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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KENAN H. BELTON
CULINARY SPECIALIST SECOND CLASS (E-5), U.S. NAVY

NMCCA 201200292
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 February 2012.
Military Judge: CDR Colleen Glaser-Allen, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.D. Hutchison, JAGC, USN.
For Appellant: LT David Dziengowski, JAGC, USN.
For Appellee: CDR Deborah Mayer, JAGC, USN; Maj David Roberts, USMC; Maj Paul Ervasti, USMC.

30 April 2013

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.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant in accordance with his pleas of one specification of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of one specification of using provoking words and gestures, four specifications of

simple assault, one specification of assault consummated by a battery, and one specification of aggravated assault, in violation of Articles 117 and 128, UCMJ, 10 U.S.C. §§ 917 and 928. The members sentenced the appellant to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error including: (1) that the military judge abused her discretion by denying his motion to compel production of an expert consultant and witness on eyewitness identification; (2) that the military judge abused her discretion by denying his request for a novel eyewitness testimony instruction; (3) that the military judge abused her discretion by denying his motion to suppress the photographic lineup; and (4) that his convictions for simple assault were legally and factually insufficient.

After careful consideration of the record and the briefs of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

I. Background

In March 2011, the appellant and his then girlfriend, S.L., had several arguments. Following one such argument, S.L. decided to watch a movie at the base theater by herself. Following the movie, the appellant met S.L. in the theater parking lot, and another argument ensued. He then lifted and threw S.L onto the hood of her car and started to choke her. Bystanders witnessed the attack, phoned 911, and attempted to intervene. During the ensuing standoff, S.L. fled to the movie theater, and the appellant returned to his vehicle.

At least two bystanders attempted to obtain the appellant's vehicle license number. The appellant produced a pistol and pointed it at four bystanders. He then returned to his vehicle and fled.

Witnesses heard S.L. call the appellant "Kenan," his first name, but she was initially hesitant to provide his full name to the police. The following day, three witnesses, not of the appellant's race, made statements to a criminal investigator and each identified the appellant from a photo lineup. Appellate Exhibit VII, Encls. A, B, and C.

Additional facts necessary to resolve the assigned errors are included herein.

II. Expert on Eyewitness Identification

In his first assignment of error, the appellant argues that the military judge abused her discretion when she denied his motion to compel production of an expert consultant and witness in cross-racial identification and eyewitness identification. We disagree.

We review a military judge's denial of a request for expert assistance for an abuse of discretion. *United States v. Lloyd,* 69 M.J. 95, 99 (C.A.A.F. 2010). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of law." *Id*. (internal quotation marks and citation omitted).

"An accused is entitled to expert assistance provided by the Government if he can demonstrate necessity." *Id*. (internal quotation marks and citation omitted). The mere possibility of assistance is not sufficient to prevail on the request for expert assistance; instead, at trial, "'[t]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.'" *Id*. (quoting *United States v. Freeman,* 65 M.J. 451, 458 (C.A.A.F. 2008)). "[T]o satisfy the first prong of this test . . . [t]he defense must show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *Id*. (citing *United States v. Gonzalez,* 39 M.J. 459, 461 (C.M.A. 1994)).

At trial, the defense counsel asserted that the expert could address the effects of stress on memory and perception, as well as, cross-racial identification issues related to the evening of the events and the photo lineup the following morning. On appeal, the appellant argues that the expert requested would have assisted in two ways: first, with regard to eyewitness identification and cross-racial issues, and second, with regard to perception issues associated with race, specifically, whether the appellant actually had a gun.[1]

[1] The appellant asserts that an expert could have briefed trial defense counsel on studies suggesting that witnesses are more likely to erroneously report the presence of a weapon when an assailant is of the appellant's race. He also argues that such an expert could have testified and "distilled the

As a preliminary matter, we find the military judge's findings of fact devoid of error and adopt them as our own. We also find that her conclusions of law were not "influenced by an erroneous view of law." *Lloyd,* 69 M.J. at 99 (internal quotation marks and citation omitted). The appellant failed to satisfy any of the three prongs of the *Gonzalez* test, and thus failed to "demonstrate necessity" for the requested expert assistance.

First, the appellant's identity was not an issue in significant controversy because the initial victim, S.L., was the appellant's girlfriend, witnesses heard her use his first name during the assaults, and she informed investigators that the appellant was her attacker. Although the three witnesses who immediately identified the appellant's photograph from photographs provided by the investigator are not of the appellant's race, each witness had substantial opportunity to view the appellant at the time of the crimes, was particularly focused on him, and accurately described him prior to reviewing the photographic lineup. *See generally, Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (articulating five-factor test for determining the admissibility of pretrial and in-court identifications).

Second, the defense failed to establish "'what the expert would accomplish for the accused.'" *Lloyd,* 69 M.J. at 99 (quoting *Gonzalez,* 39 M.J. at 461). We agree with the military judge that the offered justification was "attenuated at best." Appellate Exhibit XVI at 8. At best, the defense has articulated the "mere possibility of assistance from the requested expert;" which does not provide the requisite showing of necessity. *Lloyd,* 69 M.J. at 99 (internal quotation marks and citation omitted).

Third, the defense failed to establish why counsel was "unable to gather and present the evidence that the expert would be able to develop." *Id*. (citation omitted). This aspect of the trial judge's ruling is vindicated by trial defense counsel's able cross-examination of each prosecution witness particularly with respect to whether they actually saw the appellant holding a pistol and, if so, the varying descriptions of that weapon.

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science to the members to posit an explanation for the marked inconsistencies in the eyewitness testimony; namely, there was no gun that night." Appellant's Brief of 31 Oct 2012 at 17-26.

Fourth, the trial defense counsel failed to establish the relevance or necessity of expert assistance on the implications of race on "perceptions of witnesses" particularly with respect to whether the appellant possessed a gun. We are similarly unmoved by the appellant's argument on appeal.

Finally, we also conclude that denial of the appellant's request for expert assistance did not "result in a fundamentally unfair trial." *Lloyd,* 69 M.J. at 99 (internal quotation marks and citation omitted).

Accordingly, the military judge did not abuse her discretion when she denied the appellant's motion to compel production of an expert consultant and witness in cross-racial and eyewitness identification.

III. Novel Instruction

The appellant also argues that the military judge abused her discretion when she denied his proposed novel instruction on witness credibility. The primary language in controversy was a defense request that an instruction on "credibility of witnesses" include that "[t]he court members must be satisfied beyond a reasonable doubt of the accuracy of the recollections of the witness before [they may] convict the accused of any crime based on those recollections." Record at 507-10; AE XVIII.

We conclude that the appellant waived this issue when he agreed to "the compromise" on the requested instruction reached with trial counsel and the military judge prior to instruction on findings. RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); Record at 507-10. Trial defense counsel further agreed, "that instruction is fine with the defense." Record at 510.

Assuming without deciding that waiver is inapplicable, the military "judge has substantial discretionary power in deciding on the instructions to give." *United States v. Carruthers*, 64 M.J. 340, 345 (C.A.A.F. 2007) (internal quotation marks and citations omitted). When a party requests an instruction, we review the military judge's denial of such a request for an abuse of discretion. *Id*.

The three-pronged test to determine if the failure to give a requested instruction constitutes error is whether: "(1) the [requested instruction] is correct; (2) 'it is not substantially

covered in the main [instruction]'; and (3) 'it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation.'" *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (quoting *United States v. Winborn*, 34 C.M.R. 57, 62 (C.M.A. 1963)).

We conclude that the military judge did not abuse her discretion in declining to provide the defense requested witness credibility instruction. Record at 507-10; AE XVIII.

We find no error, as the requested language is not required by law. In addition, the legally correct essence of the requested language was "substantially covered" in the military judge's instructions on the "believability of witnesses." *Damatta-Olivera*, 37 M.J. at 478; Record at 532-33. Moreover, we conclude that the judge's decision not to include the requested language did not "deprive[] [the appellant] of a defense or seriously impair[] its effective presentation." *Damatta-Olivera*, 37 M.J. at 478 (internal quotation marks and citation omitted).

IV. Photo Lineup

The appellant next argues that the military judge abused her discretion in denying his motion to suppress the photo lineup conducted by Detective G.

We review a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Baker,* 70 M.J. 283, 284 (C.A.A.F. 2011). A photo lineup is "'unlawful' if the identification is unreliable. An identification is unreliable if the lineup . . . is so suggestive as to create a substantial likelihood of misidentification." MILITARY RULE OF EVIDENCE 321(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012, ed.) (internal quotation marks in original). In reviewing a decision on a motion to suppress, "we consider the evidence in the light most favorable to the prevailing party." *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (internal quotation marks and citation omitted).

We conclude that that the military judge did not abuse her discretion in denying the defense motion. We again find her comprehensive findings of fact void of error and adopt them as our own. AE VIII, IX, and XVII. We also find that her conclusions of law were not "incorrect." *Baker,* 70 M.J. at 287.

The photo lineup in this case was not suggestive. The photo lineup consisted of five pictures of males matching the appellant's description. AE VIII at 13-16. Each of the five pictures in the photo lineup had distinguishing characteristics, none of which encouraged the witnesses to select one photograph over the others. One photograph was black and white and showed a date that is not easily recognized upon a cursory viewing. Most of the photographs are framed slightly differently so that more or less of the background or the subject's body is visible. The quality of the digital images is better than that of the Polaroid photographs. In fact, the coloring of the appellant's photograph could lead a witness to believe the picture had not been taken recently.

Even if the photo lineup were suggestive, it did not create a substantial likelihood of misidentification. There are five factors to consider to evaluate the likelihood of misidentification: (1) the opportunity of the witnesses to view the criminal at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of the witnesses' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Baker*, 70 M.J. at 289-91 (citing *Biggers*, 409 U.S. 199-200). While the witnesses were very focused on the appellant at the time of the crime, it is unclear how long they each viewed the appellant. Descriptions of the appellant were basically the same with some variance in specific details, but all three eye-witnesses quickly identified the appellant's photo on the day after the assaults. Record at 73. Under these facts there was not a substantial likelihood of misidentification.

We therefore conclude that the military judge did not abuse her discretion by denying the appellant's request for suppression of this photo lineup.

V. Factual and Legal Sufficiency

In his final assignment of error, the appellant asserts that the evidence for Specifications 6 through 9 of Charge III is legally and factually insufficient. We find this assignment of error without merit. *United States v. Matias,* 25 M.J. 356, 361 (C.M.A. 1987).

VI. Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court