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

Before
D.E. O'TOOLE, V.S. COUCH, R.G. KELLY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KEVIN J. RONAN
COMMANDER (O-5), MEDICAL CORPS, U.S. NAVY

NMCCA 200800154
GENERAL COURT-MARTIAL

Sentence Adjudged: 09 November 2007.
Military Judge: Col Steven Day, USMC.
Convening Authority: Commander, Bureau of Medicine & Surgery, Washington, DC.
Staff Judge Advocate's Recommendation: CDR A.J. Rowe, JAGC, USN; **Addendum**: LT B.D. Cook, JAGC, USN.
For Appellant: William M. Ferris; Capt S.B. Kaza, USMC.
For Appellee: Maj James Weirick, USMC.

30 April 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Senior Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer members, of seven specifications of conduct unbecoming an officer and a gentleman, one specification of obstructing justice, and three specifications of illegal interception of oral communications as prohibited under 18 U.S.C. § 2511, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934. The appellant was sentenced to confinement for 46 months, forfeiture of all pay and allowances, and a dismissal from the naval service. The convening authority approved the findings and the sentence as adjudged, but suspended all confinement in excess of 24 months in an act of clemency.

The appellant alleges three assignments of error: (1) that the military judge erred when he denied the appellant's challenge for cause of a member; (2) that the evidence is legally insufficient to support the findings of guilt; and (3) that the military judge abused his discretion when he admitted over 2,000 pictures of a homosexual nature that were found on the appellant's personal computer. After considering the record, the appellant's briefs and assignments of error, the appellant's petition for a new trial, and the Government's responses, 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. The appellant's petition for a new trial is denied. RULE FOR COURTS-MARTIAL 1210(g)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Background

The appellant was a physician assigned to the United States Naval Academy (USNA). In that capacity, he served as a medical officer responsible for the care and treatment of midshipmen, and as a staff officer representative for the men's gymnastics team. In a volunteer capacity, the appellant participated in USNA's "sponsor program," whereby midshipmen are invited into the private homes of sponsors during liberty periods, sometimes to stay overnight. In this capacity, the appellant granted liberal access of his home to include up to thirteen midshipmen, some of whom were provided with their own key to the premises. Several of these midshipmen used two bedrooms in the house, referred to at trial as the "blue room" and the "red room," to engage in sexual activity with members of the opposite sex, or to masturbate alone.

Unbeknownst to these midshipmen, the appellant had installed a surveillance camera, also known as a "nanny cam," inside of an air purifier that he placed alternatively in the two bedrooms used by them. By using sophisticated audiovisual technology, the appellant captured footage of some of the sexual escapades by the midshipmen, and downloaded the footage onto digital video discs (DVDs) for storage. At trial, the Government produced four DVDs and one VHS tape containing video footage of nine midshipmen (seven males and two females), and one civilian woman, participating in some form of heterosexual activity. The DVDs were marked with initials that corresponded with the first names of some of the midshipmen depicted in the footage. A forensic document examiner testified that the initials on the DVDs were written by the appellant.

The DVDs were discovered in the appellant's house by Mr. AS, a former midshipman who had been disenrolled from USNA due to substandard academic performance. At the time of the discovery, Mr. AS and the girlfriend of another midshipman, Ms. RV, were viewing the contents of various CD's in the appellant's house looking for a blank compact disc (CD) on which to download

pictures from the appellant's personal computer. Within the stack of CDs they found one that contained homosexual pornography. Mr. AS noticed a stack of recordable DVDs, many of which had titles written on them. One of the DVDs had the title "Lectures" and some initials written on it. Thinking this DVD was suspicious, Mr. AS reviewed it and found three video clips of individuals engaged in sexual activity. One of the clips depicted Ms. RV and her boyfriend, Midshipman (MIDN) MP, engaging in sexual intercourse in the "red room."[1] Another clip depicted MIDN ZP while he masturbated alone in the "blue room." Alarmed at what he had found, Mr. AS searched through other media found near the appellant's television set, and found a large selection of DVDs and VHS tapes. On one of these VHS tapes, Mr. AS found footage of himself and his former girlfriend, MIDN AW, engaged in sexual activity while in the "blue room." Record at 583-85; Prosecution Exhibit 19. On the tape, Mr. AS recognized the appellant's voice saying "goodnight" to MIDN MP, who was staying in another room. Record at 586. Mr. AS found another film clip of himself and MIDN AW being sexually intimate, and determined that the footage was taken approximately one to three weeks prior to its discovery.

The next day, MIDN MP and Mr. AS conducted a search of the appellant's house, finding more DVDs in the appellant's sock drawer. One of the DVDs was titled "Lectures," and contained several film clips of Mr. AS and other midshipmen involved in sexual activity. When Mr. AS placed a VHS tape in a player attached to the appellant's television, he saw that there was a live feed into the "blue room." Upon investigation, Mr. AS and MIDN MP found the "nanny cam" in the air purifier. A few days later, MIDN MP reported what they had found to the Naval Criminal Investigative Service (NCIS).

Defense Challenge for Cause

The appellant's first assignment of error contends that the judge erred by denying his challenge for cause against a court-martial member, Captain Jeffrey MacDonald, U.S. Navy. We disagree.

During group *voir dire* of the court-martial members, the appellant's trial defense counsel asked "[w]ould you expect that an innocent person in [the appellant's] position would testify?" Record at 297. CAPT MacDonald was the only member of the panel to answer in the affirmative, and he explained his response during the following colloquy on individual *voir dire:*

> MEM (CAPT MacDonald): It – I have this – my whole career, it's "in your face honest." If – if a person feels that he's – something's happened to him that he doesn't – he should come up and speak about it, it just

[1] At the time of trial, MIDN MP had been commissioned to the rank of Ensign.

seems like – to me, it just seems when someone has an issue, then you talk about it.

TC: . . . [I]s it fair to . . . characterize your feeling as . . . if you were accused of something that you were innocent of, you feel that you would want to talk about it?

MEM (CAPT MacDonald): Yes.

TC: . . . Can you agree . . . and [the military judge] will instruct you that . . . if the [appellant] does not testify, that you can't hold that against him in any way or draw any adverse conclusion from that, can you agree . . . to apply that instruction?

MEM (CAPT MacDonald): Yes, I can.

TC: . . . Do you believe that if [the appellant] does not testify, that you will draw any adverse conclusion from that?

MEM (CAPT MacDonald): No.

TC: . . . [F]inally, do you understand that if he decides not to testify, that might be based on the advice of counsel and have nothing to do with his guilt or innocence?

MEM: I would understand that.

Id. at 325-26.

In response to this colloquy, the appellant challenged CAPT MacDonald for cause, based upon the assumption that he would expect an accused to testify.[2] *Id.* at 370. The military judge denied the challenge, stating:

MJ: . . . [CAPT MacDonald] said he would come forward, but he also indicated he could follow my instructions, he will understand that an individual has a right not to testify, I emphasized that in my own general voir dire when we started this morning, and he understands that an individual may not testify on advice of counsel. I think he was going more to the issue of somebody might want to talk about an issue. I believe that he'll understand . . . my instructions on – on the 5th Amendment. That challenge is not granted.

Id. at 371. Prior to the appellant's challenge of CAPT MacDonald, the military judge granted a defense challenge for cause of

[2] Although it is not clear from the record, we will consider the appellant's challenge for cause of CAPT MacDonald to be for both actual and implied bias.

another member, based upon his familiarity with the appellant's case. *Id.* at 370.

As a predicate matter, we note that the appellant did, in fact, testify in his own defense. *Id.* at 1523-85. However, we do not view this tactical decision to constitute waiver of the issue whether the military judge's ruling to deny the appellant's earlier challenge for cause constituted error. *See United States v. Ovando-Moran,* 44 M.J. 753, 755 (N.M.Ct.Crim.App. 1996), *aff'd*, 48 M.J. 300 (C.A.A.F. 1998).

An accused is entitled to trial by impartial members, *United States v. Townsend,* 65 M.J. 460, 463 (C.A.A.F. 2008), and may challenge any member when it appears the member "[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." RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Members may be challenged for both actual and implied bias. *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). A military judge's rulings on actual bias, which involve judgments regarding credibility, are reviewed for abuse of discretion and accorded great deference. *Id.* We give the military judge "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." *United States v. Napolitano,* 53 M.J. 162, 166 (C.A.A.F. 2000). Implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced. *Id.* at 167; *United States v. Warden,* 51 M.J. 78, 81 (C.A.A.F. 1999). Military judges are enjoined to liberally grant defense challenges for cause. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006).

In light of the statement by CAPT MacDonald that he could be fair and impartial, his stated willingness to follow the military judge's instructions, and his articulated understanding of the appellant's right to not testify, we give great deference to the military judge's assessment of this member's demeanor. *United States v. Albaaj,* 65 M.J. 167, 171 (C.A.A.F. 2007). We conclude the military judge did not abuse his discretion in finding no actual bias on the part of CAPT MacDonald.

Challenges for implied bias are viewed objectively through the eyes of the public, "'focusing on the appearance of fairness.'" *United States v. Bragg,* 66 M.J. 325, 326 (C.A.A.F. 2008)(quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). "Although we review issues of implied bias for abuse of discretion, the objective nature of the inquiry dictates that we accord 'a somewhat less deferential standard' . . . ." *Townsend*, 65 M.J. at 463 (quoting *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000)). "A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not." *Clay*, 64 M.J. at 277.

Even though the military judge did not clearly state the liberal grant mandate on the record, we still find "'a clear signal that the military judge applied the right law.'" *Id.* (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). Prior to the appellant's challenge of CAPT MacDonald, the military judge had granted a defense challenge for cause of another member, based upon a "broad appearance standpoint" that the member's service on the panel would be "problematic." Record at 370. We understand this to comport with the liberal grant mandate and conclude the military judge understood and applied the mandate in his rulings.

Viewing CAPT MacDonald's *voir dire* responses objectively, we find that a member of the public would not have substantial doubt that it was fair for him to sit as a member. *Bragg,* 66 M.J. at 327. Finding no clear abuse of discretion by the military judge in applying the liberal grant mandate, *Moreno,* 63 M.J. at 134, and no objective reason to question CAPT MacDonald's fairness and impartiality, we conclude that the military judge correctly denied the appellant's challenge against him for implied bias.

Legal and Factual Sufficiency

The appellant's second assignment of error claims that the evidence underlying his findings of guilt is legally insufficient, specifically because Mr. AS and MIDN MP are not credible, and MIDN BC was not identified on any of the video footage admitted at trial. Appellant's Brief and Assignments of Error of 16 May 2008 at 19-21. While the appellant purports to challenge only the legal sufficiency of the evidence, the pleadings include an allegation of factual insufficiency as well. Given our *de novo* review mandate under Article 66, UCMJ, we will address both contentions. *See United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

The testimony of Mr. AS and MIDN MP was important for the Government to show how the "nanny cam" and video footage of sexual activity came to light. To be sure, but for the fact that Mr. AS came across the video media while staying in the appellant's house, and sought the counsel of MIDN MP about what to do with the media, the NCIS investigation would have never been initiated, nor would the videos or camera equipment have

been recovered from the premises. At trial, the defense attempted to explain Mr. AS's motive behind his private search of the premises as an attempt to extort money from the appellant, in an effort to pay off USNA for the cost of his education. To bolster this argument, the defense effectively brought out during Mr. AS's cross-examination the facts that he had fabricated a letter of college admission from another educational institution, that he altered his USNA transcript to increase his GPA in an attempt to gain employment, and that he was untruthful in his statements to NCIS and at the appellant's Article 32 hearing.

As for the credibility attack against MIDN MP, the defense attempted to show that he, as opposed to the appellant, was the one responsible for the voyeurism involved in the creation of the sex videos. This assertion was based upon the testimony of a former girlfriend and fellow midshipman who claimed that MIDN MP had taken nude photographs of her, and had stated his desire to videotape the two of them while having sex. To bolster its claim, the defense asserted that during the footage of MIDN MP and Ms. RV, it appears MIDN MP looks straight into the camera on several occasions. MIDN MP denied all of these allegations. The defense also cross-examined MIDN MP on the fact that he initially withheld from NCIS some of the videos he removed from the appellant's house that contained footage of himself.

The sum total of the appellant's counter-accusations suggest that Mr. AS and MIDN MP - - independent of each other and for their own nefarious reasons - - were jointly responsible for the creation of the sex videos. Such logic would seem to violate the doctrine of chances, if not common sense, and we find it unpersuasive. Further degrading the persuasiveness of the appellant's argument, the record demonstrates, *inter alia,* the appellant admitted that he was the one who purchased and installed the "nanny cam," and who allowed the midshipmen to cohabit the bedrooms in his private residence. Finally, a Government expert matched the appellant's handwriting to the notations on the DVDs which contained footage of the midshipmen's sexual activity.

Regarding the appellant's assertion that MIDN BC was not identified on any of the sex videos, we disagree. NCIS agent Paul Leo testified that he had interviewed MIDN BC, and in fact identified the midshipman as one of the subjects depicted in the footage recovered from the appellant's house, on a DVD marked with the letter "B." Record at 498, 542-43; Prosecution Exhibit 21. Mr. AS testified he saw MIDN BC on one of the videos naked after getting out of a shower. Record at 591. MIDN BC testified at trial he had also seen video images from a DVD of himself, taken at the appellant's house, while naked after a shower. *Id.* at 1086-88, 1094-96. Moreover, having seen MIDN BC for themselves in court, the members were able to identify him when Prosecution Exhibit 21 was published.

After viewing the evidence in the light most favorable to the prosecution, including all reasonable inferences, we find that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007)(quoting *Jackson*, 443 U.S. at 318-19). Likewise, we too are convinced of the appellant's guilt beyond a reasonable doubt. While the record demonstrates that the credibility of Mr. AS and MIDN MP was effectively attacked at trial, it also reflects that the testimony of these two witnesses was not the sole source of credible evidence provided by the Government. Despite these credibility challenges by the appellant, we are mindful that reasonable doubt does not require that the evidence be free from conflict. *United States v. Rankin,* 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006)(citing *United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd,* 64 M.J. 348 (C.A.A.F. 2007). After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, we conclude that the appellant is guilty of all specifications and charges beyond a reasonable doubt.

Admission of Homosexual Pornography

The appellant's third assignment of error claims that the military judge abused his discretion by admitting evidence that the appellant possessed approximately 2,000 images of adult homosexual pornography on a personal computer found inside his home, under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). We disagree.

This issue was thoroughly litigated in response to a motion *in limine* at trial. Appellate Exhibits I through IX; Record at 18-158. In light of our own review of the record and the military judge's detailed findings of fact and conclusions of law, Record at 158-65, which we adopt as our own, we are satisfied that the court's ruling in favor of admissibility was not an abuse of discretion. *United States v. Freeman,* 65 M.J. 451, 452 (C.A.A.F. 2008)(citing *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995)); *see also United States v. Whitner,* 51 M.J. 457 (C.A.A.F. 1999) and *United States v. Mann,* 26 M.J. 1 (C.M.A. 1988). After careful consideration of the record, we conclude that this assignment is without merit. *United States v. Reed,* 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias,* 25 M.J. 356, 363 (C.M.A. 1987).

Petition for a New Trial

Following submission of the appellant's brief and assignments of error, the appellant filed a Petition for a New Trial. The appellant avers that an arrest record of Mr. AS was not provided to the appellant during the discovery process, thereby depriving him of impeachment evidence at trial.

On 4 June 2007, the appellant's civilian defense counsel served a Request for Production of Evidence on the trial counsel. Appellant's Petition for a New Trial of 6 Jun 2008, Encl. 1. The appellant's civilian defense counsel requested any "evidence affecting the credibility of a government witness . . . or evidence of other character, conduct or bias bearing on witness credibility," in addition to any evidence which would be exculpatory for the appellant, or relevant to his defense. *Id.* On 12 July 2007, the Government responded that all known evidence affecting the credibility of a Government witness had been provided, that the trial counsel knew of no additional material responsive to the request, and that the trial counsel will review the official records of military witnesses and other material in the Government's possession to determine if there is additional responsive information. *Id.* at Encl. 2. The Government also stated that the Request for Production of Evidence would be treated as a continuing discovery request and any additional information responsive to the request would be provided as it became available. *Id.*

Enclosure 3 to the appellant's petition includes documents relating to Mr. AS' civilian arrest resulting from an incident that occurred on 11 May 2007. A subsequent complaint alleging felony stalking against Mr. AS was sworn to by the Alachua County Sheriff's Office on 30 July 2007 in Gainesville, Florida. The appellant avers that none of the documents relating to Mr. AS' civilian arrest were turned over by the Government during the discovery process.

The appellant's general court-martial took place on 5-9 November, 2007. In the petition, the appellant claims that he first became aware of the new evidence "well after [the appellant's] trial had been completed," and that defense counsel "exercised due diligence by submitting a discovery request to the trial counsel for information related to the credibility of [AS]." Brief in Support of Petition for a New Trial at 6.

A new trial shall not be granted on the basis of newly discovered evidence unless the petition demonstrates that:

(1) The evidence was discovered after the trial;
(2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
(3) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2). Requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored; relief is granted only if a manifest injustice would result absent a new trial, rehearing, or reopening based on proferred newly discovered evidence. *United States v. Johnson,* 61 M.J. 195,

199 (C.A.A.F. 2005)(citations omitted). We need not determine whether the proffered evidence is true, nor do we need to determine the historical facts. *United States v. Brooks,* 49 M.J. 64, 69 (C.A.A.F. 1998). Rather, our inquiry should merely decide whether "the evidence is sufficiently believable to make a more favorable result probable." *Id.*

Assuming, without deciding, that the appellant's defense counsel first became aware of this new evidence after trial, and that the evidence could not have been discovered before trial with due diligence, we must weigh this new evidence against the other evidence at trial to determine the probability of a more favorable result for the appellant. *Johnson,* 61 M.J. at 200.

During the appellant's trial, Mr. AS admitted on direct examination to two serious acts of dishonesty. First, the witness admitted to forging an acceptance letter to another university in order to defer his service obligation to the Navy as a result of his separation from the USNA for poor academic performance. Second, the witness admitted to altering his official academic transcript from the Naval Academy and then submitting the altered transcript as part of an application to work as a substitute teacher in a local county school district. The trial counsel elicited these facts on direct examination, and trial defense counsel rightly focused on these acts during a lengthy, and vigorous, cross-examination. Thus, these two acts of dishonesty were in front of the members, who personally observed Mr. AS' demeanor and weighed the remainder of his testimony accordingly, in light of these two instances of untruthfulness.

The new evidence at issue in the petition for a new trial does not involve an act of dishonesty, but rather an allegation of stalking. In judging the credibility and materiality of the new evidence, we conclude that the evidence of the arrest for felony stalking is not material because it does not allege a specific instance of conduct that attacks Mr. AS' character for truthfulness such as would be allowed as impeachment evidence under MILITARY RULE OF EVIDENCE 608(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Moreover, the new evidence alleged by the appellant is not admissible as a conviction of a crime under MIL. R. EVID. 609(a). Even if the evidence were admissible under MIL. R. EVID. 608(b) or 609(a), we find it would have been more prejudicial than probative under MIL. R. EVID. 403. In light of all the evidence adduced at the appellant's trial, we are confident that an exploration of an allegation of stalking would be no more damaging than the already explored subjects of falsifying a college acceptance letter and falsifying an academic transcript as part of a job application.

In view of the overall evidence against the appellant, and the relatively minimal impact the newly discovered evidence would have had in impeaching the witness, the newly discovered evidence fails to meet the criteria set forth in R.C.M. 1210(f). We

conclude that it is not probable, in light of all other pertinent evidence, that the newly discovered evidence would have produced a substantially more favorable result for the appellant. The appellant's petition for a new trial is denied.

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

Chief Judge O'TOOLE and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court