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

Before
J.K. CARBERRY, L.T. BOOKER, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JEREMY L. RAUSCHER
MACHINIST'S MATE SECOND CLASS (E-5), U.S. NAVY

NMCCA 201000684
GENERAL COURT-MARTIAL

Sentence Adjudged: 2 September 2010.
Military Judge: CAPT John Waits, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR M.C. Holifield, JAGC, USN.
For Appellant: LT Michael B. Hanzel, JAGC, USN.
For Appellee: CDR Brendan Curran, JAGC, USN; Capt Mark V. Balfantz, USMC.

27 September 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

BOOKER, Senior Judge:

After a contested trial on the merits, officer and enlisted members sitting as a general court-martial convicted the appellant of disobedience, provoking speech, various assaults, including an aggravated assault, and communicating threats, respectively violations of Articles 91, 117, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 917, 928, and 934. The convening authority (CA) approved the adjudged sentence of confinement for nine months, reduction to pay grade E-1, and a bad-conduct discharge from the United States Navy.

The appellant stabbed a shipmate onboard USS FLORIDA (SSGN 728) while the submarine was in port at Souda Bay, Crete, Greece. The shipmate sustained a puncture wound to his chest and a slash wound to his hand. The evidence before the members of the stabbing is not in dispute. The victim testified, the appellant's bloody knife was seized and presented during the Government's case, and the independent duty corpsman assigned to the submarine testified to the extent of the injuries.

The stabbing culminated a spree of crimes that began on a liberty bus positioned about an hour away from the moored submarine. On the bus, the appellant struck several petty officers, including a chief petty officer, and bit a different junior Sailor on the cheek after the appellant had been told to stop smoking and to board the bus. Once he arrived at the submarine, the appellant directed racial epithets toward two different Sailors, one of them his supervisor (a victim of a separate assault), and the other the victim of the stabbing.

In his single assignment of error, the appellant avers that his conviction of aggravated assault cannot stand because that offense is not a lesser included offense (LIO) of the offense for which he originally stood trial, namely, an assault with intent to commit murder in violation of Article 134, and he was thus convicted of an offense with which he had not been charged. In support of his assignment, the appellant cites *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), which stands for the proposition that General Article offenses are not "necessarily included" in, a subset of, or an LIO of a charged "greater" offense. The appellant argues the converse of *Jones*, that is, that that case's logic must apply when an enumerated offense is claimed to be an LIO of a General Article offense. We resolve this issue adversely to the appellant.

Discussion

The charge brought before the court-martial alleged a violation of the General Article in that the appellant "did, on board USS FLORIDA (SSGN 728), on or about 29 March 2010, with the intent to commit murder, commit an assault upon Machinist's Mate Second Class [JD] by stabbing him in the hand and chest with a knife." The specification did not include an allegation that the action was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces, but the members were instructed on those elements. Record at 634.

This case went to trial about two months before our court decided *United States v. Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 2010), *rev'd*, 70 M.J. 255 (C.A.A.F. 2011). The parties and the military judge could not have known at the time that the General Article specification might have failed to state an offense, as the Court of Appeals for the Armed Forces only recently reversed our decision. Were we to consider this specification now in light of that court's decision, we might reach the same conclusion, although we do not dismiss the possibility that an allegation of an attempted murder of a shipmate onboard a vessel in a foreign port fairly raises, by necessary implication, the issue of prejudice to good order and discipline or the issue of a tendency to harm the service's reputation. Our opinion will therefore address only whether the specification against the appellant, which as we noted was not alleged as *Fosler* might require, provided him sufficient notice of the offense of aggravated assault of which he stands convicted.

The offense of assault with intent to commit murder, a violation of the General Article, has two statutory elements, depending on which clause under the General Article is used for charging: (1) a disorder or neglect, and (2) prejudice to good order and discipline; or alternatively (1) conduct (2) that is of a nature to bring discredit upon the armed forces. *See United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011). *Cf. United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008). For either "alternative theory of prosecution," the first element (disorder, neglect, or conduct) may consist of a number of discrete facts. The President has fixed the maximum punishment for this offense at confinement for 20 years plus accessory penalties.

The offense of aggravated assault, a violation of Article 128, has four statutory elements: (1) the accused did bodily harm; (2) the accused did so with a certain weapon; (3) the bodily harm was done with unlawful force or violence; and (4) the weapon was used in a manner likely to produce death or grievous bodily harm. The President has fixed the maximum punishment for this offense at confinement for five years plus accessory penalties.

In the General Article specification at issue in this case the discrete facts alleged state precisely a disorder or conduct; furthermore the alleged facts expressly state the elements of an aggravated assault. Coupling constitutional principles of due process and notice, we conclude that this specification provided notice of the specific LIO of aggravated

assault and a chance to be heard in a trial of the issues raised by that charge. *See Fosler*, 2011 CAAF LEXIS 611, at *12-13 (quoting *Cole v. Arkansas,* 333 U.S. 196, 201 (1948)). We thus conclude that the appellant's conviction for aggravated assault is proper.

The appellant in this case faced a specification that alleged that he assaulted his victim by stabbing him with a knife and that he intended to murder the victim. The instrumentality that he chose, a knife, was a dangerous weapon as that term is commonly understood, although we note that it is not defined in the UCMJ. *But cf*. 18 U.S.C. § 930 (criminal penalties for possessing a "dangerous weapon" in a federal facility, and only pocket knives with blades less than 2-1/2" are exempt). He also employed that instrumentality in a means likely to cause grievous bodily harm, which is defined as including deep cuts and other serious bodily injuries. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 54c(4)(iii).

Even if our act of affirming an aggravated assault should be erroneous, we would still affirm a conviction of assault consummated by a battery, even though common sense, and the charge sheet before us, suggest that one must necessarily use a dangerous weapon or a means likely to commit death in order to commit the offense of assault with intent to commit murder. An LIO of assault consummated by a battery has the common first element of an assault on the victim. "Assault" is defined as an offer or attempt to do violence, regardless whether the act is consummated (which would make it a "battery"), and in fact it is a term well-known to the common law. MCM, Part IV, ¶ 54c(1)(a). *Cf. Carter v. United States*, 535 U.S. 255, 277 (2000) (when Congress uses a "term of art" from the common law, it is presumed to understand all the ideas that term imports).

If, in the context of the assignment of error, only a finding of assault consummated by a battery were affirmed, and the other convictions were left in place, we note with respect to sentencing that the members would properly have considered all the evidence adduced regarding the aggravated assault of which they convicted the appellant, albeit in light of a lower limit on their sentencing discretion. Examining that same evidence, we would be confident in concluding that a sentencing authority would impose, and a CA would approve, a sentence at least as severe as that levied at trial for this sad case of a career Sailor, qualified in submarines, who struck several senior noncommissioned officers in the performance of their duties; who bit a Sailor newly arrived to the command; who

uttered shockingly contumacious and provoking language to superiors; and who, but for the fortunate intervention of a hand and layered clothing, might have killed a shipmate by stabbing him in the chest with the knife depicted in Prosecution Exhibit 22 and inflicting the wounds described, among other places, at Record 511-15.

Finally, although not raised as an error, we note that the court-martial order incorrectly states that the appellant was sentenced by a military judge. In fact, the panel of officer and enlisted members announced the sentence. Because a service member is entitled to records that correctly reflect the proceedings, we direct that the supplemental court-martial order note the forum elected by the appellant. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Conclusion

The findings of guilty and the approved sentence are affirmed, and with the corrected supplemental court-martial order no error remains. Arts. 59(a) and 66(c), UCMJ.

Senior Judge CARBERRY and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge BOOKER participated in the decision of this case prior to detaching from the court.