

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**THOMAS J. SCHUMACHER
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000153
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 August 2009.

Military Judge: Col John Ewers, USMC.

Convening Authority: Commanding General, 1st Marine
Division (REIN), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Maj Sean B. Patton,
USMC.

For Appellant: Maj Kirk Sripinyo, USMC.

For Appellee: CDR John J. Flynn, JAGC, USN; LT Brian C.
Burgtorf, JAGC, USN.

30 November 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

REISMEIER, Chief Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of failing to obey a lawful order, two specifications of simple assault, and communicating a threat in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and 934. The appellant was sentenced to one year confinement, reduction in pay grade to E-3, forfeiture of \$930.00 pay per month for three months, and a bad-conduct

discharge. The convening authority approved the sentence as adjudged.

The appellant raised three assignments of error.¹ We find appellant's assignments of error to be without merit and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

BACKGROUND

The appellant and his wife, Second Lieutenant (2LT) D, United States Army, lived in military housing at Camp Pendleton, CA. On the evening of 6 November 2008, they had an argument that escalated to the point where 2LT D walked to their next door neighbor's house, occupied by Sergeant (Sgt) K and his wife, Mrs. K, and asked them to call the MPs. Record at 151-52, 195-97. 2LT D testified at trial that she asked Mrs. K to call the MPs because the appellant had taken her cell phone, and she was hoping the MPs would scare him into giving it back. *Id.* at 201. In addition, Sgt and Mrs. K both testified that while Mrs. K was on the phone with the MPs, 2LT D came over a second time and told them she thought the appellant was "getting a gun." *Id.* at 153, 173. 2LT D testified that she did not remember telling Sgt and Mrs. K or an interviewing Naval Criminal Investigative Service agent that the appellant was going to get a gun. *Id.* at 202-04.

According to 2LT D, after Sgt and Mrs. K called the MPs, the appellant went into the garage to calm down by "playing with his guns." *Id.* at 205. She stated the appellant's "number one hobby" is to clean his guns and use his reloading gear. *Id.* at 206. 2LT D claimed her main concern was the "misconception" the MPs might have when they saw the appellant holding a pistol and an M4 rifle. *Id.* at 215, 239-40. She stated the MPs arrived very quickly, and both she and her husband were shocked by their appearance because they did not knock and had their guns drawn as they entered. *Id.* at 208, 210-11, 239, 248-49. 2LT D maintained she never felt threatened by the appellant, nor did he ever point

¹ 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 WAS NEVER IN REASONABLE APPREHENSION OF IMMEDIATE BODILY HARM.

II. WHETHER THE MILITARY JUDGE ERRED WHEN HE REFUSED TO GIVE A SELF-DEFENSE INSTRUCTION DESPITE EVIDENCE THAT APPELLANT HAD A REASONABLE BELIEF THE MILITARY POLICE WERE ARMED, UNLAWFUL TRESPASSERS WHO POSED A THREAT TO APPELLANT AND HIS WIFE.

III. WHETHER THE FOLLOWING AMOUNTS TO CUMULATIVE ERROR THAT MATERIALLY PREJUDICED APPELLANT'S RIGHT TO A FAIR TRIAL: 1) THE MILITARY JUDGE ERRED IN ALLOWING THE 911 CALL INTO EVIDENCE; 2) THE MILITARY JUDGE ERRED IN NOT STRIKING SERGEANT [K'S] TESTIMONY FROM THE RECORD; 3) THE MEMBERS ERRED IN NOT ENTERING THE PROPER FINDINGS; 4) THE MEMBERS ERRED DURING SENTENCING WHEN THEY UNWILLINGLY AWARDED A DISCHARGE BECAUSE THE SENTENCING WORKSHEET DID NOT INCLUDE "NO DISCHARGE" AS AN OPTION.

a gun at her or anybody else. *Id.* at 216-217, 240. She also denied the appellant made any threatening language toward the MPs. *Id.* at 245. However, at one point the appellant aimed his pistol at his own head, which did scare her despite her insistence the guns were never loaded. *Id.* at 217. Eventually, 2LT D stated she left the house because the appellant asked the MPs to remove her from the situation. *Id.* at 218.

2LT D's testimony was generally contradicted by the testimony of the two responding MPs, Sgt BL, USMC, and Lance Corporal (LCpl) JF, USMC. The following relevant aspects of their testimony were largely consistent:

- (1) Both MPs were informed of an ongoing domestic incident with a possible weapon involved, and they arrived to a screaming female voice coming from inside the house. *Id.* at 267, 273, 336-339.
- (2) They announced their presence as military police in a loud voice and banged on the door as they entered. *Id.* at 277, 340.
- (3) They drew their pistols when they noticed the appellant holding two weapons. *Id.* at 281, 343.
- (4) They ordered the appellant to lower his weapons. *Id.* at 282, 344.
- (5) The muzzle of the rifle was pointed toward 2LT D's midsection. *Id.* at 283, 345.
- (6) Both MPs testified that the appellant made various comments to include, "I've killed people before. It's nothing for me to kill a few f***ing MPs." *Id.* at 283, 348.
- (7) LCpl JF testified that the pistol would shift from being pointed toward 2LT D to being pointed toward his shoulder and face area. While Sgt BL admitted he could not directly see whether the pistol was pointed directly LCpl JF, he did state it was pointed in his general direction and LCpl JF was continually ducking for cover. *Id.* at 284, 294, 297, 308-12, 345-46.
- (8) Both MPs testified that LCpl JF grabbed 2LT D during an opportune moment by pulling her away and handing her off to Sgt BL who then took her outside. *Id.* at 288-89, 349.

Finally, over defense objection, six 911 tracks² were admitted into evidence that contained the initial emergency call from Mrs. K and conversations between the responding MPs and the dispatch. Prosecution Exhibit 5.

² This opinion refers to Prosecution Exhibit 5 as 911 tracks, however the record indicates the called number was technically an emergency base number stored in Sgt K's phone. Record at 163.

ASSIGNMENTS OF ERROR

I. Legal and Factual Sufficiency of Simple Assault

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 offense 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.Ct.Crim.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, 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.

There are two elements to the offense of simple assault: "(a) That the accused . . . offered to do bodily harm to a certain person; and (b) That the . . . offer was done with unlawful force or violence." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 54b(1).

The appellant alleges that Specification 1 of the Charge is legally and factually insufficient because 2LT D was never in reasonable apprehension of receiving immediate bodily harm. Appellant's Brief of 7 May 2010 at 6. His argument is grounded in the assumed credibility of 2LT D's trial testimony that "Appellant never pointed a weapon at her, that she believed the weapons to be unloaded, and that she never felt threatened by Appellant." *Id.* (citing Record at 216, 227, 240-41, 246, 251). Therefore, the appellant ultimately argues the evidence fails to satisfy the first element of Specification 1 of the Charge that the appellant offered to do bodily harm to 2LT D.

However, on thorough review, the record contains ample evidence of the appellant's commission of an offer type assault against his wife. For example, Mrs. K, an independent eye witness, testified that 2LT D was visibly upset when she requested the MPs be called; Mrs. K also indicated that when 2LT D came over a second time while Mrs. K was still on the phone with the MPs, she told Mrs. K she thought the appellant was "getting a gun."³ Record at 151-55. The 911 track of the emergency call captured this statement and 2LT D's attendant emotional distress, and was played for the members. PE 5. While the members were required to find apprehension of harm at the time of the assault, given the timing and content of the 911 call, it would be logical for the members to infer 2LT D was in reasonable apprehension of bodily harm both when the call was made and shortly after the track was recorded. Most importantly,

³ Sgt K substantially corroborated Mrs. K's testimony. Record at 168, 173. Additionally, Both Sgt and Mrs. K provided favorable opinions of the appellant. Record at 158-60, 181-82.

both Sgt BL and LCpl JF testified that the appellant pointed his weapons at 2LT D. Record at 283, 345, 368, 382-83.

Furthermore, 2LT D's testimony was clearly at odds with several Government witnesses. However, reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). "Members are free to believe one witness and disbelieve another and to even believe one portion of a particular witnesses' testimony but not to believe another portion." *United States v. Kivel*, ___ M.J. ___, No. 200800638, 2009 CCA LEXIS 458, at 8 (N.M.Ct.Crim.App. 22 Dec 2009) (citing *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999)), *rev. denied*, ___ M.J. ___, No. 10-0267, 2010 CAAF LEXIS 419 (C.A.A.F. May 20, 2010). In cases where witness credibility plays a critical role, we are hesitant to second-guess members' perception of their testimony. See *id.* at 8-9. The consistency and corroboration of the assault by Sgt BL and LCpl JF as stated above severely diminished 2LT D's credibility. As a result, this court is convinced that any rational fact finder could have found the appellant guilty of Specification 1 of the Charge. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to this offense.

II. Failure to Instruct on Self-Defense

The military judge has an obligation to instruct on an affirmative defense when one has been reasonably raised by the evidence. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); RULES FOR COURTS-MARTIAL 916(e) and 920(e)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). "The test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire." *Davis*, 53 M.J. at 205 (citation omitted). It is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt. *United States v. Taylor*, 26 M.J. 127, 129 (C.M.A. 1988). However, any doubt whether some evidence has been raised should be resolved in favor of the accused. *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981) (citation omitted).

In the present case, a self-defense instruction was only warranted if there was some evidence that the appellant: "(A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully [on him]; and (B) In order to deter [the MPs], [the appellant] offered but did not in fact apply or attempt to apply a means or force likely to cause death or grievous bodily harm." R.C.M. 916(e)(2).

Here, the issue is centered on the first element of self-defense, particularly whether some evidence was raised so the members could infer the appellant was reasonably in apprehension of wrongful harm. In other words, the appellant, under a reasonably prudent person standard, must have believed that the

MPs were about to inflict bodily harm upon him without legal justification. See R.C.M. 916(e)(2), Discussion.

The potential self-defense instruction was discussed at length on the record. Record at 459-64, 475-90. During an Article 39a, UCMJ, session centered on instructions, civilian defense counsel proffered that "some evidence" of self-defense was raised on two principal occasions. First, LCpl JF testified the appellant said several times to the MPs that they were going to kill him. *Id.* at 348, 372, 460. Second, LCpl JF and 2LT D both testified that the appellant stood up out of a crouched position with two weapons as soon as he saw the MPs walk in and, according to 2LT D, there was confusion as to who they were at first. *Id.* at 215, 249, 341-46.

Despite this evidence, the record does not support allowing a self-defense instruction for several reasons. Primarily, the testimony concerning the appellant's fear of the MPs killing him occurs much later in the confrontation. As a result, not only does the appellant know who the MPs are at that point, but no reasonably prudent person could believe the MPs were not lawfully present and would not be justified if they used deadly force against a person pointing a possibly loaded pistol at them. See Record at 476 (military judge discussing the timing issue and lawfulness of their actions). Furthermore, any actual confusion as to who the MPs were when they first arrived is irrelevant, because the appellant's fear of illegal intruders about to unlawfully kill him is required to be based on reasonable grounds. See R.C.M. 916(e)(2), Discussion. There is no evidence in the record that demonstrates the appellant pointed his weapon at LCpl JF until after he knew who they were. To the contrary, LCpl JF testified that he took cover behind the door, continually announced his presence, and when he would peek around the door, the appellant would point the pistol toward him. Record at 345-46.

Overall, we are not convinced that after a 911 call is made, any reasonably prudent person would either be surprised by the actual arrival of emergency responders or be in fear that the responders would wrongfully harm him/her if they saw someone holding two weapons at the time of their arrival. We agree with the military judge that, "[t]here's no evidence of facts and circumstances at the time of the alleged assault on Lance Corporal [JF] from which the trier of fact could reasonably conclude that the accused reasonably apprehended the wrongful infliction of bodily harm by Lance Corporal [JF]." *Id.* at 490. Therefore, the record lacks "some evidence" required for a self-defense instruction. See *Davis*, 53 M.J. at 205.

III. Cumulative Error⁴

A. Principles of Law

We review the question of whether cumulative errors denied the appellant a fair trial by determining whether we find, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error" *United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992) (citation and internal quotation marks omitted). The doctrine applies when no one particular error would warrant reversal, but the combination of errors merit the disapproval of a finding or sentence. *Id.* at 170-71. The appellant has alleged the following four errors and argues their combined effect denied him a fair trial: (1) The military judge erred in allowing the 911 tracks into evidence; (2) the military judge erred in not striking Sergeant Kirkland's testimony from the record; (3) the members erred in not entering the proper findings; and (4) the members erred during sentencing when they unwillingly awarded a discharge because the sentencing worksheet did not include "no discharge" as an option. Appellant's Brief at 1-2.

Regarding the recorded 911 tracks, assuming without deciding that all of the 911 tracks were erroneously admitted, such error was harmless. If the military judge's evidentiary ruling was erroneous, we would evaluate prejudice by weighing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (citation omitted). Having done so, we find no prejudice. After weighing the *Kerr* factors, any possible error in the 911 tracks admittance did not substantially influence the findings. The content of the 911 tracks was admissible -- and admitted -- through other means. At worst, the high quality of the 911 tracks may have improperly bolstered the MPs' and Sgt and Mrs. K's testimony. However, any bolstering effect the 911 tracks may have had is far outweighed by the combination of the strength of the Government's case, the immateriality of the 911 tracks relative to the other admissible evidence, and the incredible testimony of 2LT D. In reaching our conclusion, we also consider the absence of any limiting instruction for any statements admitted for non-hearsay purposes. However, defense counsel's failure to request a limiting instruction constituted forfeiture in the absence of plain error, particularly where the content of the statements was admitted through direct testimony at trial. R.C.M. 920(f); see also *United States v. Ross*, 7 M.J. 174, 176 (C.M.A. 1979) (limiting instruction required when admission of evidence has "constitutional overtones," rather than where evidence might be

⁴ Appellant Defense Counsel noted in his brief that the third assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

used merely for impeachment purposes); *United States v. Hester*, No. 200400718, unpublished op. (N.M.Ct.Crim.App. 10 Jun 2006). *rev. denied*, 64 M.J. 398 (C.A.A.F. 2007) (finding no error when a military judge admitted a contested phone recording into evidence while the military judge also had no obligation to provide a limiting instruction to the members absent a request from the defense).

Likewise, Sgt K's testimony, even if objectionable because he was present in the courtroom during testimony of other witnesses, was favorable to the defense. If anything, Sgt K's testimony is consistent with the theory behind the appellant's first assignment of error that the MPs entered his house with guns drawn, thereby suggesting a self-defense argument. However, as stated above, even with this testimony, no reasonable person could expect the MPs were about to wrongfully harm them.

Regarding findings, the members, during sentencing deliberations but before adjournment, informed the military judge they made an "administrative error" in filling out the findings worksheet. Appellate Exhibit XXVIII. They had intended to find the appellant guilty of the lesser included offense of simple assault to Specification 2 of the Charge. *Id.* The military judge discussed the issue with counsel from both sides, provided the members a new findings worksheet which they filled out, and the new findings were announced in open court. Record at 619-24. The military judge also instructed the members as to the new, lower maximum punishment, and that they should disregard any comments made by the trial counsel during his sentencing argument about a weapon being loaded. *Id.* at 624-25. The military judge permitted both sides to present further evidence or argument with respect to the sentence based on the actual findings, to which they both declined. *Id.* at 625. After review of the military judge's actions and the clear application of R.C.M. 922(d), the new announcement of the actual findings of the court was not only proper, but benefited the appellant.⁵

Finally, with regard to the sentence, there was no allegation in this case of any extraneous or improper influence on any member.⁶ To the contrary, this alleged error appears to

⁵ A service member has a right to announcement of all findings in open court. R.C.M. 922(a); see also *United States v. Dunn*, No. 200201707, 2006 CCA LEXIS 143, at 4-5, unpublished op. (N.M.Ct.Crim.App. 30 Jun 2006) (citing Art. 53, UCMJ, 10 U.S.C. § 853, and *United States v. Dilday*, 47 C.M.R. 172 (A.C.M.R. 1973)), *aff'd*, 64 M.J. 357 (C.A.A.F. 2006). An erroneous announcement of findings may be corrected by a new announcement so long as the error is discovered and the new announcement made before the final adjournment of the court-martial. R.C.M. 922(d).

⁶ R.C.M. 1008 provides: "A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member." The discussion under R.C.M. 923 concerning the impeachment of findings provides in part: "Unsound reasoning by a member, misconception of

be premised on a misapplication of the military judge's instructions. According to both precedent and the Rules for Court-Martial, the present circumstances do not warrant impeachment of the sentence. The sentencing worksheet was properly filled out. AE XXVII. The members crossed out punishments that they did not award (including punishments that, like discharge, did not include "none" as an option within the punishment category, such as reprimand or restriction) and circled or wrote in punishments they did award (i.e. confinement time, bad-conduct discharge). *Id.* As a result, the sentence adjudging a bad-conduct discharge was proper on its face.

Nevertheless, after adjournment, three members provided written statements indicating they thought they were required to choose between a bad-conduct and dishonorable discharge, and could not choose no discharge. AE XXXIV. This is despite the fact that the military judge issued proper instructions to the members concerning a punitive discharge, which provided in part: "This court may adjudge a punitive discharge In this case, if the court determines to adjudge a punitive discharge, it may sentence the accused to a dishonorable discharge or a bad-conduct discharge." Record at 613-14. A post-trial Article 39(a), UCMJ, session was held concerning the issue where the civilian defense counsel requested the bad-conduct discharge be set aside. Record at 629-37. We agree with the military judge that there is no legal basis to disturb the sentence awarded by the members. *Id.* at 636.

In sum, the alleged errors advocated by the appellant as cumulative error were either nonexistent, properly handled by the military judge, or did not prejudice the appellant. As a result, the doctrine of cumulative error does not apply to the facts of his case.

the evidence, or misapplication of the law is not a proper basis for challenging the findings." We agree with the military judge that this principle also applies to impeachment of a sentence. Record at 636. Furthermore, "a verdict cannot be impeached by a member of the jury who claims that the jury failed to follow the court's procedural or substantive instructions." *United States v. Bishop*, 11 M.J. 7, 9 (C.M.A. 1981) (citing *United States v. West*, 48 C.M.R. 548, 552 (C.M.A. 1974)); see also *United States v. Ovando-Moran*, 48 M.J. 300, 304 (C.A.A.F. 1998) (post-trial interviews of members are only intended as a trial advocacy learning tool, and there is no justification for using them to impeach a verdict); *United States v. Loving*, 41 M.J. 213, 237 (C.A.A.F. 1994) ("[T]he overwhelming weight of authority prohibits inquiry into the voting procedures actually used by court members to arrive at a sentence."); MILITARY RULE OF EVIDENCE 606(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Conclusion

Both the findings of guilty and sentence approved by the convening authority are affirmed.

Senior Judge MITCHELL and Judge Beal concur.

For the Court

R.H. TROIDL
Clerk of Court