

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

**Before
E.E. GEISER, F.D. MITCHELL, J.G. BARTOLOTTA
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHARLES B. SWANSON
ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200501593
GENERAL COURT-MARTIAL**

Sentence Adjudged: 23 February 2004.

Military Judge: CDR Charles Schaff, JAGC, USN.

Convening Authority: Commander, Submarine Group TEN, Kings Bay, GA.

Staff Judge Advocate's Recommendation: LCDR A. R. Blum, JAGC, USN.

For Appellant: LT Kathleen Kadlec, JAGC, USN.

For Appellee: Capt Geoffrey Shows, USMC.

13 November 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of unpremeditated murder and assault consummated by a battery upon a child under 16 years old, in violation of Articles 118 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 928. The appellant was sentenced to confinement for life without the possibility of parole, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's fourteen assignments of error,¹ and the Government's response.

¹ I. THE MILITARY JUDGE, AT THE GOVERNMENT'S REQUEST, REMOVED AN AFRICAN AMERICAN MEMBER FROM ET3 SWANSON'S PANEL FOR A NONSENSICAL MEDICAL REASON IN VIOLATION OF *BATSON v. KENTUCKY*, 476 U.S. 79 (1986).

II. THE MILITARY JUDGE REMOVED A NON-BIASED MEMBER PURSUANT TO THE GOVERNMENT'S CHALLENGE FOR CAUSE IN VIOLATION OF RULE FOR COURTS MARTIAL [sic] 912(f)(1)(N).

III. THE MILITARY JUDGE ABUSED HIS DISCRETION IN SANCTIONING IMPROPER Mil. R. Evid. [sic] 404(b) EVIDENCE THAT WAS MERELY EVIDENCE OF ET3 SWANSON'S TURBULENT MARRIAGE AND MATERIALLY PREJUDICED ET3 SWANSON'S RIGHTS.

IV. THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING ET3 SWANSON'S EX-WIFE TO TESTIFY AS TO STATEMENTS HE MADE DURING AN ARGUMENT THAT WERE UNFAIRLY PREJUDICIAL AND IRRELEVANT AND MATERIALLY PREJUDICED ET3 SWANSON'S RIGHTS.

V. THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING SPECIAL AGENT WILLIAM THOMAS TO TESTIFY ABOUT STATEMENTS ET3 SWANSON DIRECTED AT ANOTHER CHILD THAT WERE UNFAIRLY PREJUDICIAL AND IRRELEVANT. AS SUCH, THE MILITARY JUDGE MATERIALLY PREJUDICED ET3 SWANSON'S RIGHTS.

VI. THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING SPECIAL AGENT TIMOTHY PICARD TO TESTIFY ABOUT ET3 SWANSON'S DENIAL OF HAVING CORRESPONDENCE WITH HIS WIFE AS IT WAS UNFAIRLY PREJUDICIAL AND MATERIALLY PREJUDICED ET3 SWANSON'S RIGHTS.

VII. ET3 SWANSON'S CONVICTION SHOULD BE SET ASIDE DUE TO FACTUAL INSUFFICIENCY, AS THE GOVERNMENT OFFERED NO CREDIBLE EVIDENCE THAT ET3 SWANSON MURDERED OR ASSAULTED HIS DAUGHTER.

VIII. ARTICLE 66(c), UCMJ, WARRANTS SENTENCE RELIEF AS THE MEMBERS ADJUDGED AN INAPPROPRIATELY SEVERE SENTENCE WHEN THEY SENTENCED ET3 SWANSON TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

IX. THE UNREASONABLE POST-TRIAL DELAY IN THE PROCESSING OF THIS CASE MATERIALLY PREJUDICED ET3 SWANSON'S SUBSTANTIAL RIGHT TO A SPEEDY POST-TRIAL REVIEW.

X. PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982), ET3 SWANSON ALLEGES THAT THE GOVERNMENT VIOLATED HIS RIGHT TO A SPEEDY TRIAL PURSUANT TO ARTICLE 10 OF THE UNIFORM CODE OF MILITARY JUSTICE.

XI. PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982), ET3 SWANSON ALLEGES THE MILITARY JUDGE ERRED BY NOT CLARIFYING BURDEN SHIFTING BY THE MEMBERS IN RESPONSE TO A MEMBER QUESTION ABOUT WHO PAYS THE COST OF DNA TESTING IN A COURT-MARTIAL.

XII. PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982), THE MILITARY JUDGE ERRED IN NOT *SUA SPONTE* PROHIBITING MASTER CHIEF MARSINO FROM SERVING AS A MEMBER ON APPELLANT'S MEMBER PANEL.

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.

Facts

On 17 October 2002, the appellant's wife left her healthy 7-week-old daughter, Alaycia, in the appellant's care. Mrs. Swanson testified that at approximately 11:15 p.m., she returned home from work to discover the appellant asleep on their bed. When she woke the appellant, she discovered Alaycia face down, under the pillow upon which the appellant was lying. Alaycia was non-responsive, not breathing, and purplish in color. Mrs. Swanson called 911 and an ambulance transported Alaycia to the emergency room where, shortly thereafter, the infant was pronounced dead.

The following morning the appellant was questioned by the Naval Criminal Investigative Service (NCIS) and denied culpability. He consented to a search of his apartment and agreed to a video re-enactment. During the search, agents discovered a three-inch long piece of duct tape attached to a pillow near where Alaycia was found. DNA test results indicated the pillow and sticky side of the duct tape had a DNA mixture from the appellant, Mrs. Swanson, and Alaycia, whereas the smooth side of the duct tape had a mixture of the appellant and Alaycia, but Alaycia's DNA was the major contributor on both sides of the duct tape. Before the DNA tests were completed, the autopsy report surmised Alaycia's death resulted from acute interstitial pneumonitis and that the manner of death was natural. Following the DNA tests, NCIS investigated whether the appellant's involvement in the infant's death was more purposeful.

During the course of the investigation, the appellant made incriminating statements to an undercover NCIS Special Agent

XIII. PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982), ET3 SWANSON ALLEGES APPELLANT WAS PREJUDICED BECAUSE THE NAVAL CRIMINAL INVESTIGATIVE SERVICE (NCIS) DID NOT CONDUCT A COMPLETE INVESTIGATION OF THE CRIME SCENE. HENCE, ET3 SWANSON WAS NOT ALLOWED TO PRESENT EXCULPATORY EVIDENCE AT HIS COURT MARTIAL.

XIV. PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982), ET3 SWANSON ALLEGES THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO COMMENT OF ET3 SWANSON'S UNSWORN STATEMENT DURING SENTENCING IN VIOLATION OF RULE FOR COURTS-MARTIAL 1001(b).

regarding Alaycia's death and how he had covered her mouth with duct tape. Those statements were recorded by a hidden video camera and provided along with the DNA results to the doctor who performed the autopsy. Based upon this new information, the autopsy report was amended to state Alaycia died of asphyxia and that the manner of death was homicide.

At trial, the prosecution portrayed the appellant as selfish and uncaring. The prosecution also presented, *inter alia*, evidence of domestic violence between the appellant and Mrs. Swanson, the appellant's inappropriate treatment of Alaycia, and cruel statements made about Alaycia by the appellant both prior to and after her death. Government experts opined that the DNA evidence indicated the duct tape was placed on Alaycia's mouth and that the amended autopsy report correctly concluded suffocation was the cause of death.

Trial defense counsel portrayed the appellant as a young, inexperienced, first-time father. They argued the incriminating statements made to the undercover agent were consistent with the appellant's trait for exaggeration. Defense experts contested the opinion of Government experts stating that, in their opinion, the autopsy reports were inconclusive as to cause of death. They also attacked the Government's interpretation of the DNA findings, opining that Alaycia's DNA could easily have transferred to the duct tape by other means.

Challenges and Removal of Potential Members

The appellant's first two assignments of error contend the military judge committed prejudicial error by granting trial counsel's challenges to two potential panel members. Appellant's Brief of 13 Apr 2007 at 18-26. First, the appellant claims the race-neutral reasons trial counsel provided for her peremptory challenge of Signalman First Class (SM1) S violated *Batson v. Kentucky*, 476 U.S. 79 (1986). The appellant is African-American. SM1 S is African-American and was one of three African-Americans on the original 10-member panel. Appellate Exhibit CXV. The appellant also asserts that trial counsel's challenge for cause of Senior Chief Electronics Technician (Submarines) (ETCS) J violated RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). We disagree with both assertions.

A. Peremptory Challenge

A defendant has an equal protection right to be tried by members from which no cognizable racial group has been excluded. *Batson*, 476 U.S. at 96; *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988). Our superior court "has adopted a *per se* application of *Batson*." *United States v. Hurn*, 58 M.J. 199, 199 n.2 (C.A.A.F. 2003)(citing *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989)). Upon timely objection, the Government has the burden to provide a race-neutral factual explanation for the challenge. *United States v. Ruiz*, 49 M.J. 340, 344 n.2 (C.A.A.F. 1998). Trial counsel's factual reasons may not be "unreasonable, implausible, or . . . otherwise make[] no sense" and must be more than a simple assertion of good faith. *United States v. Tulloch*, 47 M.J. 283, 285-88 (C.A.A.F. 1997). A trial counsel's rationale may include "intuition and other objectively unverifiable considerations." *United States v. Thomas*, 40 M.J. 726, 731 (N.M.C.M.R. 1994)(citing *United States v. Bentley-Smith*, 2 F.3d 1368, 1374, n.6 (5th Cir. 1993)).

Appellate courts accord great deference to a military judge's factual determination that trial counsel's explanation for a preemptory challenge was sincere and not simply a subterfuge to mask intentional or purposeful discrimination. *Id.* The military judge's determination on the trial counsel's credibility will be overturned only if it is clearly erroneous. *United States v. Greene*, 36 M.J. 274, 281 (C.M.A. 1993).

With regard to SM1 S, following the defense objection to the Government's preemptory challenge, trial counsel articulated three reasons for his challenge. First, trial counsel noted the SM1's current use of the prescription drug Percocet which, the trial counsel opined, may affect his ability to focus on the scientific evidence. Second, the trial counsel noted the SM1's acquaintance with the appellant. Finally, the trial counsel noted the SM1's existing favorable opinion of the appellant's good military character. Record at 1397-98. We accept the military judge's favorable credibility assessment of the trial counsel. We further find that the reasons articulated by the trial counsel are race-neutral and are not unreasonable, implausible, or otherwise make no sense. This assignment of error is without merit.

B. Challenge for Cause

A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). Actual bias and implied bias are separate tests. See *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003). On questions of actual bias, we give the military judge "great deference" because he is in a superior position to directly observe and evaluate the demeanor of the participants. *United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997)(quoting *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)); see also *United States v. Rodriguez-Rivera*, 63 M.J. 372, 382 (C.A.A.F. 2006). A challenge for cause for actual bias is essentially one of credibility. See *Miles*, 58 M.J. at 194-95.

We are less deferential on questions of implied bias. See *Lavender*, 46 M.J. at 488. There is implied bias "when most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)(quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985))(internal quotation marks omitted). Implied bias is reviewed through the eyes of the public using an objective standard. See *Miles*, 58 M.J. at 195. We review all rulings on challenges for cause for abuse of discretion. See *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001); *Lavender*, 46 M.J. at 488.

The military judge granted the challenge for cause as to ETCS J. Record at 1405. Trial defense counsel did not object to the ruling. Having carefully considered the record, we find no abuse of discretion with respect to the military judge's ruling as there was sufficient basis in the record to support the challenge.

In this regard, ETCS J had significant experience as a former brig guard, duty officer, and counselor. *Id.* at 1341-42. He stated his brig experience resulted in concerns about "the [military criminal] investigation process" and caused him to be "very uncomfortable with investigators." *Id.* at 1349-51. Moreover, the military judge specifically commented on the ETCS's hesitation following the military judge's question whether his brig experience jaded his opinion about this case. *Id.* at 1353-54. We find this to be indicative of the military judge's observation and credibility determination of ETCS J. Accordingly, we find the military judge did not abuse his discretion when he granted trial counsel's challenge for cause

as to ETCS J. The appellant's second assignment of error is without merit.

Abuse of Discretion

The appellant's third, fourth, fifth, and sixth assignments of error contend, respectively, that the military judge abused his discretion when he allowed testimony regarding the appellant's turbulent marriage, a remark the appellant made during a spousal argument, remarks the appellant directed to a one-year-old girl, and the appellant's denial of correspondence with Mrs. Swanson hours after a telephone conversation between the two. The appellant claims this testimony was unfairly prejudicial and irrelevant, and its admission resulted in material prejudice to the appellant's rights. The appellant further claims the military judge failed to conduct a balancing test under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), before he allowed testimony about some of the appellant's callous remarks.

A military judge's decision to admit evidence is reviewed for abuse of discretion. *United States v. Harrow*, 65 M.J. 190, 201 (C.A.A.F. 2007)(citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)); *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). We will not overturn a military judge's evidentiary ruling unless it is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous, or influenced by an erroneous view of the law." *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006)(quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004))(internal quotation marks omitted). A trial judge abuses his discretion if he fails to apply the law correctly. *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001)(citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

The test for admissibility of uncharged acts is whether the evidence is offered for some legitimate purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the fact-finder infer that he is guilty because he is predisposed to commit similar offenses. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). In this regard, the three-part *Reynolds* test focuses our analysis on three questions: (1) whether the evidence reasonably supports a finding that the appellant committed the challenged prior crimes, wrongs or acts; (2) whether a "fact . . . of consequence" is made "more" or "less probable" by the existence

of this evidence; and (3) whether the "probative value" is "substantially outweighed by the danger of unfair prejudice." See *Harrow*, 65 M.J. at 202; *Barnett*, 63 M.J. at 394. If the record does not reflect that the military judge formally performed a balancing test, we presume the military judge properly knew and applied the law. *United States v. Stein*, 43 C.M.R. 358, 359 (C.M.A. 1971).

At trial, the defense moved to exclude testimony that the appellant, *inter alia*: pointed a knife at Mrs. Swanson and threatened her with an abortion; refused to take her to the hospital when her water broke; fought with her about his refusal to care for Alaycia; dug his fingernails into Mrs. Swanson's arm; and blew in Alaycia's face, thumped her knuckles, and twirled and threw her in the air. AE XXII.

The military judge allowed the testimony stating that members could reasonably find that the appellant committed the specific uncharged acts alleged. He further stated that the acts were relevant to the appellant's motive, intent, and lack of accident at the time he committed the charged acts. More specifically, the military judge opined that the uncharged acts were evidence of the depth of the appellant's feelings about the infant and were not offered to prove that he is a bad or violent person or that he otherwise acted in conformity with his character. Finally, the military judge found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Record at 1624-25, 1654.

Trial defense counsel also attempted to exclude: (1) the appellant's statement that if Mrs. Swanson missed Alaycia so much she should "go and dig her black ass up." AE XXII; Record at 1648-49; (2) testimony from an NCIS agent that several months after Alaycia's death he personally observed the appellant teasing a crying one-year-old girl by "jerk[ing] at" her and telling the infant to "stop all that fake crying" and "you know the baby is just crying and mad because I'm calling the baby's bluff." Record at 2401-03; and, (3) testimony by an NCIS agent that the appellant denied having contact with Mrs. Swanson only three hours after an NCIS-taped telephone conversation between the two. *Id.* at 2595-96, 2609.

We have considered the entire record and examined the testimony at issue under the three-part *Reynolds* analysis. We find that the military judge correctly articulated the law and applied it to his evidentiary rulings. We find his rulings were consistent with the law and were not arbitrary, fanciful,

clearly unreasonable, or clearly erroneous. Therefore, we find the military judge did not abuse his discretion and that these assignments of error are without merit.

Sentence Appropriateness

The appellant's eighth assignment of error contends his sentence is inappropriately severe in light of his lack of a criminal record, his "faith in God," his good character, and the profound remorse he demonstrated in his post-trial clemency letter to the convening authority. Appellant's Brief at 51-52. The appellant asks this court to reduce his confinement to 30 years based on sentence comparison with the mean maximum sentences for murder and aggravated assault in state and Federal courts. *Id.* He cites to no specific related cases in support. We decline to make the inappropriate comparison requested by the appellant.

We have considered the appellant's record and the entire record of trial. We have also considered the seriousness of his offenses. The appellant, a 21-year-old E-4, was convicted of assault consummated by a battery by placing duct tape on the mouth of his 7-week-old infant daughter and then murdering her by smothering. Committing such acts upon an utterly helpless 7-week-old infant he had a parental duty to protect is particularly reprehensible. We find the approved sentence is appropriate for this offender and these 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).

Post-Trial Delay

The appellant claims in his ninth assignment of error that he was denied speedy post-trial processing because it took 648 days after sentencing for the case to be docketed with this court. Of specific note, 591 days elapsed between the adjournment of the trial and the convening authority's action.

While the 648-day delay between sentencing and docketing is facially unreasonable, the post-trial delay in the appellant's case does not rise to the level of a due process violation. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohy v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)); see also *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The record of trial is 3,995 pages long, with numerous pretrial motions, lengthy and complex testimony from nine forensic,

pediatric, and DNA experts, and includes over 300 exhibits. Even assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006).

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. *Moreno*, 63 M.J. at 129. Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*), we find that the delay does not affect the findings and sentence that "should be approved" in this case. See Art. 66(c), UCMJ.

Conclusion

We have considered the appellant's remaining assignments of error and find them to be without merit. The findings and approved sentence are affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court