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

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

UNITED STATES OF AMERICA

v.

MICHAEL C. MESICK
LOGISTICS SPECIALIST THIRD CLASS (E-4), U.S. NAVY

NMCCA 201200385
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 April 2012.
Military Judge: CAPT Carole Gaasch, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: LT J.A. Lovastik, JAGC, USN.
For Appellant: LT Gabriel Bradley, JAGC, USN.
For Appellee: Maj Crista Kraics, USMC; Maj William Kirby, USMC.

14 May 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 general court-martial composed of officer members convicted the appellant, contrary to his pleas, of violation of a lawful general order, committing an indecent act, assault consummated by a battery, and drunk and disorderly conduct in violation of Articles 92, 120, 128 and 134, Uniform Code of

Military Justice, 10 U.S.C. §§ 892, 920, 928, and 934.[1] The members sentenced the appellant to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

In his sole assignment of error, the appellant argues that the military judge erred by not *sua sponte* excusing a member who allegedly made comments about the appellant to other panel members during trial. After reviewing the record of trial and the submissions of the parties, we find the findings of guilty and sentence are correct in law and fact and there is no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Factual Background

On 29 October 2011, while stationed at Yokosuka Naval Base, Japan, the appellant and another Sailor met LP, the wife of a third service member, at a local bar. All three individuals had been drinking alcohol throughout the evening and were intoxicated. In the early hours of the morning, the appellant and LP engaged in various sexual activities in the lobby of a building while several other individuals walked through the area. A surveillance video camera recorded these activities, which lasted about an hour. Near the end of this encounter, another Sailor and a female foreign national came upon the appellant and LP. The female foreign national was troubled by the situation and physically confronted the appellant, who struck her across the face before leaving the scene.

Panel Member's Comments

During the Government's case-in-chief, after the testimony of the second witness, the assistant defense counsel (ADC) informed the military judge that she had overheard two comments from a member in the deliberation room. The ADC stated she had heard earlier in the day either "you are going down or he's going down," but did not see which member made the comment. Record at 544. The ADC stated that she later heard the same voice in the deliberation room say, "that guy is all jacked up, he can't even get his uniform straight" immediately after Culinary Specialist Third Class (CS3) J testified as the second

[1] The members found the appellant not guilty of two specifications of aggravated sexual assault and one specification of abusive sexual contact.

witness for the Government. *Id.* at 545. The door to the deliberation room was partially open at the time of each comment.

The ADC believed that the voice belonged to Chief Warrant Officer 3 (CWO3) S, and she was concerned that CWO3 S had already formed an opinion about the case and had expressed that opinion to the other members. *Id*. The assistant trial counsel (ATC) also had overheard a voice in the deliberation room say, "he's going down" and was similarly concerned. *Id.* at 546. The ATC heard other language though, of which he could not recall specifics, which caused him to think the comments were in the context of a person actually falling down. *Id*. The ATC stated that he also overheard other words from the deliberation room that concerned him, though he could not recall details. *Id.* at 547.

The military judge called CWO3 S into the courtroom for individual *voir dire* in light of these assertions. *Id.* at 547. In response to the military judge's questions, CWO3 S stated he had not formed an opinion on the case or on the guilt or innocence of the appellant. *Id.* at 548-49. CWO3 S denied making any comment along the lines of someone "going down" and also did not recall any other member making a similar comment. *Id.* CWO3 S acknowledged that he had commented that the court was having another Article 39(a) session. *Id.* at 548. CWO3 S also stated that he said "he was missing a Battle 'E' on his Battle 'E' award" after CS3 J testified, but denied that he or any other member said anything along the lines of someone being "jacked up." *Id.* at 549.

The military judge continued to question CWO3 S, who stated the members had not discussed the case amongst themselves and that he personally still had not formed an opinion about the case. Trial counsel also conducted *voir dire* of CWO3 S, who responded that he was willing to follow all of the military judge's instructions and hear all the evidence in the case. The defense declined to *voir dire* CWO3 S. *Id*. at 550.

After *voir dire*, the military judge stated, "I don't know what to tell you about what you heard, unless he is out and out lying to me, but there's no way to prove that." *Id*. The ADC conceded that while both parties heard the same language, the "context is the question" and "there's nothing in there that would suggest that he has made an opinion." *Id*. The defense did not challenge CWO3 S for cause and also did not request to *voir dire* any of the other members. The defense did request

that the military judge reemphasize to the members to not discuss the case before deliberations, and the military judge did so the next time the members left the courtroom. *Id.* at 578. The military judge instructed the members not to discuss the case, to report to her if someone tried to discuss the case, and to keep an open mind until deliberations. *Id.* at 578-79. The military judge continued to reemphasize this instruction at various breaks in the trial proceedings, which was in addition to the same preliminary instructions she had already given the members at the beginning of the case. *Id.* at 207-08, 377, 640, 683, 1005, 1113-14.

In an unrelated issue, the senior member reported to the military judge immediately before closing arguments that an unknown officer attempted to discuss the case with him while at lunch. *Id.* at 1015. The senior member told the officer he could not discuss the case and promptly brought this issue to the attention of the court. *Id.* at 1016.

Discussion

We review whether a military judge should have *sua sponte* dismissed a member for cause for an abuse of discretion. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). A military judge may *sua sponte* excuse a member for cause "in the interest of justice" even if neither party challenges a member. RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). A member shall be excused if he or she "[h]as formed or expressed a definite opinion as to the guilt or innocence of the accused." R.C.M. 912(f)(1)(M). A member shall also be excused if it appears that he or she "[s]hould not sit as a member 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). Thus a member may be excused for actual or implied bias. In determining actual bias, we give the military judge's decision "great deference . . . because it is a question of fact, and the judge has observed the demeanor" of the member. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000).

After examining the entire record of trial, we find no evidence of actual bias by CWO3 S. The military judge and trial counsel conducted extensive *voir dire* of CWO3 S on this topic, and he indicated that he did not make any comments expressing his opinion, and that he had not formed an opinion on the case.

The military judge observed the demeanor of CWO3 S and found his answers to be credible, so we give great deference to her decision. The ADC also conceded that "there's nothing in [in the answers] that would suggest that [CWO3 S] has made an opinion." Record at 550. Therefore, we find CWO3 S was not actually biased.

We review possible implied bias of a member under an objective standard, viewed through the eyes of the public. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). Therefore we give less deference to the military judge on implied bias determinations and review "under a standard less deferential than abuse of discretion but more deferential than de novo." *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003) (quoting *Downing*, 56 M.J. at 422). The test for implied bias is "whether, in the eyes of the public, the challenged member's circumstances do injury to the 'perception [or] appearance of fairness in the military justice system.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)). "When there is no actual bias, 'implied bias should be invoked rarely.'" *United States v. Warden*, 51 M.J. 78, 81-82 (C.A.A.F. 1999) (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). In considering implied bias, we review the "totality of the factual circumstances." *Strand*, 59 M.J. at 459.

In this case, no member of the public would question the "appearance of fairness in the military justice system." *Terry*, 64 M.J. at 302. The military judge promptly called CWO3 S into the courtroom for additional *voir dire* after learning about the alleged comments. As stated, CWO3 S denied making a comment about the appellant "going down," and clarified the comment about an improper uniform, stating it referred to the Government's witness and not to the appellant. CWO3 S reiterated that he could follow the military judge's instructions and had not formed an opinion about the guilt or innocence of the appellant. CWO3 S's answers showed no bias, actual or implied.

Furthermore, when reviewing the "totality of the factual circumstances," *Strand*, 59 M.J. at 459, there is nothing about this case that would leave the public with a negative perception of the military justice system. First, the defense requested that the military judge reiterate to the members the requirement that they not discuss the case before deliberations, and the military judge complied with that request several times. Second, the members acquitted the appellant of the three most

serious charges against him,[2] and only convicted the appellant of the offenses that he openly testified to committing when he took the stand.[3] Third, the appellant's actual sentence was relatively low compared to his possible maximum sentence of eight years and a dishonorable discharge. Finally, we note that the senior member brought an issue of improper communication to the military judge's attention later in the trial, so the members understood their duty not to discuss the case and to bring any issues to the military judge. No member raised an issue about CWO3 S to the court. Under these circumstances, an objective observer would not question the legality, fairness, and impartially of the military justice system.

Because we find no actual or implied bias, we hold that the military judge did not abuse her discretion by permitting CWO3 S to serve as a member on the appellant's panel.

Although not assigned as an error, we note that the court-martial order incorrectly states the findings. The court martial order indicates that the appellant was found not guilty of aggravated sexual contact (which involves a sexual act) under Specification 2 of Charge II, as opposed to the revised offense of abusive sexual contact (which only involves sexual contact).[4] While the appellant was not prejudiced by this error, he is entitled to correction of his official records. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will order appropriate relief in our decretal paragraph.

Conclusion

The findings and sentence are affirmed. The supplemental court-martial order will reflect that the appellant was found

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[2] With these three findings of not guilty, the appellant's authorized maximum confinement decreased from 75 years to eight years.

[3] The appellant testified that he violated a general order, he was intoxicated, he committed numerous sexual activities with LP in a lobby while other people walked by, and he pushed away the foreign national female, though the appellant claimed self-defense for the assault charge. There was also a roughly hour long surveillance video that corroborated the appellant's testimony.

[4] Before trial, the military judge found that the language of the second specification of aggravated sexual assault actually alleged the offense of abusive sexual contact under Article 120(h), and because the defense was on notice as to that offense, ordered the charge sheet changed to reflect the correct charge. Record at 134.

not guilty of abusive sexual contact under Specification 2 of Charge II.

For the Court

R.H. TROIDL
Clerk of Court