted thorough voir dire with Lt Col JM over these issues, and neither side saw fit to challenge Lt Col JM, indicating that they had no concerns with his lack of impartiality. The situation with his niece involved a child per se incapable of consenting to sexual activity, a different situation than the instant case where consent and mistake of fact as to consent were at issue. Lt Col JM's disclosure did not involve an immediate family member, and Lt Col JM expressed no emotion or preoccupation with his niece's situation. Concerning his friendship with the wing SJA, Lt Col JM revealed absolutely no information that would indicate that he and the wing SJA would ever discuss this case or that his actions

would in any way be influenced by the friendship.[2] While not dispositive, we note the defense asked that all prospective panel members whether, if they were in the appellant's position, they would feel uncomfortable having them on the panel. Three members answered affirmatively, but Lt Col JM responded that he would have no such concerns. Finally, Lt Col JM's conduct throughout the trial revealed no evidence of bias toward either party. Evaluating the totality of the factual circumstances, we find that no concern of implied bias was caused by Lt Col JM's service on this panel.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[3] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[2] The appellant alleges that the wing staff judge advocate (SJA) may have been in the courtroom during Lieutenant Colonel (Lt Col) JM's individual voir dire, and that her presence may have inhibited Lt Col JM's answers. The record indicates that she was present when the Government exercised its peremptory challenge. The wing SJA's later presence in the courtroom does not demonstrate that she was present for individual *voir dire*, and even if she was present, we find no evidence that this altered Lt Col JM's answers. In fact, Lt Col JM affirmatively stated that even if the wing SJA were to later question his actions in this case, her actions "wouldn't really matter" to him.

[3] We note one issue with the record of trial. In sentencing proceedings, the Government introduced a record of nonjudicial punishment imposed upon the appellant on 28 April 2011. The record of nonjudicial punishment proceedings indicates that the appellant submitted a written presentation for the commander's consideration, but that written presentation is not included in the record of trial. Normally, when the Government introduces derogatory information from an accused's personnel record, it must, if challenged by the defense, also introduce the favorable information which is included within the record. *United States v. Salgado-Agosto*, 20 M.J. 238, 239 (C.M.A. 1985). However, where defense counsel does not identify any such favorable documents or object to the introduction of the derogatory evidence, we may presume that the record is complete and any error is waived. *Id.*; *United States v. Merrill*, 25 M.J. 501, 503 (A.F.C.M.R. 1987). Since defense counsel did not object to the introduction of the nonjudicial punishment record and did not identify that the appellant provided a response, we presume that the record of trial is complete and any error is waived.