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

Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRANDON M. MAGNAN
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201000414
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 March 2010.
Military Judge: CDR David A. Berger, JAGC, USN.
Convening Authority: Commander, Marine Corps Base, Quantico, VA.
Staff Judge Advocate's Recommendation: Col Stephen C. Newman, USMC.
For Appellant: Greg McCormack; Jarrett McCormack; LT Michael Hanzel, JAGC, USN.
For Appellee: Capt Robert Eckert, USMC.

21 July 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS A PRECEDENT.

REISMEIER, Chief Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial composed of officer and enlisted members of two specifications of orders violations, one specification of abusive sexual contact, one specification of wrongful sexual contact, one specification of forcible sodomy, three specifications of assault, and one specification of being drunk and disorderly in violation of Articles 92, 120, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, 925, 928, and 934. The appellant was sentenced to confinement for three years, forfeiture of all pay and allowances, reduction

to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and ordered it executed.

The appellant has submitted five assignments of error: (1) that the military judge erred when he instructed the members not to consider certain witness testimony and then reversed his instruction by telling the members to once again consider that same testimony; (2) that the staff judge advocate (SJA) and the CA should have been disqualified from taking post-trial action on the case because they granted immunity to witnesses during the trial; (3) that the military judge erred by denying the defense motion for a mistrial after a Government witness had a conversation with the senior member during a recess; (4) that the trial counsel committed prosecutorial misconduct by repeatedly making improper inflammatory closing arguments and improperly coaching a government witness; and, (5) that the evidence is insufficient to support the findings of guilty for certain specifications. After considering the pleadings and oral arguments of the parties as well as the entire record of trial, 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.

Background

The offenses for which the appellant was tried related to parties that he, a Marine noncommissioned officer (NCO), frequently held at his off-base residence to which he invited junior non-NCO Marines. At these parties, the appellant and his junior Marine guests referred to each other on a first name basis. Additionally, the appellant provided alcohol at these parties to individuals under the age of twenty-one.

Testimony was offered by various witnesses relating to the multiple specifications of assault, the sexual contacts, and the forcible sodomy. Specifically, three lance corporals (LCpl) testified regarding incidents that are the subject of the appellant's fifth assignment of error. LCpl JRB testified that he fell asleep at the appellant's apartment when only he and the appellant were present, and awoke to find that his shorts had been removed. LCpl JRB also recounted that after the Marine Corps Ball, he fell asleep in a hotel room that he was sharing with the appellant and awoke to find the appellant's hand "in [his] trousers . . . over [his] boxers." LCpl JLK testified that he fell asleep at the appellant's residence and awoke to find that his pants were undone and pulled down around mid-thigh level. LCpl CAH testified that he and another Marine fell asleep on the floor of the appellant's apartment after a party and awoke during the night when the appellant was next to him tugging on his hip. LCpl CAH also recounted another occasion when he awoke to find his penis in the appellant's mouth.

The testimony of two of these witnesses was interrupted by invocations of the right to remain silent, giving rise to the appellant's first three assignments of error. Before LCpl JLK began to testify, he was advised of his rights pursuant to Article 31(b) of the UCMJ for offenses relating to underage drinking and fraternization. During cross-examination civilian counsel elicited testimony from LCpl JLK that highlighted inconsistencies between his in-court testimony and his testimony at the pre-trial Article 32, UCMJ, hearing. The military judge then convened an Article 39(a), UCMJ, session. During that session, the trial counsel noted that the witness potentially admitted to perjury or false official statement during his testimony. At the request of the trial counsel, the military judge advised LCpl JLK of his Article 31(b) rights, prompting LCpl JLK to invoke his right to remain silent. As a result, civilian counsel moved to strike all of LCpl JLK's testimony. The military judge found that by refusing to testify at that point, the witness denied the appellant his right to confront an accuser, "struck" the witness' testimony and dismissed the witness. When the members re-entered the courtroom, the military judge informed them that he had "excluded" the testimony of LCpl JLK and that "[they] may not consider his testimony for anything whatsoever."

Almost exactly the same series of events occurred with LCpl CAH. He was also advised of his rights pursuant to Article 31(b) of the UCMJ for offenses relating to underage drinking and fraternization before he began to testify. He, too, initially testified. However, before he invoked his right to remain silent, additional problems emerged surrounding his testimony.

During a break in LCpl CAH's testimony, the witness was seen speaking to the senior member. Civilian counsel also claimed to have heard trial counsel advising the witness how to handle defense objections. With regard to the accusation that the trial counsel was coaching the witness, the military judge conducted an inquiry and determined that the trial counsel only answered LCpl CAH's question about the difference between an objection being sustained and overruled. The military judge then questioned the senior member outside the presence of the other members about his discussion during the break with LCpl CAH. The senior member stated that the witness wanted to find another place to sit because "he felt uncomfortable sitting in the room with the accused's family." The senior member explained that while he had mentioned the exchange to the other members, he did not repeat LCpl CAH's comment about his "comfort level." The military judge instructed the senior member to disregard the witness' comments when deliberating and excused him from the courtroom. Civilian counsel then moved for a mistrial based upon the exchange between the trial counsel and LCpl CAH and the other exchange between the senior member and LCpl CAH. The military judge did not conduct further inquiry about the discussion LCpl CAH had with the senior member, but he did call LCpl CAH into the courtroom to ask him about the conversation he had with the trial counsel. LCpl CAH

stated that trial counsel told him simply to "stay strong on the stand . . . and just tell the truth." The military judge then denied the defense's motion for a mistrial.

When LCpl CAH's testimony on the merits continued, civilian counsel cross-examined the witness about omissions in his initial statements to NCIS and inconsistencies between his testimony at the pretrial Article 32 hearing and his in-court testimony. Another Article 39(a) session was conducted, and, as occurred during LCpl JLK's testimony upon being re-advised of his rights pursuant to Article 31(b), LCpl JLK refused to testify further without a grant of immunity. The military judge similarly struck LCpl CAH's testimony, and instructed the members "to not consider" LCpl CAH's testimony.

During a subsequent break in trial, trial counsel obtained Grants of Transactional Immunity and Orders to Testify for both LCpl JLK and LCpl CAH. Appellate Exhibits XXX and XXXI. Those grants of immunity were provided by the convening authority, Commander, Marine Corps Base Quantico. In an Article 39(a) session, trial counsel argued that if the witnesses would testify, the appellant would be afforded his right to confront his accusers, so that the entire testimony of the two witnesses should now be admitted into evidence. Civilian counsel argued that the military judge could not "unstrike a stricken record." The military judge found that allowing the witnesses to testify again from where they last left off in their testimony would not adversely impact the appellant's Sixth Amendment rights. He therefore allowed the witnesses to continue their testimony. Civilian counsel moved for a mistrial, arguing that the members should not be allowed to consider testimony that had previously been stricken. The military judge denied the request for a mistrial and instructed the members regarding the witnesses' invocation of rights, subsequent grants of immunity, and instructed the members regarding both credibility and perjury. He then told the members the following about the two witnesses before they began to testify again: "You may consider all of their testimony and afford it what weight, if any, you think it deserves." LCpl JLK and LCpl CAH then completed their testimony. Record at 471-540; 541-70.

The parties then proceeded with closing arguments, giving rise to the fourth assignment of error. Trial counsel began his argument by stating that this was not a typical sexual assault case with a "he said, she said" fact scenario but rather was a "he said, they said" case. He proceeded to argue that the complaining witnesses "are not liars" but rather were "victims" and that it was "extremely improbable that a male lance corporal would falsely accuse his male corporal, a former mentor, of forcible sodomy." He then later referred to the defense's theory of the case as "impossible." The defense requested multiple Article 39(a) sessions during the trial counsel's closing argument alleging that the trial counsel ignored the military judge's "spillover" instruction and that trial counsel improperly

shifted the burden to the defense by saying that their theory of the case was impossible. Once again, the military judge denied a defense motion for a mistrial. Record at 737, 751-52. However, the military judge did sustain defense objections as to trial counsel's statements that vouched for prosecution witnesses and those that shifted the burden to the defense. The military judge then advised the members again about how they "alone had the duty to determine the credibility of witnesses" and provided an additional "spillover" instruction as well as one on burden of proof resting solely on the Government.

During his rebuttal argument, trial counsel argued that the appellant's actions would affect the victims for years to come, drawing a defense objection that was sustained. The military judge then instructed the members that the impact of events, if they occurred, was not to be considered at that point in the proceedings. Trial counsel then closed by admonishing the members to "look out for [their] Marines, [and] give them justice."

Discussion

The appellant's first assignment of error is that the military judge committed prejudicial error when he instructed the members that they were not to consider the testimony of LCpl JLK and LCpl CAH for "anything whatsoever," and then subsequently instructed the members that they could "consider their testimony and afford it what weight, if any" they thought it deserved after the witnesses had been granted immunity. We find that the military judge acted properly and that there is no prejudice to the appellant.

Whether the military judge properly instructed members is a question of law that we review *de novo*. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). A military judge has "substantial discretionary power in deciding on the instructions to give." *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)(citations omitted)).

The military judge's initial instruction regarding the testimony of LCpl JLK and LCpl CAH was to disregard their testimony. His subsequent instruction was that the entire testimony initially "stricken" could be considered. The appellant's argument fails to recognize both that the testimony at issue was never truly "stricken",[1] and that the related issue of the witnesses' credibility created by the invocation of right and ensuing grant of immunity was adequately addressed in numerous other instructions given by the military judge. *See*

[1] LCpl JLK's and LCpl CAH's testimony was heard by the members, is contained in the record, and was before the court at all times. The mere fact that its consideration was temporarily forbidden by the judge is not, by itself, a basis for a valid claim of prejudicial error. In the absence of some indication that the members were confused, we find no prejudice in the judge's determination to undo what he had initially done regarding the testimony.

Damatta-Olivera, 37 M.J. at 479. Those instructions provided "an adequate legal foundation to evaluate properly [LCpl JLK's and LCpl CAH's] testimony." *Id.* Furthermore, the defense was "afforded the opportunity in both cross-examination . . . and in closing argument to explore" any inconsistencies and bias to lie on the part of the witnesses. *Id.* Therefore, we find no prejudice to the appellant due to the military judge's instructions.

SJA and CA Disqualification

For his second assignment of error,[2] the appellant asserts that the SJA was disqualified from providing the staff judge advocate's recommendation (SJAR) under R.C.M. 1106 and that the CA was disqualified from taking action under R.C.M. 1107, arguing that they would be incapable of objectively reviewing and acting on the appellant's case because they both had been involved with the granting of immunity to LCpl JLK and LCpl CAH during trial. The appellant's argument was based on case law that has been superseded.

The question of whether the CA is an accuser is a question of law that we review *de novo*. *United States v. Conn*, 6 M.J. 351, 354 (C.M.A. 1979). In *United States v. Newman*, 14 M.J. 474, 482 (C.M.A. 1983), the Court of Military Appeals (CMA) conclude[d] that a grant of testimonial immunity -- whether to a government or defense witness -- does not affect the impartiality of a [CA] or his right to review the record of trial." The CMA subsequently extended the holding of *Newman* to an SJA and his recommendation to the CA. *United States v. Decker*, 15 M.J. 416, 418 (C.M.A. 1983)(holding that "if the granting of immunity by the [CA] does not disqualify him personally, the recommendation of his [SJA] that he take such action does not disqualify either the [CA] or the [SJA] in the absence of some clear indication" of bias that would prevent objective review of the record). This court has previously applied the CMA's rationale, which applied only to grants of testimonial immunity, to grants of transactional immunity, which is the type of immunity granted in the present case. *United States v. Walters*, 30 M.J. 1290, 1291 (N.M.C.M.R. 1990).

The appellant's argument fails in this case because there is no indication that either the SJA or CA was biased in reviewing and acting on the appellant's case. The *per se* disqualification argument the appellant appears to advance is counter to current

[2] The appellant raised this matter in a post-trial submission to the convening authority, objecting to the SJA and CA "having any post-trial responsibilities" in the case and requesting that the record of trial "be forwarded to a substitute [SJA] for preparation and submission of the Recommendation of SJA in accordance with R.C.M. 1106, and to a substitute [CA] for the taking of Action in accordance with R.C.M. 1107." Clemency Request dated 7 Jul 2010 at 3. The SJA disagreed with the allegations and recommended that the CA approve the sentence as adjudged. SJA Recommendation dated 9 Jul 2010.

precedent. The appellant makes much of the fact that the grants of immunity were granted mid-trial as opposed to pretrial, as the appellant seems to conclude is the norm. However, timing alone does not suggest that the CA or SJA had anything other than an official interest in the grants, nor does the fact that the grant contemplated immunity from prosecution for prior or future perjury or false statements arising from the testimony related to the trial. Nothing in the record calls into question the CA and SJA impartiality under the established test from controlling case law. If the CA could in some way be considered an accuser, or the evidence of record otherwise suggested that either the SJA of the CA had, as result of the grants of immunity, developed some bias that would prevent an objective view of the record, we might agree with the appellant's argument. However, the appellant has not presented any additional matters on appeal, and there is nothing in the record of trial that would allow a reasonable person to impute "a personal feeling or interest in the outcome of the litigation" or to otherwise suggest a bias. *Conn*, 6 M.J. at 354 (quoting *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)). The SJA's and CA's actions "[said] nothing at all about [their] state of mind and whether [they have] indicated any lack of objectivity." *United States v. Wallace*, 34 M.J. 353 (C.M.A. 1992). Therefore, we find that they were not disqualified from reviewing and acting on the appellant's case post-trial.

Motion for Mistrial

The appellant alleges for his third assignment of error that the military judge erred to the appellant's prejudice by not granting the defense's motion for a mistrial after LCpl CAH spoke with the senior member during a recess. We find that there was no error on the part of the military judge, and that even if there were there was no prejudice to the appellant.

A military judge's denial of a motion for a mistrial is reviewed for a clear abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). *Ex parte* communications between members and witnesses are "absolutely forbidden" unless found to be harmless. *United States v. Elmore*, 33 M.J. 387, 393-94 (C.M.A. 1991)(citing *United States v. Adamiak*, 15 C.M.R. 412 (C.M.A 1954)). The presumption of prejudice is a rebuttable one. *Id*. at 394. It must be rebutted by a "clear and positive showing" that the improper communication between the parties "did not and could not operate in any way to influence the decision." *Id*. (internal quotation marks and citations omitted).

The military judge properly investigated the discussion between the senior member and the witness, and captured testimony on the record that would rebut the presumption of any sort of prejudice. He therefore did not abuse his discretion by denying trial defense counsel's motion for a mistrial. The senior member was *voir dired* after the conversation between him and LCpl CAH. All facts in the record indicate that the senior member dealt

with the situation appropriately in terms of quickly ending the exchange and not mentioning the potentially prejudicial comments about the witness' comfort level with the other members. Record at 440-41. The member was instructed to disregard anything said by LCpl CAH during the exchange and he stated to the judge that he would follow the instruction. Members are presumed to follow a military judge's instructions, and there is no indication in this case that the senior member did otherwise. *United States v. Harrow*, 65 M.J. 190, 201 (C.A.A.F. 2007)(citing *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)). In light of the remedial actions taken by the military judge, we find that he did not abuse his discretion in denying the defense's motion for a mistrial. The exchange between LCpl CAH and the senior member "did not and could not operate in any way to influence" the members and their deliberations.

Prosecutorial Misconduct

The appellant's fourth assignment of error is that the trial counsel committed prosecutorial misconduct by making improper statements during closing argument and by coaching a Government witness during a break. We find the trial counsel's conduct did not amount to prejudicial error. Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard . . . ." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006)(internal quotation marks and citations omitted). Counsel may not express a personal belief as to guilt or innocence of the accused or the credibility of a witness. *See United States v. Fletcher*, 62 M.J. 175, 179-80 (C.A.A.F. 2005). Whether the facts in the record demonstrate prosecutorial misconduct and whether such misconduct was prejudicial error are questions of law that this Court reviews *de novo*. *See Edmond*, 63 M.J. at 347.[3] "In a due process analysis of prosecutorial misconduct [we look] at the fairness of the trial and not the culpability of the prosecutor." *Id.* at 345 (citation omitted). When analyzing whether a trial counsel's specific comments during argument constituted prosecutorial misconduct, we will look not only at whether the prosecutor's statements were "undesirable" or "universally condemned" but rather "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

[3] We note that trial defense counsel moved for a mistrial alleging improper argument by the trial counsel, and that the military judge denied the motion. Record at 736-52. However, appellate defense counsel has not alleged any abuse of discretion on the part of the military judge with regards to this issue, nor do we find any on our review of the record. Therefore, we will not review this issue for an abuse of discretion as we did the appellant's third assignment of error and will treat it solely as an issue of law that we will review *de novo*.

The trial counsel's argument was inartful; it was not a model of how a trial counsel should close his case; and it was improper. While portions of his argument might have been subject to various interpretations, when viewed in their entirety, the argument amounted to prosecutorial misconduct.[4] But unlike *Fletcher*, where the military judge's "curative efforts were minimal and insufficient to overcome the severity of the trial counsel's misconduct," the military judge in this case was engaged throughout," 62 M.J. at 185. He held several Article 39(a) sessions during the trial counsel's closing argument and provided curative instructions to counter any possible prejudice to the appellant from the trial counsel's argument. Improper vouching generally consists of the trial counsel "'placing the prestige of the government behind a witness through personal assurances of the witness's veracity.'" *Fletcher*, 62 M.J. at 180 (citing *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). Trial counsel appeared to vouch for the witnesses, but the military judge instructed the members that they had the sole responsibility to make credibility determinations. Similarly, the military judge addressed the trial counsel's "he said, they said" comment[5] by repeating the spillover instruction and trial counsel's comments about the defense's theory as impossible by reminding the members that the burden was on the Government to prove its case beyond a reasonable doubt. The military judge's curative actions ensured that the appellant was provided his due process right to a fair trial. Therefore, we find no prejudice to the appellant.[6]

Legal and Factual Sufficiency

For his fifth and final assignment of error, the appellant argues that the evidence was insufficient to support the findings of guilty beyond a reasonable doubt for the lesser included offense of the sole specification of aggravated sexual contact (abusive sexual contact), the specification of forcible sodomy, two specifications of assault consummated by a battery, the additional charge of abusive sexual contact, and the additional

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[4] We are not persuaded that the trial counsel improperly coached LCpl CAH. The military judge did not enter specific findings but, upon reviewing the record, we find no evidence of prosecutorial misconduct as to the allegation of "coaching." The evidence in the record indicates simply that the trial counsel answered a question from the witness about objections and that he told the witness to tell the truth.

[5] On its face, the prosecutor's focus on "they said" may strike one as being a spill-over violation. However, it is just as likely that the prosecutor was only commenting on the fact that some of the complainants' versions of events were corroborated by third party witnesses. Regardless, whether the argument was inartful or legally wrong, the result is the same: the judge cured any potential error.

[6] The fact that the members acquitted the accused of some of the specifications, to include the greater offense of aggravated sexual assault, "reinforces our conclusion that the prosecutor's remarks did not undermine the [members'] ability to view the evidence independently and fairly." *United States v. Young*, 470 U.S. 1, 18 n.15 (1985).

charge of assault consummated by a battery. We disagree. The tests for factual and legal sufficiency are well-known, as is the ability to rely upon circumstantial evidence of guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We need not recite them again here. The Government submitted evidence sufficient to sustain convictions for all of the offenses of which the appellant was found guilty. In his brief, the appellant makes much of the fact that the Government proved its case on many of the disputed specifications through circumstantial evidence or the testimony of witnesses whose credibility was at issue. 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 reviewing the evidence, we find that a "rational trier of fact could have found the essential elements of the crime[s of which the appellant was found guilty] beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007)(citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). We, too, are convinced of his guilt beyond a reasonable doubt. Therefore, the evidence is sufficient to sustain the convictions on the specifications challenged by the appellant.

Conclusion

The findings and the sentence are affirmed.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court