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.

RICKY J. YOUNG, JR.
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201200135
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 Nov 2011.
Military Judge: Col G.W. Riggs, USMC.
Convening Authority: Commanding General, II Marine Expeditionary Force (Forward), Camp Leatherneck, Afghanistan.
Staff Judge Advocate's Recommendation: Col Carol K. Joyce, USMC.
For Appellant: LT Ryan Mattina, JAGC, USN.
For Appellee: LCDR Keith Lofland, JAGC, USN.

28 February 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.

MCFARLANE, Judge:

The appellant entered mixed pleas at a trial by general court-martial with officer and enlisted members. Pursuant to his pleas, the military judge found the appellant guilty of one specification of violating a lawful general order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The members convicted the appellant, contrary to his pleas, of one specification of indecent exposure and one specification of wrongful sexual contact, in violation of

Article 120, UCMJ, 10 U.S.C. § 920. The adjudged sentence included confinement for 90 days, reduction to pay grade E-3, forfeitures of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.[1]

The appellant alleges the following two assignments of error: (1) that the military judge abandoned his impartial role and acted as a prosecutor during his examination of the appellant, thus calling into question the fairness and integrity of the appellant's court-martial; and (2) that the military judge erred by denying a challenge for cause, based on implied bias, against a member with 14 years experience as a police officer.

After carefully considering the record of trial and the submissions of the parties, we find merit in the appellant's first assigned error and will take corrective action in our decretal paragraph. Our action moots the remaining assignment of error.

Factual Background

In the spring of 2011, the appellant, a Marine staff sergeant, was serving as the Section Chief for the Staff Secretary's Office, II Marine Expeditionary Force (MEF) (Forward), at Camp Leatherneck, Afghanistan. As the senior enlisted person in the office, he had a number of Marines working for him, one of whom was the victim in this case, Sergeant (Sgt) RC.

In April of 2011, the appellant and three other staff sergeants were called into a meeting with the Commanding General and the Sergeant Major. They were told that there was a weigh-in coming up and that they needed to get their personnel within standards. Sgt RC was one of two Marines that the appellant was responsible for who were out of standards. In response to that order, the appellant approached Sgt RC and told her that they would be conducting physical training (PT) together.

Sgt RC was not able to PT on a regular basis because she lacked a convenient place to change clothes and store her gear. Unlike the other Marines in her office, who lived close to the work compound, she lived in a different area some distance away.

[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).

To alleviate this problem, the appellant allowed Sgt RC to utilize an unoccupied room in the berthing tent that he shared with several other male Marines who worked in the office. On 2 May 2011, an incident occurred between the appellant and Sgt RC inside the tent that gave rise to the charges in this case.

Impartiality of the Military Judge

The appellant contends that he was denied a fair trial because the military judge abandoned his impartial role by aggressively questioning the appellant in front of the members in a manner that directly attacked the appellant's credibility and suggested to the members that the military judge's opinion was adverse to the appellant. We agree.

A. Testimony of the Witnesses

During the guilty plea inquiry, the appellant admitted to consensual sexual activity in violation of II MEF (Forward) General Order Number One, which prohibited sexual acts or sexual contact with another individual while deployed in the II MEF (Forward) area of operations. The Government then went forward with charges that the sexual activity was a nonconsensual sexual assault.

The primary witnesses against the appellant were Sgt RC, the victim, and Sgt B, a Criminal Investigation Division (CID) investigator who interrogated the appellant. Sgt RC provided extensive and often emotional testimony at the trial, with her initial direct examination spanning more than 50 pages of transcript. Although Sgt RC was a strong witness for the Government, her testimony raised a number of issues that a member could reasonably consider when questioning her credibility - some of which were briefly explored by trial defense counsel during cross-examination and some of which were not. The testimony from Sgt B, the CID investigator, was also both compelling and problematic. Sgt B testified that the appellant confessed to exposing himself to Sgt RC and to committing a sexual assault, however the statement prepared by Sgt B during the interrogation, and later offered into evidence by the Government, falls short of the clear-cut confession described by Sgt B in his testimony. Sgt B testified that the statement originally contained that information, but that the appellant took it out when he was editing the document. However, Sgt B did not explain why such actions, and the omitted confession, were not otherwise memorialized in his notes or a separate report.

Despite obvious problems with the victim's and Sgt B's testimony, the military judge maintained his judicial role and did not ask any questions that could be viewed as attacking their credibility. In fact, the military judge's interaction with the Government witnesses was a model of judicial neutrality. When dealing with Sgt RC's failure to properly answer defense counsel's questions during cross-examination, the military judge firmly, but politely, directed her to answer the questions asked. When she complained that the questions were omitting certain information so as to be misleading, the military judge explained to Sgt RC that she would have an opportunity to further explain her answers on redirect.

It was against this backdrop that the appellant was called as the final witness for the defense. Similar to the Government's witnesses, the appellant made a number of claims during his testimony that a member could reasonably view with skepticism. At the conclusion of his testimony, before the members were allowed to ask questions, the military judge questioned the appellant. Although the questioning started off in an appropriate fashion, after the appellant failed to answer some of the questions to the military judge's satisfaction, the military judge inexplicably departed from his neutral role and embarked upon what can only be characterized as a devastating cross-examination of the appellant. The military judge's tone was harsh, and his questions were pointed. The military judge repeatedly interrupted the appellant, and became increasingly aggressive over the course of the examination, to the point where the questions became both argumentative and demeaning. At the end of his questioning, the military judge *sua sponte* ordered a short recess and departed the courtroom.

After coming back on the record, the military judge asked the members if they had any questions for the appellant. While they were writing out their questions the military judge instructed them as follows:

> Members, while we're involved in this process, just let me give you an instruction you're going to hear again. You must completely disregard anything that I might say or do that seems to indicate I have an opinion one way or another about the facts of this case or about the outcome. Is there any member that cannot follow that instruction? If so, raise a hand. Negative response from the members.

Record. at 534.

After the members' questions were finished, the court recessed for the evening. The next morning trial defense counsel conducted *voir dire* of the military judge concerning his questioning of the appellant. The military judge admitted that he was "definitely" more aggressive in his questioning of the appellant than he was with other witnesses. He stated that he was frustrated with the appellant's responses, and that he did not know if the members could tell the difference between the tone of the questions that he asked the appellant as opposed to the other witnesses. *Id*. at 545-46. However, when asked whether the line of questioning he pursued with the appellant was "designed to underline inconsistencies and elicit omissions as opposed to clarifying issues or elicit facts," the military judge disagreed, stating that his questions were nothing more than "a search for the truth" under MILITARY RULE OF EVIDENCE 611, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *Id*. at 548.

Following *voir dire*, the appellant's trial defense counsel moved for a mistrial, citing Supreme Court case law emphasizing the importance of judicial impartiality in close cases, and arguing that the "line of questioning and the undue influence it had on the members observing it" made it "manifestly necessary in the interest of justice to declare a mistrial in this case." *Id*. at 549. After the military judge denied the motion for a mistrial, the appellant moved to have the military judge disqualify himself from further participation in the case pursuant to RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The military judge also denied that motion. *Id*. at 552.

B. Law

A military judge's denial of a motion for recusal is reviewed for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001). A military judge's denial of a motion for a mistrial is reviewed for a clear abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003).

In general, a military judge must disqualify himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). Impartiality is an objective test, so it is "assessed not in the mind of the military judge himself, but rather in the mind of a reasonable man . . . who has knowledge of all the facts." *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999) (citations and internal quotation marks omitted). If a judge is disqualified to sit as

judge alone, he is also disqualified to sit with members. *United States v. Sherrod*, 26 M.J. 30, 33 (C.M.A. 1988).

The mere fact that a military judge asked questions of an appellant does not call into question the judge's impartiality. Our superior court has held that "Article 46, UCMJ, 10 U.S.C. § 846, and Mil.R.Evid. 614 . . . provide wide latitude to a military judge to ask questions of witnesses called by the parties." *United States v. Acosta*, 49 M.J. 14, 17 (C.A.A.F. 1998) (citation omitted). Furthermore, "[n]either Article 46 nor Mil.R.Evid. 614 precludes a military judge from asking questions to which he may know the witness' answer; nor do they restrict him from asking questions which might adversely affect one party or another." *Id*. at 17-18.

However, the military judge walks a "tightrope" in examining a witness. *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995). He may elicit or clarify relevant information to assist the court-martial members in their deliberations, but must do so in a way that "'scrupulously avoid[s] even the slightest appearance of partiality.'" *Id.* (quoting *United States v. Shackelford*, 2 M.J. 17, 19 (C.M.A. 1976)). The Court of Military Appeals noted long ago that the members expect counsel to be partisan advocates and will view the presentation of evidence and arguments by counsel in that light. *United States v. Grandy*, 11 M.J. 270, 277 (C.M.A. 1981). On the other hand, members' "expectation of impartiality on the part of the judge is so great that, when he does take sides, the members can hardly avoid being influenced substantially by *his* advocacy." *Id*. (emphasis in original).

When the court finds either actual or implied bias on the part of a military judge, we next determine "whether the error was structural in nature, and therefore inherently prejudicial, or in the alternative, determine whether the error was harmless under *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847 . . . (1988)." *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010). "Structural errors are those constitutional errors so affect[ing] the framework within which the trial proceeds . . . that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F. 2011) (citations and internal quotation marks omitted). There is "a strong presumption against structural error," and this court will not find it unless the error is difficult to assess or harmlessness is irrelevant. *Id*.

If we determine that the error was not structural, we next determine whether the bias materially prejudiced the substantial rights of the appellant. Art. 59(a), UCMJ; *United States v. Martinez*, 70 M.J. 154, 159 (C.A.A.F. 2011).

Lastly, even if we find no prejudice under Article 59(a), we look to see if reversal is otherwise warranted by the Supreme Court's decision in *Liljeberg*.[2] Under *Liljeberg*, we consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864.

C. Discussion

Although the record generally reflects a military judge that skillfully walks the "tightrope" of witness examination with an abundance of judicial neutrality, he momentarily let frustration get the better of him, and slipped into an adversarial role. The questions the military judge asked did not further develop or clarify the appellant's testimony, rather they focused on attacking his credibility in front of the members. In questioning the appellant in this manner, the military judge failed to "scrupulously avoid[] even the slightest appearance of partiality." *Shackelford*, 2 M.J. at 19. Accordingly, we find that the tone and content of the military judge's questions, especially when contrasted with the neutral questions he asked the victim and the other Government witnesses, would have led a "reasonable man . . . who has knowledge of all the facts" to believe that the military judge was biased against the appellant in this case. *Wright*, 52 M.J. at 136. Moreover, the "net effect upon the members of hearing these questions proposed by the military judge – as opposed to counsel – was to convey to them the judge's disbelief of the appellant's testimony and, by extension, his belief that the appellant was guilty." *United States v. Sowders*, 53 M.J. 542,

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[2] The Court of Appeals for the Armed Forces in *Martinez* treated these two questions as distinct lines of analysis:

> [W]e look to see if the error materially prejudiced the substantial rights of the appellant and whether, under Liljeberg, reversal is warranted. We conduct both inquiries even if we conclude that there is no Article 59(a) prejudice as it is possible that an appellant may not have suffered any material prejudice to a substantial right, but that reversal would still be warranted under Liljeberg.

Martinez, 70 M.J. at 159.

549 (N.M.Ct.Crim.App. 2000). This perception, once placed so forcefully into the minds of the members, could not be sufficiently ameliorated by the general cautionary instruction that the military judge gave the members to disregard anything that he might say or do that indicated an opinion about the facts or outcome of the case.

Having found implied bias, we next look to see if the error was structural in nature. Given the nature of the error, the fact that it arose at the conclusion of last witness' testimony, and the fact that there was no indication of any bias from the military judge prior to his exchange with the appellant, we do not find the error in this case to be structural. However, we do not find the error to be harmless, either.

The appellant's right to have his guilt or innocence decided by an untainted panel of members is a substantial one. That right was materially prejudiced in this case by the content and tone of the military judge's questions. By appearing to take the Government's side in what was arguably a close case, the outcome of which hinged on witness credibility, the military judge denied the appellant a fair trial. Accordingly, we find that it was a clear abuse of his discretion to deny the appellant's motion for a mistrial and a further abuse of his discretion to deny the appellant's subsequent motion for recusal.

Lastly, even if we were to find that the military judge's actions did not constitute material prejudice under Article 59(a), UCMJ, his actions would still fail the three-part test set forth by the Supreme Court in *Liljeberg*.

Focusing on the first factor, fairness to the parties, we find that it was fundamentally unfair for the military judge to attack the appellant's credibility in front of the members. The military judge had, quite appropriately, allowed the parties to try their cases as they saw fit before the appellant took the stand. He did not engage in a withering cross-examination of the victim, nor did he ask pointed questions of the CID agent. Only the appellant found himself squarely in the cross hairs of the military judge's aggressive examination. This one-sided approach, in a case that turned primarily on witness credibility, simply fails the fairness prong of the *Liljeberg* test.

As to the second factor, risk that denial of relief will produce injustice in other cases, as the Supreme Court stated in

Liljeberg, "providing relief in cases such as this will not produce injustice in other cases; to the contrary, [doing so] may prevent a substantive injustice in some future case by encouraging a [military] judge . . . to more carefully examine possible grounds for disqualification . . . ." 486 U.S. at 868.

Lastly, the third factor, whether the circumstances of this case create the risk of undermining the public's confidence in the judicial process, also weighs heavily in favor of granting relief. The public perception of military justice has long been a concern for this court, the Court of Appeals for the Armed Forces, and the armed forces at large. Allowing a conviction to stand after the military judge, who was senior to all but one of the panel members, indirectly expressed his opinion as to the credibility of the accused, would severely undermine the public's perception of the military justice system.

Conclusion

Accordingly the findings as to Charge I and its specification are affirmed. The findings as to Charge II and Specifications 3 and 4 thereunder are set aside. The sentence is set aside. A rehearing is authorized.

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court