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

Before
E.E. GEISER, E.C. PRICE, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN L. YOUNG
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200900116
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 September 2008.
Military Judge: CAPT David L. Bailey, JAGC, USN.
Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Col R.G. Sokoloski, USMC.
For Appellant: LT Gregory W. Manz, JAGC, USN.
For Appellee: LT Timothy Delgado, JAGC, USN.

6 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Chief Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920.[1] The approved sentence was confinement for 24 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

[1] This incident occurred in 2007, prior to the implementation of the new Article 120, UCMJ.

The appellant raises one assignment of error alleging that the military judge abused his discretion when he denied two defense challenges for cause for what the appellant characterizes as heightened sensitivities to sexual crimes.

We have considered the record of trial and the pleadings. 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.

Voir Dire and Challenges for Cause

At trial, the appellant challenged two members for cause, Major L and Master Gunnery Sergeant B. Record at 462, 477. We note that the military judge explicitly acknowledged applicability of the liberal-grant mandate to defense challenges. *Id.* at 457-58. He also articulated on the record that he was testing each member for actual and implied bias. *Id.* at 467, 470, 478, 482-83; *see United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007).

Major L: The member indicated on his questionnaire that he had a relative who had been the victim of attempted rape. When explored in more detail during individual voir dire, Major L indicated that 6-7 months prior to trial someone attacked and attempted to rape his sister-in-law in the laundry room of her Florida apartment complex. Record at 388. Major L heard about the incident second-hand from his wife and never personally discussed the incident with his sister-in-law. Major L further indicated that his understanding from his wife was that his sister-in-law somehow escaped and that, to his knowledge, police never apprehended a suspect. *Id.* He wasn't aware of any other details about the incident. *Id.* at 389-90.

In response to additional questioning, Major L also indicated that he had two daughters aged 21 and 15. When specifically asked if he thought about his daughters when he read the rape charge, he said that he did; noting that people with daughters always think about that, and that it could happen to them. He further indicated that, as a father, he warns his daughters "almost on a daily basis" that they can't trust anyone and that they need to protect themselves. *Id.* at 395. Finally, Major L indicated he would be able to sit impartially on the court-martial. *Id.* at 390, 396.

Trial defense counsel challenged Major L, arguing that the Major would have trouble acting impartially given the attempted rape of his sister-in-law and his "unusual" concerns about his daughters' safety. *Id.* at 477. The military judge carefully rearticulated Major L's voir dire responses on the record. *Id.* at 480-82. With respect to the incident with his sister-in-law, the military judge indicated that the Major said that, upon reading the charge, the prior "incident crossed [the Major's] mind" and that's all. Record at 481. The military judge went on to note that the Major didn't seem to have a close relationship with his sister-in-law and that he didn't seem to have a lot of personal knowledge about the Florida incident. The military judge also indicated that he had observed Major L's demeanor and that he believed the Major answered the military judge's questions "candidly [and] credibly" and that Major L stated believably that would be able to serve impartially. *Id.* at 481-82. With respect to the Major's daughters, the military judge disagreed with the defense characterization that the Major's concern for his daughters' safety reflected any abnormal concern or interaction with his daughters concerning the fact that they had to protect themselves and be mindful of who was around them in the community. He denied the challenge for cause.

Master Gunnery Sergeant B: Trial Defense Counsel argued that Master Gunnery Sergeant B's responses that there were "good people and bad people" in the world reflected an "inelastic attitude" towards being able to "factually and logically ferret out the facts" of the case. *Id.* at 463. During voir dire, the member stated that about 30 years earlier, in the late 1970's, someone attempted to rape his sister. At the time of the incident, his sister was 15 or 16 years old and the Master Gunnery Sergeant was 12 or 13. *Id.* at 416. He indicated that his sister somehow fought her way free and fled distraught to his family's house. *Id.* at 418. Of particular note, Master Gunnery Sergeant B stated that in the 30 years since the incident he had never spoken to his sister about what happened. *Id.* at 416. When asked if the incident had given him any preconceived notions about rape situations, he replied "not really sir, cause I do understand that you have a—different kind of people out there, some are good and some are bad, and that's just how life is in general." *Id.* at 417.

Master Gunnery Sergeant B also stated that when he arrived at his command he was, as a matter of routine, assigned a collateral duty as one of three command sexual assault Uniformed Victim's Advocates. *Id.* at 413, 419. He described his duties

in the position as a "surrogate for the victim" following a sexual assault. *Id.* at 419. He indicated he did not volunteer for the job but that he was assigned in the normal course of business. He further indicated that in the two years in the position he had not yet had any victims of sexual assault come to him for assistance. *Id.* at 413.

Similar to his analysis of the challenge against Major L, the military judge painstakingly detailed Master Gunnery Sergeant B's voir dire responses at length on the record. *Id.* at 465-67. He ultimately denied the challenge for cause noting that the attempted rape of the member's sister was dissimilar to the charged incident and that the family seems to "have moved on and gotten over it." *Id.* at 466. Regarding the Master Gunnery Sergeant's comment that "there are good people and bad people," the military judge disagreed with the defense that the statement suggested an inelastic attitude towards sentencing. With respect to the Master Gunnery Sergeant's duty as victim advocate, the military judge observed that the prospective member's entire involvement in victim advocacy seems to have been "a 2-day class." *Id*. The military judge characterized the Master Gunnery Sergeant's responses to questioning as "straightforward, candid [and] credible." *Id.* at 470.

Discussion

An accused has "a constitutional right, as well a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)(citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994)). A military judge's decision to deny a challenge for cause is reviewed for abuse of discretion. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997).

A ruling on actual bias is afforded great deference because the military judge is in the unique position to observe the member's demeanor and credibility in court. *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007); *Napoleon*, 46 M.J. at 283. Our analysis of implied bias is an objective test "viewed through the eyes of the public, focusing on the appearance of fairness." *Clay*, 64 M.J. at 276, (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). As such, a military judge's ruling on implied bias is given less deference than a ruling on actual bias. *Id*.

As a general matter, challenges for cause should be liberally granted. *United States v. Glenn*, 25 M.J. 278, 279

(C.M.A. 1987). A military judge's ruling on a challenge for cause shall not be overturned except for a clear abuse of discretion in applying the liberal-grant mandate. *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993).

A member is not *per se* disqualified because a close relative or friend, or even the member herself, has been the victim of a similar crime. *United States v Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996); *United States v. Jefferson*, 44 M.J. 312, 321 (C.A.A.F. 1996)(citing *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992), *United States v. Reichardt*, 28 M.J. 113, 116 (C.M.A. 1989), *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985), *United States v. Porter*, 17 M.J. 377, 379 (C.M.A. 1984), and *United States v. Harris*, 13 M.J. 288 (C.M.A. 1982)). In such a case, *voir dire* will ultimately illuminate whether or not the member can sit fairly and impartially in the case.

In the instant case, both members stated that they had never spoken to their family members about the incidents and neither knew many details. Record at 389, 416. In Master Gunnery Sergeant B's case, the assault took place 30 years earlier. *Id.* at 416. Neither of the members was the victim of a sexual assault. *See Brown*, 34 M.J. at 110. In addition, the crime here was dissimilar to the assaults their family members had experienced. *See id.*

Where a prior offense has not had a significant impact on a member and the events were not particularly traumatic, actual or implied bias is less likely to be present. *Id.* In this case, neither member appears to have suffered the level of impact and trauma necessitating his removal from the panel. *See Smart*, 21 M.J. at 15-16 (member during an armed robbery trial had been the victim of 6-7 armed robberies and vacillated when asked if he could disregard these incidents). Like the military judge, we are unconvinced that the past attempted sexual assaults impacted Major L and Master Gunnery Sergeant B such that their avowed impartiality was insincere or that objectively their impartiality could reasonably be questioned. *See Daulton*, 45 M.J. at 217; *Reichardt*, 28 M.J. at 116.

We agree with the military judge that Major L's comments about his daughters in no way show an improper heightened sensitivity towards sexual assault crimes. Major L's statements were little more than an expression of a father's normal concern for his daughters' safety and protection. We do not draw the same parallels the appellant does between this case and *Clay*, where the father of teenage daughters stated he would be "merciless within the limit of the law" if the defendant was

found guilty of rape. *Clay*, 64 M.J. at 275. Nowhere in Major L's voir dire do we see anything resembling this type of predisposition toward inflexibility in sentencing. Similarly, we do not believe Master Gunnery Sergeant B's collateral duty as a victim advocate clouded or could reasonably be objectively perceived as clouding his impartiality, especially in light of his never having assisted an actual victim during his two years in the position.

The military judge acknowledged applicability of the liberal grant mandate to defense challenges, thoroughly vetted the defense challenges with counsel, placed his recollection of the members' answers and observations regarding their credibility on the record, and ruled on those challenges only after applying separate legal tests for actual and implied bias. Under these circumstances, we see no plausible risk that an informed public would perce*ive* that the accused did not get a full and fair trial. *Clay*, 64 M.J. at 277. We conclude, therefore, that the military judge did not commit a clear abuse of discretion in denying the defense challenges for cause.

Conclusion

Accordingly, the findings and the approved sentence are affirmed.

Judge PRICE and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court