

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, ARGUELLES,¹ and PARKER
Appellate Military Judges

UNITED STATES, Appellee,
v.
Private First Class LUIS M. COLONRODRIGUEZ,
United States Army, Appellant

ARMY 20200031

Headquarters, U.S. Army Maneuver Support Center of Excellence
S. Charles Neill, Military Judge
Colonel Christopher B. Burgess, Staff Judge Advocate

For Appellant: Captain Nandor F.R. Kiss, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Captain Nandor F.R. Kiss, JA (on brief); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Captain Joseph A. Seaton, Jr., JA; Captain Nandor F.R. Kiss, JA (on reply brief).

For Appellee: Captain Allison L. Rowley, JA (argued); Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Major Reanne R. Wentz, JA; Captain Thomas J. Darmofal, JA (on brief).

22 October 2021

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, in accordance with his plea, of one specification of disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 890. Subsequently, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of aggravated

¹ Judge Arguelles decided this case while on active duty.

assault and one specification of assault consummated by a battery, both in violation of Article 128, UCMJ; and one specification of domestic violence, in violation of Article 128b, UCMJ.² The convening authority approved the findings and panel-adjudged sentence of a bad-conduct discharge, confinement for 180 days, and total forfeiture of all pay and allowances.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises four assignments of error, two of which merit discussion and one of which merits relief.³

DISCUSSION

A. Search Warrant

1. Facts

On 21 May 2019, a military magistrate (“magistrate”) authorized law enforcement agents to search appellant’s phone for evidence of aggravated assault, communicating a threat, and violating a Military Protective Order (“MPO”). After seizing appellant’s phone, law enforcement agents found evidence of a text message sent in February of 2018, in which appellant described assaulting and choking the victim. After being admitted at trial, this text message formed the basis for the only assault charge for which the panel found appellant guilty.

The affidavit in support of the search warrant described how appellant was arrested on 5 March 2019 at the victim’s (his wife) residence in violation of an MPO. While at the residence, the victim told military police that appellant sent her a Facebook message before appearing at the house. The affidavit then detailed the interviews of multiple witnesses, almost all of whom stated that it appeared appellant was physically abusing his wife. The affidavit concluded by describing an interview on 18 March 2019, in which the victim told a Criminal Investigation Command (CID) Special Agent that appellant assaulted her on multiple occasions

² The panel acquitted appellant of two additional specifications of aggravated assault (Article 128, UCMJ); two additional specifications of assault consummated by battery (Article 128, UCMJ); two additional specifications of domestic violence (Article 128b, UCMJ); and one specification of communicating a threat (Article 115, UCMJ).

³ Appellant’s unlawful command influence and dilatory post-trial processing claims are without merit and do not warrant further discussion. We have also given full and fair consideration to the matter personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find it to be likewise without merit.

between January of 2018 and February of 2019. Although the victim showed the CID Special Agent screen shots of text and Facebook messages between her and appellant “in regards to their relationship,” the affidavit did not recount the content of those messages or indicate whether they specifically pertained to any alleged assaults. In the same interview, the victim said that appellant sent a video without her consent to unknown individuals of her performing sexual acts on him.

Based on the affidavit, the magistrate authorized a search of appellant’s phone for “any information related to the reported aggravated assaults of [victim] by [appellant], broadcasting of an indecent recording, and violating a MPO.” The authorization did not set forth any limitations in terms of date ranges or the types of files that could be searched.

Ruling on the subsequent defense motion to suppress all the evidence recovered from appellant’s phone, including the 2018 text, the military judge found that there was insufficient evidence to support the magistrate’s finding of “probable cause that there would be evidence that [appellant] communicated to his wife about the alleged assaults or that he had photographs of her injuries.” Although he found a sufficient basis in the affidavit to justify the search for evidence of an MPO violation and indecent recording, the military judge ruled that the authorization for those searches should have been more limited in scope. For example, the military judge suggested that the search for MPO violations should have been limited to the time while the MPO was in effect, and that the search for the indecent recording should have been limited to “video files (and evidence that the sexually-explicit video had been forwarded).”

The military judge did not, however, suppress any of the evidence recovered from appellant’s phone, instead finding it to be admissible under the good faith exception to the exclusionary rule. Military Rule of Evidence (M.R.E.) 311(c)(3). Appellant now challenges this ruling on appeal.

2. *Legal Standard*

We review a military judge’s denial of a motion to suppress evidence for abuse of discretion. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). The abuse of discretion standard is deferential, predicated reversal on more than a mere difference of opinion. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted) (“[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.”). In reviewing a motion to suppress, the evidence is considered in the light most favorable to the party that prevailed on the motion. *United States v. Hernandez*, __ M.J. ___, No. 21-0137, 2021 CAAF LEXIS 752, at *11 (C.A.A.F. 12 Aug. 2021).

When reviewing a military magistrate's finding of probable cause to issue a warrant, we inquire whether the magistrate had a "substantial basis for concluding that probable cause existed." *Id.* (citing *United States v. Rogers*, 67 M.J. 162, 164–65 (C.A.A.F. 2009)). This review is conducted with "great deference" to the magistrate's finding because of the "Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

Consistent with the Fourth Amendment, M.R.E. 315(f)(1) requires all search authorizations to be based on probable cause. Probable cause exists if there is a "reasonable belief that the property or evidence [to be searched] is . . . evidence of a crime" and if there is enough information for the military magistrate to have "a reasonable belief that the . . . evidence sought is located in the place . . . to be searched." M.R.E. 316(c)(1), 315(f)(2). In deciding whether probable cause exists, the magistrate looks to the totality of the circumstances to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that . . . evidence of a crime will be found in a particular place." *Hernandez*, __ M.J. ___, 2021 CAAF LEXIS 752, at *13 (citations omitted) (alterations in original). A probable cause finding does not require officers to rule out a suspect's innocent explanations, but merely requires that a person of "reasonable caution" could believe that a search may reveal some evidence of a crime; "it does not demand any showing that such a belief be correct or more likely true than false." *Id.* at *14 (citing *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005)). Likewise, in determining whether probable cause exists the magistrate may draw "reasonable inferences" from the affidavit. *Id.* (citing *Hoffman*, 75 M.J. at 125).

Finally, in order for there to be probable cause, "a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized." *Id.* (citing *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017)). In *Nieto*, the Court of Appeals for the Armed Forces (CAAF) held that there must be specific and particular information in order for a magistrate to determine that there is a "fair probability" that evidence of a crime will be found in a particular place. 76 M.J. at 108. Applying that standard, the CAAF held that there was no probable cause to search the appellant's laptop when the evidence presented to the magistrate suggested the evidence of the supposed crime would only be located on his phone. *Id.* at 107–08.

Pursuant to M.R.E. 311(a), evidence seized pursuant to a search warrant issued without probable cause must be suppressed unless an exception applies. *United States v. Perkins*, 78 M.J. 381, 386 (C.A.A.F. 2019). Under the "good faith" exception, evidence obtained pursuant to an invalid search warrant is not suppressed if law enforcement officials who conducted the search acted in reasonable reliance on a warrant issued by a neutral and detached magistrate. *Hernandez*, __ M.J. ___,

2021 CAAF LEXIS 752, at *18 (citing *United States v. Leon*, 468 U.S. 897, 918 (1984)).

As codified in M.R.E. 311(c) and interpreted by CAAF, the good faith exception applies in military courts when: (1) the magistrate who issued the warrant was competent to do so; (2) the individual executing the search “had an objectively reasonable belief that the magistrate had a ‘substantial basis’ for determining the existence of probable cause”; and (3) the investigators seeking and executing the warrant reasonably and with good faith relied on the issuance of the warrant. *Id.* at *19–20 (citations omitted). We review a military judge’s good faith exception ruling in the light most favorable to the government. *Id.* at 23.

The first prong of the test for a good faith exception is not at issue here. Regarding the reasonably objective belief prong, the CAAF has held that this second component cannot be met if “the materials presented to the commander or magistrate issuing the search and seizure authorization are ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” *United States v. White*, 80 M.J. 322, 329 (C.A.A.F. 2020) (quoting *United States v. Carter*, 54 M.J. 414, 419 (2001)); *see also United States v. Smith*, 77 M.J. 631, 637 (Army Ct. Crim. App. 2018) (holding the second prong was satisfied where, inter alia, there was no evidence that the affiant provided or omitted information in an attempt to mislead the magistrate). As to the third prong of the good faith exception test, the CAAF in *Carter* held that reviewing courts must ask whether the magistrate “rubber stamp[ed]” the warrant, and/or if the affidavit was “facially deficient.” 54 M.J. at 422.

3. Analysis

As an initial matter, we question the military judge’s ruling that it “was a leap of logic” to conclude that evidence pertaining to any assaults would be found on appellant’s phone. Given the totality of the affidavit, including its detailed description of the long history of domestic violence between appellant and the victim, a credible argument can be made that the affidavit supported a “reasonable inference” that messages on appellant’s phone “in regard to their relationship” might include evidence of the alleged assaults. Put another way, after giving the required “great deference” to the magistrate’s findings, we are not convinced that he erred in making a “practical, common-sense decision” that there was a “fair probability” that appellant’s phone and messages *might* contain evidence of the assaults.

Alternatively, we note that appellant is not challenging the military judge’s ruling that the search for the indecent recording should have been limited to “video files (and evidence that the sexually-explicit video had been forwarded).” As such, under the plain view doctrine it is possible that law enforcement officials might have discovered the incriminating February 2018 text message while searching appellant’s texts and messages for evidence pertaining to the video. *See United States v.*

Richards, 76 M.J. 365, 370–71 (C.A.A.F. 2017) (“[I]n the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files . . . [the agent’s] discovery of the child pornography images within the folder of unallocated materials was consistent with *Horton v. California* and the plain view exception to the Fourth Amendment.”) (citation omitted) (first alteration in original).

Because we agree with the military judge’s ruling on the good faith exception, however, we need not definitively resolve the issues of whether there was probable cause to support the issuance of the warrant in the first instance and/or whether the plain view doctrine applies. Among other things, there is no evidence that the affiant misrepresented or omitted any information; to the contrary, the affidavit included descriptions of witnesses who saw no evidence of assaults or domestic violence. As such, and for the reasons set forth above in our probable cause discussion and our mandate to review the military judge’s conclusions in the light most favorable to the government, we conclude the affidavit in this case was: (1) not “so lacking indicia of probable cause as to render official belief in its existence to be entirely unreasonable”; and (2) not “facially deficient.” See *Perkins*, 78 M.J. at 389 (stating even if the magistrate “rubber stamped” the application, there was no evidence to support a finding that the affiant knew that; and holding a warrant that identifies the place to be searched and describes in detail what to look for is not “facially deficient”).

B. Panel Member Challenges

1. Facts

After conducting two rounds of individual voir-dire, defense counsel challenged potential panel member Command Sergeant Major JW (“panel member”) for actual and implied bias on three separate grounds: (1) the panel member believed the defense was required to put on evidence; (2) he stated he would believe law enforcement officers over other witnesses; and (3) when asked if he could be impartial, there was a long pause before he answered “I would like to think so.”

Midway through the defense counsel’s voir dire, the following exchange occurred with the panel member:

Q: Would you believe a law enforcement officer’s testimony over any other witness’s testimony?

A: For the most part, yes.

Neither the defense counsel, trial counsel, nor the military judge asked any follow-up questions on this issue.

On the issue of whether the defense was required to put on evidence, the panel member started out by saying he would expect the defense to put on evidence, that it was "warranted" for the defense to put on evidence, and that he would like to see the defense call witnesses. In follow up questioning by trial counsel, the panel member stated that he "would like to think" he could follow the instruction that the defense is not required to put on any evidence. Yet, when asked if he could find the accused not guilty if the prosecution failed to meet their burden, the panel member said "No. I need -- I'd like to have some evidence."

On further questioning by the military judge, the panel member said he would be able to follow the law that says if the defense did nothing and/or did not present any evidence, he would still acquit if the prosecution failed to prove guilt beyond a reasonable doubt. Likewise, the panel member also indicated that he would follow the instruction that the defense has no obligation to present any evidence or disprove the elements of the offense. In subsequent questioning by defense counsel, the panel member stated that he personally would like defense counsel to produce evidence to present a full picture, but that it would not bother him if the defense did nothing in the case.

When recalled later for additional questioning, the panel member stated that he would like the defense to put on evidence even if not required, "[b]ut if they're not required, so be it." In response to the military judge's question if he was "saying you'd like to hear from them because you'd like to have more evidence in the case, a fuller picture of the case, or you think they're obligated to do that," the panel member responded, "I would think just more evidence." Finally, on follow up by trial counsel, the panel member stated that he understood that the defense had no obligation to put forth any evidence and would not hold it against them if they exercised that right.

In denying the challenge for cause, the military judge stated that the panel member did not say that he expected the defense to present evidence, but rather, after a series of vague questions from the defense, said he would like to hear more evidence as opposed to less evidence. The military judge also noted that the panel member confirmed multiple times that he would not hold it against the defense if they did not present evidence and would properly hold the government to their burden. As such, the military judge found that a reasonable member of the public would not question the legality, fairness, or impartiality of the proceedings if this panel member were to sit. The military judge did not, however, in any way address, either directly or indirectly, the panel member's response that he would "[f]or the most part" believe a law enforcement officer's testimony over any other witness.

A similar exchange regarding potential law enforcement bias occurred during the individual voir dire of potential panel member First Sergeant JC (“second panel member”):

DC: Would you believe the testimony of a law enforcement officer over another witness?

A: Yes. Well, not over another witness.

Q: You would be more inclined to believe a law enforcement officer?

A: Yes.

Q: And why is that?

A: They represent the law.

During follow-up questioning by trial counsel, the second panel member said that he believed law enforcement officers could lie, and that if a law enforcement officer were to testify, he could evaluate his testimony as he would any other witness.

When the defense challenged the second panel member for cause, the military judge expressed concern that he would more likely believe a law enforcement officer and was “not confident” that he was effectively rehabilitated. After hearing further argument from trial counsel, the military judge ruled that because it was a “close call,” the application of the liberal grant mandate warranted granting the challenge for cause as to the second panel member based on his responses to questions about law enforcement witnesses.

2. *Legal Standard*

Rule for Courts-Martial 912(f)(1)(N) provides for the exclusion of a member for cause whenever it appears the member “[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.” This rule encompasses challenges based upon both actual and implied bias. *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008) (citing *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)).

“Actual bias is a question of fact to be decided by the trial judge on the basis of the responses of the member and any other evidence presented at the court-martial.” *United States v. Velez*, 48 M.J. 220, 224 (C.A.A.F. 1998). It is a “personal bias which will not yield to the military judge’s instructions and the evidence

presented at trial,” and “the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020) (citations omitted). We review a military judge’s ruling on a challenge for cause for abuse of discretion. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

Implied bias exists when most people in the member’s position would be biased, and is assessed on the totality of the circumstances. *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). The test for implied bias is objective, “viewed through the eyes of the public, focusing on the appearance of fairness.” *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (quoting *Clay*, 64 M.J. at 276). When ruling on an implied bias challenge in a close case, the “liberal grant mandate” enjoins military judges to err on the side of granting the challenge. *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015) (citing *Clay*, 64 M.J. at 277). This “mandate stems from a long-standing recognition of certain unique elements in the military justice system including limited peremptory rights and the ‘manner of appointment of court-martial members [that] presents perils that are not encountered elsewhere.’” *Id.* (citations omitted) (alteration in original).

We review rulings on challenges for implied bias based on a standard that is “less deferential than abuse of discretion, but more deferential than de novo review.” *Peters*, 74 M.J. at 33 (quoting *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006)). This is because “cases of implied bias are based upon an objective test and therefore the military judge is given less deference.” *Id.* at 34 (quoting *United States v. Miles*, 58 M.J. 192, 194–95 (C.A.A.F. 2003)); *United States v. Leathorn*, ARMY 20190037, 2020 CCA LEXIS 450, at *20–21 (Army Ct. Crim. App. 11 Dec. 2020) (mem. op.) (“Thorough, well-reasoned [implied bias] analysis places the ruling on the end closest to abuse of discretion review. The absence of any analysis places the judge’s ruling at the end closest to de novo review.”). Along the same lines, although a military judge is not obligated to place his or her implied bias analysis on the record, “doing so is highly favored and warrants increased deference from appellate courts.” *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (citing *Clay*, 64 M.J. at 277). Further explaining, the CAAF in *Clay* cautioned that:

[W]here a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge’s exercise of discretion will be reversed will indeed be rare. In such circumstances, what might appear a close case on a cold appellate record, might not appear so close when presented from the vantage point of a military judge observing members in person and asking the critical

questions that might fill in any implied bias gaps left by counsel.

64 M.J. at 277.

On the other hand, in *United States v. Woods*, 74 M.J. 238, 239–41 (C.A.A.F. 2015), a potential panel member indicated on her questionnaire and initial voir dire responses that in the military justice system she believed the burden was on the accused to prove he was not guilty. Although the military judge successfully rehabilitated the panel member, recognized his duty to liberally grant defense challenges, and placed his reasoning on the record, the CAAF nevertheless held that since the initial mistake went to the “core of our judicial system,” it was error not to excuse the member under the liberal grant mandate. *Id.* at 244–45. In *United States v. Hines*, 75 M.J. 734, 741 (Army Ct. Crim. App. 2016), we similarly noted that “it is equally clear from *Woods* that, in some cases, the military judge must grant an implied bias challenge for cause based on a member’s incorrect view of the law notwithstanding the member’s candid and credible assertion that they will follow the military judge’s instructions.”

Finally, where the military judge fails to take into account the liberal grant mandate and denies an implied bias challenge in a “close case,” such error prejudices an appellant’s substantial rights and mandates reversal under Article 59(a), UCMJ, without any requirement for the accused to demonstrate prejudice. *See United States v. Badders*, ARMY MISC 20200735, 2021 CCA LEXIS 510, at *27–28 (Army Ct. Crim. App. 30 Sep. 2021) (mem. op.) (“The presence of a biased member on the panel, whether actually or impliedly biased, is ‘inherently prejudicial’ requiring reversal ‘without the need for a further showing of prejudice.’”); *Dockery*, 76 M.J. at 98 (“However, asking this court to *reverse* a ruling of implied bias does not place Dockery in the same position as an appellant who has brought a successful implied bias challenge, and therefore does not eliminate the need for Dockery to establish that he was prejudiced by the error.”) (emphasis in original); *Cf. United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017) (holding no showing of prejudice is required for appearance of unlawful command influence; “[r]ather, the prejudice involved in the latter instance is the damage to the public’s perception of the fairness in the military justice system as a whole and not the prejudice to the individual accused”).

3. Analysis

A. Law Enforcement Bias

First, as noted above, neither the military judge nor either side asked any follow up questions in response to the panel member’s statement that he would believe law enforcement officers over other witnesses. The military judge did not

address this issue in his ruling. At oral argument, the government contended that since the party challenging a potential panel member bears the burden of persuasion, the defense should have asked follow up questions. We disagree. Once the panel member expressed his partiality towards law enforcement, the defense met its burden to demonstrate his bias. *See United States v. Lancaster*, 96 F.3d 734, 743 (4th Cir. 1996) (recognizing the general principle that “bias in favor of law enforcement officials was inappropriate”); *State v. Draper*, 675 S.W.2d 863, 865 (Mo. 1984) (“When a venireman expresses a partiality toward police officer testimony per se – as a generic class – the bias of credibility contrary to the interest of the complainant-litigant disqualifies service as a juror”); *Cf. Leathorn*, 2020 CCA LEXIS 450, at *23 (“[N]othing on the record supports the explanation provided by the government. Neither counsel nor the military judge asked 1SG MS to explain why she failed to answer the military judge’s question honestly.”). As such, the military judge abused his discretion in not granting the challenge to the panel member for actual bias, especially given his finding that the panel member was “truthful” in response to other questions.

Alternatively, looking to implied bias we fail to see how an objective member of the public would view this court-martial, which included a panel member with an unchallenged bias towards law enforcement, as a “fair trial.” Likewise, the government fails meaningfully to address the fact that the military judge invoked the liberal grant mandate to uphold the defense challenge to the second panel member. Unlike the panel member at issue, the second panel member responded to follow up questions by acknowledging that law officers could lie, and confirming that if a law enforcement officer were to testify, he could evaluate that testimony as he would any other witness. In short, we fail to see how an objective member of the public looking at these wholly contradictory rulings could still somehow conclude that the court-martial was fair. *See Leathorn*, 2020 CCA LEXIS 450, at *28–30 (“The military judge’s ruling on 1SG MS is even more curious when compared to his ruling on the challenge of 1SG KB. . . . Given the similarities between the voir dire responses of 1SGs KB and MS, we are left wondering why 1SG MS was permitted to serve on the panel given the prior excusal of 1SG KB.”). Accordingly, we conclude that the military judge also abused his discretion in failing to grant the challenge for cause for implied bias.

B. Expectation of Defense to Put on Evidence

As described above, although he waived in his initial answers, the panel member eventually stated both that he would follow the military judge’s instruction that the defense had no obligation to put on evidence, and that he would vote to acquit if the prosecution failed to prove guilt beyond a reasonable doubt. As such, on this issue the panel member was not actually biased. *See United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016) (“[A]ctual bias analysis [] involves a member’s willingness to yield to the evidence and follow the judge’s directions.”).

On the other hand, the first two times he was questioned about the defense burden to produce evidence, the panel member clearly indicated that he expected the defense to call witnesses, and that even if the government failed to meet their burden, he would be unable to acquit the defendant without hearing evidence from the defense. Again, notwithstanding the fact that for the most part the military judge and trial counsel were able to rehabilitate the panel member, we question whether his initial belief that the defense is required to put on evidence goes to the “core of our judicial system.” See *Hines*, 75 M.J. at 741 (“[I]t is equally clear from *Woods* that, in some cases, the military judge must grant an implied bias challenge for cause based on a member’s incorrect view of the law notwithstanding the member’s candid and credible assertion that they will follow the military judge’s instructions.”). We are also concerned with the effort required to rehabilitate the panel member. See *United States v. Wright*, ARMY 20170486, 2019 CCA LEXIS 324, at *8–9 (Army Ct. Crim. App. 9 Aug. 2019) (mem. op.) (holding a panel member’s “substantial hesitation before answering ‘okay’ and then a begrudging ‘yes’ to a leading question were inadequate to resolve the question of his personal bias”).

Ultimately however, we need not determine whether the panel member’s response to questions about the defense burden to put on evidence constitutes implied bias. Rather, given the totality of the voir dire, to include the panel member’s responses to both the law enforcement and evidence questions, this was clearly a “close case” which required dismissal of the panel member under the liberal grant mandate. *Peters*, 74 M.J. at 34 (stating under the liberal grant mandate and taking into consideration the totality of the circumstances, if “the military judge finds it a close question, the challenge should be granted”).

CONCLUSION

The finding of guilty for appellant’s guilty plea to one specification of Article 90, UCMJ, is AFFIRMED.⁴

⁴ We note that the Statement of Trial Results (“STR”) contained the following errors: Specification 1 of Charge I, with regards to the specification language on which the accused was arraigned, omits the language “arm and” before the word “hand”; Specification 6 of Charge I, on which the accused was arraigned, was omitted; Specification 7 of Charge I, is incorrectly listed as “Specification 6” and incorrectly reflects the plea as “Not Guilty;” and The Specification of Charge V reflects language of a specification dismissed before arraignment rather than the language of the remaining specification on which the accused was arraigned.

We exercise our discretion to correct the STR by directing the following changes to properly reflect the charge and specifications on which the appellant was arraigned:

(continued . . .)

The findings of guilty returned by the panel (one specification of aggravated assault and one specification of assault consummated by a battery, both in violation of Article 128, UCMJ, and one specification of domestic violence in violation of Article 128b, UCMJ), and the sentence, are SET ASIDE. A rehearing on the set aside specifications and/or the sentence may be ordered by the same or different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

(. . . continued)

by, in Specification 1 of Charge I, adding the words “arm and” before the word “hand;”

by in Specification 6 of Charge I, replacing the language of the specification with, “In that PFC Luis Colon-Rodriguez, U.S. Army, did at or near Saint Robert, Missouri, on or about 2 March 2019, unlawfully strike a male whose name is unknown, on the face with his hand,” by reflecting the plea as “No plea entered, and the finding/disposition as “Dismissed;”

by adding Specification 7 of Charge I, to read 7
“(Renumbered as Specification 6) In that PFC Luis Colon-Rodriguez, U.S. Army, did, at or near Fort Leonard Wood, Missouri, on or about 9 June 2017, unlawfully strike Specialist [REDACTED] on the face with his hand;” and by reflecting the plea as “No plea entered” and the finding/disposition as “Dismissed;” and

by amending the Specification of Charge V to read: In that PFC Luis Colon-Rodriguez, U.S. Army, did, at or near Fort Leonard Wood, Missouri, on divers occasions between on or about 24 April 2018 and on or about 7 February 2019, wrongfully abuse a certain animal, to wit: his dog, and that said conduct was of a nature to bring discredit upon the armed forces” and reflecting the plea to that specification as “No plea entered” and the finding/disposition as “Dismissed.”

See Rule for Courts-Martial 1111(c)(2); *United States v. Pennington*, ARMY 20190605, 2021 CCA LEXIS 101 at *5 (Army Ct. Crim. App. 3 Mar. 2021) (summ. disp.) (“Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant’s post-trial documents . . .”).

COLONRODRIGUEZ—ARMY 20200031

Senior Judge BROOKHART and Judge PARKER concur.

FOR THE COURT:



JOHN P. TAITT
Clerk of Court