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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MATTHEW T. BURK
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800146
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 September 2007.
Military Judge: CAPT Brian Roberts, JAGC, USN.
Convening Authority: Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.
Staff Judge Advocate's Recommendation: Col D.J. Lecce, USMC.
For Appellant: LCDR Kristina Reeves, JAGC, USN.
For Appellee: LT Derek D. Butler, JAGC, USN.

4 December 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A general court-martial composed of officer and enlisted members[1] convicted the appellant, contrary to his pleas, of attempted rape, rape, and indecent assault in violation of Articles 80, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 920, and 934. The appellant's approved sentence was confinement for 6 months, forfeiture of $859.00 pay per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge.

[1] The panel that convicted the appellant consisted of 3 officer members and 2 enlisted members. When jeopardy attached, the panel consisted of 4 officer members and 2 enlisted members, but during the testimony of one prosecution witness an officer member discovered a conflict and was excused.

The appellant claims that the military judge erred in denying several challenges for cause against members nominated to serve. He further claims that the evidence is legally and factually insufficient to sustain the findings. Finding merit in his first assignment of error, we will set aside the findings and the sentence and authorize a rehearing.

During his trial on the merits, the appellant contested the consent and force aspects of all three offenses of which he was convicted. His strategy included rigorous cross-examination of all Government witnesses and presentation of defense witnesses who perceived the appellant's and the alleged victim's activity on the night in question. Lance Corporal (LCpl) D -- the prosecutrix of the rape, indecent assault, and attempted rape -- testified, and she acknowledged that she and the appellant were alone together in her barracks room for the critical period preceding initiation of intercourse and further attempts at intercourse. The Government also presented the testimony of several Marines who looked in on LCpl D and the appellant at various points, but none of them was privy to any conversation between LCpl D and the appellant. The Government introduced the appellant's statement to the Naval Criminal Investigative Service which acknowledged intercourse but denied force and lack of consent. The appellant did not testify.

The venire originally consisted of seven officer and six enlisted members. One enlisted member was excused immediately after assembly, and before voir dire, due to a family emergency. After group and individual voir dire, the military judge granted two government challenges and denied a third, and he granted two defense challenges and denied four others. Both parties exercised their single peremptory challenge, the Government removing the member whom it had unsuccessfully challenged for cause, the defense removing one of the four whom it had unsuccessfully challenged for cause. The resulting panel contained six members, four officer and two enlisted, and fully two-thirds of the panel (coincidentally, the fraction required to convict) were seated over defense challenges.

Our review of the voir dire proceedings leads us to conclude that the military judge abused his discretion in denying two of the defense's challenges. Staff Sergeant (SSgt) M responded in group voir dire that she could not state with absolute certainty that she presumed the appellant to be innocent of the charges against him. She later revised her position, in individual voir dire by the trial counsel, to state that she was "neutral," adding that "if I have to go for innocent or guilty, sir, then yes, innocent until proven guilty". She also responded to the defense counsel that a Marine should testify when he says he is not guilty, stating "if it would be me, I'd want people to know I'm innocent and not leave any doubt in anyone's mind I didn't do something . . . ." Record at 194. She denied that that thought would be in the back of her mind during deliberations, but she did acknowledge she held the belief. *Id.* Finally, in response

to questions from the military judge, SSgt M stated that she understood the appellant's absolute right not to testify and would not hold it against him if he chose to exercise that right, and that she further understood the presumption of innocence and its application to the court-martial. *Id.* at 195-96.

SSgt R voiced his belief that "[i]f you are getting charged for a crime, you should speak up and acknowledge that you are not guilty", adding that "[y]ou should defend yourself at all possible costs . . . ." *Id.* at 204. He did remark that this was his own personal stance and that it could be logically consistent for a person charged with a crime to plead not guilty and stand on his right to remain silent. *Id.* at 204-05.

The defense challenged SSgt M on the basis of her profession that the appellant should testify and her difficulty grasping the presumption of innocence.[2] The defense challenged SSgt R on a similar basis. The military judge denied both challenges. The military judge conducted a brief analysis of the challenges against SSgt M and SSgt R from an implied-bias standpoint, and concluded in each case that the individual member's circumstances did not do injury to the perception of appearance of fairness. Notably, the military judge analyzed each member's response to questioning and rehabilitative efforts, but he omitted any discussion of demeanor. *Id.* at 223-24. Such observations would have been particularly useful to us in determining whether the military judge abused his discretion, as we are not as deferential to the resolution of challenges based on implied bias as we are to the resolution of challenges based on actual bias. *See United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007).

As noted above, the appellant and the prosecutrix were alone together at several critical points when the offenses are alleged to have occurred. Because two of the members professed a belief that one accused of a crime should testify, our own perception of the fairness, and the apparent fairness, of the proceedings is significantly undermined, and we believe that the general public would have a like perception.

[2] A third prong, that her mother had been sexually assaulted before SSgt M was born, was also raised and properly rejected by the military judge.

Conclusion

The findings and the sentence are set aside. A rehearing is authorized.

For the Court

R.H. TROIDL
Clerk of Court