UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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

UNITED STATES, Appellee
v.
Private E2 JOSHUA A. HERNANDEZ
United States Army, Appellant

ARMY 20200653

Headquarters, 25th Infantry Division
Mark A. Bridges, Military Judge
Colonel Marvin J. McBurrows, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Joseph A. Seaton, Jr., JA (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Dustin L. Morgan, JA (on brief).

29 August 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Senior Judge:

Appellant asserts that the military judge abused his discretion by denying the defense challenge for cause of a panel member who believed that consent to sexual activity must be verbal.[2] We agree, and hold that the military judge abused his

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

[2] We have fully and fairly considered appellant's other assignments of error and find that they warrant neither discussion nor relief with the exception of the assigned error of "[w]hether the military judge abused his discretion by denying the defense request for an additional instruction." Since we find that the military judge erred in failing to grant appellant's causal challenge against a panel member, we need not

(continued . . .)

discretion in analyzing the panel member's belief that consent must be verbal for implied bias and failing to apply the liberal grant mandate.

BACKGROUND

A. Appellant's Friendship and Sexual Assault of Victim

Appellant and the victim, Private First Class (PFC) [redacted] met through mutual friends in approximately April of 2019. Over the next eighteen months the two became close, frequently spending time together and growing in physical and verbal intimacy. They would refer to each other as "babe" or "baby" and expressed "I love you" to each other both verbally and via text message. They expressed their closeness physically by holding hands and giving each other full body massages. The appellant made it very clear to the victim that he was interested in him, both romantically and sexually. Appellant even referred to the victim as his husband. Prior to the charged offenses, appellant engaged in two unsolicited incidents of groping the victim's penis. In one instance, the victim verbally expressed his displeasure by telling appellant to stop. Despite these two incidents of unwanted touching, the close friendship continued as normal. At the time of the assault, PV2 JH was thirty-one years old, and the victim was nineteen years old.

On the day leading up the assault, the victim had a long, tiring day at the installation medical center and was mentally and physically exhausted. When he returned to his barracks room, the victim realized that he was locked out of his room. He contacted his roommate for assistance, but his roommate was at a party and sent a mutual friend to pick him up and bring him to the party. The victim socialized for a short time at the party and then fell asleep on an air mattress in the living room. A short while later, a mutual female friend joined the victim on the air mattress and fell asleep next to him without waking the victim.

In the early hours of the following morning, when the other individuals at the party had shifted to another room in the house, appellant joined victim and their mutual friend on the air mattress. The appellant took off the victim's shoes and gave him a foot massage for approximately fifteen to twenty minutes, getting up and leaving periodically only to come back and continue massaging. By all accounts the victim remained asleep during the foot massage, but could have moved around some, suggesting—in the eyes of the appellant—that he was enjoying the massage. The appellant then decided to "take his shot" and pulled down the victim's pants,

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(. . . continued)
decide whether the military judge erred in denying appellant's request for an additional instruction.

exposing his erect penis, which appellant proceeded to grab and rub with his hand. The appellant then proceeded to put his mouth on the victim's erect penis and perform oral sex. Appellant admitted to performing oral sex on the victim for several minutes. The victim testified he drifted in and out of sleep three times during the oral sex. The victim described hearing and feeling odd sounds and sensations, akin to a dog drinking water or having night sweats. The victim testified that he initially thought he was dreaming but then realized what he was experiencing was not a dream and did not know how to respond to appellant's actions. The victim testified that once he realized what was happening, the oral sex lasted another ten seconds before being interrupted.

As the victim was realizing what was happening, another soldier at the party came down the stairs and saw appellant performing oral sex on the victim and jumped on the air mattress, interrupting the fellatio. The appellant released the victim's penis which slid back into the victim's pants. This interruption led to a confrontation between the soldier who jumped on the air mattress and appellant, which escalated in volume to the point where other friends came downstairs in order to investigate. The victim testified that he was still trying to process what happened and rolled over to go back to sleep in the hope that it was just a dream. The victim's friends noticed that he looked dazed and groggy, like he had just woken up.

Several hours after the assault, the victim used his roommate's car to drive to the beach for the day. According to the victim, he requested permission to use the car, which was a regular and consensual occurrence. However, the roommate claimed that the victim took the car without permission. The roommate sent multiple texts to the friend group's group chat that day asking where the car was, and threatening to report the car as stolen to the military police. The victim, who had turned his phone off, responded later that day that he had the car and would be returning it. When the victim arrived back to the barracks, the military police were already present. When both the roommate and the appellant approached the victim with raised voices, the victim responded to appellant, "well you molested me last night."

In the several months following the assault, appellant and the victim continued to interact. Many interactions centered around their close-knit, shared friend group. There were independent one-on-one interactions, which had varied responses. At times, the victim sought out interactions with the appellant, such as inviting the appellant to help him rearrange furniture in his barracks room. There were also occasions in which appellant and the victim texted each other and referred to each other by pet names and expressed "I love you" to one another. At other times, the victim displayed strong negative feelings towards the appellant, threatening to press charges or report appellant for breaching the military protective order prohibiting appellant from engaging in any contact with the victim.

B. Military Judge's Denial of Appellant's Challenge of a Panel Member

During voir dire, trial defense counsel inquired as to whether panel members believed that consent to sexual intercourse required verbal consent. Two panel members expressed a personal belief that consent to sexual intercourse must be expressed verbally. The military judge denied defense counsel's challenge for cause of each of these panel members. The trial defense counsel exercised their peremptory challenge on one of those members, LTC [redacted] and he was excused from serving on the panel. However, one of those panel members, SFC [redacted] remained on the panel.

Sergeant First Class [redacted] expressed a strongly held belief that consent to sexual intercourse must be expressed verbally. When asked by the defense counsel, "[d]o you think consent to sexual intercourse has to be verbal?" SFC [redacted] responded, "[y]es." Defense counsel then quoted the definition of consent that the military judge would later use in instructions, and then asked: "[s]o if you saw the words 'consent is a freely given agreement,' you would think that agreement has to be a verbal agreement?" SFC [redacted] responded with: "[i]t has to be verbal without intoxication." When it came time for the MJ to question SFC [redacted] he attempted to rehabilitate the member, asking, "[i]f my definition of consent differs from you[r] own personal beliefs, would you be able to follow my definition?" to which SFC [redacted] replied, "[y]es, sir." During their turn to question SFC [redacted] the government revisited SFC [redacted] understanding of consent, again attempting to rehabilitate the panel member, asking: "If someone else were to indicate with a thumbs up or a nod, would that be interpreted as consent for you?" SFC [redacted] replied, "I would have to hear it, personally." And when asked one final time if it was his personal view that consent must be verbal, SFC [redacted] responded, "[a] thumbs up or a nod could be a miscommunication between the two, so it's best to clear it up."

Trial defense counsel raised a causal challenge against SFC [redacted] on the grounds that his wife served as a victim advocate in her role as a Sexual Assault Response Coordinator (SARC)[3] and due to his belief that consent to sexual intercourse requires verbal consent. The military judge denied trial defense counsel's challenge for cause of SFC [redacted] In doing so, the military judge mentioned the liberal grant mandate but asserted that the panel member did not meet the standard for actual or implied bias. His analysis thereof included the standards of actual bias and how

[3] The SARC is an individual that "serves as the single point of contact for coordinating appropriate and responsive care for sexual assault victims." Dep't of Def. Dir. 6495.01, Sexual Assault Prevention and Response (SAPR) Program, para. 4.e.(1) (23 Jan. 2012) (Change 5, 10 Nov. 2021).

they apply, along with a recitation of the definition of implied bias, without application. Specifically, the MJ said:

> So when it comes to challenges for cause, I analyze under both actual and implied bias. And the test for actual bias is whether the member's bias will not yield to the evidence presented and the judge's instructions. That's a question of fact. And when it comes to implied bias, implied bias exists when most people in the same position as the court member would be prejudiced. In making that determination, I look at the totality of the circumstances. 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. And that, of course, is knowing all the facts as they exist. I'm also aware of the fact that the appellate courts have required me to liberally grant challenges for cause made by the defense. But even considering all those standards, I don't believe a challenge for cause against Sergeant [redacted] should be granted. There certainly is no actual bias. It's been demonstrated in this case. The fact that Sergeant [redacted] has a personal belief that someone should get verbal consent to sex and that alcohol should not be involved when someone is consenting to sex, doesn't mean he can't apply the instructions that I'm going to give him in this case. And I am going to instruct him on what consent means in this case under the law. And Sergeant [redacted] indicated to me that he absolutely could put aside his personal beliefs and apply the law that I instruct him on, and there's no reason to think otherwise base[d] upon his answers to my questions. The fact that his wife is a victim advocate also does not give me any concern. And that's because he says he never speaks to he[r] about her duties or what it is she does. And so again, anybody who understands that would understand that there's no bias whatsoever with him being on this particular court-martial. So again, in light of all that, I find that there is no basis, again, either actual or implied or even under the liberal grant mandate for me to grant the challenge against Sergeant [redacted] So the challenge for Sergeant [redacted] is denied.

LAW AND DISCUSSION

A. Standard of Review for Implied Bias Challenges

We review rulings on challenges for implied bias "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (quoting *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)) (cleaned up). This is because "cases of implied bias are based upon an objective test and therefore the military judge is given less deference in such cases." *Peters, 74 M.J.* at 34 (cleaned up). Although a military judge is not obligated to place his or her implied bias analysis on the record, doing so "warrants increased deference from appellate courts." *Dockery,* 76 M.J. at 96 (citing *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007)). Conversely, one who fails to place sufficient reasoning on the record regarding his or her implied bias ruling is given less deference, and "the analysis logically moves more towards a de novo standard of review." *Dockery*, 76 M.J. at 96 (quoting *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016)).

B. Implied Bias and the Liberal Grant Mandate

A service-member has a constitutional right to a fair and impartial panel. *United States v. Wiesen,* 56 M.J. 172, 174 (C.A.A.F. 2001) (citation omitted). Rule for Courts-Martial 912(f)(1)(N) provides for the excusal of a member for cause "whenever it appears that 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." *United States v. Commisso*, 76 M.J. 315, 323 (C.A.A.F. 2017) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)) (alteration in original). "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)). "'Substantial doubt' exists where the presence of a member on the panel would cause the public to think 'that the accused received something less than a court of fair, impartial members,' injuring the public's perception of the fairness of the military justice system." *Commisso, 76 M.J. at 323* (cleaned up).

A causal challenge addresses disqualification based on either actual bias, implied bias, or both, and is evaluated based on the "totality of the circumstances." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). Implied bias is "'bias conclusively presumed as [a] matter of law.'" *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020) (quoting *United States v. Wood*, 299 U.S. 123, 133 (1936)). 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) (citation omitted). 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.* (cleaned up).

Reversal will "indeed be rare" when a military judge "considers a challenge based on implied bias, recognizes his [or her] duty to liberally grant defense challenges, and places his [or her] reasoning on the record." *Clay*, 64 M.J. at 277. On the other hand, where the military judge fails to apply the liberal grant mandate and denies an implied bias challenge in a "close case," such error prejudices an appellant's substantial right to an impartial trial and mandates reversal under Article 59(a), UCMJ, without any requirement for the accused to demonstrate prejudice. *Id.* at 278 (holding that the military judge abused his discretion by "not applying the liberal grant mandate" to the challenge, with no requirement of a showing of prejudice). Our superior court has repeatedly declined to apply a prejudice test to the inclusion of biased members, whether the bias was actual or implied. *See United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005); *see also United States v. Peters*, 74 M.J. 231 (C.A.A.F. 2015).

C. Discussion

Appellant asserts that the military judge abused his discretion by denying the defense challenge for cause of SFC [redacted] who believed that consent to sexual activity has to be verbal. For the reasons set forth below, we agree.

On the spectrum between abuse of discretion and de novo review, the military judge's decision to deny the defense causal challenge against SFC [redacted] in this case is reviewed more towards de novo as to the issue of implied bias. Although the military judge defines implied bias in his ruling on the challenge to SFC [redacted] it is what *Dockery* warns against: "a mere incantation of the legal test for implied bias without analysis . . . ." 76 M.J. at 96. The military judge spent much of his time discussing actual bias, to include thoroughly analyzing SFC [redacted] history, occupation, and wife's position as a SARC. However, after defining implied bias, the military judge made no mention of it, other than a general statement that SFC [redacted] lacked any bias. In other words, the military judge's analysis essentially pertained to *actual* bias, and not implied bias.

The implied bias test is an objective assessment of whether or not a member of the public would have "substantial doubt as to legality, fairness, and impartiality" with regard to the proceedings, if the panel member remained on the case. *Commisso*, 76 M.J. at 323 (citation omitted). We first consider the matter of SFC [redacted] spouse being a victim advocate under the implied bias analysis. Just as there is

"no per se rule that a panel member must be excused" when they had been the victim of a crime similar to the one being tried, there is also no per se rule that a panel member whose spouse is a victim advocate must be removed from sexual assault cases. *United States v. Castillo*, 74 M.J. 39, 42 (C.A.A.F. 2015). In this case, given that SFC [redacted] and his wife rarely discussed her work with, and on behalf of victims, the public would have no reason to doubt the legality, fairness, or impartiality of the proceedings. However, the same is not true as to SFC [redacted]s strong personal belief that consent to sexual intercourse must be verbal.

We hold that the military judge abused his discretion in evaluating SFC [redacted] strong personal belief that consent to sexual intercourse must be verbal under the implied bias analysis. More specifically, we find that the military judge failed to properly apply the liberal grant mandate under the totality of the circumstances of this case. Sergeant First Class [redacted] expressed multiple times, to both the government and to the trial defense counsel, that he believed consent could only be given verbally. When given an example of non-verbal cues indicating consent, a thumbs-up or a head nod, SFC [redacted] replied that those signals could be misinterpreted and it would be "best to clear it up" verbally. If a panel member has a personal belief about an action which is not in strict alignment with the law, but it is clear they can and will set aside their personal views of that action in favor of what the law says for the purposes of the trial, their beliefs "are not per se disqualifying". *United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008) (finding that the strongly held moral and religious views of a panel member regarding sodomy and pornography did not bar that panel member from sitting, because most members have strong feelings about all sorts of lawful and unlawful conduct, and what matters is their ability to set aside their own feelings and beliefs). However, SFC [redacted] beliefs were not centered around the accused's actions, rather, they centered on the legality of the accused's actions. Where in *Elfayoumi* the panel member had strong feelings about sodomy and pornography in general, here, SFC [redacted] had a strong misunderstanding of the law surrounding consent, which was left uncorrected during both the rehabilitation attempt by the military judge during voir dire and the court's final panel instructions.[4] Given the totality of the circumstances of the voir dire of SFC [redacted] we find that an objective member of the public would have a substantial doubt as to the legality, fairness, and impartiality of the proceedings in this case.

[4] While we need not reach the assignment of error related to the panel instructions in this case, to the extent it is relevant to the panel member challenge we note that appellant asked the military judge to instruct the panel at the close of the case that consent "does not have to be verbal," and the military judge declined to give that instruction.

Finally, as appellant appropriately asserted before this court, the liberal grant mandate is not a suggestion nor a preference, it is just that, a mandate. Under this mandate, even when a challenge against a panel member is a "close call" then the challenge must be granted. The government has not provided this court with a single case from any military appellate court—and we are aware of none—where a panel member who repeatedly stated in voir dire a belief that consent must be verbal then sat on the panel and the conviction was affirmed. We are also not aware of any case where an appellate court *reversed* in such a case. There is an obvious likely rationale for this lack of appellate case law; when panel members repeatedly indicate in sex assault cases that consent must be verbal, they are struck. *See, e.g., United States v. Eller*, No. 2013-15, 2013 CCA LEXIS 512, at *1-3 (A.F. Ct. Crim. App. 21 Jun. 2013) (unpublished) (noting with approval that the military judge granted a challenge for cause, not because of the panel member's knowledge of the President's comments related to sexual assault cases—as the government alleged—but rather because the panel member "had exhibited an implied bias in part due to her comments regarding the specificity of permission [e.g., verbal consent,] that might be required in order for her to find that sexual activity between two people was consensual"). Even under a deferential view of the military judge's ruling here, the question of whether SFC [redacted] should sit on this panel was at least "close" under any conceptualization of the issue. Therefore, we hold that the military judge abused his discretion by failing to follow the liberal grant mandate. *See Clay*, 64 M.J. at 278.

CONCLUSION

For the foregoing reasons, the findings of guilty and the sentence are SET ASIDE. A rehearing may be ordered by the same or a different convening authority.

Judge EWING and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court