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.

RODNEY WILLIAMS
CHIEF INFORMATION SYSTEMS TECHNICIAN (E-7), U.S. NAVY

NMCCA 201200248
GENERAL COURT-MARTIAL

Sentence Adjudged: 9 December 2011.
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: LCDR Brian Mizer, JAGC, USN.
For Appellee: Capt Samuel Moore, 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.

WARD, Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of voluntary manslaughter, aggravated assault, willfully discharging a firearm under such circumstances as to endanger human life, and disorderly conduct in violation of Articles 119, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 919, 928, and 934.[1] They sentenced the appellant to confinement

[1] The members found the appellant not guilty of the charged offense of unpremeditated murder, but guilty of the lesser included offense of voluntary

for five years and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.[2]

The appellant raises four assignments of error:

> (1) the military judge erred by allowing the prosecution to test the opinion of the defense character witnesses with a purported threat made by the appellant to the arresting police officer;
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> (2) the appearance of unlawful command influence (UCI) in this case is not harmless beyond a reasonable doubt;
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> (3) the military judge erred by excusing a member for implied bias; and
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> (4) the trial counsel committed prosecutorial misconduct by insinuating that the victim was not violent during an unrelated incident where the victim was arrested for a firearms related offense.[3]

We have examined the record of trial, the appellant's assignments of error, and the Government's answer. We conclude that the findings and sentence are correct in law and fact and that no materially prejudicial error was committed. *See* Arts. 59(a) and 66(c), UCMJ.

I. Factual Background

Late in the evening of 5 October 2008, the appellant and his friend went to a sports bar and club located in Virginia Beach, Virginia. What ultimately transpired throughout the evening and shortly before closing time remains hazy. What is clear, however, is that shortly before closing time the appellant shot another bar patron 14 times in the parking lot

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manslaughter. Prior to sentencing, the military judge merged the offense of voluntary manslaughter and willfully discharging a firearm for purposes of sentencing and instructed the members accordingly. Record at 2450-53; 2498.

[2] The CA waived automatic forfeitures for the benefit of the appellant's family members.

[3] During trial, the defense failed to object to the trial counsel's witness examination and related argument. We have reviewed this assigned error and, finding no plain or obvious error, conclude it is without merit. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

outside of the club. The victim, Mr. NN, died as a result of his wounds. Police arrived on scene shortly thereafter and took the appellant into custody. As the arresting officer placed the appellant in handcuffs and into the police cruiser, the appellant allegedly stated that "he could have killed them all." The Commonwealth of Virginia charged the appellant with, *inter alia,* murder for the killing of Mr. NN. On 20 August 2010, a jury found the appellant not guilty of second degree murder, but guilty of voluntary manslaughter. On 18 March 2011, the Circuit Court Judge sentenced the appellant to 12 month's incarceration and a $2,500.00 fine. Defense Exhibit I at 4.

Throughout his civilian trial, the appellant appeared in uniform. Additionally, several members of the chiefs' mess sat in the gallery throughout trial in uniform as a sign of solidarity. Also attending in uniform was Lieutenant Junior Grade (LTJG) Nicole Staring, JAGC, USN, a young prosecutor tasked with monitoring the trial. In her report to the CA, LTJG Staring later opined that the presence of the appellant in uniform and additional chief petty officers in uniform in the gallery had "an untold impact on the jury members." Appellate Exhibit XLI at 7. She also recommended trial by court-martial, despite the appellant's civilian conviction and sentence, because the sentence awarded was "insufficient in light of the accused's conduct." *Id*. Based in part on LTJG Staring's recommendation, the CA notified the Office of the Judge Advocate General of his intent to prosecute the appellant despite his civilian conviction and sentence. AE LXXVI at 3. Upon his release from Norfolk City Jail, the appellant was immediately placed into pretrial confinement, where he remained until trial. *Id*. at 3-4.

In anticipation of media attention, the public affairs office (PAO) for the CA, in cooperation with trial and defense counsel, prepared a frequently asked questions guide (FAQs) explaining the Navy's reasons for prosecuting the appellant following his civilian trial. Among those FAQs was a statement that "the Navy believes certain military concerns were not addressed at the state trial, and believes the defendant's active-duty status might have influenced the civilian prosecution." *Id*. at 4. The PAO would later tell a local reporter during an interview that the command "wasn't happy with the outcome" of the appellant's civilian trial. *Id.*

During the appellant's court-martial, various prosecution witnesses gave unclear or conflicting testimony regarding the appellant's actions shortly before the shooting. In his defense, the appellant focused on both the victim's character

for violence and the appellant's own character for peacefulness and good military character. To advance his theory of self-defense, the appellant attempted to plant the seed that he only fired after the victim threatened him first with a weapon.

II. Discussion

A. Cross-Examination on a Purported Threat Made by Appellant to the Arresting Officer

During the appellant's court-martial, the defense objected to any testimony concerning the appellant's purported threat to police upon being taken into custody.[4] Before the defense began its case-in-chief, however, the Government requested permission to cross-examine defense character witnesses with this instance of the appellant's conduct. AE CXXXIX; Record at 1725-43. After hearing argument, the military judge granted the Government's motion, with modification.[5]

The defense called seven character witnesses in its case in chief. Of that total, six were military members who testified to the appellant's good military character, and character for truthfulness and peacefulness. On cross-examination, the trial probed each of these six witnesses about the appellant's purported threat to police in line with the military judge's ruling. None of the witnesses testified that they were aware of or had heard of the incident. Five testified that it had no effect on their opinion. The one remaining witness testified that it might affect his opinion of the appellant's character.

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or conclusions of law are incorrect. *Id.* When a military judge clearly articulates a MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-

[4] The Government initially argued that the appellant's threat to police was *res gestae* as it was inextricably linked to the charged offense of murder. Record at 845-46. Although finding it more properly evidence of consciousness of guilt under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) the military judge excluded the evidence for lack of timely notice. *Id*. at 848.

[5] The military judge ruled on the record and expressly applied the MIL. R. EVID. 403 balancing test and the factors under *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005). Record at 1744-45. The military judge restricted the trial counsel to asking the question "Have you heard that the arresting officer claims that [the appellant] said to him 'I could have killed you all?'" Record at 1742-43.

MARTIAL, UNITED STATES (2008 ed.) balancing test on the record, "[that] ruling will not be overturned unless there is a clear abuse of discretion." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (internal quotation marks and citation omitted).

Where proof of character is provided by an opinion of a witness, "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct." MIL. R. EVID. 405(a). Inquiry is restricted to only when "(1) there [is] a good-faith belief by the opponent that the conduct occurred; and (2) the conduct [] relate[s] to instances of [the pertinent character trait]." *United States v. Robertson*, 39 M.J. 211, 214 (C.M.A. 1994). This includes not only the pertinent character trait offered, but also any reasonable inference to be drawn therefrom. *Cf*. *United States v. Brewer*, 43 M.J. 43, 50 (C.A.A.F. 1995) (holding that in cross-examining a character witness, an opponent is not limited solely to the period of time addressed by the witness's testimony, but may impeach using any reasonable inference to be drawn from that witness's testimony).

In this instance, there is no dispute that the trial counsel possessed a good faith basis to ask this question. However, the appellant argues that the appellant's statement falls short of establishing any logical or legal relevance to the character trait(s) in issue because "[n]o reasonable person could construe what Appellant is alleged to have said as a threat of any sort." Appellant's Brief of 9 Oct 2012 at 20. We are not persuaded by the appellant's argument.

In the instant case, we find that the trial counsel's question was a permissible means to test the basis for each witness's opinion. The reasonable inference of their testimony was that the appellant was acting peaceably and consistent with good military character that evening. Such aggressive and provocative statements to police upon arrest do not comport with a peaceful nature. Nor are they consistent with good military character, which implicitly includes respect for law enforcement. We find that the trial counsel's inquiry was a meaningful way to test the basis of each witness's opinion and therefore appropriate for inquiry under MIL. R. EVID. 405.

We also note that the military judge properly conducted a balancing test under MIL. R. EVID. 403 and specifically weighed each *Berry* factor. We find no clear abuse of discretion in her analysis, particularly in light of her modification to the Government's proposed questions. Furthermore, the fact that all witnesses save one remained steadfast in their opinion, despite

the trial counsel's inquiry, ameliorated any potential prejudice. *See United States v. Donnelly*, 13 M.J. 79, 83 (C.M.A. 1982) (finding that prejudice from improper cross-examination on prior instances of conduct to be "illusory" when witness refuses to change opinion.) Accordingly, we find no error by the military judge in admitting this evidence.

B. UCI

Before trial, the defense filed a motion to dismiss all charges for UCI[6] due to numerous statements released to the press and public by the CA's PAO.[7] The civilian defense counsel conceded that these public statements raised only the appearance of UCI. The military judge agreed; however, she concluded that any such appearance could be remedied through extensive *voir dire* and additional peremptory challenges. However, the appellant maintains that the only appropriate remedy was dismissal with prejudice. We review the military judge's findings of fact as to UCI under a clearly erroneous standard, "but the question of command influence flowing from those facts is a question of law" we review *de novo*. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008) (citation omitted).

Where the appellant has successfully raised the issue of UCI at trial, the Government must then prove either that there was no UCI or that the proceedings will be untainted. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). On appeal, the Government may meet its burden by persuading us that any unlawful command influence had no prejudicial impact on the court-martial. *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999). Or, we may conclude that the remedy fashioned

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[6] The defense also moved to dismiss all charges for "vindictive prosecution" and deprivation of the appellant's right to due process under the Fifth and Fourteenth Amendments. AE LII. This motion focused on the same allegations of UCI, but also in part claimed that the CA's decision to prosecute these offenses at court-martial was in retaliation for the appellant appearing in uniform at his civilian trial. *Id*. The military judge concluded that the appellant failed to meet his burden in demonstrating either vindictive prosecution or a violation of his right to due process. AE LXXVI at 15-19. The appellant does not now challenge that ruling. Accordingly, we find it to be the law of the case and we will focus our attention on the appellant's assigned error regarding UCI. *United States v. Savala,* 70 M.J. 70, 77 (C.A.A.F. 2011).

[7] Record at 478. Although civilian defense counsel conceded and the military judge concluded that only apparent UCI was present, we examine the issues in terms of both actual and apparent UCI. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008).

by the military judge sufficiently cures "the taint of unlawful command influence and ensure[s] a fair trial." *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) (citations omitted). In examining the military judge's decision on crafting a remedy, we give "broad discretion . . . and we will not reverse so long as the decision remains within that range." *Id*. (internal quotation marks and citation omitted).

After our *de novo* review of the record, we agree with the military judge that her choice of remedies cured any appearance of UCI and a "disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command influence." *Lewis*, 63 M.J. at 415. Our conclusion is buttressed by the fact that a significant lapse of time passed after the statements were released to the public and the appellant's trial began. During that period, no further statements were released. Moreover, we find several other indicators that assure the general public of the fairness of the proceedings. Prior to the Article 32, UCMJ, pretrial investigation, the Government provided the appellant with three expert consultants, including a civilian forensic science expert who later testified at trial. Regarding the members, the military judge allowed extensive *voir dire* by the defense regarding pretrial publicity. Record at 653–839. She also granted the appellant a total of five peremptory challenges.[8] We find no evidence in the record suggesting that any witness refused to cooperate with or testify on behalf of the appellant. These factors collectively support our belief that the public would find the appellant's trial free from command influence. *Lewis*, 63 M.J. at 415.

C. Military Judge's Excusal of Chief Petty Officer B for Implied Bias

During general *voir dire*, one of the panel members, Chief B, revealed that his aunt was acquitted of the murder of her boyfriend by claiming self-defense. Chief B explained how he discussed his aunt's case with his mother and also read about it in the local newspaper. Record at 793-96. He agreed with the assistant defense counsel that he could follow the military judge's instructions in the case and that his aunt's experience would not prevent him from following the judge's instructions. *Id*. at 795. But he conceded that his aunt's trial was an emotional experience for him and his family. *Id*. at 796. At the end of *voir dire*, the Government challenged Chief B for

[8] Of the five total peremptory challenges, the appellant used three.

actual bias. The military judge disagreed with any actual bias; however, over defense objection she granted the Government's challenge based on implied bias. *Id*. at 823. The appellant argues that the military judge erred by removing Chief B from the panel.

We review the military judge's decision to grant a challenge for cause for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). Since the military judge articulated implied bias as the basis for removal, we grant less deference than abuse of discretion, but more than *de novo*. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). The test for implied bias is whether "most people in the same position would be prejudiced," *Armstrong*, 54 M.J. at 53-54 (internal quotation marks and citations omitted), and the test is viewed under an objective standard, through the eyes of the public, *Napoleon*, 46 M.J. at 283 (citation omitted). Our 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), and we consider the totality of the circumstances in making our determination, *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004).

The military judge based her decision on the similarities between the appellant's case and Chief B's personal experience of his aunt similarly defending against murder based on self-defense. The military judge concluded that the use of self-defense in both cases, coupled with Chief B's firm belief that his aunt's actions were justified, were enough to tip the scale. Record at 795-96; 823-24. Granting her due deference, *Napoleon*, 46 M.J. at 283, we find no error in her decision. While Chief B acknowledged he could follow the military judge's instructions on the law, he conceded that his aunt's trial shaped his opinion on the topic of self-defense and the experience as a whole "had a pretty significant impact" on his entire family. Therefore, we find his perfunctory responses to the defense's rehabilitative questions "less than resounding." *United States v. Daulton*, 45 M.J. 212, 218 (C.A.A.F. 1996).

III. Conclusion

The findings and the approved sentence are affirmed.

Senior Judge PAYTON-O’BRIEN and Judge McFARLANE concur.

For the Court

R.H. TROIDL
Clerk of Court