IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Matthew A. ROGERS Electrician's Mate Third Class (E-4) United States Coast Guard, Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 16-0006/CG Crim.App. No. 1391

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE IMPLIED BIAS CHALLENGE AGAINST COMMANDER (CDR) K IN LIGHT OF HER VARIOUS PROFESSIONAL AND PERSONAL EXPERIENCE WITH SEXUAL ASSAULT.

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge, the U.S. Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over Electrician's Mate Third Class (EM3) Matthew A. Rogers' case under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. §866(b)(1)(2012). This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A members panel with enlisted representation, sitting as a general court-martial, convicted EM3 Rogers, contrary to his pleas, of one specification of conspiracy to commit wrongful interference with an adverse administrative proceeding, one specification of making a false official statement, and two specifications of sexual assault in violation of Articles 81, 107, 120, UCMJ, 10 U.S.C. §§ 881, 907, 920 (2012). He was also convicted of five specifications of violating Article 134, UCMJ. 10 U.S.C. § 934 (2012) (J.A. at 215-16.). The members sentenced EM3 Rogers to confinement for ten years, reduction to paygrade E-1, and a bad-conduct discharge.(J.A. at 218.) The convening

authority approved the sentence and, except for the punitive discharge, ordered it executed. (J.A. at 27.)

On July 8, 2015, the lower court set aside the findings of guilt with regards to Specifications 1 and 5 of Charge IV, but affirmed the remaining findings and sentence as approved by the convening authority. (J.A. at 13.) EM3 Rogers petitioned this Court for a grant of review on September 4, 2015. On December 1, 2014, this Court granted review on the specified issue.

Statement of Facts

On August 15, 2012, EM3 Rogers met MC at a bar while he was in Norfolk, Virginia for training. (J.A. at 146-47.) MC left the bar with EM3 Rogers and went to his hotel across the street. (J.A. at 143.) Although witnesses at the bar described MC as highly intoxicated (J.A. at 126, 139), the last person to see them together was a hotel clerk. The clerk testified that they walked into the hotel together laughing, giggling, and flirting as they made their way to an elevator. (J.A. at 139-40.) The clerk agreed that MC looked intoxicated, but noted MC kissing and licking EM3 Rogers on the neck on her own accord. (J.A. at 145.)

While there are inconsistencies in EM3 Rogers' statements about how he met MC, he consistently described what happened next in his hotel room as a consensual sexual encounter with MC actively participating. (J.A. at 156, 160-61.) MC reported

having no recollection from the time she was in the bar up until she woke up the next morning, (J.A. at 170) other than a single memory of seeing a man's stomach in front of her face. (J.A. at 177-78.)

A sexual assault forensic exam revealed physical signs of sexual acts, but no indicators of non-consensual sex. (J.A. at 184-87.)

As EM3 Rogers' case went to trial in July of 2013, the military faced increased pressure to respond to the issue of sexual assault in the ranks. (J.A. at 242-98.) Numerous political leaders and senior officers made public statements calling for the eradication of sexual assault in the military. (Id.) In July of 2012, President Obama publicly stated "I don't want just more speeches or, you know, awareness programs or training, but ultimately folks look the other way. If we find out somebody's engaging in this stuff, they've got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged – period." (J.A. at 242-43.)

Concerned that EM3 Rogers would not receive a fair trial amid such rhetoric, the trial defense team filed a motion to dismiss the charges for unlawful command influence. (J.A. at 222-41.) The military judge denied the motion and granted no remedies. (J.A. at 370-77.)

During voir dire, one of the members – Commander (CDR) K – revealed she was serving as the Atlantic Area Leadership, Diversity, and Inclusion Officer. (J.A. at 55.) Her duties included acting as the sexual assault prevention and response (SAPR) Common Operating Picture Coordinator--the Atlantic Area Commander's "number one person" for writing SAPR operational plans. (J.A. at 55.)

CDR K elaborated that she was very close to the issue of sexual assault for both personal and professional reasons:

> Because of the work I do, I do keep a very close eye on what's going on with the media. I keep a very close eye on what's going on with different cases, some of the major cases that are going on throughout the country. I am concerned that, you know, sometimes people feel--may feel pressured to, you know, either press charges when there isn't sufficient information, or press a higher level of charges when it's not necessarily warranted because they're trying to be extra overly cautious. Nobody wants to be the guy who -- you know, to put something aside and then have the media get upset at them. Hopefully you're going to continue asking me questions. I have very strong feelings about this issue.

(J.A. at 56.) She also described her brother's convictions for multiple sexual assaults against members of her family and "the damage it does to a family when someone is convicted of a sexual assault." (J.A. at 57.)

CDR K further related that as an officer in the Coast Guard, she had direct professional experience with allegations of sexual assault among members of a former command. (J.A. at

60-61). She served as a member in a previous court-martial in which an accused had been found guilty of a sexual assault. (J.A. at 57-58). CDR K related she had done extensive reading on the issue of sexual assault in furtherance of her duties and based on her research she believed about two percent of sexual assault claims were false. (J.A. at 56-58.)

CDR K also stated she strongly believed that a person too intoxicated to remember having given consent to sexual activity could not give legally valid consent. (J.A. at 65-66.) She explained:

> My understanding is, if the person is so drunk that they are legally, you know, that they are intoxicated enough to not be able to give consent, then there is a line that says this person is too intoxicated to give consent. And I think--I believe that--I would be--You'd have to work hard to make me believe that someone was so drunk they can't remember anything about the evening, that they were then also able to give consent. I would have to be--that would have to be proven to me.

(J.A. at 66.)

In response to questioning by the trial counsel, CDR K affirmed she would be able to disregard what she believed about intoxication if the judge instructed her differently. (J.A. at 73.) The defense challenged CDR K for cause on the basis of actual and implied bias; the military judge denied the challenge:

> For [CDR K], I find that there is no actual bias. The member clearly stated her willingness to yield to the evidence and to follow my instruction.
>
> As to implied bias, would there be a substantial doubt as to the fairness or impartiality, I believe that her entire statements, taken in context, would not leave a reasonable member of the public doubt as to the fairness of her impartiality. I listened to her entire answers, also from both counsel. She had every opportunity to say that she would not consider my instruction, especially based on the alcohol consumption. She did not state that.
>
> I believe that she would be a [*sic*] impartial and fair member, so the challenge for cause is denied.

(J.A. at 85.)

The defense utilized its preemptory challenge to excuse another member. (J.A. at 107.) CDR K served as the president of EM3 Rogers' court-martial panel.

The military judge provided no instructions regarding when a person is "incapable of consenting to the sexual acts due to impairment by an intoxicant" beyond the statutory language. (J.A. at 210-11.)

Summary of Argument

The military judge erred in denying the defense challenge for cause against CDR K. Under the totality of circumstances, CDR K's presence on the court-martial panel – especially as the senior member – creates a high risk that the public would not believe EM3 Rogers received a fair trial. This implied bias stems from her professional role in the Coast Guard's efforts to

eliminate sexual assault in a politically charged environment, her family experience with sexual assault, as well as her mistaken beliefs about alcohol and consent. The findings and sentence should be set aside.

Argument

THE MILITARY JUDGE ERRED IN DENYING THE IMPLIED BIAS CHALLENGE AGAINST CDR K IN LIGHT OF HER VARIOUS PROFESSIONAL AND PERSONAL EXPERIENCE WITH SEXUAL ASSAULT.

Standard of Review

A military judge's ruling on an implied bias challenge is reviewed under a standard less deferential than abuse of discretion, but more deferential than de novo review. United States v. Woods, 74 M.J. 238 (C.A.A.F. 2015) (citing United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002).

Discussion

A member's implied bias is tested against the public's perception of fairness. As discussed in United States v. Peters,

> R.C.M. 912(f)(1)(N) sets the basis for an implied bias challenge, which stems from the "historic concerns about the real and perceived potential for command influence" in courts-martial. Unlike the test for actual bias, this Court looks to an objective standard in determining whether implied bias exists. The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel. In reaching a determination of whether there is implied bias, namely, a "perception or appearance of fairness of the military justice system," the totality of the circumstances should be considered.

74 M.J. 31, 34 (C.A.A.F. 2015) (citations omitted).

"[W]hile it will often be possible to 'rehabilitate' a member on a possible question of actual bias, questions regarding the appearance of fairness may nonetheless remain." United States v. Woods, 74 M.J. 238, 243 (C.A.A.F. 2015). Attempts to rehabilitate a member with leading questions are not always effective. United States v. Nash, 71 M.J. 83, 89 (C.A.A.F. 2012).

In her ruling, the military judge recited the test for implied bias, yet she failed to apply it appropriately. The military judge explained, "I listened to her entire answers, also from both counsel. She had every opportunity to say that she would not consider my instruction, especially based on the alcohol consumption. She did not state that." (J.A. at 85.)

Rather than analyzing how the public would perceive CDR K's answers, she reiterated that CDR K herself disclaimed bias and agreed to follow the military judge's instructions. While this is relevant to actual bias – which was also raised by the defense – it does not address the problem of public perception.

CDR K should have been excused due to her extensive personal and professional experience with sexual assault. A reasonable member of the public would have reasonable doubt as to the fairness of EM3 Rogers' court-martial.

A. CDR K's Professional Role in SAPR Planning

In her ruling, the military judge failed to address how the public would perceive a senior member in a sexual assault trial who also served concurrently in a prominent role in the Coast Guard's efforts to combat sexual assault. Under the totality of the circumstances in this case, the presence of CDR K on the panel created an unacceptably high risk the public would not believe EM3 Rogers received a fair trial.

A member should not necessarily be disqualified merely because their official duties touch upon matters at issue in a court-martial. For example, a peace officer is not per se excluded from service as a member in a court-martial. United States v. Berry, 34 M.J. 83, 88 (C.M.A. 1992). Likewise, an attorney is not per se excluded simply because it is a legal proceeding. United States v. Hedges, 11 C.M.A. 642, 643 (C.M.A. 1960).

Rather, the question is whether or not the member's official duties create a concern about the public's perception of fairness. For example, in United States v. Dale, 42 M.J. 384-386 (C.A.A.F. 1995), this Court held that a member who was the base deputy chief of security should have been relieved because he was the embodiment of crime prevention on the base and appointing him to serve as a member was "asking too much of both him and the system."

At the time of trial, CDR K's duties included serving as the SAPR Common Operating Picture Coordinator. (J.A. at 55.) She described herself as the Atlantic Area commander's "number one person" on SAPR planning. (Id.) The Atlantic Area Commander is the direct superior of the Ninth District Commander – the convening authority in this case. (J.A. at 352.)

CDR K's presence on the panel here presents a problem similar to the deputy chief of security in Dale. She is the embodiment of the Atlantic Area SAPR effort. Of particular concern, her plans envision sexual assault prevention as a matter of command climate and leadership. (J.A. at 62, 69.)

At trial and before the court below, the Government dismissed this responsibility as insignificant and highlighted that barracks lighting and personal safety strategies were part of the plan, not investigation or prosecution.

Yet the Government's argument oversimplifies and minimizes the broad policy-making nature of CDR K's work. Rather than handling individual cases, she was responsible for conceptualizing and implementing all efforts to eradicate sexual assault in her area of responsibility. (J.A. at 62-63.) This included training, indoctrination, and guidance for commanders to address sexual assault prevention in their commands. (J.A. at 55). Her responsibilities also included the drafting of the Atlantic Area sexual assault prevention and response plan. (J.A.

at 55.) In short, her work touched all aspects of sexual assault prevention in the Atlantic Area.

Furthermore, CDR K viewed sexual assault prevention as a leadership issue. In her view, "providing an environment for all of our members that is safe from sexual assault is part of good leadership" and leadership was her "main focus." (J.A. at 62.) Much of her research focused on how command climate could potentially prevent sexual assault. (J.A. at 69.)

It is also important to note CDR K's service on this court-martial took place against a backdrop of intense political pressure for the military to deal with the issue of sexual assault. (J.A. at 242-98.) While CDR K rightly agreed such pressure should be resisted, she acknowledged she was aware of the president's statements and the political pressure on military commanders. (J.A. at 56, 63.) Many – including the trial defense team in this case – have raised concerns that the eagerness to stamp out sexual assault in response to such pressures would lead to unlawful command influence and the trampling of service member's rights.

All of this is troubling. In an environment where many are concerned with unlawful command influence in sexual assault cases, the person charged with guiding sexual assault policy in the Atlantic Area served as the president of a court-martial panel in a sexual assault case. She cannot reasonably be

expected to have set aside her professional concerns about command climate and its effect on sexual assault prevention and judge EM3 Rogers impartially. Further, as both the president of the panel and an authority on the service's politically sensitive sexual assault prevention policy, her presence had the potential to chill appropriate skeptical assessment of the evidence by other members.

B. CDR K's Personal Experiences with Sexual Assault

In addition to her duties drafting sexual assault prevention plans, CDR K had painful family experiences with sexual assault. During voir dire, CDR K revealed that her brother was convicted of multiple sexual assaults against members of her family. CDR K was herself indirectly a victim of her brother's crimes because of the "damage" his crimes did to the family. She also saw firsthand the "damage" sexual assault had done to her foster children, who were also victims of unrelated sexual abuse. These personal experiences add to her implied bias.

A member is not per se excluded because they or a close relative have been victims of a crime. United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 2012). However, when the member has suffered traumatic or similar crimes it may be necessary in the interest of fairness to remove the member. United States v. Smart, 21 M.J. 15, 20 (C.M.A. 1985).

For example, in Smart this Court's predecessor held a member should have been excused from a robbery case because he had been the victim of several robberies. If most people in the same position would be prejudiced, the military judge should assume the member would be prejudiced even in the face of the member's disclaimer of bias. Id.

At trial and before the court below, the Government argued CDR K's family experience with sexual assault made her a fair member because she stated she knew "the damage it does to a family when someone is convicted of a sexual assault," it was something she took "extremely seriously," and she said there "needs to be compassion for both sides." (J.A. at 57.)

While CDR K expressed compassion for a relative who committed a terrible crime, it goes too far to suggest that makes her neutral or even aligned with the accused based on this experience. To the contrary, in the same breath she expressed compassion for her brother she also mentioned the "damage" his crimes did to her family. (J.A. at 56-57.) CDR K was herself indirectly a victim of her brother's crimes. She also had personally witnessed the "damage" sexual assault did to children she fostered. (J.A. at 57.)

While CDR K may have personally believed her experiences made her a fair member, most people would feel the opposite – that she would likely be prejudiced by these damaging

experiences. In implied bias cases, it is the objective public perception that matters – not CDR K's opinion of herself. The military judge failed to address the impact of her personal experience with sexual assault at all.

In addition to her family experiences, CDR K also dealt with sexual assault cases in a professional context. She had previously served as a court member in a sexual assault case which resulted in a conviction. (J.A. at 64.) She had a member in her command accused of sexual assault. (J.A. at 57.) These less personal experiences must be weighed along with the rest of her answers as part of the totality of the circumstances.

C. CDR K's strongly-held erroneous beliefs about consent

Finally, CDR K had strongly-held, but mistaken, beliefs about alcohol intoxication and consent. CDR K believed a person in a blackout could never consent to sexual acts. (J.A. at 65.) She based this in part on her Coast Guard training. (J.A. at 65.) As discussed below, these answers further contribute to the concern of public perception of bias based on her personal and professional experiences.

A member's strongly-held misconceptions about key legal concepts may create an implied bias. In United States v. Woods, this Court found an implied bias in a member who believed an accused in the military was guilty until proven innocent. Woods, 74 M.J. at 244. In Woods, this Court did not establish a per se

rule and the holding turned on the specific facts of that case. One of the reasons this Court found implied bias was – although the member agreed to follow the law – she did not "convincingly depart" from her mistaken view.

In the present case, CDR K never renounced her view of consent. She merely agreed to follow the law. However, the military judge's instructions would not have changed her opinion because they never directly addressed that opinion.

But CDR K's beliefs are unsupported both legally and factually because blackout is a function of memory, not capacity. (J.A. at 187-89.) The UCMJ does not criminalize sex with someone in a blackout, only sex with someone incapable of consenting due to impairment. 10 U.S.C. § 920 (2012). A person is capable of consenting if they "[possess] the physical and mental ability to consent." United States v. Pease, 74 M.J. 763, 770 (N-M. Ct. Crim. App. 2015), review granted 75 M.J. 44 (C.A.A.F. 2015). A person in a blackout may indeed possess the physical and mental ability to consent – they just would not remember.

While CDR K agreed to follow the judge's instructions on the law regarding consent, nothing in the judge's instructions would have dispelled that strongly-held misconception. (J.A. at 210-11.) The defense theory at trial was that MC consented to sexual acts while in an alcohol-induced blackout. From the

start, the senior member of the panel was preconditioned to reject this defense as invalid.

Several facts in the record highlight CDR K's precondition to reject the defense's theory. First, even at the point of deliberations, CDR K submitted a question about the definition of "competent" as it relates to consent. (J.A. at 367.) The military judge and the parties agreed there was no appropriate definition to give and instructed the members to rely on their own understanding of the word. (J.A. at 214.) In CDR K's case, that meant a person in a blackout could never consent to sexual activity. Despite her assertions she would follow the military judge's instructions, a reasonable member of the public would believe CDR K was biased against the defense's legally sound theory of innocence.

Additionally, during voir dire, CDR K said she would put the burden of proof on the defense with regard to consent in a blackout. She stated, ""You'd have to work hard to make me believe that someone was so drunk they can't remember anything about the evening, that they were then also able to give consent. I would have to be--that would have to be proven to me." (J.A. at 66.) While CDR K agreed she would follow the law in response to leading questions, she was never asked specifically to refute this burden-shifting opinion. (J.A. at 73.)

The military judge and the lower court placed great emphasis on CDR K's assurances that she would set aside her personal opinions and her official duties and decide EM3 Rogers' case impartially. (J.A. at 5, 85.) Again, while this may dispel a concern of actual bias, it does not necessarily address implied bias. Under these circumstances, a reasonable observer would believe she was biased against the defense theory of innocence.

Conclusion

The public – even taking into account CDR K's subjective opinion that she was a fair member with compassion for both sides of an accusation – would doubt the fairness of EM3 Rogers' trial based on CDR K's extensive personal and professional experience with sexual assault and her flawed understanding of the law of consent. This Court should set aside the findings and sentence.

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 15 January 2016.

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Certificate of Compliance

This brief complies with the page limitations of Rule 24(b) because it contains less than 14,000 words. Using Microsoft Word version 2010 with 12-point-Courier-New font, this brief contains 4,273 words.

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