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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RICHARD T. PEARCE
CHIEF WARRANT OFFICER 3 (W-3), U.S. MARINE CORPS

NMCCA 201100110
GENERAL COURT-MARTIAL

Sentence Adjudged: 25 March 2011.
Military Judge: LtCol Robert Palmer, USMC.
Convening Authority: Commanding General, Marine Corps Installations East, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol J.M. Henry, USMC.
For Appellant: Capt Michael Berry, USMC.
For Appellee: Maj Paul Ervasti, USMC.

28 November 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.

STOLASZ, Judge:

A military judge sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, violating a lawful general order, conduct unbecoming an officer and a gentleman, two specifications of fraternization, two specifications of breaking restriction, and two specifications of solicitation in violation of Articles 86, 92, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§

886, 892, 933, and 934. The appellant was then convicted by members, contrary to his pleas, of attempted adultery, violating a lawful general order, two specifications of sodomy, adultery, and two specifications of solicitation in violation of Articles 80, 92, 125, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 925, and 934. The members sentenced the appellant to six months confinement, forfeiture of all pay and allowances, and a dismissal. The convening authority (CA) approved the sentence as adjudged.[1]

The appellant submits the following eight assignments of error[2]:

> (1) The *Marcum* factors are functionally equivalent to elements of Article 125, UCMJ, such that they must be pleaded, instructed upon, and proven beyond a reasonable doubt;
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> (2) The military judge abused his discretion and tainted the members panel by ruling that the adultery exception under MILITARY RULE OF EVIDENCE 504(c)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) allowed him to compel the appellant's spouse to testify adversely and thereafter not limiting her testimony to the alleged adultery;
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> (3) Specifications 1, 5, and 6 of Charge VI, adultery and solicitation, fail to state offenses because they do not allege the terminal element;
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> (4) The specification under Charge I, attempted adultery, fails to state an offense;
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> (5) The sole specification under Charge II, unauthorized absence, fails to state an offense because the date alleged does not include the year;

[1] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

[2] The appellant's initial brief was filed with this Court on 20 October 2011 and assigned six errors. On 6 June 2012, the appellant filed a consent motion for leave to file a supplemental assignment of error. On 2 July 2012, the appellant filed a non-consent motion for leave to file an additional supplemental assignment of error and motion to attach.

(6) Specifications 2, 3, and 7 under Charge VI, fraternization and solicitation, the specification under Additional Charge II, breaking restriction, and Specifications 1 and 2 under Additional Charge III, breaking restriction and solicitation, fail to state offenses because they do not allege the terminal element;

(7) The guilty findings for Specifications 1, 5, and 6 of Charge VI are fatally ambiguous;

(8) The military judge's extra-judicial comments made after the court-martial create the appearance that the military judge abandoned his impartiality and deprived the appellant of a fair and impartial court-martial.

Factual Background

The appellant, a Chief Warrant Officer 3 in the United States Marine Corps, had approximately 18 years of service prior to his general court-martial. His downward spiral apparently coincided with the death of his father and his failure to select for Chief Warrant Officer 4. This downward spiral was characterized by excessive drinking, a penchant for texting or emailing inappropriate pictures to his subordinates, and becoming overly and unduly familiar with subordinates while he served as the director of the Installation Personnel Administrative Center (IPAC) aboard Marine Corps Air Station Beaufort, South Carolina. His more egregious conduct involved engaging in sexual activity with one subordinate, Lance Corporal (LCpl) MM, and the wife of an another subordinate, Mrs. SV.

Discussion

1. *Marcum* Factors

The appellant's first assigned error asserts that the factors identified in *United States v Marcum*, 60 M.J. 198 (C.A.A.F. 2004), are functionally equivalent to elements under Article 125 and thus must be pleaded, instructed upon, and proven beyond a reasonable doubt. He also claims that the military judge's failure to instruct the members on the *Marcum* factors resulted in the appellant's conviction for a constitutionally protected activity which was not criminal in nature. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Marcum*, 60 M.J. 198. We disagree.

Contrary to his pleas, a panel of officer members convicted the appellant of sodomy upon Mrs. SV, the wife of Sergeant (Sgt) MV, one of the appellant's subordinates. The appellant was Sgt MV's officer-in-charge (OIC) at the IPAC. The appellant's sexual interlude with Mrs. SV occurred while Sgt MV was at work.

The members also convicted the appellant of sodomy with LCpl MM. While at the appellant's house for dinner, LCpl MM consumed large amounts of alcohol, becoming inebriated and ultimately vomiting. Shortly after she laid down in the appellant's master bedroom, the appellant entered the bed and began kissing and fondling her breasts and vagina before performing oral sex on her.

In *Lawrence*, the United States Supreme Court held that individuals have a liberty interest that protects consensual "private sexual conduct," including oral and anal sodomy. 539 U.S. at 578 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)). This liberty interest is not absolute, however, and is subject to certain delineated exceptions. *Id.* Those exceptions include, *inter alia* "persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused." *Id.*

The Court of Appeals for the Armed Forces (CAAF) applied the *Lawrence* decision within the "military context" in *Marcum.* 60 M.J. at 205. The CAAF determined that Article 125, UCMJ, was not facially unconstitutional, but might be unconstitutional as applied in certain situations. *Id.* at 207. CAAF outlined a three-part test to make this determination. First, "was the conduct the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?" . . . Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?" *Id.* at 206-07.

Here, the appellant argues that the *Marcum* factors are *de facto* elements of sodomy under Article 125 and, as questions of fact, may only be resolved by the members. Appellant's Brief of 20 Oct 2011 at 11-12. The military judge ruled that the *Marcum* factors were questions of law to be decided by him and not the jury.[3] Thus, we must determine if the *Marcum* factors are to be

[3] Record at 1046-47.

analyzed by the military judge as questions of law, or by the trier of fact as questions of fact.

The issue of whether the military judge gave proper instructions is a question of law we review *de novo*. *United States v. Schroder*. 65 M.J. 49, 54 (C.A.A.F. 2007).

The military judge determines questions of law. Art. 51(b), UCMJ; RULE FOR COURTS-MARTIAL 801(a)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Further, "[w]hether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact for determination by the triers of fact." *United States v. Carson*, 35 C.M.R. 379, 380 (C.M.A. 1965). This principle has been repeatedly applied to situations in which certain questions of fact must be answered by the military judge in order to resolve a question of law. *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005). Further, as "[d]eterminations as to what constitutes a federal crime, and the delineations of the elements of such criminal offenses—-including those found in the UCMJ—-are entrusted to Congress", *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010) (citations omitted), we find that the military judge did not err in deciding that the *Marcum* factors are questions of law to be determined by the military judge. *See United States v. Stratton,* No. 201000637, 2012 CCA LEXIS 16, unpublished op. (N.M.Ct.Crim.App. 26 Jan 2012); *United States v. Harvey*, 67 M.J. 758, 763 (A.F.Ct.Crim.App. 2009).

We note that the appellant also summarily asserts that the *Marcum* factors were nonexistent in his case. Appellant's Brief at 13. We disagree. The military judge conducted an analysis of the *Marcum* factors regarding the appellant's conduct with Mrs. SV and LCpl MM and determined that the conduct fell into the second prong of the *Marcum* analysis and created a situation where consent might not be easily refused. Record at 1046-47. However, our review of the record leads us to conclude that the appellant's conduct was not protected under either the second prong, or the third prong, which provides that there are additional factors relevant solely to the military environment affecting the reach of the *Lawrence* liberty interest. Engaging in sexual activity with a subordinate after excessively drinking with that subordinate, as the appellant did with LCpl MM, and engaging in sexual activity with the wife of another subordinate, as appellant did with Mrs. SV, are clearly actions that fall outside protected liberty interests recognized in *Lawrence* and appropriately regulated as matters of military

discipline under Article 125. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

2. Spousal Privilege under MIL. R. EVID. 504(c)(2)(A)

The appellant's second assignment of error avers that the military judge abused his discretion by compelling the appellant's wife, AP, to testify against the appellant regarding his adulterous conduct, and further requiring her to testify as to other charged offenses which improperly tainted the members. We disagree.

When questioned by the military judge, AP stated that she desired to invoke her spousal-incapacity privilege under MIL. R. EVID. 504(a). Record at 935. The military judge ruled that AP, as the victim of her husband's adultery, did not have a privilege to refuse to testify, and thus, he ordered AP to testify. *Id.* The defense counsel agreed with the military judge, indicating that AP could not invoke her spousal privilege regarding the adultery. The defense counsel questioned whether AP could invoke the spousal privilege as to other charges where she was not the victim—"or is this a blanket?". *Id.* at 936. The military judge ruled that the spousal privilege either exists or does not exist, and because AP was the victim of an adulterous relationship, it did not exist. *Id.* The defense counsel did not object to this ruling, and stated that "within the military jurisdiction, that it [immunity] is a blanket." *Id.* The defense counsel then proffered that AP had no personal knowledge of any of the charges other than the adultery charge with Mrs. SV. *Id.*

Since trial defense counsel did not object to the military judge's order directing AP to testify, we review for plain error. MIL. R. EVID. 103(d); *see also United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011).

MIL. R. EVID. 504 combines into one rule the spousal and confidential marital communications privileges. *United States v. Taylor*, 64 M.J. 416, 420 (C.A.A.F. 2007). The rule also provides for exceptions to the privilege, wherein it states that there is no spousal incapacity or marital confidential communications privilege "[i]n proceedings in which one spouse is charged with a crime against the person or property of the other . . . ." MIL. R. EVID. 504(c)(2)(A). In *Taylor*, the CAAF held that adultery is a "crime against the person of the other spouse" under MIL. R. EVID. 504(c)(2)(A). 64 M.J. at 420.

We conclude that the military judge did not err when he determined that the spousal immunity privilege was waived regarding AP and the appellant pertaining to his sexual acts with Mrs. SV and LCpl MM as they were clearly offenses against his wife.

Even if the military judge erred when he ordered AP to testify and then permitted her to testify about the appellant's sexual behavior with LCpl MM, we find no material prejudice to the appellant. "We evaluate prejudice from an erroneous evidentiary ruling 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). After consideration of these factors, we find no prejudice.

3. Failure to State an Offense as to Contested Specifications

The appellant correctly notes that the adultery and solicitation specifications as set forth in Specifications 1, 5, and 6 of Charge VI, which he contested, fail to allege the terminal element of either conduct that is prejudicial to good order and discipline or service discrediting. Pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012) the omission of the terminal element from these specifications constitutes error.

The appellant did not object to these specifications at trial. "[A] charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error." *Ballan*, 71 M.J. at 34 (citations and footnote omitted). Absence of the terminal element within a specification is plain and obvious error. *United States v. Humphries*, 71 M.J. 209, 214 (C.A.A.F. 2012). However, in order to receive relief, the appellant has the burden to show that, "the Government's error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [the appellant's] substantial, constitutional right to notice." *Id.* at 215 (citations and footnote omitted); *see also* Art. 59(a), UCMJ. The appellant's burden regarding prejudice may be met if neither the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued. Thus, we must "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id.* at 215-16, (quoting *United States v. Cotton*, 535 U.S. 625,

633 (2002)). We conclude that the appellant has failed to meet his burden.

To begin, during the *voir dire* process the trial defense counsel questioned a number of potential members individually about good order and discipline and Article 134 offenses. The following colloquy occurred with Major F:

> DC: And you found that even though he had sex with a civilian that that was still prejudicial to good order and discipline or service discrediting?
> MEM: Correct.
>
> DC: Could you explain why you felt that way? I mean, this is a civilian. Right?
> MEM: Right.
>
> DC: I mean, why would you think that it is prejudicial to good order and discipline and service discrediting?
> MEM: Because adultery is against the law. It is against good order and discipline, and it is specifically cited in the UCMJ.
>
> DC: Well, adultery, actually, in and of itself, is not illegal. Right? It is only adultery that is prejudicial to good order and discipline.
> MEM: Right.
>
> DC: So instructions – The judge will actually walk you through his instructions and say hey, not all adultery is actually criminal, not all of it is illegal. It also has to be prejudicial to good order and discipline.
> TC: Sir, I am going to object to this kind of instructing the member rather than asking voir dire questions.
>
> DC: I was just correcting, sir.
> MJ: Overruled. Go ahead.
>
> DC: Thank you, sir. So working on that premise, that general premise that adultery is not necessarily per se illegal, that there has to be some sort of prejudicial and effect on good order and discipline
> . . . .

Record at 634.

The trial defense counsel questioned another member, Lieutenant Colonel (LtCol) M, in the similar fashion, as follows:

> DC: Well, I mean, if you, as a convening authority, get handed a charge and one of the charges reads Article 134 and it was, say, sexual harassment –
> MEM: Okay
>
> DC: -- there is a prejudice-to-good-order-and-discipline element that the government needs to be able to prove beyond a reasonable doubt for somebody to be found guilty of Article 134. So prejudice to good order and discipline is something that – it is kind of a big deal. When you are discussing charges and the validity of those charges and whether you should refer something forward, what is your opinion of good order and discipline?
> MEM: Well, I mean if the charges are true, if they are factual and they are prejudicial to, I hate to use the same phrase, but if they are prejudicial to good order and discipline of the unit or if they are prejudicial to mission accomplishment, then article 134 applies. I don't know if that explains what you are looking for.
>
> DC: Well. Let me give you an example: If adultery occurred between one of your Marines and another service member, adultery occurs. That's what the allegation is. In your mind, is adultery, in and of itself, prejudicial to good order and discipline?

Id. at 613-14.

Then, during the challenge process, the trial defense counsel, when discussing his objection to a particular member, engaged in this colloquy with the military judge:

> DC: But he did say, sir, that he thought adultery was prejudicial to good order and discipline. Using the same exact fact pattern that we have here today. It is an officer misconduct. It is a Sergeant who leaves to go do work and then the officer actually, while the Sergeant is doing work, sleeps with the wife of the Sergeant. I mean, it is the exact same fact pattern. He has already said that that fact pattern is illegal. He has already said it. You can't get around that.

MJ: I think he was saying that it could be illegal.

DC: Sir, he was very -- I actually tried to rehabilitate him. He specifically said that it is illegal. And he kind of was like dumbfounded that I was even asking him that. He thought that it was just a matter of fact that adultery is illegal. He was kind of surprised that I had to say, well, not always.
MJ: Well, it is like murder is illegal as long as you intend to kill and you don't have legal justification or excuse. I think he was just acknowledging that it is against the UCMJ. That is why when you were saying, well, not all adultery is. Only those that are found to be prejudicial to good order and discipline. Again, I don't know if he knows that that – I think they call it the terminal element in all Article 134 charges – exists or not, but he certainly will after I give him instructions; if I give him instructions, if we get that far.

Id. at 695.

The trial defense counsel also engaged other members individually in discussions of adulterous conduct and Article 134, UCMJ, offenses and whether such conduct was prejudicial to good order and discipline. *Id.* at 583, 584, 650, 664, 665, 670, 671, 695.

Next, although the Government did not reference the terminal element in its opening statement, it presented testimony from Sgt MV and Sgt VB during its case-in-chief concerning the effect of the appellant's offenses on their working relationships with the appellant. The record reveals that trial counsel elicited testimony during his case-in-chief from Mrs. SV that she engaged in sodomy and intercourse with the appellant, her husband's OIC, while her husband was at work. *Id.* at 908-17. Sgt MV testified that the appellant's adulterous affair with his wife impacted his relationship with the appellant at the workplace because he "began to distrust [his] OICs in general." *Id.* at 898. The trial counsel also elicited testimony from Sgt VB that the text messages she received from the appellant as well as his propositioning her created an uncomfortable work relationship. *Id.* at 956. Additionally, when the military judge questioned the Government counsel as to the purpose for certain questions during its examination of Mrs. SV, the Government counsel indicated they were offering the testimony to satisfy the terminal element of prejudice to good

order and discipline. Record at 916, 933. In response to the Government's proffer, the defense counsel objected on the grounds of relevance and hearsay.

Although it was error for the Government to not plead the terminal element in the specifications of adultery and solicitation, we find that the totality of the circumstances shows that notice of the missing terminal element was extant throughout the record of trial. Trial defense counsel spent considerable time and effort educating and conditioning the members during individual *voir dire* that adultery must be prejudicial to good order and discipline to constitute a crime, and that Article 134 offenses require the element of prejudice to good order and discipline.

After considering the totality of the circumstances in this case, as provided for by the CAAF in *Humphries*, we find the lack of notice due to the omission of the terminal element from the contested specifications was sufficiently cured by the Government during the course of the trial and that trial defense counsel's consistent and repeated attempts to ensure that the members understood that Article 134 offenses must be prejudicial to good order and discipline clearly shows that the appellant was on notice of the terminal element. Under these circumstances, we find the appellant has failed to demonstrate that the defective Article 134 specifications caused material prejudice to his substantial right to notice.

4. Unauthorized Absence; Missing Date

The appellant pleaded guilty to a specification of unauthorized absence, however, the specification failed to state the year. The appellant asserts that because the charged offenses cover a large period of time, August 2008 to August 2010, he is not on notice at to which year the failure to go occurred. He asserts that the specification is susceptible to multiple meanings, and that he does not know whether the failure to go was on 29 June of 2008, 2009, or 2010.

When explaining the elements of the offense to the appellant the military judge used the date of 29 June 2010, clearly placing the appellant on notice. Record at 426. We note that the Government made a motion to amend the specification and indicated the date to be added as "29 June 2010." The defense had no objection to the change. *Id.* at 419. The military judge granted the motion and directed the trial counsel to notate the amended date on the charge sheet.

Although the trial counsel neglected to include the year when amending the charge, the appellant had ample notice of the amendment, through the Government's approved motion and the military judge's providence inquiry. Additionally, although the charge sheet may not correctly reflect the change, the record of trial sufficiently protects the appellant from re-prosecution. Consequently, we conclude that the specification states an offense.

5. Guilty Pleas to Article 134 Offenses and Terminal Element

The appellant pleaded guilty to the charges and specifications at issue. *Id.* at 413-14. As such, we resolve this issue pursuant to the CAAF's decision in *Ballan*, 71 M.J. at 28. As articulated in *Ballan*, we apply a plain error analysis to allegations of defective specifications first raised on appeal. 71 M.J. at 16. Although the specifications at issue did not include the terminal element, which is plain error or obvious, the military judge explained each element of the charged offenses during the providence inquiry, including the terminal element that the appellant's conduct was to the prejudice of good order and discipline or was service discrediting. The appellant proceeded to explain why his conduct was prejudicial to good order and discipline or was service discrediting. Thus, when conducting our plain error analysis, we find that it was error to fail to allege the terminal element; the error was obvious; however, under the facts of this case, the showing of error alone is insufficient to show prejudice to a substantial right. *Id.* We decline to grant relief.

6. Disjunctive Terminal Element

In his first supplemental assignment of error, the appellant avers that the guilty findings for adultery and two specifications of solicitation (Specifications 1, 5, and 6 of Charge VI, respectively) are fatally ambiguous and this court is therefore unable to conduct its review under Article 66(c). We disagree.

Each of these specifications failed to allege the terminal element, and the military judge's findings instructions were presented in the disjunctive – that the appellant's conduct was either "prejudicial to good order and discipline" or "service discrediting." As to Specification 1 alleging adultery, the military judge further instructed: "[u]nder some circumstances, adultery may not be prejudicial to good order and discipline

but, nonetheless, may be service discrediting . . . . Likewise, depending on the circumstances, adultery can be prejudicial to good order and discipline but not be service discrediting. *Id.* at 1102. The appellant asserts that the members' general finding of guilty to each of these specifications, without clarification from the military judge whether their finding was based on a clause 1 or clause 2 offense, created an ambiguous verdict preventing this court from conducting its Article 66 review.

We review *de novo* the question of whether there is an ambiguity in the findings that prevents us from conducting our factual and legal sufficiency review under Article 66(c), UCMJ. *See United States v. Rodriquez*, 66 M.J. 201, 203 (C.A.A.F. 2008); *United States v. Brown*, 65 M.J. 356, 358-59 (C.A.A.F. 2007). This court may affirm only those findings of guilty we find correct in law and fact and determine, on the basis of the entire record, should be approved. Art. 66, UCMJ. If a verdict is ambiguous, review under Article 66(c) is not possible.

In *United States v Miles*, __ M.J. ___, No. 201100578, 2012 CCA LEXIS 398 (N.M.Ct.Crim.App. 17 Oct 2012), this court addressed a similar issue. There the terminal element of a General Article specification was charged in the disjunctive instead of the conjunctive, and the appellant similarly argued that the guilty finding was ambiguous.

In *Miles*, we noted that the CAAF, in dicta, has consistently reasoned that "[t]he three clauses [of Article 134] do not create separate offenses. Instead, they provide alternative ways of proving the criminal nature of the charged misconduct.'" *Id.* at *4 (quoting *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008)). Consistent with the reasoning in *Medina*, we concluded that clauses 1 and 2 of Article 134 are two different theories of liability under which an accused can be found guilty for one crime. *Id.*

"The longstanding common law rule is that when the factfinder returns a guilty verdict on an indictment charging several acts, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Rodriquez*, 66 M.J. at 204 (citing *Griffin v. United States*, 502 U.S. 46, 49 (1991)). This presumption in favor of general verdicts is also true when the Government presents multiple or alternate theories of liability as a general guilty verdict attaches to them all. *Id.* (citing *Turner v. United States*, 396 U.S. 398, 420 (1970)); *see also United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987).

("It makes no difference how many members choose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members").

Here, the trial defense counsel spent considerable time and effort conditioning and educating the members that in order to be criminal an Article 134, UCMJ, an offense must be prejudicial to good order and discipline. In his closing argument, the trial counsel listed prejudicial to good order and discipline as the terminal element for specifications 1, 5 and 6. Record at 1115-17. A review of the record suggests that both trial and defense counsel proceeded in their respective cases with the understanding that the adultery and solicitation specifications involved conduct that was to the prejudice of good order and discipline, and advanced that theory to the members. The appellant relies on *United States v. Woode*, 18 M.J. 640 (N.M.C.M.R. 1983), in which this court found a disjunctive specification alleging use and/or distribution of drugs fatally defective because it was subject to multiple interpretations. However, this reliance is misplaced as clauses 1 and 2 of Article 134 do not allege different offenses, but rather different theories of liability. Therefore, consistent with *Rodriguez*, *Vidal* and *Miles*, we find no ambiguity in the findings to impede our review under Article 66(c), UCMJ.

7. Post-Trial Comments by the Military Judge

The appellant asserts that the military judge's post court-martial comments created an appearance of abandonment of his impartiality and deprived the appellant of a fair and impartial court-martial. We do not countenance the comments made by the military judge, however, we are convinced that the appellant's court-martial was a fair and impartial proceeding.

On 21 June 2012, the military judge, LtCol GP, provided professional military education (PME) training to five Marine Corps officers who were performing temporary duty during their summer recess from law school. During the PME, LtCol GP made various statements not in keeping with judicial decorum.[4]

R.C.M. 902 provides two categories for when a military judge may be disqualified: "specific circumstances connoting actual bias and the appearance of bias." *United States v. Quintanilla*, 56 M.J. 37, 44-45 (C.A.A.F. 2001). "The appearance

[4] Appellant's Non-Consent Motion For Leave to File Supplemental Assignment of Error and Motion to Attach of 12 Jul 2012.

standard is designed to enhance public confidence in the integrity of the judicial system." *Id.* at 45 (citing *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 860 (1988). The rule also serves to reassure the parties as to the fairness of the proceedings, because the line between bias in appearance and in reality may be so thin as to be indiscernible. *Id.* R.C.M. 902(a) provides that disqualification is required "in any proceeding in which [the] military judge's impartiality might reasonably be questioned," even though the evidence does not establish actual bias. *Quintanilla*, 56 M.J. at 45.

If specific circumstances do not show actual bias, we look to see if disqualification is warranted under an objective standard under R.C.M. 902(a):

> Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982) (quoting E. Thode, *Reporter's Notes to Code of Judicial Conduct* 60 (1973)); [*United States v.*] *Wright*, 52 M.J. [136,] 141 [(C.A.A.F. 1999)]. . . . "When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt" by the military judge's actions. *United States v. Burton*, 52 M.J. 223, 226 ([C.A.A.F.] 2000) (citations and internal quotation marks omitted). On appeal, "the test is objective, judged from the standpoint of a reasonable person observing the proceedings." *Id.*

Quintanilla, 56 M.J. at 78. *See also United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000).

In this case we note the comments of the military judge were made on 21 June 2012, some 15 months after the appellant was sentenced. The comments did not specifically reference the appellant or the appellant's case. We also note that the appellant pleaded guilty to various offenses and contested other offenses before members who determined his guilt and subsequent punishment. Thus we have a different factual scenario than the one presented to this court in *United States v. Hayes*, No. 200600910, 2010 CCA LEXIS 364, unpublished op. (N.M.Ct.Crim.App. 28 Oct 2010).

In *Hayes,* the military judge, after taking the appellant's plea and sentencing him to a bad-conduct discharge, made critical comments during a post-trial debrief while specifically referencing the appellant and his offenses. This court determined that the timing of the statements suggested that the military judge held these views while presiding over the case, and ruled that the military judge's appearance of bias should have led to his recusal or disqualification.

Here, our review of the record reveals that the appellant's court-martial was a fair and impartial proceeding. There is no indication of conduct that would lead a reasonable person to question the military judge's impartiality. Further, the appellant was convicted and sentenced by members, thus removing the power of punishment from the hands of the military judge. We find the military judge was not actually biased and that there was no appearance of bias during the appellant's court-martial.

The remaining assignment of error, that the attempted adultery specification failed to state an offense, is without merit.

Conclusion

The findings and sentence as approved by the CA are affirmed.

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court