

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, BURTON,¹ and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Major BRIAN V. CASHIN
United States Army, Appellant

ARMY 20200050

Headquarters, Fort Bliss
James P. Arguelles, Military Judge
Colonel Andrew M. McKee, Staff Judge Advocate

For Appellant: Antoinette Q. O'Neill, Esquire (argued); Captain Joseph A. Seaton, Jr., JA; Antoinette Q. O'Neill, Esquire; Catherine M. Deist, Esquire (on brief and reply brief).

For Appellee: Captain R. Tristan C. DeVega, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA (on brief).

28 March 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PENLAND, Judge:

Appellant asserts the military judge erred by not granting the defense's causal challenge against LTC ■ for implied bias. We agree and shall grant relief in our decretal paragraph.

¹ Senior Judge Burton took final action on this case prior to her retirement.

BACKGROUND

On 4 October, 12 November 2019, and 27–31 January 2020, an officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of assault consummated by a battery and one specification of obstructing justice, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934 [UCMJ]. Appellant was acquitted of multiple rape specifications. The panel sentenced him to a dismissal and confinement for fourteen days.

Lieutenant Colonel [REDACTED] a prospective panel member and battalion commander, described during voir dire his directly-engaging approach to preventing and responding to allegations of sexual harassment and sexual assault involving Soldiers in the battalion. He indicated that his unit had a notably high incidence of such allegations, and that he and the command sergeant major had become “directly involved in . . . changing the culture of the battalion when it comes to sexual harassment and sexual assault since we’ve had [a] . . . higher than average rate of offenses inside of our battalion.”

The military judge and LTC [REDACTED] had the following exchange:

MJ: Are you now of the mindset like, “Wow this stuff is rampant in the Army and we just got to shut it down,” or can you sort of detach yourself from your battalion and say, “I’m going to view this case on the facts and circumstances presented to me,” and you know, can you wall that off, what you’ve dealt with in the battalion.

LTC [REDACTED] Yeah, I can, sir. Yes.

MJ: You can?

LTC [REDACTED] Yes.

MJ: Any—I’m not trying to judge your answers or bull you into saying what I think is the right answer. So, most important is the honest answer. So, but you honestly think that you can—you can, sort of, wall that off and—what it really comes down to is, you’re going to sit and listen to all of the facts, government’s got the burden to prove each element beyond a reasonable doubt, if they don’t meet their burden you have to vote not guilty, right? And that beyond a reasonable doubt is a high standard. It’s going to come down to it at the end where you think, “I don’t

know. This is a close call. I probably think he did it. Maybe the government didn't get to reasonable doubt, but he probably did it. And, you know, we've got this huge problem so I'm going to vote to—I'm going to vote guilty."

LTC [REDACTED] Sir, I'll be candid with you, it's difficult, right. So I've had multiple victims sitting in my office in tears over the last six months. It would have to be—will try to be objective though. So, do I have some recent experience, some scar tissue, absolutely? Do I think, you know, the government[']s asked me to make an objective decision that I can reach it, yeah I think—I think that's my duty.

The military judge emphasized to LTC [REDACTED] that it actually was not his duty to serve as a panel member; rather, it was his duty to give honest answers during voir dire. Then, the military judge asked:

MJ: I'm just trying to make sure I get—and I know I'm asking you to project yourself into something you don't know, because you don't know what the facts are, but what I'm really just trying to—as you sit here now, do you think you can be a fair and impartial juror, and if you think the government hasn't met its high burden, would you vote not guilty?

LTC [REDACTED] I would, sir.

After the military judge's questions, trial counsel and LTC [REDACTED] had the following exchange:

TC: Sir, I just want to go a little further down that rabbit hole with what you mentioned as scar tissue when dealing with some of the issues in your unit. What did you mean by "scar tissue"?

LTC [REDACTED] So, when I took command I did not anticipate having to deal with some of the things that I've had to deal with and I don't want to go into the weeds of each case unless you want me to, but some of them are less than savory.

TC: Understood, sir. But do you think that—dealing with those specifics, do you think you can just wall that off and focus just on the facts on this case and make a determination just on the evidence presented in this case?

LTC [REDACTED] Yes, I have to.

TC: Do you feel comfortable doing that?

LTC [REDACTED] I do.

TC: And, if you—as part of this panel chose to or decided that the government had not met our burden and acquitted the accused, would you feel comfortable going back to your unit and saying, “Yes, I sat on that panel and the government did not meet their burden so we acquitted”?

LTC [REDACTED] Yes, I would probably feel comfortable with that.

The defense then asked several questions of LTC [REDACTED] which again indicated that LTC [REDACTED] approached sexual misconduct allegations in his unit with notable diligence. LTC [REDACTED] did not know and was therefore unable to say whether fellow commanders were similarly engaged, leading to the following exchange:

DC: Okay. So let me ask you this. Let’s say, you know, you made a recommendation, case needs to go to court-martial, say general court-martial, and it does, and then that case is acquitted. After you’ve gone through all that diligence, you make—you look at the case, you felt good about that case, and you felt like, “Yep, he did it,” and it comes back acquitted, how does that make you feel?

LTC [REDACTED]: So I’d say the most—so I have not been through that, so I can’t tell you. But I can tell you the most difficult thing I’ve had to do in command to date is walk into a victim and tell her that her case had no—that there’s no probable cause found and that they were not pursuing any charges and that the alleged offender was not going to go to court.

DC: And so, similarly, you’re going to have to have that conversation with an alleged victim—

LTC ■ Yep.

DC: —after one of these cases that you recommended go to court-martial, if it's acquitted, right, sir?

LTC ■ Yes.

DC: Not looking forward to that conversation?

LTC ■ No, I don't think any of us would.

The military judge then picked up on this line of questioning, which allowed LTC ■ to clarify that the non-prosecuted case to which he referred was handled by civilian authorities:

MJ: Did you feel—or did you know either way, like, “Hey, I know you have a just case, I know you have a righteous case, and El Paso's not going to prosecute it. I'm sorry.” Or was it more of you didn't know much about the facts and circumstances, you just felt bad because you're telling the victim, who obviously believes something happened, that her case wasn't going to go forward? That's all I was trying—I'm just trying to figure out, like how much involvement did you have? Did you think—or did you have an opinion either way as to whether the decision not to go forward was a correct one?

LTC ■ Sir, I did not have an opinion whether or not it was the right way to go forward. I did provide her the update and in the course of all of the conversations I've had with her, so I think I've sat down with her three times, and in each time I've sat down with her, just her emotional reactions led me to believe that she truly feels that something bad has happened to her.

MJ: Okay. And that's why you feel bad in telling her—

LTC ■ Absolutely, sir. You have to have—you don't get to this job unless you have some level of empathy.

MJ: Then just one last follow-up, sir, along the question from [defense counsel]. So, if you had a case that you recommended go forward and it went to court-martial, or with this process, and the panel says, “Nope, didn't prove

beyond a reasonable doubt, acquittal," somebody on each side will have to tell the victim, but would you kind of take that personally, like, "Well, I just spent a lot of time reviewing this and I think it was a righteous case and I went forward and the panel goofed it up. You know, they screwed up this case." Would that kind of be your—what would your reaction be if you—

LTC ■ So, I mean, it's a fair question. Some of it comes down to, I think human nature, right. So on one point, I absolutely believe that, you know, justice is done right. So when we do it, and we hold people accountable, and we also give them, you know, the basic foundations of our nation, right. You are innocent until proven guilty and it must be done in the court of law against all reasonable doubt. But as a human, right, you still are going to walk away from that situation with some level of feeling, right, and that feeling[']s not, you know, you're probably not going to be, you know, very good—

MJ: Fair enough.

LTC ■ —because somebody feels like they had truly been hurt and you're going to have to walk back and watch them grieve through that process, and you're going to have to care for that human being inside of your formation and that comes with a burden.

MJ: Okay. All right. Thank you, sir.

Trial counsel then followed up with LTC ■

TC: Sir, this really is going to be kind of a tough question, but I want you to think about, kind of, all the things we talked about over the last few minutes and scar tissue you said you may have and multiple cases that you've seen. If you were sitting as an accused today in this courtroom, you know, accused of sexual assault among other offenses, would you feel comfortable with yourself sitting as a panel in judgment?

LTC ■ I would hope, yeah. I would.

MJ: You would feel comfortable with yourself?

LTC [REDACTED] Absolutely.

Before ruling on challenges, the military judge indicated he would evaluate any of them on actual and implied bias grounds, and he restated the principles associated with each—that actual bias is a question of fact, while:

[i]mplied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced. *United States v. Napolitano*, 53 M.J. 162, in determining whether implied bias is present, military judges look to the totality of the circumstances. *United States v. Strand*, 59 M.J. 459, implied bias is viewed objectively through the eyes of the public, implied bias exists if an objective observer would have substantial doubt about the fairness of the accused's court-martial panel If the defense has any challenges for cause, when I evaluate those challenges for cause I am aware of the rule and will employ the liberal grant mandate that applies to the defense challenges for cause, *United States v. Clay*, 64 M.J. 274.

Before challenging LTC [REDACTED] for cause, the defense challenged two other members. In ruling on each of them, the military judge again emphasized his recognition of the liberal grant mandate. He and the parties then turned to LTC [REDACTED]

DC: So, Lieutenant Colonel [REDACTED] articulated on the record that—what sounds like, he and his sergeant major are basically on a[n] anti-sex assault crusade within his own his own battalion having what he thinks is an unusual—well certainly more sexual assault incidents in his battalion than he ever expected to have to deal with. And in dealing with those he said that the—listening to the evidence in those revealed an unsavory side of his battalion that he didn't expect before becoming battalion commander. He also went on to describe his personal connection to the victims in those cases and his, you know, basically the fact that he dreads having to go back to those victims and tell them that they either—law enforcement decided that there wasn't probable cause or that—the case that he's recommended for court-martial, that those courts-martial found the accused not guilty.

MJ: Well, I don't think he's gotten there yet, right? I think he said he hadn't had that situation yet.

DC: He hasn't, sir, but he did he did say that he's not looking forward to it. And in this particular case he may be asked to inflict that exact—that exact thing on one of his peers who preferred this case. So, he's too close to the fire in this particular case, sir. He's got way [too] much invested in stamping out sexual assault within his own battalion, and he's going to feel—there's an implied bias he's going to feel compelled to do what he expects his peers to do when his cases come up for trial.

MJ: Government?

ATC: Your Honor, the government disagrees with that characterization. What is it that he said—in fact he did say he could wall off all that other—what he described as scar tissue regarding what he's dealt with in the past. And there's two actual key things that he said that I think are very telling regarding his bias. The first one is, he told this court that if sat on this panel and he found this accused not guilty, he would feel comfortable going back to his unit and saying, you know, even with us having this sexual assault problem, tell them, "Yes, I sat on this panel, I saw the evidence, and I still voted to acquit this person who has been charged with these same things."² And the second thing that he said that's very telling is like his—his internal thought process. Even with all of the scar tissue and with all of the things that he's had to do and with having talked to these current victims, he felt very comfortable with himself sitting on the panel, if he was sitting that seat over there, Your Honor. And so with that the government believes implied bias has not been reached in this case.

MJ: Yeah, and I think—I took his—to me, I took his testimony about telling victims was, him telling his own Soldiers; the pain of having to tell his Soldiers who work for him, "Hey, I'm sorry Sergeant or Captain," whoever the victims are, "I'm sorry that your case isn't going forward," because I took that as, "Hey, I care about my Soldiers," and I thought he was pretty clear that it wasn't

² LTC ■ did not say he would reveal his vote to his unit; this is good, as panel members vote by secret ballot. R.C.M. 921(c)(1).

so much that he thought, "Well, justice isn't being done," or, "The system[']s all screwed up," or, "Every rapist should be convicted." For him it was more of a personal thing, having to tell his Soldier, who he worked for, who he's responsible for caring for that, "Hey, I'm sorry, but your case isn't going to go forward." And I don't disagree with him. I think any commander, having to tell their Soldier, "Look, I know you feel something horrible has been done to you, but we're not going to—nobody's going to do anything. I'm sorry." I don't think that's such an abnormal reaction to say—any commander's going to say, "Yeah, that's not really a conversation I'm looking forward to." It wasn't in line—he wasn't saying, "I have to let [my] Soldier[']s know another rapist is walking free. The system's all jacked up." It was more a personal level of him relating to his Soldiers.

And I actually thought—I watched him testify and I thought he was more honest than most potential jurors. He easily could have said, "Yeah, I can wall that off. Not a problem at all. Not a big deal." But he said, "Hey look, I'm human. It affects me." And I credit him for that and I thought he was sincere and I thought he was honest and I thought he said, "Yes, I can do it." And I pressed him on it. I said, "Look I'm telling you, it's not your job to be a juror. It's your job to be a fair juror." And I pressed him. I said, "So if you think you can't be fair, then that's your job." He said he understood that, he acknowledged that, and he said, "At the end of the day, I can wall it off. I can judge this case on the facts."

So I don't think he's—there's any actual bias there and I don't think there's an implied bias. I think someone's sitting in the audience, the general public, would not look at this case and say, "Oh my gosh, I can't believe they left that guy on that panel, a guy who said 'I can be fair and wall it off,' a guy who said, 'When my Soldiers have issues, I don't like telling them bad news.'" I mean, I understand why the defense doesn't want him, but I don't think at the end of the day you've met the burden or I can make a finding that there's actual or implied bias. So, but do you want to make some further record on that?

DC: Just one more point, Your Honor.

MJ: Sure.

DC: I mean, Colonel [REDACTED] expressed the burden that he feels all in terms of what will happen if the accused is acquitted. So he never talks about the burden of finding someone guilty, he talks about the burden of acquitting people and that is hard for him and it shouldn't be. It should be no harder for a panel member to acquit somebody as to find them guilty, the burden should be the same.

MJ: That's where I disagree with you. I don't think he ever said, "Oh, it's such a huge burden when these guys get acquitted." I think he said, "The burden is interacting with my Soldiers and telling them that either your case isn't going to go forward or you're not going to get justice." I never heard him say, "Yes, it's such a burden when these guys get acquitted. It's such a burden, it's terrible."

DC: He said, "It doesn't feel good. It comes with a burden that someone's been hurt."

MJ: Right. That's his Soldier, him telling his Soldier, "You feel like you've been hurt," because he even had that conversation. He said, "Look, I don't really know the facts, but I've interacted with this Soldier two or three times and in her mind she clearly feels she's been wronged and now I'm the one who has to tell her, I'm sorry, but the case isn't going to go forward." And he's—

DC: Because of her—I'm sorry, Your Honor, I didn't mean to interrupt you.

MJ: No, go ahead.

DC: Because of her emotional response to him, he was compelled by her emotional response. We're going to have victims—alleged victims come in here and they're going to put off an emotional response, and he's going to feel an obligation—

MJ: But they're not his Soldiers. If this was his Soldier—if his Soldier was the alleged victim then I'd say,

yeah, of course, he's gone, but they're not his Soldiers, that's why—that's how I think we see it different. I didn't see him say it as it's just a burden of victims who don't get justice, his burden is telling his Soldier[]s that their cases aren't going forward. I mean, again, I don't think it's such an irrational—I mean—what would you want him to say? "Yes, it makes me feel good to tell my Soldiers who think they've been wronged that they're not going to get any justice." I mean that—I don't really know what to say, you know.

DC: Your Honor, I think what he says is justice has been done in this case, whether that's an acquittal or it's a conviction, justice has been done. But to say that whenever there's an acquittal there is—justice has failed. That's the problem—

MJ: He didn't say that. He never said that though. He never came out and said, "In every acquittal justice has failed. The system fails when people get acquitted." He didn't say that. He just said, "My—" he—I mean that's why we just see it different. I saw it as him talking about him related to his Soldiers on a one-on-one basis and saying, "I feel bad because they feel like they didn't get justice and now I have to break the news to them or I have to deal with them." But I never got him to say—I never heard him say, "it's just—it's a travesty of justice anytime there's a victim and there's an acquittal." I don't—I mean, you didn't ask him that and he didn't say that. He said—his problem was when his Soldiers—having to deal with his Soldiers who feel like they've been harmed and aren't getting justice. And again, I don't—I don't fault him for that. I think that's what a normal commander would feel when they have to tell their Soldiers, "I'm sorry, but you're not going to get justice." So—but I mean, you've made your record. Yeah. If I got it wrong so be it. ACCA has no problem telling me I got it wrong. So—but, as I sit here now based on everything before me including my observations of his demeanor, the way he testified, the way he engaged, the way he answered questions, I thought he honestly answered the questions and I thought he made it clear that he can be a fair and impartial juror. So—all right.

So I'll deny the challenge both on the actual and implied bias theories as to Colonel [REDACTED]

LAW AND DISCUSSION

"[A]n accused has a *constitutional right*, as well as a regulatory right, to a fair and impartial panel." *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005) (internal quotations and citations omitted) (emphasis added). Our standard of review for causal challenges is less deferential than abuse of discretion, yet more deferential than de novo. *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020) (citation omitted). We offer more deference to military judges when they correctly determine the facts, display an accurate understanding of the relevant law, and, in the event of denying a causal challenge, place on the record their full analysis supporting denial. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

There is a difference between actual bias and implied bias. Actual bias is largely a subjective, fact-based question: does the prospective member hold subjective views or have experiences that would actually impair their ability to be fair and impartial? See *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). On the other hand, implied bias is an objective question of law: despite a prospective member's sincere and credible disclaimer of actual bias, would an impartial observer have a substantial question about their fairness and impartiality? See *United States v. Rogers*, 75 M.J. 270, 271 (C.A.A.F. 2016) (citation omitted).

Military judges must err on the side of liberally granting defense causal challenges. *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). This liberal grant mandate *is not an automatic* grant mandate; otherwise, a causal challenge would effectively be little different from a peremptory. Nonetheless, in close cases, the liberal grant mandate applies. *Id.*

In this case, the military judge's factual findings were—while perhaps not clearly erroneous—not exactly correct. Between the military judge and trial counsel, the concept of "walling off" experiences as a battalion commander was attributed to LTC [REDACTED] multiple times. However, LTC [REDACTED] never used that phrase; rather, it was incorporated into the military judge's and trial counsel's voir dire questions. The military judge quoted LTC [REDACTED] as saying, "At the end of the day, I can wall it off. I can judge this case on the facts." However, LTC [REDACTED] did not expressly say this.

With the military judge's apparent agreement,³ trial counsel emphasized two points in opposition to the causal challenge. First, trial counsel characterized LTC ■ as saying that, in the event of acquittal, he would be comfortable returning to his unit and reporting that he had voted for a finding of not guilty. Second, trial counsel urged the military judge to consider LTC ■ self-assessment that, if he were in appellant's position, he would feel comfortable with himself as a panel member. Trial counsel's first point was incorrect for two reasons. First, LTC ■ seemed to perhaps equivocate when asked if he would be comfortable delivering news of an acquittal, saying: "Yes, I would *probably* feel comfortable with that." Second, and we hasten to add, lest one perceive him as unable to preserve the secrecy of panel deliberations and voting, LTC ■ did not indicate that he would reveal his vote to his unit—nor should he have. Trial counsel's second point was, if not incorrect, at least misplaced on the question of implied bias—the relevant point of view is that of the public, not a panel member's self-assessment.

The military judge's rationale for denying the causal challenge was firmly grounded in actual bias principles. He concluded LTC ■ could set aside his experiences as a commander and judge appellant's case based on what he heard and saw in court. And, the military judge said LTC ■ discomfort in telling a subordinate, an alleged victim, that her case would not be prosecuted would not impair his ability to impartially serve on the panel. On the other hand, the military judge placed little implied bias analysis on the record to support his conclusion that a member of the public would not question LTC ■ suitability. Finally, unlike his decisions on previous causal challenges, the military judge did not restate the liberal grant mandate.

We agree that LTC ■ was not actually biased toward finding appellant guilty. While we note that some of his responses were arguably equivocal, we place significant weight on the military judge's assessment that LTC ■ was credible and forthcoming. Reviewing a cold appellate record, we are ill-positioned to assess LTC ■'s demeanor as he answered voir dire questions. Were LTC ■'s "probably[,] " and "it's difficult[,] " answers actually indicators of equivocation? Was his commitment to "try to be objective" sufficient? For purposes of actual bias, we do not disturb the military judge's denial of the challenge. However, viewed in totality and in assessing implied bias, we find LTC ■'s voir dire answers "less than resounding." *United States v. Daulton*, 45 M.J. 212, 218 (C.A.A.F. 1996).

³ The military judge responded to trial counsel's argument, "Yeah. . . .", and he continued with his own characterization of LTC ■'s voir dire answers. We interpret the military judge's affirmative response as one of agreement; in contrast, he clearly expressed his disagreement multiple times with the defense's characterization of LTC ■'s words.

“[I]mplied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal.” *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008). Lieutenant Colonel ■ did not expressly convey, nor was he asked, how he felt about the prospect of creating a “burden” for someone else, commander or not, in the event appellant was found not guilty. Perhaps he did not care, but his attitude about such a prospect is at least *unclear and unknown*. He made it very clear that, in the event an acquittal resulted from a case involving an alleged victim in his unit, he would bear a burden in delivering news of that result. And, when he indicated a tension between due process considerations, including the burden of proof beyond a reasonable doubt, and an alleged victim’s sincere belief in their complaint, he did not describe that phenomenon as one that could only occur in his unit. Indeed, to the degree there is tension between these concepts, it exists in any judicial proceedings where a factfinder may consider proof of an alleged victim’s complaint insufficient. Whether acquittals created a burden for him or someone else, LTC ■ did view them as burdensome. Whether they materialized as a result of judicial proceedings in LTC ■’s unit or elsewhere, was a distinction without a difference.

Lieutenant Colonel ■ also described himself as directly involved in changing the culture in his battalion regarding sexual harassment and sexual assault. While he did not explicitly detail his methods in bringing about this culture change, we gather an overall theme from his *voir dire*: support alleged victims. This theme is consistent with the Army’s institutional-level approach, and nothing in this decision should be interpreted as criticizing it. We simply note that Army senior leaders require commanders and other leaders to be personally and decisively engaged in preventing and responding to allegations of sexual harassment and sexual assault as a fundamental part of effective command and leadership. Mindful of this institutional backdrop, military justice practitioners should be prepared to reliably assess, discuss, and decide whether those same commanders and leaders are actually or impliedly biased when sitting in judgment of cases involving alleged sexual assault or sexual harassment. Prospective panel members who cannot table their obligation to support the Army’s strategic objectives in favor of their controlling duty to be fair and impartial cannot serve, because they are actually biased. Yet even when a member convinces a military judge that they *can, as a matter of fact*, fairly and impartially decide the case, it is a separate question whether they *should, as a matter of law*—especially where the public perceives obedience to orders and commands as a defining feature of military service. As a result, when a close call materializes regarding a panel member’s suitability, defense causal challenges must be liberally granted.

The circumstances here created a close call: LTC ■’s direct command involvement in preventing and responding to sexual harassment and sexual assault; the contrast he indicated between due process and supporting alleged victims; his view that acquittals are burdensome events; and, his arguably equivocal responses

during voir dire all weighed against the objective perception of impartiality. Considering these factors and the military judge's brief analysis of implied bias regarding LTC [REDACTED] we provide little more deference than de novo review and conclude it was error to deny the defense's causal challenge.

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing may be ordered by the same or different convening authority.

Senior Judge BROOKHART and Senior Judge BURTON concur.

FOR THE COURT:

[REDACTED]

JOHN P. TAITT
Chief Deputy Clerk of Court