UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant ANTON M. GANTT
United States Air Force

ACM 34387

29 January 2002

Sentence adjudged 27 October 2000 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Steven A. Hatfield.

Approved sentence: Bad-conduct discharge and reduction to E-4.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel William B. Smith, and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

ROBERTS, Judge:

The appellant was convicted, contrary to his pleas, of forgery by making a false writing with intent to defraud, in violation of Article 123, UCMJ, 10 U.S.C. § 923. The approved sentence consists of a bad-conduct discharge and reduction to E-4. The appellant avers the following errors on appeal: (1) The trial judge erred when he admitted handwriting "standards" consisting of the appellant's responses to adverse actions; (2) Trial counsel's exercise of the peremptory challenge against an African-American court member violated the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986); (3) Trial counsel's sentencing argument blurred the distinction between a punitive discharge and an administrative discharge; and (4) The appellant's sentence was inappropriately severe. We disagree and affirm.

HANDWRITING STANDARDS

The appellant was charged with various offenses involving jewelry that was discovered missing from an upscale jewelry store where he worked as a security guard for a private security company. Court members convicted the appellant of forgery by writing false information on a receipt from the jewelry store. Evidence relied upon by the government included handwriting samples known to be the appellant's. These known samples included the following: an Air Force Form 174, Record of Individual Counseling, with the appellant's hand-written response to a counseling for using profanity in the presence of a senior noncommissioned officer; a three-page Statement of Financial Status, to which the appellant did not object at trial; and a handwritten letter to his commander in response to imposition of nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815. The forensic documents examiner compared these documents with the jewelry receipt.

The trial judge admitted the counseling form and handwritten letter for a limited purpose and instructed the court members,

> You may consider these exhibits only for the limited purpose of evaluating the basis of the expert's opinion, determining the weight to give the expert's opinion, and in making your own comparison with questioned documents, but for no other purpose whatsoever. Specifically, you may not consider the information in the handwriting as evidence that any formal disciplinary action was ever completed against the [appellant].

We review a trial judge's rulings on the admission or exclusion of evidence, for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (1995). We find no abuse of discretion with the trial judge's decision to admit these documents. Before admitting the evidence, the trial judge conducted a proper analysis under Mil. R. Evid. 403. He instructed the court members on the limited purposes for which they could consider the evidence. There in no evidence in the record of trial that the court members were confused about the trial judge's limiting instruction, or that they failed to follow it. Absent evidence to the contrary, we may presume that court members follow a trial judge's instructions. *United States v. Taylor*, 53 M.J. 195, 198 (2000).

PEREMPTORY CHALLENGE

The appellant next claims that trial counsel's exercise of the government's peremptory challenge against the only black member of the panel was a pretext for racial discrimination and violated the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986). The appellant requested that enlisted members sit on his court-martial panel. During the

initial voir dire and challenge process, the challenges resulted in less than the required one-third number of enlisted court members. Article 25, UCMJ, 10 U.S.C. §825. The convening authority appointed additional enlisted members and, during the second voir dire and challenge process, trial counsel exercised a peremptory challenge against the only black enlisted court member. This member had been appointed to the court-martial in the second group of court members. Trial defense counsel immediately requested that trial counsel articulate a race-neutral basis for the challenge, to which trial counsel replied:

> He is, and would be the most junior member of the panel. Of the three individuals we have just had in front of us, he has the least experience as a supervisor in the Air Force. He is the only one who has not completed his Community College of the Air Force Degree and he also has the least amount of experience in dealing with matters such as discipline, counselings, involvement in the discipline, or the military justice process.

The trial judge then held that trial counsel had articulated a racially neutral basis for exercising the peremptory challenge, and granted the challenge.

"Neither the prosecutor nor the defense may engage in purposeful discrimination on the basis of race or gender in the exercise of a peremptory challenge." *United States v. Chaney*, 53 M.J. 383, 384 (2000) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989); *United States v. Witham*, 47 M.J. 297 (1997)).

> When the defense objects to a government peremptory challenge against a cognizable racial group of which the accused is a member, the trial counsel must articulate a reason for the challenge that is race-neutral. The [trial] judge must review the record and weigh the trial counsel's credibility. The judge must then make a factual finding regarding the presence or absence of purposeful discrimination in the peremptory challenge. If the rationale is facially race-neutral, the judge must determine whether the trial counsel's rationale is merely a pretext by considering whether the proffer is unreasonable, implausible, or nonsensical. If it is none of these, the judge will sustain the challenge. While the burden of *articulating* a race-neutral rationale shifts to the government upon defense objection, the burden of *establishing* purposeful discrimination rests with the defense.
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> ….
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> We review the [trial] judge's factual determination for an abuse of discretion, which in this context involves the clearly erroneous standard. We give the judge's determination great deference because it is based

> primarily upon his personal evaluation of the trial counsel's credibility. We will not disturb it unless we find it clearly erroneous.

United States v. Burt, 54 M.J. 687, 688-89 (A.F. Ct. Crim. App. 2001) (citations omitted) (emphasis in original), *aff'd*, 54 M.J. 450 (2001).

We find that the trial judge did not abuse his discretion when he held that trial counsel had articulated a racially neutral basis for exercising the peremptory challenge. Those reasons were not unreasonable, implausible or nonsensical, and they satisfied the underlying purpose of *Batson*, *Moore*, and *Tulloch*, 47 M.J. 283 (1997), which is to protect participants in judicial proceedings from racial discrimination.

TRIAL COUNSEL'S SENTENCING ARGUMENT

In effect, the appellant next claims that the trial judge committed plain error by not sua sponte objecting to assistant trial counsel's sentencing argument. The appellant claims that assistant trial counsel's argument improperly blurred the distinction between a punitive discharge and an administrative discharge. The appellant acknowledged on appeal that neither of the appellant's two trial defense counsel objected to assistant trial counsel's argument. "Failure to object to improper argument before the [trial] judge begins to instruct the members on sentencing shall constitute waiver of the objection." *United States v. Jenkins*, 54 M.J. 12, 19 (2000); Rule for Courts-Martial 1001(g). To overcome waiver, appellant must convince us that the argument was error, that the error was plain or obvious, and that the error materially prejudiced his substantial rights. Plain error is error that is clear and obvious, and "materially prejudices the substantial rights of the [appellant]." *United States v. Powell*, 49 M.J. 460, 464-65 (1998). While we may act on plain error, we are required to correct a plain error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). *See also* Article 59(a), UCJM, 10 U.S.C. § 859(a).

We find that the trial judge did not commit plain error when he failed to sua sponte stop assistant trial counsel's argument. In argument, a trial counsel "may strike hard blows, [but trial counsel] is not at liberty to strike foul ones." *United States v. Stargell*, 49 M.J. 92, 93 (1998) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). We further find that assistant trial counsel's argument was neither erroneous nor did it materially prejudiced the appellant's substantial rights. *United States v. Baer*, 53 M.J. 235, 237 (2000). In making this finding, we note that "[t]he lack of defense objection is relevant to a determination of prejudice because the lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment." *United States v. Gilley*, 56 M.J. 113, 123 (2001) (citation omitted).

SENTENCE APPROPRIATENESS

The appellant's final assigned error is that his sentence is inappropriately severe. Article 66(c), UCMJ, 10 U.S.C. § 866(c) requires that we approve only that part of a sentence that we find "should be approved." We evaluate the sentence by giving individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of his service. *United States v. Joyner*, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (citing *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988)). We do not find the appellant's sentence to be inappropriately severe.

CONCLUSION

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court