

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**COOPER JACKSON
ENGINEMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200700255
GENERAL COURT-MARTIAL**

Sentence Adjudged: 27 October 2006.
Military Judge: CAPT Daniel O'Toole, JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic,
Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.T. Katz,
JAGC, USN.
For Appellant: CDR Sherry J. King, JAGC, USN.
For Appellee: LCDR Guillermo Rojas, JAGC, USN; LT Justin
E. Dunlap, JAGC, USN.

9 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge, sitting as a general court martial, convicted the appellant, pursuant to his pleas, of premeditated murder, impersonating a Naval Criminal Investigative Service (NCIS) agent, kidnapping, and wrongfully impeding an investigation, in violation of Articles 118 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 934. The appellant was sentenced by members with enlisted representation to life imprisonment without the possibility of parole, reduction to pay grade E-1, total forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully examined the record of trial, the appellant's three assignments of error,¹ and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Admissibility of NCIS Videotape

The appellant argues the military judge erred by admitting Prosecution Exhibit 14 during presentencing, a video tape depicting NCIS agents locating and identifying the body of the victim, Corporal (Cpl) Huff, because the video was unnecessary and highly prejudicial. We disagree. The defense did not object at trial so we apply a plain error analysis. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

The record reflects that the military judge conducted a MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2005 ed.), balancing analysis on the record. He found the probative value of the video evidence was not substantially outweighed by the danger of unfair prejudice. Record at 409-10. In fact, the military judge stated that the video revealed nothing alarming beyond the fact that the video was of the victim's grave. With regard to probative value, he found the video highly probative of how the body was disposed of, which was at issue in the case.

Having viewed the video, we agree with the military judge that the probative value of the video was not substantially outweighed by the danger of unfair prejudice. Even assuming, *arguendo* that the military judge did err in admitting the video, we find there was no material prejudice to the substantial rights of the appellant. We conclude that the appellant has not met his burden of establishing plain error.

Trial Counsel's Sentencing Argument

The record reflects that the appellant murdered Cpl Huff by cutting his neck. Record at 100-01. An expert witness estimated that it would have taken at least five minutes for the victim to lose consciousness after suffering such a wound. During his

¹ I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL DETRIMENT OF APPELLANT BY ADMITTING EVIDENCE WHICH INCLUDED VIDEOTAPED CONVERSATIONS BETWEEN NCIS AGENTS AND DEPICTED NCIS AGENTS PARTIALLY UNCOVERING THE BODY OF CORPORAL HUFF.

II. TRIAL COUNSEL'S INAPPROPRIATE SENTENCING ARGUMENT ASKING MEMBERS TO PUT THEMSELVES IN THE PLACE OF THE VICTIM BY SUGGESTING THEY TAKE FIVE MINUTES TO SEE HOW LONG IT TOOK THE VICTIM TO DIE WAS PREJUDICIAL AND RESULTED IN AN INAPPROPRIATELY HARSH SENTENCE.

III. THE CHARACTER OF APPELLANT'S MILITARY SERVICE, THE LACK OF OTHER CRIMINAL OFFENSES, THE SITUATION SURROUNDING HIS RELATIONSHIP WITH ASHLEY ELROD, AND THE PREJUDICIAL EVIDENCE ADMITTED AT TRIAL MITIGATE AGAINST A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

sentencing argument, trial counsel asked the members to look at their watch at the next recess and "come to terms with how much five minutes really is." Record at 823. The appellant contends the trial counsel's argument was inappropriate and resulted in an inappropriately harsh sentence. We disagree.

Trial defense counsel did not object to trial counsel's argument. Failure to object to improper argument constitutes waiver in the absence of plain error. RULE FOR COURTS-MARTIAL 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); see *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993).

Arguments that ask members to place themselves in the place of a victim in a criminal trial are improper and impermissible. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). Arguments that ask members to imagine the victim's "fear, pain, terror and anguish" are permissible as victim impact evidence. *Id.*

We do not find that the trial counsel's argument constituted a request for the members to place themselves in the place of the victim. Trial counsel did not instruct the members to imagine themselves in the place of the victim; rather, he asked them to consider just how long the victim was aware of his situation as he lay on the ground. The argument was far more akin to asking the members to imagine the victim's "fear, pain, terror and anguish." *Id.*

Even assuming, *arguendo*, that the argument was improper, any potential prejudice to the appellant was mitigated by the military judge's admonition to the members before releasing them at the next recess. He instructed the members not to begin their deliberations during the recess to follow. More specifically, he instructed members that his admonition "would include taking the time in the recess to time the 5 minutes. Although that was offered as a euphemism during the argument by counsel, you're not literally to comply with that and then come back to the courtroom and use information gathered during the recess in your deliberations." Record at 851.

We hold that there was no error. If there was error, the military judge's admonishment to the members mitigated any prejudicial effects.

Sentence Appropriateness

The appellant argues that his prior service, lack of a criminal record, the circumstances surrounding the crime, and the "prejudicial evidence" admitted all mitigate against a sentence of life imprisonment without the possibility of parole. We disagree.

The nature of this murder was particularly callous and brutal. The appellant pretended to be an NCIS agent, kidnapped an innocent U.S. Marine, drove him across state lines to a remote location, handcuffed him, forced him to the ground, and then stabbed his victim in the neck twice while kneeling on the victim's back. The appellant stated that he began this odyssey with the belief that Cpl Huff had sexually abused a friend of his. By the time of the murder, however, he acknowledged that he knew Cpl Huff was innocent of any wrongdoing. The appellant stated that he committed the murder in order to avoid being caught for impersonating a federal official and for kidnapping.

We have considered the record of trial, the appellant's record, the circumstances of the case, and the nature of the offenses. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

Accordingly, we approve the findings and the sentence, as approved by the convening authority.

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court