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

Before
J.R. PERLAK, M.D. MODZELEWSKI, R.G. KELLY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ERIKA D. CHATMAN
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200225
GENERAL COURT-MARTIAL

Sentence Adjudged: 10 February 2012.
Military Judge: LtCol David M. Jones, USMC.
Convening Authority: Commanding General, 1st MAW, Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol J.M. Henry, USMC.
For Appellant: LCDR Brian L. Mizer, JAGC, USN.
For Appellee: Maj David N. Roberts, USMC.

28 March 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 panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to her pleas, of one specification of aggravated sexual assault, one specification of indecent act, one specification of forcible sodomy, and one specification of unlawful entry, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The members sentenced the appellant to confinement for 30 months and a dishonorable

discharge. The convening authority (CA) approved the sentence as adjudged.[1]

The appellant assigns six errors: 1) the military judge erred in permitting the Government's peremptory challenge of Master Sergeant (MSgt) D pursuant to *United States v. Tulloch*, 47 M.J. 283 (C.A.A.F. 1997); 2) the military judge erred by permitting the challenge for cause of Chief Warrant Officer 4 (CWO4) T, who was the military judge's neighbor; 3) the military judge erred by admitting into evidence in aggravation a counseling chit for the appellant for the theft of a credit card pursuant to RULE FOR COURTS-MARTIAL 1001(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); 4) the military judge erred in permitting the assistant trial counsel to commit prosecutorial misconduct during the rebuttal closing; 5) Additional Charge I fails to state an offense and, even if it does, the conduct falls into a constitutionally protected zone of privacy under *Lawrence v. Texas*, 539 U.S. 558 (2003); and, 6) the evidence is factually and legally insufficient to sustain convictions on all charges.

After reviewing the record of trial and the parties' submissions, we find no error materially prejudicial to a substantial right of the appellant. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

Background

This case involves sexual assault and related offenses occurring in the barracks in Okinawa, Japan. The circumstances were alcohol related and both the appellant and the victim, Lance Corporal F, were female Marines assigned to quarters on the same corridor. Additional facts necessary to address the assigned errors are contained herein.

Members Challenges

After *voir dire,* the trial counsel challenged CWO4 T for cause because he was the next door neighbor of the military judge. Trial counsel then used his peremptory challenge against MSgt D, raising a potential *Batson/Tulloch* issue.[2] When asked for a race-neutral reason for the challenge, the trial counsel

[1] To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

responded that MSgt D seemed to have an unreasonably high threshold of proof based upon his responses to a hypothetical presented based on a moon landing. The military judge granted both challenges, finding implied bias with regard to CWO4 T and a race-neutral reason for the challenge against MSgt D. The appellant now claims the military judge erred with regard to both challenges.

Standards of Review

We review challenges for cause for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). Implied bias is reviewed under a standard less deferential than abuse of discretion, but more deferential than *de novo*. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997).

A military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to "great deference" and will not be overturned absent "clear error." *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996).

CWO4 T

A member may be removed for cause if it is shown that he or she should not sit, "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). In furtherance of this rule, the Court of Appeals for the Armed Forces (CAAF) has determined that a member shall be excused in cases of implied bias, as well as in cases of actual bias. *Napoleon*, 46 M.J. at 282-83. The test for implied bias is whether, "most people in the same position would be prejudiced." *Armstrong*, 54 M.J. at 53-54 (citations and internal quotation marks omitted). "While actual bias is reviewed through the eyes of the military judge or the court members, implied bias is reviewed under an objective standard, viewed through the eyes of the public." *Napoleon*, 46 M.J. at 283 (citing *United States v. Daulton,* 45 M.J. 212, 217 (C.A.A.F. 1996)). The focus "is on the perception or appearance of fairness of the military justice system." *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). When there is no actual bias, "implied bias should be invoked rarely." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998).

We find that the military judge did not abuse his discretion in granting the challenge for cause of CWO4 T. A

[2] MSgt D was African-Americans.

member of the public viewing this trial may well conclude that most people who are next-door neighbors to the judge hearing a case would be influenced or prejudiced by that relationship.

MSgt D

Batson prohibits the use of a peremptory challenge based on race. The CAAF has adopted a *per se* application of *Batson*, placing the burden on the challenging party, upon timely objection, to provide a race-neutral explanation for the challenge. *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989). The proffered reason for the challenge may not be one "that is unreasonable, implausible, or that otherwise makes no sense." *Tulloch,* 47 M.J. at 287.

During *voir dire*, the trial counsel and assistant trial counsel used the moon landing as a hypothetical to explore the members' understanding of reasonable doubt. Record at 240. In response to this line of questions, MSgt D's responses evolved during individual *voir dire* from believing that the moon landing occurred beyond a reasonable doubt, to not being convinced beyond a reasonable doubt, and being uncomfortable with the terminology "beyond a reasonable doubt." Record at 308-13.

Because MSgt D was African-American, the military judge applied *Tulloch* and requested a race-neutral basis for the trial counsel's challenge. The military judge found the Government's reasoning, that MSgt D may hold the Government to a higher standard of proof due to his understanding of "beyond a reasonable doubt," to be legitimate and granted the challenge. *Id.* at 386.

In *United States v. Allen*, this court found that the Government's peremptory challenge of a member who was once a criminal defendant was reasonable and race-neutral because he may have held the Government to an unreasonably high standard of proof. 59 M.J. 515 (N.M.Ct.Crim.App. 2003), *aff'd*, 59 M.J. 478 (C.A.A.F. 2004). The military judge in this case stated that he understood why MSgt D's answers about proof of the moon landing would concern the Government and also noted that while listening to MSgt D's *voir dire* he made a note with "a big star" of the same concern. Record at 389.

As in *Allen,* we are not persuaded by the appellant's argument. The military judge was in the best position to observe the responses of MSgt D and shared the same concerns expressed by the trial counsel. Additionally, the basis

provided by the trial counsel is supported by the record, is race-neutral, and does not amount to clear error per *Williams*. We conclude that the military judge did not err.

Evidence in Aggravation

In the sentencing hearing, the Government offered into evidence the service record of the appellant, which included a record of counseling dated shortly before trial. Prosecution Exhibit 9 at 1. The counseling was for the theft of a debit card and subsequent withdrawal of $400.00 in cash. *Id.* Trial defense counsel objected to the admission of this record based on hearsay and claimed the probative value was substantially outweighed by the danger of unfair prejudice under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.); Record at 789-90. Additionally, the defense counsel claimed that this was not regular counseling, but rather made for the purposes of trial. The theft at issue occurred prior to the appellant's arraignment for the charges for which she was to be sentenced. Record at 789. The appellant now argues that the military judge abused his discretion in admitting the evidence on the same grounds. We disagree.

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the mattered asserted." MIL. R. EVID. 801(c). Hearsay is generally inadmissible. MIL. R. EVID. 802. However, records of regularly conducted activity, which are kept in the regular course of business, are an exception to the general rule of exclusion for hearsay. MIL. R. EVID. 803(6).

Additionally, R.C.M. 1001(b)(2) provides:

> Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's . . . character of prior service. . . .
>
> "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the

> matter shall be determined by the military judge. . . .

See also Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7E § 0141 (20 June 2007) ("If otherwise admissible, trial counsel are authorized to present . . . matters set out in R.C.M. 1001(b)(2), MCM.").

We test a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009); *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Otherwise admissible evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MIL. R. EVID. 403. When the military judge conducts a proper balancing test under MIL. R. EVID. 403 on the record, that ruling will not be overturned absent a clear abuse of discretion; the ruling of a military judge who fails to articulate the analysis will receive correspondingly less deference. *Manns*, 54 M.J. at 166. When a military judge fails to conduct the MIL. R. EVID. 403 balancing test, we will examine the record ourselves. *Id.*

The record was offered to prove that the appellant was counseled, not to prove the theft itself. Such a record is nonhearsay pursuant to MIL. R. EVID. 801(c). The military judge determined that the document was made in the regular course of business and that the document was admissible under MIL. R. EVID. 803(6) and R.C.M. 1001(b)(2). Therefore, the record is an exception to the hearsay rule. While the military judge failed to establish whether the record was kept in the regular course of business and kept pursuant to set guidelines, the defense did not object on the basis of foundation, and therefore forfeit the objection in the absence of plain error. MIL. R. EVID. 103.

Turning to the analysis under MIL. R. EVID. 403, the military judge captured his reasoning on the record; therefore, we afford his ruling great deference. *Manns*, 54 M.J. at 166. The appellant analogizes this case to *United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004). In a trial for theft and sale of Government property, the Government introduced evidence that Saferite's wife assisted in his escape efforts during the trial in order to show her bias as a witness. *Id.* at 272. The CAAF found the admission to be an abuse of discretion because the wife's bias was evident through other evidence at trial and the evidence of the escape attempt was extremely tenuous. *Id.* at 274. Even so, the court also found that the accused suffered no

prejudice because the members were already aware of the escape and because he received only six years confinement when the Government asked for sixteen. *Id.* at 275.

This case is distinguishable from *Saferite* because the probative value of the counseling chit was not substantially outweighed by the danger of unfair prejudice for three reasons. First, through instructions the military judge ameliorated the potential prejudice by making it clear to the members that the appellant had not been convicted of the allegations. *Id.* at 819-20. The military judge also gave the standard instruction regarding punishing only for offenses of which the appellant was found guilty. Through these instructions, the military judge eliminated the risk that the members would punish the appellant for the theft offenses in addition to those charges for which she was convicted.

Second, the evidence is probative of the appellant's rehabilitative potential and credibility. Finally, because counseling for a theft of $400 is significantly less serious than the charges of sexual assault and forcible sodomy for which the potential of a life sentence was present, this evidence did not overly-criminalize her in the eyes of the panel of members. We find that the military judge did not err in admitting this counseling entry. Assuming *arguendo* that he did, any potential prejudice was cured by the instructions and context given to the members.

The remaining assignments of error are without merit. *United States v. Matias,* 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

We affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court