

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Quoc V. TRAN
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200600880

Decided 28 March 2007

Sentence adjudged 19 July 2005. Military Judge: M.P. Gilbert. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Military Police Battalion, II Marine Expeditionary Force, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

LCDR LUIS LEME, JAGC, USN, Appellate Defense Counsel
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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, following the entry of mixed pleas, of two specifications of assault with a dangerous weapon in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant was sentenced to confinement for six months, forfeiture of \$823.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

The appellant originally alleged, in his sole assignment of error, that the CA's action incorrectly states that the appellant pled guilty to Specification 1 of the Charge, when in fact the military judge entered a plea of not guilty on behalf

of the appellant to this specification. Thereafter, by order of this court, three issues were specified.¹ We need not address the merits of the appellant's original assignment of error in light of our findings with respect to this court's specified issues.

In response to this court's specified issues, the appellant contends that the evidence is legally and factually insufficient to support a conviction of assault with a dangerous weapon in Specification 1 of the Charge, and that his plea of guilty to assault with a dangerous weapon in Specification 2 of the Charge was improvident. We have reviewed the record of trial, the appellant's assignments of error and brief in response to the specified issues, and the Government's responses. We find merit in the first two specified issues and will set aside the findings and dismiss the charges in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was charged with two specifications of assault with a dangerous weapon stemming from two separate incidents in which he drew his loaded 9mm service weapon and pointed it in the direction of two different Marines on board Camp Fallujah, Iraq, where the appellant was serving as a Military Policeman (MP).

Specification 1 of the Charge

On 30 March 2005, the appellant was in the Fox Company compound vehicle maintenance area, working on a High Mobility Multipurpose Wheeled Vehicle (humvee) when Lance Corporal (LCpl) M came up from behind him and "reached around and tried pulling [the appellant's] weapon." Record at 14. The appellant, who

¹The specified issues are as follows:

I. WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT WITH RESPECT TO SPECIFICATION 1 OF THE CHARGE, WHERE THE VICTIM OF THE OFFER TYPE ASSAULT TESTIFIED THAT HE DID NOT FEEL THREATENED WHEN THE APPELLANT POINTED THE APPELLANT'S WEAPON AT HIM?

II. WHETHER THE APPELLANT'S PLEA OF GUILTY TO SPECIFICATION 2 OF THE CHARGE WAS PROVIDENT WHERE THE VICTIM OF THE OFFER TYPE ASSAULT TESTIFIED DURING SENTENCING THAT HE DID NOT FEEL THREATENED WHEN THE APPELLANT POINTED THE APPELLANT'S WEAPON AT HIM?

III. IF THE ANSWER TO EITHER OR BOTH OF THE FIRST TWO SPECIFIED ISSUES IS IN THE NEGATIVE, DOES THE RECORD SUPPORT A FINDING OF GUILTY OF ANY LESSER INCLUDED OFFENSE(S).

testified he had no idea who was touching him, instinctively reacted by spinning around, unholstering his weapon, racking the slide, and pointing his weapon at the perceived threat. *Id.* at 15, 28. Once he recognized LCpl M, the appellant lowered his weapon, "took it down to condition three ... and reholstered." *Id.* at 16. The appellant told LCpl M never to touch his weapon again and mentioned weapons retention training he received in MP school. *Id.* at 43.

The appellant pled guilty to this offense, but during the *Care* inquiry, the military judge found the plea improvident. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). The military judge stated that "it appears that a number of defenses arise, one of which is automatic response to an incident" and "[o]f course, self-defense is also a defense that arises at this point. And moreover, there doesn't seem to be any intent offered whatsoever from the accused other than his blanket assertion that he did intend to do bodily harm to Lance Corporal [M]." Record at 29-30.

The military judge entered a plea of not guilty to the specification on the appellant's behalf and the Government proceeded to trial.² The Government called LCpl M, who testified he was "hanging out" with the appellant when he reached over and touched the appellant's weapon. At that point the appellant "jumped back, drew his weapon, sort of racked it back, jammed [sic] it around and pointed towards my feet and said, 'don't ever touch my ---- weapon again,' and something else along the lines of, 'they teach us weapons retention in MP school,' or something like that." *Id.* at 43. LCpl M testified that he didn't report the appellant's actions because he didn't think much of the incident and that he did not feel threatened at the time of the incident.

The military judge elicited testimony from LCpl M that he approached the appellant from behind without announcing his presence while the appellant was at the front of a humvee. LCpl M testified that he believed the appellant should have known it was him approaching due to the noise he made while walking on the gravel in the compound. Despite this assertion, LCpl M stated he did not believe the appellant looked at him until the appellant had already drawn his weapon and pointed it in his direction.

² The contested portion of the trial commenced after the military judge accepted the appellant's plea to Specification 2 of the Charge.

In an effort to counter a potential self-defense argument, First Sergeant A from Fox Company testified that Fox Company is situated in a secure compound located on board Camp Fallujah. He further testified that all visitors must enter the compound through one entrance guarded by two sentries, and that he was unaware of any unauthorized entries to the compound to date.

Specification 2 of the Charge

The incident forming the basis of Specification 2 of the Charge occurred in the appellant's barracks on board Camp Fallujah on 19 May 2005. The appellant was cleaning his crew served weapon while other Marines were engaged in a squirt gun fight in the barracks. When the appellant was accidentally sprayed with water, he pulled his 9mm pistol, racked the slide, and pointed it in LCpl S's direction. The appellant told LCpl S, "Do it again and see what happens." *Id.* at 35. After LCpl S stated, "I wasn't aiming at you, I didn't mean to do it", the appellant retracted his weapon, removed the magazine and went about his business. *Id.* at 34.

Based on the evidence presented for Specification 1 and the appellant's responses during the providence inquiry for Specification 2, the military judge found the appellant guilty of both specifications of the Charge. The trial then proceeded to the sentencing phase, where trial counsel called LCpl S, the victim in Specification 2, to the stand in aggravation. During cross-examination by the defense counsel and examination by the military judge, LCpl S testified that, while the appellant's actions "pissed me off", he did not feel threatened while the appellant was pointing his weapon at his leg. *Id.* at 71.

Legal and Factual Sufficiency for Specification 1

In his response to the first issue specified by this court, the appellant claims his conviction of assault with a dangerous weapon was legally and factually insufficient because the Government failed to introduce any evidence to prove that the appellant "attempted to do, offered to do, or did bodily harm to a certain person." *MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)*, Part IV, ¶ 54c(1)(a). We agree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325

(C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art. 66(c), UCMJ. Reasonable doubt does not require that the evidence presented be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

Conviction of assault with a dangerous weapon requires proof beyond a reasonable doubt:

- (1) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
- (2) That the accused did so with a certain weapon, means, or force;
- (3) That the attempt, offer, or bodily harm was done with unlawful force or violence;
- (4) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm; and,
- (5) That the weapon was a loaded firearm.

MCM, Part IV, ¶ 54b(4)(a).

"An 'attempt' type assault requires a *specific intent to inflict bodily harm*, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm." MCM, Part IV, ¶ 54c(1)(b)(i)(emphasis added). "An 'offer' type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, *which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm*. Specific intent to inflict bodily harm is not required." MCM, Part IV, ¶ 54c(1)(b)(ii)(emphasis added).

The victim in Specification 1, LCpl M, stated consistently throughout the proceedings, including at sentencing, that he was not under any apprehension at the time of the alleged assault, and only looking back did he "kind of feel" that he should have felt threatened. Record at 50. As our sister court has held, "... in order to prove an offer to do bodily harm there must be an apprehension on the part of the victim of the possibility of

danger to his person, and that apprehension must be in the anticipated sense, not the cognizance of past danger." *United States v. Kaufman*, 46 C.M.R. 822, 823 (A.C.M.R. 1972)(quoting *United States v. Hernandez*, 44 C.M.R. 500, 502 (A.C.M.R. 1971)(emphasis in original). We concur with this understanding of the law, and find no evidence in the record before us that the appellant's actions created in LCpl M's mind an apprehension of receiving immediate bodily harm.

Considering the evidence in the light most favorable to the prosecution, we conclude that a reasonable fact-finder could not have found all the essential elements of aggravated assault beyond a reasonable doubt. See *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006)(citing *Turner*, 25 M.J. at 324). After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are not convinced of the appellant's guilt beyond a reasonable doubt. See *Turner*, 25 M.J. at 325. Neither standard has been met. Therefore, we will set aside the finding of guilty of Specification 1 of the Charge.

Improvident Plea to Specification 2 of the Charge

In the appellant's response to the second specified issue, the appellant claims his plea of guilty to Specification 2 of the Charge, assault with a dangerous weapon on LCpl S, was improvident. He argues that no evidence was introduced at trial that LCpl S experienced a reasonable apprehension of receiving immediate bodily harm when the appellant pointed his weapon at him. We agree.

The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). Rejection of the plea must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); see also R.C.M. 910(j).

During the providence inquiry, the military judge clearly established that the parties were operating under an "offer" type assault theory. Record at 12-13, 33. When asked by the military judge whether it was reasonable for LCpl S to "have

apprehension at your actions", the appellant answered, "Yes, sir." *Id.* at 36. However, when called as a witness in aggravation during sentencing, LCpl S testified that he did not feel threatened at the time the appellant pointed his weapon in his direction. Instead, LCpl S testified, the appellant's actions "pissed me off." *Id.* at 70-71. In light of this response, the military judge then asked LCpl S whether this meant he had "some emotional reaction" to the appellant pointing his weapon at his leg, to which LCpl S replied, "Yes, sir." *Id.* at 71. That the victim was "pissed...off" or had "some emotional reaction" does not satisfy the required element of an "offer" type assault. The appellant's actions must create in the mind of another a *reasonable apprehension of receiving immediate bodily harm*. MCM, Part IV, ¶ 54c(1)(b)(ii)(emphasis added).

The evidence adduced at trial clearly shows that LCpl S was cognizant of a past danger associated with the appellant pointing his weapon in his direction. His apprehension arose only after the appellant had withdrawn his weapon and he realized the appellant's weapon had a loaded round in the chamber when it was pointed at him. The victim's retrospective assessment of the danger posed by the appellant's actions fails to satisfy the requirement of apprehension of immediate bodily harm, in the anticipated sense, as the offense requires. *Kaufman*, 46 C.M.R. at 823.

As LCpl S's sworn testimony was at variance with the appellant's bare bones assertion during the providence inquiry that his actions caused LCpl S to experience a reasonable apprehension of receiving immediate bodily harm, the military judge erred by failing to discuss these inconsistencies with the appellant and to seek resolution of the factual conflict. *United States v. Epps*, 20 M.J. 534, 537 (A.C.M.R. 1985). Based on the record before us, we find that even if the military judge had attempted to discuss these inconsistencies with the appellant and to seek resolution of the factual conflict, he would have been unable to do so. Therefore, we conclude that there is a substantial basis in law and fact for questioning the guilty plea, and that the military judge's error in accepting the guilty plea was to the substantial prejudice of the appellant. See Art. 59(a), UCMJ. We will set aside the finding of guilty to Specification 2 of the Charge in our decretal paragraph.

Conclusion

Accordingly, the findings and the sentence are set aside. The Charge and its two accompanying specifications are dismissed.³ All rights, privileges and property of which the appellant has been deprived by virtue of the findings of guilty and sentence that have been set aside are hereby restored. The record is returned to the Judge Advocate General for action in accordance with this decision.

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court

³ In response to our third specified issue, both the Government and appellate counsel found there to be no lesser included offenses to the two specifications of the Charge. We agree. The appellant correctly cites "simple assault" as an LIO to the charge, but also correctly argues that such a charge would fail for the same reasons as the greater offense. Appellant's Brief of 8 Jan 2007 at 15.