UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, EWING,[1] and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist TERRON S. CLEMMONS
United States Army, Appellant

ARMY 20180581

Headquarters, Fort Carson
Tiernan P. Dolan and Steven C. Henricks, Military Judges
Colonel Robert A. Borcherding, Staff Judge Advocate

For Appellant: Captain James J. Berreth, JA; Frank J. Spinner, Esquire (on brief); Captain Alexander N. Hess, JA; Frank J. Spinner, Esquire (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Reanne R. Wentz, JA (on brief).

18 December 2020

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ALDYKIEWICZ, Senior Judge:

Appellant claims his trial defense team provided ineffective assistance of counsel by presenting alternate theories of defense and by failing to call him as a witness at trial. As discussed below, we disagree and affirm the findings and sentence.[2]

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[1] Judge Ewing decided this case while on active duty.

[2] A panel of officers with enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of attempted premeditated murder, one specification of spoiling non-military property, one specification of obstructing justice, and one specification of shooting a firearm in a

(continued . . .)

I. BACKGROUND

Appellant's convictions stem from a shooting outside of a Colorado Springs, Colorado nightclub and his subsequent attempt to mislead a civilian law enforcement officer about the identity of the shooter. Appellant was the shooter. In addition to damaging private property, appellant's rounds struck and seriously injured a fellow soldier, Staff Sergeant (SSG) RD.

On the evening of 3 November 2017, appellant went to the Thirsty Parrot nightclub. While there, appellant met and socialized with a group of acquaintances, including Specialist (SPC) DU, Sergeant (SGT) CP, SGT DB, and AT. While in the Thirsty Parrot, members of appellant's group began conversing with another group of people, including SSG RD, RC, and an individual known only as Red. A verbal argument broke out between members of the two groups resulting in a security officer employed by the nightclub demanding that both groups leave the nightclub. Once the two groups were outside, the security officer's parting request was that the groups go their separate ways. Unfortunately, the groups did not heed his behest.

Rather than parting ways, the groups continued arguing and exchanging threats. The verbal argument escalated into a physical altercation when SGT CP and RC—the agitators from each respective group—exchanged blows. The physical fight was short-lived because SSG RD grabbed RC and attempted to remove him from the scene. RC, however, turned around and once again approached appellant's group in an aggressive manner. At some point, RC said he was going to "air this bitch out," or words to that effect, meaning gunshots were going to be fired.

At some point during the verbal argument and physical skirmish outside of the Thirsty Parrot, appellant obtained a 9mm pistol and returned to the area where the groups were gathered. He fired multiple shots into the air. Two of his rounds struck and damaged the window of two downtown businesses. Appellant then lowered his weapon, pointed it at SSG RD, and fired three shots. The rounds struck SSG RD, damaging his right ulna and left femoral artery. Staff Sergeant RD testified he did not know who shot him and that whoever shot him appeared not to be aiming for him, but rather engaged in "random spraying" of rounds. Shortly after the shooting, SPC DU—who heard but did not witness the shooting—called appellant to check on him. In their phone conversation, appellant told SPC DU that he fired the rounds.

Law enforcement responded to the scene but did not find any firearms. There was no evidence of any other member of the groups being armed either while in the

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public location, in violation of Articles 80, 109, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 908, and 934 [UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge and confinement for twelve years.

Thirsty Parrot that evening or later in the parking lot prior to the shooting. The parties stipulated that RC, a member of the victim's group, if called to testify, would have testified that he did not have a weapon in the alley that night. Later, however, while at the hospital, RC was found to be in possession of a firearm. He was also recorded on an officer's body camera saying that he could not get to his gun in time or he "would have aired that whole mother [ ] club out."

A few days after the shooting, on 7 November 2017, appellant waived his rights and provided a statement to Detective (DET) MM of the Colorado Springs Police Department. Initially, appellant told DET MM that he was in his vehicle when he heard the gun shots. Appellant then changed his story and told DET MM that he was physically present at the scene where the shots were fired, but that he was not the shooter. Appellant accused SGT CP of doing the shooting. At that time, DET MM suspected SGT CP was the shooter, based upon one witness' description of the shooter as a "light skinned black male" and another bystander witness' on-scene identification of SGT CP as the shooter. However, after retrieving additional surveillance footage from the scene, DET MM concluded appellant was the shooter. At trial, DET MM described the surveillance footage to the members and identified appellant as the shooter.

Approximately two weeks after the shooting, appellant confided in a coworker, SPC GG, about what happened at the Thirsty Parrot. In yet another version of events, he told her that he "felt threatened" by a group of people at the nightclub and feared he "was going to get jumped." He told SPC GG that one person from the group was "threatening with a gun." As a result, appellant told SPC GG that he drew his own firearm and fired a couple rounds into the air. Appellant further told SPC GG that a struggle for his firearm ensued after he fired the rounds into the air and, as a result of the struggle, he accidentally fired a couple of rounds that might have hit another person. This evidence was presented to the members through the government's direct examination of SPC GG.

A month after the shooting, in early December 2017, a civilian found a safe submerged in a lake near Colorado Springs. Inside the safe was a 9mm pistol. The civilian turned the safe over to the police, who matched the firearm's serial number to a firearm purchased by appellant. Despite telling DET MM that neither he nor his spouse owned any firearms, appellant actually purchased the weapon a year earlier in December 2016.

II. LAW AND DISCUSSION

Appellant claims his defense counsel were ineffective by advancing alternative defense theories and by not calling him as a witness in his defense. We review this claim de novo. *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018) (citing *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016)).

The Sixth Amendment entitles criminal defendants to representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To prevail on his claim, it is appellant's burden to demonstrate both "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Harpole*, 77 M.J. at 236 (quoting *Captain*, 75 M.J. at 101).

On the performance prong, we presume counsel to be competent and our inquiry into an attorney's representation is "highly deferential." *Strickland*, 466 U.S. at 689. There is a "strong presumption that counsel's conduct falls within the wide range of professionally competent assistance." *Id.* "We do not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (citations omitted). This is so because there "are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. Even "the best criminal defense attorneys would not defend a particular client in the same way." *Id.*

On the prejudice prong, an appellant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

A. Appellant fails to establish deficient performance.

Addressing counsel's performance, we do not find that it fell beneath the constitutional floor of competency.

1. It was objectively reasonable for defense counsel to posit alternative theories concerning both the identity of the shooter and self-defense.

Appellant's defense team lodged a two-prong defense. First, they argued the government failed to prove beyond a reasonable doubt that appellant was the shooter. Second, they asserted that even if the panel believed appellant was the shooter, he did not shoot with the specific intent to kill but rather acted in self-defense or in defense of others based upon the verbal arguments, threats, and physical altercation that occurred outside of the Thirsty Parrot.

As a threshold matter, we reject appellant's contention that these alternative

theories are "conflicting" or even inconsistent. Rather, it is clear to us that the defense team's strategy, selected after a thorough investigation of the facts with the assistance of a government-funded private investigator, was to present as many bases for acquittal as reasonably supported by the evidence adduced. This is a "strategic choice[]," which is "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Indeed, it is well-established that defense counsel are free to present alternative—and even conflicting—theories of defense. *See Mathews v. United States*, 485 U.S. 58, 64 (1988); *United States v. Viola*, 26 M.J. 822, 828 (A.C.M.R. 1988). We see no conflict in this multi-layered defense strategy.

Having reviewed the record, and considered the facts that: (i) nobody on the scene, including the victim, identified appellant as the shooter; (ii) a bystander witness positively identified another person as the shooter; (iii) the primary suspect was initially SGT CP; (iv) nobody on the scene identified appellant as the shooter based upon any surveillance footage; and (v) the surveillance footage relied upon by DET MM was less than clear as to the identity of the shooter, we find no deficient performance in the defense team's tactical decision to contest the identity of the shooter and additionally present evidence concerning affirmative defenses. Had the identity strategy succeeded in the minds of three of the eight members, then appellant would have been acquitted of the most serious offense without having to resort to affirmative defenses. Of course, the fact that it did not succeed is of no moment; our review is limited to whether the selected strategy was objectively reasonable. *See Dewrell*, 55 M.J. at 136. We conclude it was. As such, appellant fails to establish deficient performance on this basis.

2. There is no deficient performance based upon appellant's personal decision not to testify.

With the advice of counsel, appellant did not testify in his defense. After an overnight recess, the military judge convened an Article 39(a), UCMJ, session and asked appellant if it was his "personal decision" not to testify. Appellant stated it was. The military judge followed up with appellant and asked if he had "a chance to discuss that [decision] with [his] counsel and make an informed decision." Appellant stated that he had.

In his affidavit submitted to this court in support of his claim of ineffective assistance of counsel, appellant admits he was the shooter and asserts he was prepared to take the stand and testify accordingly. Appellant states, "I was prepared to take responsibility for what I did, including lying to the police, and relied on my defense counsel to know how best to present my defense." Appellant further claims that his "defense counsel did not prepare [him] to testify and, on the advice of counsel [he] did not testify." Appellant further laments the alternative defense strategy employed by his defense team and claims that if he testified and accepted responsibility for the shooting and lying, he believes he would have been acquitted

based upon self-defense and defense of others.

At the outset, we see no need to order affidavits from defense counsel or a fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (1967). Assuming appellant's affidavit is "factually adequate on its face," we conclude "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability" of appellant's claims that he was unprepared to testify or somehow precluded from testifying based upon the defense team's strategy. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *see Dewrell*, 55 M.J. at 135; *United States v. Williams*, ARMY 20140604, 2017 CCA LEXIS 178, *1 n.2 (Army Ct. Crim. App. 21 Mar. 2017) (summ. disp.) (declining to order affidavits or a fact-finding hearing in part because the "record as a whole compellingly demonstrates the improbability of appellant's claim that he was not prepared to testify"); *United States v. Nordin*, ARMY 20090044, 2013 CCA LEXIS 547, *16 (Army Ct. Crim. App. 3 Jul. 2013) (mem. op.) ("The record clearly indicates appellant was aware the decision as to whether to testify was his to make, and that appellant personally made this decision following consultation and advice from his counsel.").

Addressing the legal issue, it was appellant's choice whether or not to testify at his court-martial. After an overnight recess "during which there was ample opportunity for appellant to express his desire to testify," appellant relied on the advice of his counsel and chose not to testify. *Dewrell*, 55 M.J. at 135. Notwithstanding his newly revealed desire to testify, there "is no indication that he told his counsel he rejected their advice." *Id.* Nor did appellant equivocate on the record when discussing his choice not to testify with the military judge. After trial, appellant expressed no dissatisfaction with his defense counsel to the convening authority in his post-trial submissions. Taken together, appellant's "failure to speak up at or after trial belies his assertion that his desire to testify was improperly cut off" by the actions of his defense counsel or the strategy employed by his defense team. *Id.* We conclude that appellant's absolute right to testify was not diminished or inhibited by any deficient performance on the part of his trial defense team.[3]

B. Appellant fails to establish prejudice.

Assuming without deciding that appellant prevailed in demonstrating deficient performance, his claim would still fail because he cannot establish prejudice. This is so for at least two reasons.

First, had appellant testified consistent with his affidavit, he would have

[3] To the contrary, and as discussed *infra*, we conclude defense counsel's advice to appellant not to testify was objectively reasonable given the damaging cross-examination that almost certainly would have resulted.

given up entirely the identification defense, which as we discussed above, was a reasonable defense based upon the evidence adduced. This would have limited appellant's chances at an acquittal to an affirmative defense of self-defense or defense of others. Appellant's testimony was not required in order to receive either of these defenses. Indeed, the military judge provided both instructions based on the testimony of SPC GG and others about the threats exchanged that night, the verbal and physical altercation between the groups, and appellant's subjective belief—articulated through a government witness, SPC GG—that he felt threatened by a gun and thought he was going to get jumped. Simply stated, appellant's decision not to testify did not foreclose any avenues for acquittal, nor was appellant's testimony necessary in order to secure any additional bases for acquittal.

Furthermore, appellant was a demonstrated liar. His evolving versions of events would have provided fertile ground for a scathing cross-examination. By testifying, appellant would have run the risk that the members would believe the opposite of his testimony and use that as substantive evidence of his guilt. *See United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019). Appellant's statements in his affidavit and arguments on brief assume that his testimony would have been favorably received by the panel rather than met with, at best, substantial skepticism or, at worst, utter disbelief. Even taking appellant's affidavit at face value, we note that nowhere does appellant actually state that he saw another armed individual or articulate with specificity the reasons for his belief that someone else was armed. Rather, appellant claims in his affidavit that: (i) SSG RD jiggled his hands in his pocket "as if he had a pistol;" (ii) he "wondered if [RC] had been given a gun;" (iii) "it looked as if [RC] had a gun in his waistband;" and (iv) he "thought that [SSG RD] was pulling a gun." Based on these non-specific assertions, we conclude appellant's testimony would have added little support to his claims of self-defense and defense of others, defenses for which evidence was already adduced and instructions were provided. This is especially true when considering the significant downside of a likely devastating cross-examination.

For these reasons, we find that even if appellant's defense counsel performed deficiently, appellant fails to establish a reasonable probability of a different outcome.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judges WALKER and EWING concur.

FOR THE COURT:

[redacted]

MALCOLM H. SQUIRES, JR.
Clerk of Court