

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Ryan M. LUKENS
Private First Class (E-1), U. S. Marine Corps**

NMCCA 200600173

Decided 27 February 2007

Sentence adjudged 08 July 2005. Military Judge: J.M. Schum.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commanding General, 3d Force Service Support Group,
Marine Forces Pacific, Kaneohe Bay, HI.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of aggravated assault, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant was sentenced to confinement for 4 months and a bad-conduct discharge. The convening authority approved the sentence as adjudged

The appellant raises three assignments of error. First, he asserts that the military judge erred by failing to *sua sponte* excuse Master Sergeant Samuels as a member. Second, the appellant avers that the military judge committed plain error by asking an expert witness to make conclusions of law. Finally, the appellant argues that the trial counsel committed plain error by making improper statements during his closing arguments to the effect that the appellant led a "fireteam" assault on the victim and that the appellant's assertion that he acted in self-defense was a "laughers."

We have examined the record of trial, the assignments of error 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.

Military Judge's Failure to Excuse a Member *Sua Sponte*

The appellant argues that Master Sergeant Samuels should have been excused, *sua sponte*, as a member by the military judge for implied bias. In support, the appellant notes that Master Sergeant Samuels received a generalized briefing about the "bar fight" at issue when he checked into the command. Record at 121. The appellant cites as additional support the member's admission that his parents had been assaulted and robbed while staying at a hotel in Georgia and that the Master Sergeant, himself, was the victim of an assault by multiple attackers outside a bar in Ankara, Turkey. *Id.* at 124-26. Notwithstanding Master Sergeant Samuel's repeated statements that he could be impartial in spite of his unfortunate prior experiences, the appellant contends that we must presume him to be prejudiced.

Actual bias is a question of fact, which is reviewed subjectively through the eyes of the military judge. We give the military judge great deference in such cases. Implied bias, on the other hand, is viewed through the eyes of the public, and the focus is on the perception or appearance of fairness of the military justice system. *United States v. New*, 55 M.J. 95, 100-01 (C.A.A.F. 2001). We, therefore, apply an objective standard which is less deferential than abuse of discretion but more deferential than *de novo*. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).

Notwithstanding our less deferential standard, when there is no evidence of actual bias, we will rarely invoke implied bias. Due process does not require a new trial every time a juror has been placed in a potentially compromising situation; instead, we will find that implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [i.e. biased]). In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances. *Id.*

In the instant case, Master Sergeant Samuels' recitation of the facts surrounding the attacks on his parents was matter-of-fact and unemotional. Record at 124-25. When describing the injuries suffered by his mother he said, "My mom had, I think, a busted lip and bruised face." He offered no further elaboration or comment. *Id.* Further, notwithstanding the fact that he was apparently in the area for the trial of the persons accused of attacking his parents, he elected not to attend.

Similarly, his description of his experience as a victim of a brawl outside a bar was equally low-key. He stated that the attack had occurred 20 years previously and that his injuries were "nothing major." *Id.* at 126. Based on an objective

standard and considering the totality of the factual circumstances reflected in the record, we find that the military judge did not err by permitting Master Sergeant Samuels to serve as a member at the appellant's court-martial.¹

Expert Testimony

Major Benjamin Cable, the victim's treating surgeon at Tripler Army Medical Center, testified as an expert regarding the extent of the victim's injuries. Following his testimony, the military judge read the doctor the bench book definition of grievous bodily harm. He then asked the doctor if, in his expert opinion, the injuries sustained by the victim fit this definition. The doctor replied that they did. He went on to detail the specific injuries to the victim's head and more specifically his left eye socket that he believed fit within the definition. *Id.* at 357-58. Neither counsel objected.

An expert's testimony is admissible if it is relevant and if its probative value outweighs any prejudicial value. MILITARY RULES OF EVIDENCE 401-403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The expert's testimony touched neither on the guilt nor innocence of the appellant nor on a matter of law. See *United States v. Benedict*, 27 M.J. 253, 259 (C.M.A. 1988). As acknowledged in the appellant's brief, an expert opinion is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. Mil. R. Evid. 704.

Contrary to the appellant's assertion, the military judge did not ask the expert to "make conclusions of law." The military judge simply asked the expert to apply the facts the expert had observed to a legal standard which the military judge provided. The witness was not invited to affirm or in any way comment on the legal standard itself. We find this assignment of error without merit.

¹ The appellant also asserts that Master Sergeant Samuels' questions during trial reflected that he was considering facts not in evidence. We disagree. The military judge's *voir dire* of the member immediately following his questions indicates that he was simply making assumptions of what probably happened based on his own past experience with such matters. The military judge ensured Master Sergeant Samuels understood and agreed that he was not to form an opinion until after having heard all the evidence. Record at 431-32.

Conclusion

The appellant's remaining assignment of error is without merit.² The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court

² With regard to the appellant's third assignment of error, we note that he failed to object to the trial counsel's arguments at trial. Assuming, *arguendo*, that the trial counsel's comments were error; we find any error was harmless beyond a reasonable doubt. Trial counsel's comments were neither egregious nor inflammatory. See *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2000).