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

Before
D.E. O'TOOLE, V.S. COUCH, E.E. GEISER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

TRENT D. THOMAS
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200800327
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 July 2007.
Military Judge: LtCol David Jones, USMC.
Convening Authority: Commander, U.S. Marine Corps Forces Central Command, MacDill Air Force Base, FL.
Staff Judge Advocate's Recommendation: LtCol G.W. Riggs, USMC.
For Appellant: LT Kathleen Kadlec, JAGC, USN; Capt Anthony Burgos, USMC.
For Appellee: LT Duke Kim, JAGC, USN; LT Timothy Delgado, JAGC, USN.

11 August 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of one specification of conspiracy to commit larceny, housebreaking, kidnapping, false official statement, and murder, and a separate specification of kidnapping, in violation of Articles 81 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 934. The members found the appellant not guilty of separate specifications alleging murder, housebreaking, larceny, and making a false

official statement. The approved sentence was reduction to pay grade E-1 and a bad-conduct discharge.

We have examined the record of trial and the pleadings of the parties.[1] We conclude that the findings and 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.

Background

The appellant was a fire team leader who deployed to Iraq in January 2006. Initially the appellant was sent to an area of operations (AO) on the outskirts of Fallujah, Iraq. The appellant and his team were involved in a number of engagements with insurgents, both receiving and returning fire.

The appellant and his unit were subsequently shifted to an AO near Hamdaniyah, Iraq. In Hamdaniyah, the appellant and his Marines spent significant time operating from a fortified outpost designated Patrol Base Bushido. From this location, the Marines variously conducted counter-insurgency missions, counter-improvised explosive device (IED) ambushes, intelligence collection operations, and humanitarian assistance operations.

In connection with his fire-team's recurring counter-IED missions, the appellant and his Marines came to believe that a particular local Iraqi man was significantly involved in the IED threat within their AO. Higher authority was also interested in the individual and at one point the appellant's unit was deployed to detain the man. The appellant and his team successfully detained the individual and transferred him to the regional detainee holding area for questioning. After three days of questioning, the Iraqi was released back into the AO. Various

[1] The appellant raised seven assignments of error as follows:

I. THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO SUBSTITUTE THE IDENTITY ELEMENT FOR ALL OF THE CHARGES AFTER THE CLOSE OF THE GOVERNMENT'S CASE AS IT CONSTITUTED A MAJOR VARIANCE.
II. THE MILITARY JUDGE ERRED IN GRANTING THE GOVERNMENT'S CHALLENGE FOR CAUSE AGAINST WARRANT OFFICER [L] AS THE LIBERAL GRANT MANDATE ONLY APPLIES TO THE DEFENSE.
III. THE MILITARY JUDGE ERRED IN GRANTING THE GOVERNMENT'S PEREMPTORY CHALLENGE AGAINST GUNNERY SERGEANT [S] FOR NONSENSICAL REASONS PURSUANT TO *Batson v. Kentucky*, 476 U.S. 79 (1986).
IV. THE EVIDENCE IN THIS CASE IS LEGALLY INSUFFICIENT DUE TO THE OVERWHELMING EVIDENCE OF CORPORAL THOMAS' POST-TRAUMATIC STRESS DISORDER AND HIS TRAUMATIC BRAIN INJURY.
V. ARTICLE 66, UCMJ, WARRANTS SENTENCE RELIEF IN THIS CASE AS CORPORAL THOMAS WAS CREDITED WITH 519 DAYS OF PRETRIAL CONFINEMENT CREDIT WHICH IS INAPPLICABLE TO HIS SENTENCE.
VI. THE MILITARY JUDGE ERRED IN GIVING BOTH A SUBJECTIVE AND, OBJECTIVE INSTRUCTION FOR THE DEFENSE OF LAWFULNESS OF SERGEANT HUTCHINS ORDER.
VII. THE EVIDENCE IS FACTUALLY INSUFFICIENT AS THE GOVERNMENT DID NOT PROVE CORPORAL THOMAS' IDENTITY AT TRIAL.

members of the appellant's unit testified that such capture and release episodes became common and caused increasing frustration within their unit.

Evidence at trial indicates that on 25 April 2006, the appellant and seven members of his squad were tasked to conduct a counter-IED ambush. The senior Marine was the appellant's squad leader, Sergeant (Sgt) Hutchins. While waiting for darkness to cover their movement, Sgt Hutchins, raised an idea with his subordinate squad leadership to include the appellant. Specifically, Sgt Hutchins observed that their ambush location was near the home of the Iraqi man whom squad members had previously detained and whom they still collectively believed was an IED facilitator. Sgt Hutchins suggested that the group kidnap the Iraqi, place him in an old IED hole near the main road, and then execute the man.

The squad leadership agreed to the general plan and moved into detailed planning. Each of the four senior members of the squad, to include the appellant, discussed the plan and assisted in refining it so that the killing would be staged to appear to be the result of a lawful engagement. Essentially, the plan required a portion of the squad to kidnap the suspected insurgent leader from his home in Hamdaniyah and then stage his death to look as if the Marines had been ambushed and forced to respond with deadly defensive force.

The plan as developed required the squad to steal a shovel and an AK-47 from local residents and plant them in the vicinity of the IED hole to lend credence to the ambush story. Accounting for the possibility that the Iraqi man might not be home, the plan included contingency options to either take another military-aged male from the Iraqi target's household or, alternatively, to take a military-aged Iraqi man from a neighboring house. The developed plan was then presented to more junior Marines in the squad.

Six Marines and their Navy corpsman ultimately agreed to the plan and carried it out during the early morning hours of 26 April 2006. Each member of the squad had specific tasks allocated to them. Unlike a standard mission tasking, prior to executing the plan, Sgt Hutchins offered each participating squad member the opportunity to withdraw from the plan and, thereby, cancel the entire scheme. Nobody withdrew.

When the group attempted to execute their plan, they found that the suspected IED facilitator and his family weren't home. Consistent with the back-up plan, the team went to a nearby house and abducted another military-aged man, bound his hands, and walked/dragged him to the IED hole. The Marines threw the man into the IED hole along with the shovel and AK-47 which had been stolen from another nearby house. The team left the man bound up and retreated to their ambush location where they opened fire. One member of the ambush team fired the AK-47 in the air and

tossed the spent brass into the hole to create the scene. Members of the team, to include the appellant, approached the hole. Finding the man severely wounded but still alive, Sgt Hutchins and the appellant respectively fired into the man's head and body, killing him.

Initially, members of the conspiracy stuck to the ambush story, but when local Iraqi citizens raised allegations of kidnapping and murder, Marine Corps higher authority called in the Naval Criminal Investigative Service (NCIS) who initiated an investigation. The conspirators' ambush story quickly unraveled.

Amendment to Charges

In his first assignment of error, the Appellant asserts that the military judge erred by allowing the Government to amend the charges after arraignment resulting in what the defense characterizes as a "major change or variance." Specifically, the Government was permitted to substitute the descriptor "an unknown Iraqi man" for the name of the victim of the various crimes who had been specifically identified in the specifications as "Hashim Ibrahim Awad." Contrary to the appellant's assertion on appeal, the Government requested permission to make what they characterized as a "minor change" just prior to resting their case-in-chief on the merits. Record at 1336-39.

RULE FOR COURTS-MARTIAL 603(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), allows a military judge to permit the Government to make minor amendments to a specification, after arraignment and prior to findings, so long as the accused is not prejudiced. R.C.M. 603(d) prohibits major amendments to specifications where the accused objects to the amendment. The question before us is whether the amendments to the conspiracy and kidnapping specifications were major or minor changes. This is a question of law that is reviewed *de novo*. *See United States v. Sullivan*, 42 M.J. 360, 364-66 (C.A.A.F. 1995); *United States v. Loving*, 41 M.J. 213, 287 (C.A.A.F. 1994).

R.C.M 603(a) defines minor changes as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to offenses charged." In deciding whether the change is major or minor, a two-part test is applied. First, does the change result in an additional or different offense? Second, does the change prejudice a substantial right of the appellant? [2] *Sullivan*, 42 M.J. at 365.

[2] The legal analysis of amendments to a specification prior to findings under R.C.M. 603 and variance cases involving the fact finder's amendment of a specification through exceptions/substitutions in findings is substantially similar. Each involves consideration of notice to the appellant of the nature and identity of the charges to which he must answer and the amendment's impact on the due process requirement that the appellant be given a fair opportunity to defend against the charges.

A similar fact pattern to the case at bar occurred in *United States v. Hopf*, 5 C.M.R. 12 (C.M.A. 1952). In *Hopf*, the case involved assault with a dangerous weapon against a Korean man. The military judge found the accused guilty but excepted the name of the victim from the specification, substituting therefore the descriptor, "an unknown" Korean male. The Court of Military Appeals upheld the judge's findings, noting that the variance was not fatal because neither the nature nor identity of the offense was changed. The appellant was convicted of the same assault for which he was charged, and the defense preparations to meet the charge were unaffected. *Id*.

In contrast, in the more recent case, *United States v. Marshall*, __ M.J. __, 2009 CAAF LEXIS 643 (C.A.A.F. June 18, 2009), the accused was charged, *inter alia*, with escaping from the custody of a Captain (CPT) Kreitman. At the close of the Government's case on the merits, the accused moved for a finding of not guilty based on a lack of evidence that the accused was ever in CPT Kreitman's custody. The military judge denied the accused's R.C.M. 917 motion and later found that the accused had actually escaped from the custody of a Staff Sergeant (SSG) Fleming. At trial and on appeal, the Government asserted an agency theory, arguing that SSG Fleming was acting under CPT Kreitman's orders.

Hopf can be distinguished from *Marshall*. As noted by the *Marshall* court, while the nature of the offense remained the same, the identity of the offense against which the accused needed to defend was changed. The court also noted that the accused had no notice of the agency theory relied upon by the Government and no opportunity to explore the lawfulness of SSG Fleming's custody of the accused. As a result, the variance in Marshall was deemed fatal.

In the instant case, the appellant stands convicted of the same kidnapping and conspiracy charge on which he was arraigned. There is no indication that the Government altered its case or placed evidence into the record that suggested someone other than the person believed to be the man originally named in the charges was the victim. At no time did the defense question the fact that this Iraqi man had been killed and his precise identity was neither material to the charges, nor was it the focus of the defense strategy. Rather, the defense fundamental focus was on the appellant's subjective perception of the victim as a threat to himself and other Marines. The defense presented detailed medical testimony that the appellant's cognitive abilities had been hampered by his combat experiences and by what he subjectively perceived to be orders from higher authority to act in a more aggressive manner. The specific time, date, and location of the charged incidents were unchallenged at trial. We further note that the amendment occurred prior to the close of the Government's findings case. Unlike the *Marshall* case, the instant appellant had a full opportunity to defend against the amended charges. At no point did the defense move for a

continuance or otherwise request more time to prepare. The defense was free to recall any Government witness to refine the earlier testimony in relation to the amendment.

Based on this analysis, we find that the amendment at issue did not 1) substantially change the nature of the offense; 2) increase the seriousness of the offense; 3) increase the maximum punishment of the offense; or 4) change the identity of the offense against which the accused had to defend. We further find that the amendment did not place the appellant at risk of another prosecution for the same conduct, mislead the appellant, or otherwise deny the appellant an opportunity to defend against the charges. We find, therefore, that the amendment was minor, and that the military judge did not err in granting the Government's motion to amend the pleadings.

Challenge for Cause

A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N).

R.C.M. 912(f)(1)(N) encompasses challenges for actual bias as well as implied bias. *See United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). Accordingly, "military judges are required to test the impartiality of potential panel members on the basis of both actual and implied bias." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). "Challenges for actual or implied bias are evaluated based on a totality of the circumstances." *Id.* (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)).

Notwithstanding a member's disclaimer of bias, there is implied bias "when 'most people in the same position would be prejudiced.'" *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)(quoting *Schlamer*, 52 M.J. at 93)(footnote omitted). We view implied bias objectively "'through the eyes of the public, focusing on the appearance of fairness.'" *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)(quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). The applicable standard of appellate review of a military judge's challenge for cause decision for implied bias is not *de novo*, but less deferential than the abuse of discretion standard for actual bias. *Id.*

In focusing on the public perception of fairness, we consider the perspective of reasonable people possessed with "all the facts." *United States v. Townsend*, No. 200501197, 2007 CCA LEXIS 23 at 10, unpublished op. (N.M.Ct.Crim.App. 12 Jan 2007), *aff'd*, 65 M.J. 460 (C.A.A.F. 2008); *see United States v. Lewis,* 63 M.J. 405, 415 (C.A.A.F. 2006)(noting that the objective test for the appearance of unlawful command influence is similar to

the test for implied bias, and considering a member of the public "fully informed of all the facts and circumstances").

In this case, the Government challenged Warrant Officer (WO) L because he had a close professional and personal relationship with the former commander of the appellant's company during the time of the incident, had actually talked to the company commander about the appellant and the charges, and the company commander had expressed his own opinion which included his belief that the appellant was a good Marine and did not do it. Moreover, the military judge in his ruling noted that the company commander was a "potential . . . witness, who still works in the same office with [WO L] in an on-going basis." Record at 773. It should be noted that the company commander did, in fact, testify as a witness in this case.

Assuming, *arguendo*, that the military judge's reference to the liberal grant mandate being equally applicable to Government challenges as defense challenges was erroneous, his conclusions were not. We have independently examined the record without application of the liberal grant mandate and are satisfied that an appearance of unfairness would exist if a close personal and professional associate of the appellant's company commander were allowed on the panel when he previously discussed the quality of this Marine and the substance of the allegations with the company commander and that company commander would potentially be a witness in the trial. We thus conclude that the military judge did not err or otherwise abuse his discretion when he excused WO L from the panel.

Peremptory Challenge

The appellant asserts that the military judge erred when he accepted a "nonsensical" rationale for the Government's peremptory challenge against Gunnery Sergeant (GySgt) S, a minority member of the venire. The Government's articulated rationale was that during individual *voir dire*, the member indicated that the past April he was a member in another court-martial which acquitted an accused of an Article 112a, UCMJ, offense. The Government also argued that the prospective member indicated that he takes a prescribed sleep aid each evening that is time-released and that occasionally he wakes-up a bit fuzzy, but that he was "good to go" by 0830. When pressed, the prospective member indicated that he could give his full measure of attention at 0800 when proceedings were to commence each morning. Record at 769. Trial counsel also observed that "[he] didn't exercise any sort of peremptory challenge to any other minority member in this case." *Id.* at 781. The military judge granted the challenge. *Id.* at 781-82.

Batson v. Kentucky, 476 U.S. 79 (1986), prohibits the use of a peremptory challenge based on race. Our superior court has adopted a *per se* application of *Batson*, placing the burden on the challenging party, upon timely

objection, to provide a race-neutral explanation for the challenge. *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989). The proffered reason for the challenge may not be one "that is unreasonable, implausible, or that otherwise makes no sense." *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997).

A military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to "great deference" and will not be overturned absent "clear error." *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996). In the instant case, the Government offered two race-neutral explanations for his challenge, neither of which were unreasonable or implausible.[3] We find, therefore, that the military judge's determination to excuse GySgt S was not clear error.

Factual and Legal Sufficiency

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 appellant asserts that the evidence is insufficient to support the convictions because of the "overwhelming evidence" that the appellant suffers from post traumatic stress disorder (PTSD) and traumatic brain injury (TBI). In essence, the appellant posits that he was mentally unable to form the *mens rea* required for any of the charges, to include conspiracy and kidnapping, due to his medical conditions. The appellant also asserts, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the evidence was insufficient due to a lack of a courtroom identification of him.

Our review of the record leads us to a contrary conclusion on both assertions. This court is satisfied beyond a reasonable doubt that the appellant's convictions are legally and factually sufficient. The record contains testimony and other evidence that demonstrate this Marine's ability to remember, plan, evaluate, decide, brief, and then finally execute the actions

[3] The Second Circuit has found that removal of any person who has previously served on a jury that ultimately acquitted an accused is an appropriate reason, regardless of race, for future challenge. *United States v. Douglas*, 525 F.3d 225 (2nd Cir. 2008).

needed to accomplish the objects of the conspiracy. Based on these capabilities, a member could reasonably infer that he also possessed the capability to form the requisite specific intent required for culpability notwithstanding his PTSD and TBI. We are similarly satisfied beyond a reasonable doubt of the appellant's guilt.

With respect to the lack of in-court identification, the appellant cites no legal authority to support his assertion that a lack of courtroom identification renders his convictions factually insufficient. While we were unable to identify any military caselaw directly on point, the vast majority of the federal circuits hold that in-court identification is not required if such identification can be inferred from the facts and circumstances in evidence.[4] Testimony of numerous witnesses, both Government and defense, identify the appellant as being a member of the conspiracy and of personally participating in carrying out the pre-planned criminal activity. None of the witnesses gave any indication that the person sitting at the defense table was not the individual they were referring to. This assignment of error is without merit.

Instructions

At trial, the military judge found as a matter of law that the plan agreed to by the appellant and other Marines in his squad, if construed as an "order," would have constituted an illegal order. *See United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001). Consistent with his finding, the military judge subsequently instructed the members, in relevant part, that:

> The acts of the accused, if done in obedience to an unlawful order, are excused and carry no criminal responsibility unless the accused knew that the order was unlawful *or unless the order was one which a person of ordinary common sense, under the circumstances, would know to be unlawful*.

Record at 1819-20.

The appellant argues that the military judge erred when he instructed the members that their analysis of the defense of obedience to an order must include consideration of the "order" from both a subjective and an objective standpoint. As the appellant did not object to the instruction at trial, we will consider this assertion under a plain error analysis.

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[4] *See United States v. Alexander,* 48 F.3d 1477, 1490 (9th Cir. 1995); *United States v. Morrow*, 925 F.2d 779, 781 (4th Cir. 1991); *United States v. Capozzi*, 883 F.2d 608, 617 (8th Cir. 1989); *United States v. Doherty*, 867 F.2d 47, 67 (1st Cir. 1989); *United States v. Green,* 757 F.2d 116, 119 (7th Cir. 1985); *United States v. Cooper*, 733 F.2d 91, 92 (11th Cir. 1984); *Delegal v. United States,* 329 F.2d 494 (5th Cir. 1964); *Walker v. United States,* 254 F.2d 509 (6th Cir. 1958).

A military judge is required to "give the members appropriate instructions on findings." R.C.M. 920(a). We review the propriety of the military judge's instructions to the members *de novo*. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006); *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002). This court's standard for the adequacy of instructions is "whether the instructions as a whole provide meaningful legal principles for the court-martial's consideration." *United States v. Peszynski*, 40 M.J. 874, 882 (N.M.C.M.R. 1994)(citing *United States v. Truman*, 42 C.M.R. 106, 109 (C.M.A. 1970)). If an instructional error of constitutional dimension is found, such error is then tested for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005).

The appellant's contention that the Army court's decision in *United States v. New*, 50 M.J. 729 (Army Ct.Crim.App. 1999), supports his argument misconstrues the Army court's decision. In *New*, the issue involved disobedience to an order charged under Article 92(2), UCMJ. Article 92(2), UCMJ, requires as an element of the offense that an accused "had knowledge of the order." The Army court opined that an honest and reasonable standard was appropriate *unless* the evidence "raise[s] a legal or factual mistake by appellant concerning the actual knowledge element" of the disobedience offense.

Assuming, *arguendo*, that the conspiracy plan could reasonably be construed as an "order," illegal or otherwise, from Sgt Hutchins, there was no evidence presented that raised either a legal or factual mistake by the appellant regarding the content of the "order." On the contrary, the evidence strongly indicates that the appellant understood the nature and parameters of the "order." At trial, the defense argued that the appellant's PTSD and TBI impacted his cognitive ability to subjectively discern that the order was illegal. There was no evidence and the defense did not argue that the appellant's PTSD and TBI impacted his cognitive ability to factually understand what specific actions the "order" entailed. In the absence of evidence raising legal or factual mistake as to the content of the order, we find that the military judge correctly instructed the members regarding the subjective and objective aspects required to sustain a defense of obedience to orders and that the military judge did not otherwise abuse his discretion.

Conclusion

The appellant's remaining assignment of error is without merit. *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987). The findings and approved sentence are affirmed.

Chief Judge O'TOOLE and Senior Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court