

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

**Before
R.E. VINCENT, E.C. PRICE, P.G. STRASSER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ERIK P. ZACATELCO
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200700588
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 31 January 2007.

Military Judge: LtCol Paul Ware, USMC.

Convening Authority: Commanding Officer, Combat Service Support Group 3, 3d Marine Logistics Group, Marine Forces Pacific, MCBH, Kaneohe Bay, HI.

Staff Judge Advocate's Recommendation: LtCol K.M. McDonald, USMC.

For Appellant: LT Dillon Ambrose, JAGC, USN.

For Appellee: CAPT Frederic Matthews, JAGC, USN; LT Justin Dunlap, JAGC, USN.

25 November 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STRASSER, Judge:

The appellant was convicted, contrary to his pleas, by a special court-martial consisting of officer members, of two specifications of failure to obey a lawful general order, five specifications of maltreatment, and wrongfully communicating a threat, in violation of Articles 92, 93, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, and 934. The appellant was sentenced to forfeiture of \$867.00 pay per month for six months, confinement for six months, reduction to pay grade E-1,

and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error. First, the appellant avers that the evidence supporting all the charges is factually insufficient to support findings of guilty. Second, the appellant argues that the evidence is legally insufficient to support a finding of guilty to maltreatment alleged in Charge II, Specification 4.

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

I. Factual Sufficiency

The appellant was charged with abusing his position and authority as a noncommissioned officer (NCO) to haze and strike Marines subject to his authority on various occasions from July through October 2006. It was further alleged that he intimidated them not to reveal his actions. The Government's primary evidence was the testimony of six Marines, including four male victims and one female victim. A non-victim NCO eyewitness testified to the incident that forms the basis of Charge II, Specification 4, a maltreatment (hazing) of Lance Corporal (LCpl) A that occurred on 26 July 2006.

Facts

The first incident (Charge II, Specification 1) occurred on 15 July 2006. The appellant and his section had driven to the airport to meet and bring back to base some reservists. The appellant, the senior NCO of the section, was driving his car with LCpl P, LCpl K, and LCpl M. After they dropped off one of the reservists at a rental car office, LCpl P got in the front seat of the car. The appellant then punched LCpl P twice in the face. The appellant called LCpl P "stupid" and a "p****." The force of the punches was so hard that LCpl P's jaw was sore for the rest of the day. LCpl K and LCpl M were sitting in the back seat, witnessed this assault, and testified in addition to LCpl P. Record at 70-72, 97, 142-43.

The second incident (Charge II, Specifications 1 and 2) occurred on 18 July 2006. The appellant was in the section's front office with LCpl P, LCpl K, LCpl M, and nine reservists. Because the reservists were acting somewhat rambunctiously, the appellant decided to demonstrate how well trained his Marines were. He ordered LCpl P to bend over, and then struck him in the face with a closed fist. He then did the same to LCpl K, calling him a "p****," striking him three times in the face and once in the groin. LCpl K's chin began to bleed. As LCpl K dropped to

the floor, gasping for air, the appellant laughed. Again, LCpl P, LCpl K, and LCpl M testified to these assaults. Record at 72-73, 98-99, 144-146.

The third incident (Charge II, Specification 3) occurred later that same day, once again in front of the reservists. The appellant punched LCpl M "full on into the jaw" as she was trying to step out of his path by the storage room. She rocked back from the strength of the blow and her jaw was sore thereafter. LCpl M was the sole testifying witness to this incident. Record at 146.

The fourth incident (Charge II, Specifications 4 and 5) occurred on 26 July 2006. That day, the appellant was conducting a pre-inspection in the barracks room of LCpl A, LCpl G, and LCpl F. The inspector, then Corporal (Cpl) S (but promoted to Sergeant (Sgt) by the time of trial), had just entered the room. The three Marines were at parade rest, at different angles to each other by their racks. The appellant punched LCpl G in the stomach, folding him over from the blow. Cpl S did not see the punch, but she heard LCpl G grunt. LCpl A saw the punch out of the corner of his eye. As Cpl S turned around, she saw LCpl G doubled over. She then asked LCpl A a question, but he began to stutter. The appellant then struck LCpl A on the neck with his digital cammie cover.¹ It was a very forceful strike and left a two-inch red mark. LCpl A was shocked and stunned; he was upset and felt bad, because he had just been struck by his NCO a person he was supposed to look up to. Cpl S asked the appellant to leave the room and then asked the two Marines if they were all right. She had never before seen an NCO strike a Marine in such a fashion, not even in boot camp. She, as well as LCpl G and LCpl A, testified to this incident. Record at 114-15, 130-33, 180-83.

The fifth incident (Charge I, Specifications 1 and 2) occurred on 10 September 2006. The appellant, LCpl P, and LCpl A were in the office. The appellant ordered LCpl P and LCpl A to bite the desk with their teeth. When they did not bite the desk immediately, the appellant physically pushed each of their heads down, forcing them to bite the desk. He told them there was no one in the company big enough to stop him. The two felt embarrassed and humiliated. They were the sole witnesses to this incident and testified thereto. Record at 77-78, 119-120.

The sixth and final incident (Charge II, Specification 1, and Charge III, sole specification) occurred on 1 October 2006. The appellant was driving a government van with LCpl P and LCpl A as his passengers. LCpl P was sitting in the passenger seat and LCpl A was in the rear. The appellant then punched LCpl P three

¹ The evidence is conflicting as to whether the appellant actually hit LCpl A by striking him with the cover through motion of his hand/arm or by throwing the cover at him without his hand actually striking LCpl A. For the purposes of this decision, the actual manner of striking is irrelevant.

times in the face. The punches were hard and LCpl P's jaw was sore for several days. When LCpl P asked the appellant to stop, the appellant told him to shut up and called him a "p****." The appellant told LCpl P that if he told anyone, that there was no one in the company big enough to stop him (the appellant) from getting to LCpl P. The appellant then repeated this threat to LCpl P several more times over the next month. Both LCpl P and LCpl A testified regarding this incident. Record at 75-76, 117-18.

Law

The appellant contends the combined testimony of the six Government witnesses is factually insufficient because several of them had previously denied the hazing to investigators, some of the versions of the incidents were in conflict, and the six as a whole were a "tightly knit group of friends" laying a "web of deception" against the appellant.

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 members, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. Reasonable doubt does not mean, however, that the evidence contained in the record must be free from any and all conflict. *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000).

We have carefully reviewed the record of trial in this case. The Government witnesses were skillfully cross-examined by the appellant's defense counsel. The initial denials of hazing and the inconsistent versions of some of the incidents were fully explored. The witnesses admitted that when initially confronted by investigators they were scared and provided false statements denying any knowledge of hazing.

The testimony of the six Government witnesses in this case is credible and consistent. After reviewing the record and taking into account that we did not see or hear the witnesses, we are convinced the testimony of the witnesses was worthy of belief and we are convinced of the appellant's guilt beyond a reasonable doubt.

II. Legal Sufficiency of Charge II, Specification 4²

Charge II, Specification 4, alleges the appellant maltreated LCpl A by striking him in the face with his cover. The facts adduced at trial, however, indicate that the appellant struck LCpl A on the neck, not the face. The appellant argues that the

² Initially charged as Charge II, Specification 5. After the Government merged original Specifications 2 and 7 with and into Specification 1 (all involving LCpl P), this specification involving LCpl A became Specification 4.

evidence in support of the appellant's conviction of this specification and charge are legally insufficient as striking someone on the body with a cover does not objectively establish maltreatment. The appellant cites no authority for this proposition.

The crime of maltreatment was thoroughly discussed in *United States v. Carson*, 57 M.J. 410 (C.A.A.F. 2002). The essence of the offense of maltreatment is abuse of authority. In *Carson*, the Court of Appeals for the Armed Forces concluded "it is not necessary to prove physical or mental harm or suffering on the part of the victim" but acknowledged "proof of such harm or suffering may be an important aspect of proving that the conduct meets the objective standard." *Id.* at 415. The court held that for conduct to constitute "maltreatment" within the meaning of Article 93, UCMJ, "[i]t is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's actions reasonably could have caused physical or mental harm or suffering." *Id.*

In *Carson*, the court cited with approval *United States v. Finch*, 22 C.M.R. 698, 700 (N.B.R. 1956), wherein the defendant, who was in charge of a prisoner detail, ordered the prisoners to kick and strike each other with their fists. The court upheld the conviction, observing that even if some of the witnesses regarded the treatment as "horseplay" and no one was physically harmed, the conduct amounted to maltreatment because it was improper for the accused to subject persons under his control to such "ill befitting treatment." *Id.* at 701.

In the case *sub judice*, as measured from an objective viewpoint in light of the totality of the circumstances, the appellant's actions toward LCpl A, then subject to the appellant's orders, certainly constitute "ill befitting treatment." This includes striking LCpl A with his cover. There is no question in our minds that the appellant's actions reasonably could have caused physical or mental harm or suffering to LCpl A. The evidence indicates that LCpl A was standing at parade rest awaiting inspection with LCpl G. The appellant first struck LCpl G in the abdomen. He then turned to LCpl A, who also was standing at parade rest, and struck LCpl A with his cover hard enough that it left a red mark on LCpl A's neck, approximately 2 inches in size. Record at 115. Cpl S indicated that the appellant struck LCpl A "very forcefully." Following this assault, Cpl S asked the appellant to leave the room. She then asked LCpl A how he felt, out of concern for LCpl A's condition after just having been struck. LCpl A indicated he was "shocked and stunned." *Id.* at 181-82.

Thus, the evidence clearly establishes that the appellant struck LCpl A, his subordinate, with his cover, in a forceful way that left a bruise on LCpl A's neck. The appellant committed this offense against his subordinate, while LCpl A was standing at parade rest with his arms behind his back. Certainly that

there was an assault upon a defenseless subordinate is cruel to that person and, as such, is a classic case of maltreatment of a subordinate. That the strike upon LCpl A was not on his face does not make it any the less maltreatment.

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art. 66(c).

Conclusion

As noted above, and with respect to Charge II, Specification 4, the evidence establishes the appellant hit LCpl A in the neck, not his face. Accordingly, as to Specification 4 under Charge II, we affirm the findings except for the word "face" and substitute therefore the word "neck." We affirm the remaining findings of guilty and the sentence as approved by the convening authority.

Senior Judge VINCENT and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court