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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEVE MOYA
CULINARY SPECIALIST SEAMAN RECRUIT (E-1), U.S. NAVY

NMCCA 201100444
GENERAL COURT-MARTIAL

Sentence Adjudged: 19 May 2011.
Military Judge: CAPT Carole Gaasch, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA.
Staff Judge Advocate's Recommendation: LCDR J.L. Markley, JAGC, USN.
For Appellant: LCDR Michael R. Torrisi, JAGC, USN; LT Ryan Mattina, JAGC, USN.
For Appellee: Capt Samuel C. Moore, USMC.

22 August 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MODZELEWSKI, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence, two specifications of missing movement, two specifications of orders violations, one specification of driving while drunk, one specification of drunk and disorderly conduct, and one specification of providing alcohol to a minor in violation of Articles 86, 87, 92, 111, and

134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, 892, 911, and 934. A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of aggravated sexual contact and one specification of indecent language, in violation of Articles 120(e) and 134, UCMJ, 10 U.S.C. §§ 920 and 934.

The appellant was sentenced to confinement for 30 months, forfeiture of all pay and allowances for 30 months, and a bad-conduct discharge from the United States Navy. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant raises four assignments of error:

> (1) that the military judge erred in denying a defense challenge for cause due to both actual and implied bias; (2) that the force element of aggravated sexual contact requires specific intent, and that the military judge erred by failing to instruct that voluntary intoxication could negate the element; (3) that the indecent language specification failed to state an offense due to omission of the terminal element; and (4) that the appellant was not tried by a fair and impartial panel.[1]

After consideration of the pleadings of the parties, as well as the entire record of trial, we conclude that the appellant suffered prejudice from the failure of the indecent language specification to state an offense. Accordingly, we set aside the finding of guilty as to that specification and reassess the sentence. Following that corrective action, the remaining findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

In the early morning hours of 17 December 2009, the victim, Aviation Ordnanceman Airman (AOAN) EB (EB) returned to Naval Air Station North Island after having dinner with friends. Before returning to her ship, she and a male friend (OG) stopped at the base Laundromat to use the restroom. The appellant was among a group of several men standing near the laundromat, listening to music and talking.

[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The appellant followed EB into the Laundromat and into the women's restroom. The appellant, a stranger to EB, placed his hand on her shoulder from behind, turned her around and said words to the effect of "Come on, I can give it to you however you like," and proceeded to back her into a corner. Record at 433-34. The appellant then wrapped his arms around her in a bear hug. As EB resisted, the appellant tightened his grip and stated words to the effect of, "Oh, so you like it rough." *Id.* at 434. EB raised her voice and continued to resist verbally and physically as the appellant slid his hands down her back, into her pants, under her underwear making skin on skin contact. As OG emerged from the men's restroom, he heard raised voices from the women's restroom, recognized his friend's voice, and opened the door. As he entered, he discovered the appellant pinning EB in a corner. OG yanked the appellant off of EB, shoved him out of the door, and shortly thereafter escorted EB from the laundromat.

Challenge for Cause

The appellant's first assignment of error is that the military judge abused her discretion in denying a challenge for cause against Chief W. First, the appellant argues Chief W's responses during *voir dire* demonstrated an actual bias that rendered him incapable of considering evidence of voluntary intoxication, which was the crux of the defense case and argument. The appellant asserts that Chief W demonstrated actual bias in three ways: his ex-wife and children were involved in a car accident caused by a drunk driver; during *voir dire*, he referenced the Navy's "zero tolerance" policy towards alcohol abuse; and he stated that individuals should be accountable for their actions when they are intoxicated. Additionally, the appellant argues that, even if Chief W was able to set aside any actual bias, his presence on the panel created an implied bias that warranted his excusal.

During group *voir dire*, the members were asked if they or anyone close to them had ever been through a traumatic event such as a car accident or being the victim of a crime. *Id.* at 214. Chief W responded affirmatively. *Id.* at 215. During individual *voir dire*, Chief W explained that his ex-wife and children had been involved in a minor traffic accident with a drunk driver that resulted in no injuries, never went to trial, and was "adjudicated between the lawyers." *Id*. at 301. Chief W stated that he did not resent the drunk driver involved in the accident, stating he "had nothing against him." *Id*.

The defense counsel also asked about Chief W's experiences participating in Disciplinary Review Boards (DRBs) for Sailors where alcohol was a contributing factor. *Id*. at 302. Chief W responded that he was always "just following the rules on what the law is, zero tolerance and especially Navy zero tolerance . . . ." *Id*. at 303. When defense counsel asked specifically if Chief W could follow instructions from the military judge that do not fit within his understanding of the Navy's zero tolerance policy, Chief W stated that he would be able to do so. *Id*.

Chief W was then asked directly whether he believed alcohol consumption could ever excuse conduct. *Id*. Chief W responded that it could not be an excuse. *Id*. He elaborated, "I still think you're still responsible for your actions to anything, that once you're drinking, you do anything outside of that, outside of that realm, you should be accountable for your actions when it comes to alcohol drinking because you know that it can impair your judgment." *Id*. at 304.

The trial counsel sought to clarify some of Chief W's comments by asking directly whether he would follow the military judge's instructions regarding how to consider the effects of alcohol use. *Id*. at 305. Chief W responded affirmatively, "Yes sir. If [the military judge] gives me instructions, I'll follow the instructions she gives me, sir." *Id*.

From the initial panel, defense counsel challenged three panel members for cause. The military judge granted the first two of those following argument from counsel and consideration of the liberal grant mandate. The defense counsel then challenged Chief W for both "implied bias and an inelastic attitude towards alcohol." At the close of arguments and counter-arguments, the military judge denied the challenge:

> I will note . . . I observed Chief [W] and, based on a cold record, it doesn't always pick up the tone and demeanor. I found Chief [W] to be very candid and very believable and I believed him when he stated that he would agree to follow the Court's instructions. I don't find the fact that his family was involved in an accident involving alcohol to be persuasive.
>
> With regard to his comments that he doesn't believe alcohol should excuse actions, that's part of the instructions that he's going to get as far as voluntary intoxication. I don't find that to be

> either implied or an actual bias, and he specifically said that he would agree to follow the Court's instructions. And again, observing Chief [W] and his demeanor and tone, the Court found him to be credible and I believe he will, in fact, do just that, follow the Court's instructions. So even considering the liberal grant mandate, the Court denies that challenge as there being no actual or implied bias.

Id. at 329.

RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) requires the removal of a court member "in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." This rule encompasses both actual and implied bias. *United States v. Clay,* 64 M.J. 274, 276 (C.A.A.F. 2007). Although actual and implied bias are not separate grounds for challenge, they do require separate legal tests. *Id*. Challenges for both actual and implied bias are based on the totality of the circumstances. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). The burden of establishing the basis for a challenge is on the party making the challenge. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (citing R.C.M. 912(f)(3)).

Actual Bias

A military judge's ruling on a challenge for cause based on actual bias is reviewed for an abuse of discretion. Because the question of whether a member is actually biased is a question of fact, and involves judgments regarding credibility, the military judge is given significant deference in determining whether a particular member is actually biased. *Terry*, 64 M.J. at 302; *Clay*, 64 M.J. at 276.

Here, the military judge determined that Chief W was not actually biased either as a result of a minor traffic accident or because of his recitation of the Navy's policy on alcohol abuse. Moreover, she found that Chief W was credible when he answered that he would follow the military judge's instructions.

Although Chief W initially recited the Navy's zero tolerance policy, in context it is clear that he was responding to defense counsel's questions about his role in his command's Disciplinary Review Boards. In a court-martial setting, Chief W clearly indicated that he would yield to the military judge's instructions. *Id*. at 329. The military judge was impressed by

Chief W's candor and credibility, and noted that she "believed him when he stated that he would agree to follow the Court's instructions." *Id*. Based on the totality of these circumstances, we conclude that the military judge did not abuse her discretion in denying the challenge based on actual bias.

Implied Bias

The standard of review for implied bias is "less deferential than abuse of discretion, but more deferential than *de novo* review." *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006). However, military judges who place their reasoning on the record and consider the liberal grant mandate will receive more deference on review. *Clay*, 64 M.J. at 277. Here, the military judge recognized and applied the liberal grant mandate and articulated her analysis on the record, and her ruling should therefore be given greater deference.

The test for implied bias is objective. Viewing the situation through the eyes of the public and focusing on the perception of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced. *Moreno*, 63 M.J. at 134. We ask whether there is too high a risk that the public will perceive that the accused received less than a court composed of fair and impartial members. *United States v. Wiesen,* 56 M.J. 172, 176 (C.A.A.F. 2001). As in actual bias, we analyze implied bias based on the totality of the circumstances. *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004).

Here, the military judge clearly understood the rule for implied bias and the liberal grant mandate. Citing to the mandate and articulating a lengthy and thoughtful analysis on the record, she granted three of the four defense challenges for cause for implied bias.[2] Invoking the same implied bias analysis and giving due consideration to the liberal grant mandate, she denied this one challenge against Chief W.

We conclude that, viewed objectively, a member of the public would not question the fairness of Chief W sitting as a panel member. The fact that Chief W's ex-wife and children were involved in a minor car accident with a drunk driver does not, by itself, lead an objective member of the public to question

[2] She granted two of three defense challenges for cause on the original panel, and then granted a third challenge from the supplemental members after the panel fell below quorum. Defense counsel exercised their preemptory challenge on another member.

the integrity of the proceedings. Prior experience or connection with the same crime is not per se disqualifying. *Terry*, 64 M.J. at 305. Chief W had no substantial emotional involvement with the crimes at issue, (*Clay*, 64 M.J. at 278), no close personal ties with someone who was a victim of the same crime, (*Terry,* 64 M.J. at 305), and no close relationship with one of the parties, or witnesses (*United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

In this instance, Chief W testified that no one in his family was harmed and that he had no resentment towards the driver. Record at 301. Additionally, Chief W did not view people who drink alcohol in a negative light. *Id*. at 304. In fact, it is clear from responses during general *voir dire* that Chief W himself both drinks alcohol and keeps alcohol in his home. *Id*. at 218-19. Based on the answers that Chief W provided, most people in his position would not be prejudiced. *Moreno*, 63 M.J. at 134.

Similarly, Chief W's responses regarding the Navy's zero tolerance policy do not objectively raise doubts regarding the fairness of the court-martial or indicate an implied bias against the appellant. Chief W was relaying his view of the Navy's policy, rather than his own personal moral code. Record at 303. The entire exchange was prefaced by questions regarding the need for Chiefs to participate in DRBs for Sailors who had been under the influence of alcohol. *Id*. at 302. Viewed through that lens, it is clear that Chief W was discussing the consequences of irresponsible alcohol use in the Navy rather than his own viewpoint on alcohol use. The military judge determined that Chief W was sincere in his willingness and ability to follow her instructions and the record contains nothing to challenge that factual finding.

When questioned directly about the role alcohol can play in determining culpability, Chief W indicated a belief that individuals should be held accountable for their actions even when alcohol use has impaired their decision making ability. *Id*. at 304. The fact that Chief W articulated this generalized statement about responsibility, which is a relatively universal or mainstream view, certainly poses little risk that the public would perceive that the appellant received less than a court composed of fair and impartial members. *Wiesen,* 56 M.J. at 176. He later responded that he would be able to follow the military judge's instructions on the law. Record at 305. While a military judge should not accept a token claim of impartiality as conclusive, a member's unequivocal statements can be properly

considered. *United States v. Nigro*, 28 M.J. 415, 418 (C.M.A. 1989). The military judge noted that she found Chief W's response that he would be able to follow her instructions credible and believable. Record at 329.

Considering the totality of the circumstances, we find that the public would perceive this panel to be fair and impartial and conclude that the military judge did not err in denying the defense's challenge for implied bias.

Instructions to Members

The appellant next alleges the military judge erred in her instructions in that she should have instructed that voluntary intoxication could negate the third element of aggravated sexual contact, the force element.[3] We review this claim of instructional error *de novo*. *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011).

Consistent with our ruling in *United States v. Redd,* No. 201000682, 2011 CCA LEXIS 413 at *10-11, unpublished op. (N.M.Ct.Crim.App. 29 Dec 2011) *aff'd in part and reversed in part on other grounds*, __ M.J. __, No. 12-0354, 2012 CAAF LEXIS (C.A.A.F. Jul. 10, 2012) (summary disposition), we disagree with the appellant's assertion. Force is not a specific intent element, and voluntary intoxication is therefore not a defense. *Id*. The voluntary intoxication instruction was inapplicable as to that element, and the military judge did not err in her instructions.

Failure to State an Offense

The appellant next avers that the sole specification under the Additional Charge alleging indecent language fails to state an offense for lack of the terminal element. The appellant correctly notes the specification does not expressly include the terminal element of conduct prejudicial to good order and discipline or service discrediting, as required for violations of Article 134, UCMJ.

Whether a specification states an offense is a matter we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). To state an offense, a specification must

[3] The military judge properly instructed that voluntary intoxication could negate the first element of the offense by negating the ability to form the requisite intent to abuse, humiliate, or degrade, or to arouse or gratify sexual desire. Record at 519.

allege every element, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *Crafter,* 64 M.J. at 211; R.C.M. 307(c)(3). When a specification does not expressly allege an element of the intended offense, appellate courts must determine whether the terminal element was necessarily implied. *Fosler*, 70 M.J. at 230. However, the interpretation of a specification in such a manner as to find an element was alleged by necessary implication is disfavored. *Ballan*, 71 M.J. at 33-34.

Regardless of whether the appellant contested the charge or pled guilty, a charge found defective for failure to allege an offense is tested for plain error. *Id*. at 43. Under the plain error analysis, the appellant shoulders the burden of demonstrating: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

Looking to the plain language contained within the four corners of the specification, we are unable to conclude that it alleges the terminal element expressly or by necessary implication. *See United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012). Having found error, and recognizing that it was plain and obvious error, we test for prejudice. The third prong of the plain error analysis asks "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *United States v. Humphries*, 71 M.J. 209, 2012 CAAF LEXIS 691, at *17, (C.A.A.F. 2012) (citations omitted). Where prejudice to a material right is rooted in notice, the record is examined to determine if the omitted element is somewhere extant in the trial record, or whether the element is essentially uncontroverted. *Id*. at *19.

Here, the pretrial proceedings did not make any mention of the terminal element. The Government made no reference to the terminal element during its opening statement and did not introduce evidence on the merits that might satisfy the element. Although the trial counsel argued the terminal element during closing arguments, and the military judge instructed the panel on the terminal element, these references occurred after the close of evidence. The record lacks any indication that the appellant was on notice as to the terminal element of the charged offense prior to the close of evidence. We are convinced that the appellant's substantial rights were materially prejudiced by the lack of notice as to what exactly

he must defend against. Accordingly, the findings of guilty of the Additional Charge and the specification thereunder must be set aside and that the Additional Charge and its specification are dismissed.

Fair and Impartial Members

We have reviewed the appellant's remaining assignment of error and determined it to be without merit.

Sentence Reassessment

Having set aside and dismissed the indecent language offense, we must now "assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). Our action on findings does not dramatically change the sentencing landscape so as to negate our ability to reassess the sentence. *United States v. Buber,* 62 M.J. 476, 479 (C.A.A.F. 2006). Remand for a rehearing on sentence is unnecessary in this case.

Dismissal of the indecent language offense reduces the maximum possible confinement by six months from 30 years and six months to 30 years, leaving the other categories of punishment unchanged. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 89(e)(2). This change is essentially inconsequential. The 30 months of confinement awarded to the appellant is well below the maximum authorized confinement based upon the offenses of which he was properly found guilty.

Here, the gravamen of the offense was not the indecent language the appellant used during the incident, but rather the physical acts that constituted the aggravated sexual contact itself. The language he used during the commission of that offense would have properly been testified to in the course of proving up the sexual contact offense, and could properly have been considered by the members both on the merits, and as aggravation in sentencing on that offense. The appellant was properly convicted of the aggravated sexual contact itself, along with a myriad of other offenses including unauthorized absence, twice missing movement, two specifications of orders violations, driving while intoxicated, drunk and disorderly conduct, and providing alcohol to a minor. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after reconsidering the entire record, we are

satisfied beyond a reasonable doubt that, even if the indecent language specification had been dismissed at trial, the members would have adjudged a sentence no less than that actually adjudged and approved by the convening authority in this case.

Conclusion

The appellant's convictions on the Additional Charge and its sole specification are set aside and the Additional Charge and its specification are dismissed. The remaining convictions are affirmed. The sentence as adjudged and approved by the convening authority has been reassessed and is affirmed.

Chief Judge PERLAK and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court