

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**D.O. VOLLENWEIDER**

**J.E. STOLASZ**

**V.S. COUCH**

**UNITED STATES**

**v.**

**Herbert VELEZ, Jr.  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200600399

Decided 10 May 2007

Sentence adjudged 13 May 2005. Military Judge: M.P. Gilbert.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commanding General, 2d Marine Aircraft Wing, Cherry  
Point, NC.

LT DARRIN MACKINNON, JAGC, USN, Appellate Defense Counsel  
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of using disrespectful language toward a superior noncommissioned officer, fleeing apprehension, wrongful use of cocaine, wrongful use of marijuana, and larceny of military property of a value greater than \$500.00, in violation of Articles 91, 95, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 895, 912a, and 921. The members sentenced the appellant to confinement for 1 year, total forfeiture of pay and allowances for a period of 5 months, reduction to pay grade E-1, and a punitive letter of reprimand. The members also recommended that the appellant be placed in medical care from his completion of confinement until the end of his active obligated service. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's two assignments of error, and the Government's response. 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.

### **Lack of Mental Responsibility**

In his first assignment of error, the appellant asserts that he established by clear and convincing evidence that he is not guilty because he lacked mental responsibility. We disagree.

Lack of mental responsibility is an affirmative defense to any offense if: "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense." Art. 50a(a), UCMJ; RULE FOR COURTS-MARTIAL 916(k)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense. Art. 50a(b), UCMJ; R.C.M. 916(k)(3)(A).

"Clear and convincing evidence is that weight of proof which 'produces in the mind of the fact finder a "firm belief or conviction" that the allegations in question are true.'" *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001)(quoting CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 3:10 at 239 (7th ed. 1992)). An accused may satisfy this test by demonstrating that he lacked mental responsibility over a period of time that includes the time of the offense. However, the Government may rebut this by demonstrating that the accused was mentally responsible at specific times during the time period in question. *Martin*, 56 M.J. at 99.

Our superior court has articulated the following tests for courts to apply:

In determining whether the members' finding [that the appellant did not lack mental responsibility at the time of the alleged offenses] was correct in fact, the court must weigh the evidence and determine for itself whether appellant proved the defense of lack of mental responsibility by clear and convincing evidence. In determining whether the finding was correct in law, the court must view the evidence and all reasonable inferences in the light most favorable to the Government and determine whether a court-martial composed of reasonable members could have found that appellant failed to prove lack of mental responsibility by clear and convincing evidence."

*Id.* at 104 (citing *United States v. Martin*, 53 M.J. 221, 222 (C.A.A.F. 2000)(summary disposition)).

Our superior court follows the Fifth Circuit test of "reasonableness" in applying these standards of review to a non-guilt finding of fact by members on the question of mental responsibility. *Id.* at 107. "Specifically, the Fifth Circuit has determined that an appellate court 'should reject the jury verdict [on insanity] . . . only if no reasonable trier of fact could have failed to find that the defendant's criminal insanity at the time of the offense was established by clear and convincing evidence.'" *Id.* (quoting *United States v. Barton*, 992 F.2d 66, 68 (5th Cir. 1993)(alterations in original)). "Such an appellate determination, in turn, depends on whether there is substantial evidence in the record supporting the jury's finding of fact." *Id.*

This court must now determine whether there was substantial evidence to support the members' finding that the appellant did not prove by clear and convincing evidence that he lacked mental responsibility. The following chronology outlines the appellant's various offenses:

<u>Date</u>	<u>Event</u>
06 Jan 04 - 06 Feb 04	Wrongful use of cocaine
22 Jun 04 - 22 Jul 04	Wrongful use of marijuana
14 Jul 04	First R.C.M. 706 board
18 Aug 04 - 18 Oct 04	Larceny of military property
24 Aug 04	Second R.C.M 706 board
19 Oct 04	Using disrespectful language and fleeing apprehension
02 Feb 05	Third R.C.M. 706 board
March/April 2005	Fourth R.C.M. 706 board

It is undisputed that the appellant suffered from a mental disease or defect during the period of time in which he committed his offenses. The record indicates that four R.C.M. 706 sanity boards were conducted on the appellant prior to his trial, each concluding that the appellant suffered from Bipolar I disorder. While the first three boards each concluded that the appellant was unable to appreciate the nature and quality or the wrongfulness of his actions, the fourth board reached the opposite conclusion. At trial, three expert witnesses testified for the defense and one expert witness testified for the Government. The defense experts were: (1) Lieutenant (LT)Jonathan Locke,<sup>1</sup> the clinical psychologist who conducted the

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<sup>1</sup> LT Locke was the staff psychologist at the Naval Hospital on board Camp Lejeune, North Carolina. At the time of trial he was a licensed clinical psychologist, but was under supervision from 26 July 2003 until 3 May 2005 and working toward acquiring his license. He was not a licensed psychologist at the time he conducted the initial two R.C.M. 706 sanity boards on the appellant on 14 July 2004 and 24 August 2004. Interestingly, the 14 July 2004 report of examination is signed solely by LT Locke as a Staff Psychologist while the 24 August 2004 report of examination is signed solely by LT Locke as a Clinical Psychologist.

first two boards; (2) Dr. Leif Crowe,<sup>2</sup> the clinical psychologist who conducted the third board; and (3) Lieutenant Commander (LCDR) Jeffrey Litzenger,<sup>3</sup> an expert consultant for the defense who had served as the appellant's treating psychiatrist between April and October 2004. The Government expert was Commander (CDR) Edward Simmer,<sup>4</sup> the forensic psychiatrist who conducted the fourth board.

All four experts agreed that the appellant was suffering from a mental disease or defect. The defense experts all opined that the appellant was unable to appreciate the wrongfulness of his actions at the time of the specific offenses, while the Government expert opined that the appellant did understand the difference between right and wrong. The defense experts testified that in making their diagnoses, they had relied on interviews with the appellant, a review of his service and medical records, including inpatient and outpatient records, notes from other providers, and various psychological tests<sup>5</sup> that they had conducted. The defense experts indicated that at various times, the symptoms of the appellant's Bipolar I disorder included manic or hyper manic episodes, depressive episodes, and psychotic symptoms that included auditory and visual hallucinations.<sup>6</sup> The defense experts admitted that they did not review the appellant's written statement<sup>7</sup> regarding his cocaine use, nor did they interview lay witnesses who had the opportunity to view the appellant's demeanor at the time of the offenses.

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<sup>2</sup> Dr. Crowe, a civilian working for the Department of Defense, was, at the time of trial, the supervising psychologist at the Halyburton Naval Hospital on board Marine Corps Air Station Cherry Point, North Carolina, and specializes in clinical psychology. He previously served as staff psychologist at the National Naval Medical Center in Bethesda, Maryland. He has published articles on alcohol and human sexuality and has conducted approximately 50 R.C.M. 706 sanity boards in the prior 15 years.

<sup>3</sup> LCDR Litzenger was, at the time of trial, the outpatient psychiatrist at the Naval Hospital on board Camp Lejeune, North Carolina. His expertise was general psychiatry with a subspecialty in child and adolescent psychiatry.

<sup>4</sup> CDR Simmer was, at the time of trial, the Director for Health Quality Improvement at the Naval Medical Center in Portsmouth, Virginia. He was certified in general psychiatry and forensic psychiatry. He described forensic psychiatry as a subsection of psychiatry that looks at the interface between psychiatry and legal issues. He had conducted between 200 and 300 R.C.M. 706 sanity boards and had testified as an expert witness between 200 and 300 times.

<sup>5</sup> The Minnesota Multiphasic Personality Inventory (MMPI-2) is an example of one of those tests.

<sup>6</sup> LT Locke first saw the appellant on 5 January 2004 when he presented with suicidal thoughts. On 4 May 2004, the appellant was hospitalized after he experienced auditory hallucination telling him to harm himself, cut his wrists with a sharp metal object and reported hearing a woman screaming. He was also hospitalized for 13 days on 24 June 2004 and 27 July 2004 when he suffered a return of manic symptoms, in part, because he was not taking his medication.

<sup>7</sup> Prosecution Exhibit 2.

These failures were highlighted by the trial counsel in his cross-examination of each of the defense experts. LT Locke testified that the appellant's written statement regarding his use of cocaine suggested someone who knew the difference between right and wrong, and admitted that an individual suffering manic or psychotic episodes in July or August 2004 is not dispositive of whether the individual was suffering from those episodes in January or February 2004. LT Locke also admitted that it was difficult to look back in time to determine the appellant's state of mind at the time he used cocaine and marijuana.<sup>8</sup> He further testified that even if the appellant was having a manic episode it was entirely possible for him to understand the difference between right and wrong.

Similarly, Dr. Crowe admitted that it was impossible to determine the appellant's state of mind at the time of each specific offense with any degree of certainty because no one was able to investigate him at that time. However, in his opinion the preponderance of the evidence suggested that the appellant was unable to control his behavior at the time of *some* (emphasis added) of the alleged incidents. Dr. Crowe diagnosed the appellant as bipolar with severe psychotic symptoms.<sup>9</sup> On cross-examination, Dr. Crowe indicated that he did not see the evaluations of LCDR Litzinger on 18 and 22 October 2004 indicating that the appellant was not suffering from psychotic symptoms. He further testified that reviewing LCDR Litzinger's evaluations would have been helpful when making his diagnosis, but it would not have changed the result of the diagnosis.

LCDR Litzinger testified he began treating the appellant on or about 29 April 2004 through 24 October 2004. He examined the appellant on 18 and 22 October 2004 and indicated in his written notes that the appellant showed no acute signs of manic or depressive episodes, that his judgment was intact, and that he showed no apparent sign of mental illness at that time.<sup>10</sup> LCDR Litzinger opined that the appellant was experiencing psychotic symptoms at the time he used cocaine, basing his opinion on his experience in seeing the appellant over many experiences of psychosis, and how he described experiencing things in January and February 2004 that were very similar to his psychotic symptoms. LCDR Litzinger did not know whether the appellant was experiencing psychotic symptoms at the time he used marijuana.

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<sup>8</sup> LT Locke also testified that he was not qualified to make such a determination because he was not a forensic psychiatrist or psychologist.

<sup>9</sup> The symptoms include command hallucinations, auditory hallucinations, visual hallucination and paranoid ideations.

<sup>10</sup> On cross-examination, LCDR Litzinger indicated that his recordkeeping was poor and that he believed the appellant's judgment was poor and his insight was fair at the time of his examination. LCDR Litzinger's written notes of the examinations were marked as Prosecution Exhibit 13. Unfortunately, while Prosecution Exhibit 13 was marked as an exhibit, it was neither offered nor admitted at trial.

In contrast, the Government expert, CDR Simmer, testified that he had interviewed the appellant pursuant to his R.C.M. 706 evaluation, reviewed the records of the other treating physicians, reviewed the appellant's medical and service records, and reviewed the records of the three prior R.C.M. 706 sanity boards as well as the psychological testing conducted on the appellant at the Naval Medical Center in Portsmouth, Virginia. CDR Simmer additionally interviewed lay witnesses in an attempt to determine the severity of the appellant's disorder at the time of each offense. He also reviewed the written statement that the appellant gave regarding his cocaine use. Specifically, CDR Simmer looked at the appellant's actions and words at the time his offenses were committed in reaching his conclusion that the appellant was able to appreciate the wrongfulness of his conduct. CDR Simmer's testimony, combined with the trial counsel's skillful cross-examination of the defense experts, was a persuasive rebuttal to the conclusions of the defense experts and exposed flaws in the methods they had used to reach their conclusion that the appellant was unable to appreciate the wrongfulness of his conduct. CDR Simmer's opinions were well supported and not successfully rebutted by the defense.

In addition to the testimony of the expert witnesses, the members heard the testimony of numerous lay witnesses who had the opportunity to observe the appellant during the timeframe of his larceny and fleeing apprehension offenses. The testimony from these witnesses established that the appellant made statements to other military members that were indicative of someone who knew the difference between right and wrong. These statements included, inter alia, the appellant's assertions prior to the larceny that it would be easy to steal night vision goggles and body armor plates, and, after the larceny, that he needed to get his car off base because he would be in trouble if it were searched.

The members also heard testimony that the appellant had his car towed off base after making these statements and that when the car was searched his trunk contained the very items he had talked about stealing. These facts are highly indicative of someone attempting to conceal his acts because he knew they were wrongful. The members also saw that the appellant had written that he knew cocaine was an illegal substance when he used the drug. The members are entitled to consider the testimony of both expert and lay witnesses in their deliberations. See *United States v. Dubose*, 47 M.J. 386, 389 (C.A.A.F. 1998) (all relevant evidence must be considered; there is no premium placed upon lay opinion as opposed to expert opinion, nor on "objective" as opposed to "subjective" evidence). Further, the members are entitled to make credibility determinations regarding witnesses, including expert witnesses. *United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998).

It is apparent from our review of the record that the testimony of CDR Simmer, when viewed in sum with the testimony of

the lay witnesses and the appellant's own words and actions, provided sufficient evidence to the members that the appellant was able to differentiate between right and wrong at the time of his offenses. It is also apparent that the trial counsel was able to expose flaws in the opinions of the defense experts, specifically their collective failure to consider potential indicia of the appellant's state of mind at the specific time of his offenses. Our careful review of the record indicates that there was substantial evidence from which the members could find that the appellant did not prove by clear and convincing evidence that he lacked mental responsibility for his offenses.

We conclude from our review of the record as well, that the appellant failed to carry his burden of proving by clear and convincing evidence that he lacked the ability to appreciate the nature and quality or wrongfulness of the acts constituting any of his offenses. Viewing the evidence and all reasonable inferences in the light most favorable to the Government, we also conclude that a reasonable trier of fact could have found that the appellant failed to meet his burden of proving by clear and convincing evidence that he was unable to appreciate either the nature and quality or the wrongfulness of his acts. The members' finding on mental responsibility was legally and factually correct.

#### **Adequate Substitute Expert**

The appellant's second assignment of error asserts that the military judge abused his discretion by denying the appellant's request for a specific expert consultant. We disagree.

The accused in a trial by court-martial must be afforded equal access to witnesses and evidence, including the right to investigative or other expert assistance when necessary for an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986); see Art. 46, UCMJ. The right to expert assistance includes not only expert testimony, but may also encompass the assistance of an expert before trial to aid in the preparation of a defense upon a demonstration of necessity. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). However, a military accused has the resources of the Government at his disposal and thus is not automatically entitled to an expert of his choice. *Garries*, 22 M.J. at 290 (citing Art. 46, UCMJ). R.C.M. 703(d) provides that:

When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening

authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling.

We review a military judge's ruling on a request for expert assistance for an abuse of discretion. *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001).

The appellant and the Government agreed that expert assistance was a necessity in this case. The appellant filed a request with the convening authority for a specific expert: Dr. Richard Louis Ogle. The request identified Dr. Ogle as an expert in the areas of bipolar disorder and chemical addiction. The convening authority denied the request, and the appellant renewed the request before the military judge. The military judge determined that adequate substitutes were available, specifically, LCDR Litzinger.

In *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005), our superior court held that the Government did not provide an adequate substitute when it assigned the Air Force's premier shaken baby syndrome expert to itself, while denying the defense's request for an adequately-qualified expert and instead providing the defense with a consultant with no apparent experience in the area of shaken baby syndrome. *Warner* 62 M.J. at 115. In that case, as here, there was no dispute as to the defense need for expert assistance. The court stated that there is no litmus test standard for determining whether a substitute is adequate. It is a fact-intensive determination left to the sound discretion of the military judge. *Id.* at 119.

Here, the military judge determined that LCDR Litzinger was an adequate substitute for Dr. Ogle. We have reviewed the military judge's extensive findings of fact, set forth at Appellate Exhibit XLVIII, and adopt them as our own. We find that the military judge did not abuse his discretion in determining that LCDR Litzinger was an adequate substitute for Dr. Ogle. We note that the determination depends on whether LCDR Litzinger's professional qualifications were reasonably comparable to those of Dr. Ogle. The military judge determined that LCDR Litzinger's qualifications were superior to those of Dr. Ogle, and that he was readily available. AE XLVIII at 5. The military judge also indicated that the Government was willing to consent and abide by confidentiality provisions during trial to facilitate full attorney-client discussions, while preserving the capacity of the consultant to testify about non-privileged matters. AE XLVIII at 4, 5. We further find from our own review of the record that LCDR Litzinger was a competent and qualified

expert consultant and witness whose objectivity was not undermined because he served as appellant's treating psychiatrist.

Citing *United States v. Best*, 61 M.J. 376 (C.A.A.F. 2005), the appellant alleges "that the military judge forced the defense to choose an adequate substitute, LCDR Litzinger, one of appellant's treating psychiatrists, and that this ruling was prejudicial to the defense because it undermined LCDR Litzinger's appearance of objectivity, and created the appearance that he was bias[ed] having an allegiance to the defense." Appellant's Brief of 31 May 2006 at 9. We find this claim unpersuasive and not supported by the record.

LCDR Litzinger was the appellant's treating psychiatrist for approximately 6 months, but did not serve on any of the four R.C.M. 706 boards convened in appellant's case. The appellant mistakenly references *Best* to support his claim regarding LCDR Litzinger's lack of objectivity before the members. In *Best*, our superior court stated that "an actual conflict of interest exists if a psychotherapist's prior participation materially limits his ability to objectively participate in and evaluate the subject of an R.C.M. 706 sanity board." 61 M.J. at 387 (quoting *United States v. Best*, 59 M.J. 886, 892 (Army Ct.Crim.App. 2004) (*Best II*)). The appellant attempts to apply the principle enunciated in *Best* to his case by theorizing that if the defense can demonstrate a psychotherapist's prior participation limits his ability to objectively participate as a consultant and/or expert witness in issues involving R.C.M. 706 boards, then there is an actual conflict of interest. Appellant's Brief at 9. The appellant claims that LCDR Litzinger's treatment limited his ability to participate as an objective consultant.

There is no evidence in the record to support this claim, nor is there any prohibition which prevents a treating psychiatrist from serving as an expert consultant and witness. There is no evidence to suggest that LCDR Litzinger was unable to objectively serve as an expert consultant and witness for the appellant or that the members would view his testimony more favorably if he were not the appellant's treating psychiatrist. As stated in *Best*, "Opinions by physicians who have neither examined nor treated a patient 'have less probative force, as a general matter, than they would have if they had treated or examined him.'" *Best*, 61 M.J. at 383 (quoting *Wier ex rel. Wier v. Heckler*, 734 F. 2d 955, 963 (3d Cir. 1984)).

The appellant also mistakenly asserts that a neutral or objective witness would not be confronted with the appellant's statements or the conclusions of other witnesses on cross-examination. This assertion is simply not valid. LCDR Litzinger's diagnosis and findings were subject to cross-examination as were the diagnoses and findings of any other expert who testified, whether for the defense or Government. It was for the members to determine the weight and believability of that testimony. The issue is not whether LCDR Litzinger could

serve as both an expert consultant and a treating physician, but whether he was an adequate substitute under R.C.M. 703 (d).

Nor is appellant's claim of conflict of interest supported by the evidence. In *United States v Short*, 50 M.J. 370 (C.A.A.F. 1999), the military judge denied the appellant's request for an independent urinalysis expert to assist in his defense. The Government, agreeing that expert assistance was necessary, offered to provide the prosecution's expert witness to the appellant. Judge Effron, in his dissenting opinion, noted the conflict of interest inherent in offering the principal prosecution expert to the appellant. *Short*, 50 M.J. at 379 (Effron J. dissenting). Here, there was no indication that LCDR Litzinger was beholden to the Government. To the contrary, LCDR Litzinger's prior participation as appellant's treating psychiatrist is more likely evidence of his subjectivity, rather than his opposition to the appellant. Simply stated, there was no discernible conflict in this case.

We further find that appellant's due process claim and allegation of Government manipulation of the pool of "available" experts to be without merit and not supported by evidence in the record.

We find that the military judge was not clearly erroneous in his findings of fact, and did not base his decision on an incorrect view of the law. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). Accordingly, we hold that the military judge did not abuse his discretion in determining that an adequate substitute was available. The appellant's second assignment of error is without merit.

### **Conclusion**

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

Senior Judge VOLLENWEIDER and Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court