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

Before
J.A. MAKSYM, R.E. BEAL, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

TREVOR D. WELLER
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201100043
GENERAL COURT-MARTIAL

Sentence Adjudged: 16 September 2010.
Military Judge: CAPT Bruce MacKenzie, JAGC, USN.
Convening Authority: Commanding General, 3d Marine Division (REIN), MCB Hawaii, Kaneohe Bay, HI.
Staff Judge Advocate's Recommendation: LtCol K.J. Estes, USMC.
For Appellant: LT Michael Hanzel, JAGC, USN; Capt Michael Berry, USMC.
For Appellee: LT Kevin Shea, JAGC, USN.

30 April 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.

MAKSYM, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of negligent discharge of a firearm in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was also convicted, contrary to his pleas, of one specification of assault with a dangerous weapon in

violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The military judge sentenced the appellant to eighteen months confinement, reduction to pay grade E-1, total forfeitures, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant assigns five errors: (1) the appellant's conviction for assault with a dangerous weapon was factually insufficient under a culpable negligence standard because the Government failed to prove that the appellant acted with culpable negligence rather than simple negligence; (2) the appellant's conviction for assault with a dangerous weapon was legally insufficient because the theory upon which the appellant was charged and convicted, assault by battery (i.e., battery absent assault), is not a crime under Article 128, UCMJ, which only criminalizes two types of assault, namely offer and attempt; (3) the Government violated the Jencks Act when it failed to record the Article 32 investigation, to the appellant's prejudice; (4) the appellant's convictions for negligent discharge and assault with a dangerous weapon constitute an unreasonable multiplication of charges; and (5) the sole specification of Charge II fails to state an offense because it does not allege the terminal element.

After hearing oral argument and carefully considering the record of trial and the parties' pleadings, we conclude that the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

During the summer of 2009, the appellant was stationed with his unit[1] at Forward Operating Base (FOB) Cafaretta in Now Zad, Helmand Province, Afghanistan. Record at 87. On 1 August, the appellant's unit returned to the base after a three-day patrol. *Id*. at 88. The standard practice upon entering the base perimeter was to clear any weapons of ammunition. *Id*. at 89. The appellant, having performed this task for his M240 machine gun but not his M9 pistol, walked into a partially enclosed area near several tents and large protective barriers called hescoes. *Id*. at 88. At some point, Lance Corporal (LCpl) RM also approached the area carrying a tray of food. Shortly thereafter, LCpl RM was shot in the abdomen by the appellant

[1] Golf Company, 2d Battalion, 3d Marines.

with a single round from the appellant's M9. *Id*. LCpl RM sustained life-threatening injuries that required emergency medical care and extensive surgery, which effectively ended his career in the Marine Corps. *Id*. at 191.

LCpl RM's account and the defense theory could not be more different. According to LCpl RM, shortly after returning from patrol, he approached the entrance to the area where the appellant was sitting. *Id.* at 117. After observing the M9 in the appellant's hand, LCpl RM told the appellant not to point it at him. *Id*. at 118. LCpl RM had previously counseled him on improperly handling the M9 and once again voiced his concern, telling the appellant "someone was going to get hurt." *Id*. at 118, 143-45. According to LCpl RM, the appellant responded "[w]hat? Like this?" and shot him. *Id*.

The appellant, through counsel, agreed that he shot LCpl RM, but believed that this tragedy was brought on by simple negligence in clearing his weapon.

After the shot hit LCpl RM, the appellant ran out of the enclosed area and began shouting for medical assistance. *Id.* at 276. Soon, several people who had heard the gunshot arrived at the tent, including a medic and medical officer. *Id*. at 189, 231, 241, 276. They found LCpl RM lying on his side, bleeding profusely, and in shock. *Id*. at 191. A medevac was requested and LCpl RM was flown to a field hospital and, later, to a military hospital in Germany.

During the trial, both the Government and the appellant called several witnesses present at FOB Cafaretta that day, although only LCpl RM and the appellant actually witnessed the shooting. Additionally, several ballistics and medical experts testified. Their testimony was meant to bolster either LCpl RM's version of events or the appellant's. While LCpl RM and the appellant have differing versions of events, it is clear that both Marines were highly trained and experienced in the operation and safety of firearms and had used firearms regularly in combat. *Id*. at 120. What is also clear is that the appellant was issued his M9 two weeks prior to the shooting and did not have formal training on that particular firearm. *Id*. at 197.

Factual and Legal Sufficiency

The appellant challenges both the factual and legal sufficiency of his conviction for assault with a dangerous weapon.[2] Appellant's Brief of 6 Jun 2011 at 18. Pursuant to Article 66(c), UCMJ, we review questions of factual and legal sufficiency *de novo*. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).

The appellant argues that his conviction for assault with a dangerous weapon is factually insufficient because his actions were negligent rather than culpably negligent. While culpable negligence satisfies the *mens rea* element of assault with a dangerous weapon, simple negligence does not. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 54c(1)(b)(ii). Culpable negligence is defined as:

> [A] negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. . . . Acts or omissions which may amount to culpable negligence include . . . pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous . . . .[3]

Id. at ¶ 44c(2)(a)(i); *see also* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, "Article 128," 3-54-8, note 8

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[2] The sole specification under Charge I reads:

> In that Lance Corporal Trevor D. Weller, U.S. Marine Corps, on active duty, did, on board Forward Operating Base Caferetta, Now Zad, Afghanistan, on or about 1 August 2009, commit an assault upon Lance Corporal [RM], U.S. Marine Corps, by shooting him in the stomach with a dangerous weapon likely to produce death or grievous bodily harm, to wit: a loaded firearm.

[3] The military judge granted the appellant's motion to consider the following culpable negligence definition from American Jurisprudence:

> Mere lack of foresight, stupidity, irresponsibility, thoughtlessness, or ordinary carelessness, however serious the consequences may happen to be, do not constitute culpable negligence. There must exist in the mind of the party charged, at the time of the act or omission, a consciousness of the probable consequences of the act, and a wanton disregard of them.

Appellate Exhibit IIIX; Record at 77-81.

"AGGRAVATED ASSAULT – DANGEROUS WEAPON, MEANS, OR FORCE," (1 Jan 2010). This definition, which is found under Article 119 in the MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.) has been applied to Article 128 offenses. *United States v. Mayo*, 50 M.J. 473, 474 (C.A.A.F. 1999). Given that the appellant plead guilty to the negligent discharge of a firearm, there is no question that his actions were negligent. Having reviewed the record, we are convinced beyond a reasonable doubt that the appellant was also culpably negligent.

If LCpl RM's version of events is to be believed, the appellant's actions were strikingly similar to the example cited above from the MCM. LCpl RM testified that the appellant pointed his M9 at him and stated "[w]hat, like this?" pulled the trigger and shot him. Record at 118. Although the appellant on cross challenged certain parts of LCpl RM's recollection of events, as well as his ability to accurately remember the shooting, the evidence nevertheless supports the victim's recollection of events. Key aspects of LCpl RM's testimony match the testimony of other witnesses. Corporal (Cpl) Cardenas verified that the appellant had been counseled on unsafe weapons handling in the past. *Id.* at 213. LCpl Davidson testified that he saw the appellant running away just seconds after the shot rang out. *Id*. at 231, 237. Furthermore, both Mr. Trahin and Ms. Sevigny, firearms experts for the defense and Government, respectively, testified that performing a "brass check," the crux of the appellant's defense, would not ordinarily have led to the discharge of a round. *Id*. at 266, 355. Finally, the appellant had a powerful motive to modify his story in order to reduce his culpability.

While not every detail of LCpl RM's account is free from factual dispute, we lend little credence to the appellant's explanation of events, particularly the manner in which he handled his M9 that fateful afternoon. We are convinced beyond any reasonable doubt that the appellant, disregarding years of prior training and basic common sense, pointed his loaded M9 at LCpl RM and pulled the trigger, seriously wounding his fellow Marine. The appellant's actions clearly entail a "culpable disregard for the foreseeable consequences to others of that act. . . ." MCM, Part IV, ¶ 44c(2)(a)(i). We affirm the factual sufficiency of the appellant's conviction for assault with a dangerous weapon.

The appellant's conviction for assault with a dangerous weapon is also legally sufficient. The test for legal sufficiency is "whether, after reviewing the evidence in the

light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Article 128(a), UCMJ, reads "[a]ny person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct." Similarly, Article 128(b)(1) states, "[a]ny person subject to this chapter who . . . commits an assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm . . . . is guilty of aggravated assault and shall be punished as a court-martial may direct." The question raised by the appellant is, essentially, whether the above referenced statute, which clearly contemplates "assault by attempt" and "assault by offer", also includes an "assault by battery" theory. Appellant's Brief at 31. We find that it does.

"Assault by battery" is a historically recognized theory of assault. The Court of Military Appeals (CMA) explicitly confirmed a conviction based on an "assault by battery" theory in *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963). This precedent was reaffirmed in *United States v. Joseph*, in which the CMA reiterated that "[i]t is black letter law that every battery includes an assault," meaning that "one means of proving an assault is to prove a battery. . . ." 37 M.J. 392, 395 (C.M.A. 1993).[4]

The elements of assault with a dangerous weapon contained in the MCM support this precedent. Those elements are:

> (i) That the accused attempted to do, offered to do, or did bodily harm to a certain person; (ii) That the accused did so with a certain weapon, means, or force; (iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and (iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

[4] The foundation upon which the appellant builds his argument that Article 128, UCMJ, does not include the crime of "assault by battery" is Judge Wiss' concurrence in *Joseph*, which argues that Congress, by failing to mention the word "battery" in the statute itself, declined to outlaw "assault by battery" in Article 128, UCMJ. 37 M.J. at 402-06. While Judge Wiss' point is well taken, we decline to follow his logic as adopted by the appellant for the reasons set forth herein.

MCM, Part IV, ¶ 54b(4)(a). Included within the third element is the theory of not just "assault by attempt" and "assault by offer," but also "assault by battery."

The appellant notes that this portion of the MCM is not part of the statute, but rather an annotation made by the President. Appellant's Brief at 32. While correct, the portions of the MCM that outline the elements, punishments, and sample specifications are given considerable persuasive authority. *See United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010) (holding that the President's listing and explanation of offenses is persuasive authority). Combined with the precedent established in *Redding* and reiterated in *Joseph*, this inclusion of "assault by battery" as an element of assault with a dangerous weapon convinces us that this is a viable theory of assault and, therefore, the appellant's conviction is legally sufficient. *Redding*, 34 C.M.R. at 22; *Joseph*, 37 M.J. at 392.

Jencks Act

Prior to his trial, the appellant requested a verbatim transcript of a portion of the Article 32 investigation, in particular the testimony of LCpl RM. Record at 18. When it became clear that the Government had failed to record the Article 32 hearing, the appellant filed a motion to exclude the testimony of LCpl RM pursuant to the Jencks Act. Appellate Exhibit VI.

After a witness "has testified [for the United States] on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." Jencks Act, 18 U.S.C. § 3500(b). The purpose of the Act is to allow an accused to use the pretrial statements of witnesses for cross-examination during a trial. *See United States v. Jarrie*, 5 M.J. 193 (C.M.A. 1978). It is clear that the Jencks Act applies to military courts in general and Article 32 investigations in particular. *United States v. Marsh*, 21 M.J. 445, 451 (C.M.A. 1986). However, in cases such as this, where no recording of the Article 32 investigation was made, the Jencks Act does not apply because the Government was never in possession of the witness' statement.

While we agree with the Government that there is no statutory requirement to record Article 32 investigations and, therefore, failing to record an investigation does not trigger

the Jencks Act, we strongly urge the Government to record these hearings, such a policy being consistent with Rule 6 of the FEDERAL RULES OF CRIMINAL PROCEDURE.[5] *See United States v. Giusti*, 22 M.J. 733 (C.G.C.M.R 1986); RULE FOR COURTS-MARTIAL 405, MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.).

Unreasonable Multiplication of Charges

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). A military judge's ruling on unreasonable multiplication of charges is reviewed on appeal for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (Army Ct.Crim.App. 1999)). In determining whether multiple convictions constitute an unreasonable multiplication of charges, five factors are considered:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001). When applying *Quiroz*, "these factors must be balanced, with no single factor necessarily governing the result." *Pauling*, 60 M.J. at 95.

The appellant asserts that his convictions for negligent discharge of a weapon and assault with a dangerous weapon

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[5] Indeed, Rule 6(e)(1) of the FEDERAL RULES OF CRIMINAL PROCEDURE states:

> (1) *Recording the Proceedings.* Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

constitute and unreasonable multiplication of charges.[6] Appellant's Brief at 46. In reference to the first *Quiroz* factor, the appellant raised the issue of unreasonable multiplication of charges at trial, but did not formally object. Record at 453. As such, we find that this factor does not weigh in favor of the appellant.

Per the second factor, the appellant's convictions for assault with a dangerous weapon and negligent discharge of a firearm describe distinct criminal acts. The crime of negligent discharge of a firearm is meant to address a failure to follow well-established safety precautions as well as common sense, the result being a weapons discharge that threatens good order and discipline or tends to discredit the armed forces. Article 134, UCMJ. In contrast, assault with a dangerous weapon addresses, primarily, the grave injury that can or does result from an assault with a dangerous weapon. In this case, the negligent discharge of a firearm in a combat zone substantially prejudiced good order and discipline, while the assault with a dangerous weapon injured LCpl RM. Furthermore, negligent discharge of a firearm and assault with a dangerous weapon have distinct victims, the U.S. Marine Corps and LCpl RM, respectively. Although based on the same physical actions, each charge addresses distinct criminal acts. As such, this factor weighs against the appellant.

Similarly, the specifications do not misrepresent or exaggerate the appellant's criminality. These were the only two charges and specifications in this case. As noted above, each specifications is aimed at preventing distinct harms, whether prejudice to good order and discipline and/or discredit to the armed forces or, separately, grave physical harm. As the charges do not misrepresent or exaggerate the appellant's criminality, this factor also weighs against the appellant.

In this case, the number of charges and specifications does not unreasonably increase the appellant's punitive exposure because the military judge merged the two charges for sentencing. Record at 455. Additionally, the negligent

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[6] The sole specification under Charge II reads:

> In that Lance Corporal Trevor D. Weller, U.S. Marine Corps, on active duty, did, on board Forward Operating Base Caferetta, Now Zad, Afghanistan, on or about 1 August 2009, through negligence, discharge a firearm into the stomach of Lance Corporal [RM], U.S. Marine Corps.

discharge offense exposed the appellant to a much shorter amount of confinement, three months, in comparison to the assault with a dangerous weapon charge, eight years. MCM, Part IV, ¶ 80e and ¶ 54e(8)(a). Given the military judge's decision to merge the two convictions for sentencing and the relatively short period of confinement associated with the negligent discharge of a firearm conviction, the fourth factor weighs against the appellant.

Finally, there is no evidence of prosecutorial misconduct. Balancing the above five factors, we find that that the two charges and specifications do not represent an unreasonable multiplication of charges.

Failure to State an Offense

In all charges and specifications alleging a violation of Article 134, UCMJ, the terminal element of prejudice to good order and discipline and/or service discrediting must be separately charged and proven. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012). "[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." *Id*. In a plain error analysis, the appellant must show that: (1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). Finally, if the appellant has plead guilty and the providence inquiry "clearly delineates each element of the offense and shows that the appellant understood 'to what offense and under what legal theory [he was] pleading guilty,'" there is no prejudice under the plain error analysis. *Ballan,* 71 M.J. at 34 (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)); *see also United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012) (holding that an accused suffered no prejudice under a plain error analysis when he pled guilty to an Article 134, UCMJ, charge and the military judge explained the terminal elements during the providence inquiry).

In this case, the appellant pled guilty to the sole specification under Charge II, negligent discharge of a firearm. Record at 81. Although it was obvious error to omit the terminal elements from the specification, this error did not prejudice the appellant because he pled guilty and the military judge fully explained every element of the offense during the providence inquiry. *Id*. at 86. The appellant confirmed that he understood these elements and explained to the military judge why he believed his actions met every element of the offense,

including prejudice to good order and discipline and service discrediting. *Id*. at 101. As such, he suffered no prejudice and his conviction for negligent discharge of a firearm is affirmed.

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

Judge BEAL and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court