UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TEDIO ALAMEDA JR.
United States Air Force

ACM 33529 (f rev)

21 July 2003

Sentence adjudged 14 October 1998 by GCM convened at Kadena Air Base, Japan. Military Judge: Kurt D. Schuman.

Approved sentence: Dishonorable discharge, confinement for 18 years, and reduction to E-1.

Appellate Counsel for Appellant: Jack B. Zimmermann, Terri R.Z. Jacobs, Kyle R. Sampson, and Major Jefferson B. Brown.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

A general court-martial consisting of officer and enlisted members tried the appellant at Kadena Air Base, Okinawa, Japan. Contrary to his pleas, the court-martial convicted the appellant of attempted premeditated murder, disobeying the order of his superior commissioned officer, assault consummated by a battery, and communicating a threat, in violation of Articles 80, 90, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 890, 928, 934. The court-martial sentenced the appellant to a dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved a sentence of a dishonorable discharge, confinement for 18 years, and reduction to E-1.

During our initial review of this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c), the appellant asserted two issues: (1) That the military judge abused his discretion by admitting certain evidence and (2) That he erred in failing to instruct sua sponte on voluntary abandonment. This Court ruled that the military judge had erred in admitting certain evidence but that it was harmless under the circumstances, and affirmed in an unpublished decision. *United States v. Alameda*, ACM 33529 (A.F. Ct. Crim. App. 27 Feb 2001).

On appeal to the United States Court of Appeals for the Armed Forces (CAAF), the appellant raised a new issue concerning whether the government had improperly presented evidence and argument on the appellant's pre- and post-apprehension silence. Our superior court found constitutional error. *United States v. Alameda*, 57 M.J. 190, 199 (2002). The CAAF then considered the cumulative effect of the evidentiary error previously found by this Court and the constitutional error. The Court concluded the errors were harmless with regard to the convictions for disobeying an order, assault consummated by a battery, and communicating a threat. *Id.* at 200. The CAAF concluded the errors were not harmless with regard to the conviction for attempted premeditated murder, or the lesser included offenses of attempted unpremeditated murder and attempted voluntary manslaughter. *Id.* The Court then remanded the case to us to determine whether the cumulative effect of the evidentiary error and the constitutional error was harmless with regard to the remaining lesser included offenses of aggravated assault by means or force likely to produce death or grievous bodily harm or assault consummated by a battery, and, if so, whether the evidence is legally and factually sufficient to support such findings. *Id.* at 201. Alternatively, we may order a rehearing on the charge of attempted premeditated murder and the sentence. If we affirm a lesser included offense, we may reassess the sentence or order a rehearing on the sentence. *Id.*

The threshold question for this Court is whether to remand this case for a rehearing on the charge of attempted premeditated murder or continue the constitutional harmless error analysis begun by our superior court. As the Supreme Court observed in *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986):

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States v. Nobles*, 422 U.S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it").

In *United States v. Hasting*, 461 U.S. 499, 509 (1983), the Supreme Court wrote:

> Since *Chapman* [*v. California*, 386 U.S. 18 (1967)], the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, *see, e.g., Brown* [*v. United States*, 411 U.S. 223, 230-232 (1973)]; *Harrington v. California*, 395 U.S. 250 (1969); *Milton v. Wainwright*, 407 U.S. 371 (1972). The goal, as Chief Justice Traynor has noted, is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error." Traynor, supra, at 81.

Indeed, in *Hasting*, the Supreme Court found that the lower court erred in failing to conduct a review for constitutional harmless error. *Hasting*, 461 U.S. at 509. *See also Neder v. United States* 527 U.S. 1, 7 (1999).

Finally, we note that the Uniform Code of Military Justice also includes a "harmless error" rule. Article 59(a), UCMJ, 10 U.S.C. § 859(a) provides: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Consistent with these principles, we conclude it is appropriate for this Court to complete the review for constitutional harmless error as to the lesser included offenses.

We begin with a review of Supreme Court guidance on constitutional harmless error. The Supreme Court first set out the test for constitutional harmless error in 1967 in the *Chapman* case. In determining whether evidence admitted in violation of an appellant's constitutional rights could be harmless, the Court declared, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

In later cases, the Supreme Court further illustrated the scope of this test. In *Harrington*, 395 U.S. at 254, the Court held the *Chapman* test could be satisfied where there was "overwhelming evidence" of guilt. A few years later, in *Schneble v. Florida*, 405 U.S. 427 (1972), the Court examined the harmlessness of the constitutional error "on the basis of 'our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average jury.'" *Id.* at 432 (quoting *Harrington*, 395 U.S. at 254). The Court concluded that the error was harmless because, "the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to [the co-defendant's] admissions been excluded." *Id.* at 432.

In *Rose v. Clark*, 478 U.S. 570 (1986), the Court explained the test for constitutional harmless error in this way: "Where a reviewing court can find that the

record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Id.* at 579. Later in the opinion, the Court expressed the analysis in this manner: "Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?" *Id.* at 582. *See also Hasting*, 461 U.S. at 510-11 ("The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?").

Most recently in *Neder*, the Supreme Court described constitutional harmless error by reiterating the language from *Chapman*, "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24). Later in the opinion, the Court described the analysis this way: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* at 18.

Our superior court has provided guidance on conducting a review for non-constitutional harmless error. Whether an error is harmless is a matter we consider de novo. *United States v. Grijalva*, 55 M.J. 223, 228 (2001). We assess prejudice from erroneously admitted evidence by weighing: 1) The strength of the prosecution's case; 2) The strength of the defense case; 3) The materiality of the evidence at issue; and 4) The quality of the evidence at issue. *United States v. Kerr*, 51 M.J. 401, 405 (1999) (citing *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985)).

We turn to the analysis for the potential cumulative effect of the errors on the lesser included offense of aggravated assault by means or force likely to produce grievous bodily harm. The facts are set out in detail in the previous opinions. We must consider "our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average" panel of court members. *Harrington*, 395 U.S. at 254.

We begin our analysis of the prejudicial impact of the erroneously admitted evidence in light of the evidence properly admitted at trial. We note there was a considerable amount of evidence indicating the long history of domestic violence involving the appellant and his wife. Indeed, our superior court has already affirmed the appellant's convictions for a prior assault on his wife, communicating a threat to kill her, and his violation–on the very date in question–of the order of his commander to stay away from his wife, all of which clearly shows the appellant was present and assaulted his wife. The victim testified the appellant drew from his pocket a previously unopened Hefty plastic garbage bag with yellow drawstrings, attempted to subdue her, and put the trash bag over her head. Her testimony is corroborated by witnesses who heard her excited utterances, and medical testimony that the victim had fresh injuries on her neck.

Significantly, the evidence also showed that a box of new Hefty garbage bags matching that description was found in the trash of the communal bathroom nearest the appellant's dormitory room. Only one bag was missing from the box, and the box bore the appellant's fingerprint. As noted above, the appellant was not at work or at the chaplain's office at the time of the assault, and a witness saw the appellant's van near the victim's quarters at the time of the offenses.

The evidence presented by the defense did little or nothing to diminish the force of the prosecution's evidence. The defense suggestion that the victim fabricated the allegations as an act of spite or revenge was far-fetched and untenable. There is no evidence that she would have known the appellant was not at work (or at the chaplain's office) at the reported time, no way she could have arranged to have his distinctive van parked by her house at the crucial hour, and no way she could have known that an almost-full box of Hefty garbage bags matching her description and bearing the appellant's fingerprint would be found in the bathroom nearest his dorm room during a very narrow time frame. The evidence presented by the defense–that the appellant had a pack of GPC cigarettes when confined, that a sleeping neighbor did not hear any disturbance during the period in question, and that a young girl thought Mrs. Alameda left her home from the porch rather than the window–does nothing to lessen the overwhelming weight of the evidence that the appellant came to the quarters and tried to choke her with his hands and to suffocate her with a trash bag.

When considering the likely impact of the improperly admitted matters, we must consider the evidentiary weight of the evidence. We note the constitutional error was based upon the appellant's lack of a response to the security forces investigator, rather than some affirmative, incriminating evidence. When asked what the appellant's reaction was when he was informed he would be apprehended, the patrolman testified: "He didn't say anything. He didn't do anything. He had a look like [witness stared ahead] and that was it." As the CAAF determined, such testimony is inadmissible. However, silence under these circumstances is ambiguous and only generates the possibility that the members drew an adverse inference. It is not as obviously prejudicial as an illegally obtained confession, *see Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), or the detailed confession of a co-defendant, *see Schneble*, 405 U.S. at 431-32.

We also consider the likely impact on the minds of the court members. The rule against introducing evidence that an accused invoked his constitutional right to silence arose from the concern expressed by the Supreme Court that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann v. United States*, 350 U.S. 422, 426 (1956). *See also Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978). However, the public today may be more willing to accept an accused's assertion of his rights as a neutral fact. As the Supreme Court observed in *Mitchell v. United States*, 526 U.S. 314, 330 (1999):

> It is far from clear that citizens, and jurors, remain today so skeptical of the principle or are often willing to ignore the prohibition against adverse inferences from silence. Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition.

Court members are those the convening authority finds best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. Article 25, UCMJ, 10 U.S.C. § 825. For this reason, courts-martial have long been considered to be "blue-ribbon" panels. *See United States v. Wiesen*, 56 M.J. 172, 180 (2001) (Crawford, C.J., dissenting); *United States v. New*, 55 M.J. 95, 114 (2001) (Effron, J., concurring), *cert. denied*, 534 U.S. 955 (2001); *United States v. Matthews*, 16 M.J. 354, 383 (C.M.A. 1983) (Fletcher, J., concurring). We suspect that few court members–indeed, few citizens of the United States–are unfamiliar with the advisement of rights given upon apprehension, and the protections they afford under the law. It is less likely that members of a "blue-ribbon" panel would misconstrue the import of remaining silent in the face of police apprehension or questioning. This is especially true where, as here, they knew the appellant had a history of involvement in disciplinary actions, which would have given him greater than normal experience in this area.

We also consider the prejudicial impact of this evidence and the prosecutor's argument in light of similar evidence presented to the members. It is helpful to place the improper evidence in perspective with all the evidence in the case. As noted above, when the appellant was first approached by security forces and apprehended, he did not respond. The next day, while being transported by security forces personnel, the appellant voluntarily told his escorts that he was at the chaplain's office during the time of the alleged assault on his wife. The government introduced the appellant's statements in the prosecution's case-in-chief and then relied on witnesses and telephone records to show the appellant had left the chaplain's office by the time of the attack. It appears the evidence of the appellant's silence when first confronted was intended, at least in part, to impeach the appellant's later statement to his escorts.[*] All this evidence was admitted to show that the appellant lied to the escorts about his alibi, indicating his "consciousness of guilt."

The prejudicial effect of the improperly admitted evidence is diminished by the presence of additional, admissible evidence showing the appellant's consciousness of guilt. The appellant's assertion that he was in the chaplain's office at the time of the

* Of course, if the appellant had testified and asserted the alibi defense, the prosecution could have used his post-arrest silence to impeach him. *See Jenkins v. Anderson*, 447 U.S. 231, 237 (1980); *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). However, the appellant did not testify, and so the use of the impeachment evidence was improper.

attack was impeached by the telephone records that place the time of the consultation earlier in the day. The victim's explicit testimony, along with others who corroborated her excited, emotional reaction, showed the appellant committed the attack. Also, a neutral witness identified the appellant's distinctive vehicle at the scene. There was so much other evidence revealing the appellant's lie to his escorts (and thus his consciousness of guilt), that the prejudicial impact of the improperly admitted evidence was substantially reduced. *See Schneble*, 405 U.S. at 432 (improper admission of the confession of a non-testifying co-defendant was harmless where there was other overwhelming evidence of the same matter).

At the same time we must also consider the improperly admitted evidence of the masking tape, utility knife, and latex gloves. Applying the test set out in *Kerr*, 51 M.J. at 405, we are satisfied that this evidence would have had no impact on the members' determination of the appellant's guilt regarding the lesser included offense of aggravated assault by means or force likely to produce death or grievous bodily harm. As discussed above, the government's evidence was overwhelmingly strong, and the defense case was weak. This evidence was relevant to show premeditation and, as argued by the prosecution, intent to kill. However, these are not elements of the remaining offenses of aggravated assault or assault consummated by a battery; therefore, this evidence was not material to the elements of the included offenses. Finally, the quality of the evidence was not so compelling as to require a finding of prejudice. While the purchase of these items could be consistent with premeditated murder, it might also be consistent with a planned housebreaking, or just moving household goods and cleaning house.

We considered the cumulative effect of the erroneous admission into evidence of the appellant's silence when confronted by the investigator, the improper argument, and the military judge's instructions, along with the tape, gloves, and knife. The properly admitted evidence of the appellant's aggravated assault by means or force likely to produce grievous bodily harm was overwhelming. *Harrington*, 395 U.S. at 254. The "minds of an average jury" would not have found the prosecution's proof of this offense significantly less persuasive had the improper evidence been excluded. *Schneble*, 405 U.S. at 432. We are convinced beyond a reasonable doubt that, even absent the errors, the court-martial would have returned a verdict of guilty to aggravated assault by means or force likely to produce grievous bodily harm. *Neder*, 527 U.S. at 18; *Hasting*, 461 U.S. at 510-11. For all these reasons, we conclude the errors were harmless beyond a reasonable doubt as to this lesser included offense.

The evidence was also legally and factually sufficient to prove the lesser included offense of aggravated assault by means or force likely to produce grievous bodily harm, in violation of Article 128(b)(1), UCMJ. The elements of that crime are:

> 1) That on or about 19 May 1998, at or near Kadena Air Base, Okinawa, Japan, the accused attempted to do, offered to do, or did bodily harm to Marla Alameda;

2) That the accused did so with a certain means or force by trying to suffocate her with a plastic bag and choke her with his hands;

3) That the attempt, offer, or bodily harm was done with unlawful force or violence;

4) That the means or force was used in a manner likely to produce death or grievous bodily harm.

It is clear that the appellant tried to suffocate his wife by choking her and by placing a plastic bag over her head, and that he had no legal justification or excuse to do so. There is no indication this was an accident, or that it was intended as a joke. A natural and probable consequence of choking someone or placing a plastic bag over someone's head is death or grievous bodily harm, thus "it may be inferred that the means or force is 'likely' to produce that result." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 54c(4)(a)(ii) (1998 ed.). We also find that the probable consequence of choking Mrs. Alameda and placing a plastic bag over Mrs. Alameda's head under these circumstances would have been her suffocation, clearly a means likely to produce death or grievous bodily harm. *See United States v. Weatherspoon*, 49 M.J. 209, 212 (1998); *United States v. Bygrave*, 46 M.J. 491, 493 (1997). We further find that Mrs. Alameda was placed in reasonable apprehension of death or grievous bodily harm.

For these reasons, we affirm the findings of guilt for the Specification of Charge I for the lesser included offense of aggravated assault by means or force likely to produce death or grievous bodily harm, in violation of Article 128, UCMJ, to wit:

> Specification: In that SENIOR AIRMAN TEDIO ALAMEDA, JR., United States Air Force, 18th Maintenance Squadron, did, at or near Kadena Air Base, Okinawa, Japan, on or about 19 May 1998, commit an assault upon Marla D. Alameda by choking her with his hands and attempting to suffocate her with a plastic bag, a means or force likely to produce death or grievous bodily harm.

Having affirmed findings of guilt to the lesser included offense, we must reassess the sentence or return the case for a rehearing on the sentence. The maximum possible punishment for the offenses of which the appellant now stands convicted is a dishonorable discharge, confinement for 11 years and 6 months, and reduction to E-1. This is substantially less than the original maximum, which included life in prison. However, regardless of the difference in the maximum punishment, the crimes for which the appellant must be sentenced paint a picture very similar to that before the members at trial. The appellant assaulted his wife and threatened to kill her. He was ordered to stay away from his wife, but he violated that order and assaulted her again, this time using

force likely to produce death or grievous bodily harm. The appellant had a long history of similar misconduct, and previous attempts at correcting his misconduct were unsuccessful.

Undoubtedly, the court members found the original charges were quite serious. At least three-fourths of the members concurred in arriving at the original sentence, including 18 years' confinement. We have no doubt they would have found the charges affirmed by this court to be quite serious as well. The appellant's extensive pattern of misconduct, his flouting of military authority, his lack of amenability to discipline, and the risk of death or great physical harm to the victim make the appellant's crimes especially egregious. Reassessing the sentence under the criteria set out in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we find that the appropriate sentence is a dishonorable discharge, confinement for 7 years, and reduction to E-1. The members may well have adjudged a more severe sentence. However, we are convinced beyond a reasonable doubt that this sentence is no greater than the sentence the original court-martial would have imposed, absent the errors discussed above. *United States v. Doss*, 57 M.J. 182, 185 (2002).

The findings, as amended, and the sentence, as reassessed, 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. Reed*, 54 M.J. 37, 41 (2000) and cases cited therein. Accordingly, the findings, as amended, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court