

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, BOOTH, and OLMSCHIED
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class JESUS RIOS
United States Army, Appellant

ARMY 20020123

1st Cavalry Division
Michael B. Neveu, Military Judge
Lieutenant Colonel Kevan F. Jacobson, Staff Judge Advocate

For Appellant: David P. Sheldon, Esquire; Captain Charles L. Pritchard, Jr., JA (on brief).

For Appellee: Lieutenant Colonel Theresa A. Gallagher, JA; Major William J. Nelson, JA; Captain Larry W. Downend, JA (on brief).

29 September 2006

MEMORANDUM OPINION

Per Curiam:*

A panel of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 [hereinafter UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to Private (PVT) E1. The convening authority approved only a finding of guilty for unpremeditated murder and reduced appellant's sentence to confinement to twenty-one years.

This case is before the court for review pursuant to Article 66, UCMJ. We have considered the record of trial, appellant's assignments of error, and the government's reply thereto. Appellant asserts, *inter alia*, that the military judge erred by failing to properly instruct the panel members on lesser-included offenses

* Judge Booth took final action in this case prior to his release from active duty.

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sufficiently raised by the evidence. We agree and find that the error undermines the findings in this case. As a result we will set aside the findings of guilty and the sentence. Our resolution of this issue makes it unnecessary to address the other errors asserted by appellant.

Facts

Appellant was one of three soldiers charged with the murder of another soldier in a barracks room on Fort Hood, Texas. The government's case rested heavily upon appellant's sworn statement to investigators, admitted as Prosecution Exhibit 2, and the testimony of Specialist (SPC) Gonzalez and Private First Class (PFC) Sires. According to the testimony, in the early morning hours of Sunday, 4 November 2001, appellant, PFC Hartsfield and his roommate PFC Perez, PFC Sires, and PVT Soto were drinking and watching movies in the barracks. Afterwards, PVT Soto and PFC Hartsfield got into a verbal altercation that escalated into a physical altercation, which PFC Hartsfield won. Private Soto left the room, but came back, whereupon the two engaged in another fight, with PFC Hartsfield prevailing yet again.

According to appellant's statement, sometime later PVT Soto and PFC Perez decided to go to PFC Hartsfield's room to even the score by "kick[ing] Hartsfield's ass." Appellant went along because he "did not want to be a pussy." When they arrived, PFC Hartsfield was sleeping, but he started to fight back as PVT Soto and PFC Perez attacked him. The two overpowered PFC Hartsfield. After about five minutes, PFC Perez grabbed a nearby plastic bag to place over PFC Hartsfield's face. At this point, appellant claims that he told PFC Perez and PVT Soto, "you fucked him up now leave him alone." Appellant also claims that he tried to move PFC Perez off of PFC Hartsfield, but that PFC Perez kept "shrugging" him off. After about ten minutes, PFC Perez and PVT Soto suffocated PFC Hartsfield to death. When asked if he was a lookout, appellant responded, "I wasn't actually standing outside the room looking out for anything I was just standing on PFC Perez' side of the room telling them to leave him alone." When asked if PVT Soto and PFC Perez meant to kill PFC Hartsfield, appellant responded, "I think at first it was to beat him up, but it changed when they were in the room they wanted to kill him."

Afterwards, appellant drove PFC Perez and PVT Soto to SPC Gonzalez' house. When appellant knocked on the door nobody answered, so the three men waited outside in appellant's truck. Specialist Gonzalez, appellant's team chief, testified that when he found appellant and the other two soldiers asleep outside of his house he woke up appellant. Appellant told SPC Gonzalez "we fucked up last night. We fucked up Hartsfield." Appellant clarified that "Perez and Soto had beat up Hartsfield" and that "it didn't look good." When asked what he meant by that, appellant stated, "I don't know if he's alive or not." Appellant also told SPC

Gonzalez that he had no idea that PFC Perez and PVT Soto were going to kill PFC Hartsfield and that when things “got out of hand” he had tried to stop them. According to SPC Gonzalez, appellant appeared to be “very, very frightened” of PFC Perez and PVT Soto. Specialist Gonzalez let appellant stay at his house and drove the other two soldiers back to the barracks. When SPC Gonzalez saw the military police investigating the situation later that day, he returned to his house and told appellant that appellant should turn himself in to the authorities.

Prior to panel deliberations on findings, trial defense counsel asked the military judge to instruct the panel on the lesser-included offenses of assault consummated by battery and aggravated assault. He argued that if the panel found appellant’s “intent was less than the principles involved, they could find that he either withdrew or was not a member of a continuing conspiracy, and as such, is not liable for the murder, if they find that a murder occurred.” The military judge refused to instruct on those lesser-included offenses stating,

You actually have a dead body. And I don’t think the assault offenses are relevant. I think, like I said, the unpremeditated murder includes, basically, a killing where the intent was just to inflict grievous bodily harm. So that pretty much includes an offense similar to aggravated assault, but death resulted, which is what we have here.

Law

We review a military judge’s decisions on panel instructions *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). As this court recently reiterated:

Required instructions on findings include “[a] description of the elements of each lesser included offense *in issue*” and “[a] description of any special defense under [Rule for Courts-Martial (R.C.M.)] 916 *in issue*.” R.C.M. 920(e) (emphasis added). “A matter is ‘in issue’ when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.” R.C.M. 920(e) discussion. If there is any doubt as to whether a lesser included offense or special defense is in issue, the doubt shall be resolved in favor of appellant.

United States v. Brown, 63 M.J. 735, ___; 2006 CCA LEXIS 193, *8-9 (Army Ct. Crim. App. 2006) (citing *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000)).

If “it is determined that a specific instruction is required but not given, the test for determining whether this constitutional error was harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *United States v. Dearing*, 63 M.J. ___, ___; 2006 CAAF LEXIS 1197, *20 (C.A.A.F. 18 Sept. 2006) (internal quotations and citations omitted).

Discussion

The government presented two theories of liability against appellant: aiding and abetting, and co-conspirator liability under *Pinkerton v. United States*, 328 U.S. 640 (1946). Because the panel returned a general verdict, appellant’s conviction is valid only if the jury was correctly instructed on both theories. If the jury was incorrectly instructed on one theory, then the conviction must be reversed. *United States v. Shelton*, 62 M.J. 1, 5 (C.A.A.F. 2005).

We turn to the aiding and abetting theory. The elements of aiding and abetting another person to commit a crime under Article 77(1), UCMJ, are: “(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense.” *United States v. Gosselin*, 62 M.J. 349, 351-52 (C.A.A.F. 2006) (quoting *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A.1990)). A person may be an aider and abettor to a lesser degree than his co-actors if he did not share the required criminal intent or purpose of his co-actors. *See, e.g., United States v. Simmons*, 63 M.J. 89, 93-94 (C.A.A.F. 2003).

Article 118, UCMJ, defines unpremeditated murder as the unlawful killing of another human being with the intent to kill or to inflict great bodily harm. *Manual for Courts-Martial, United States* (2005 ed.) [hereinafter *MCM*], Part IV, para. 43c(3). Article 128, UCMJ, punishes several degrees of assault, including assault and battery, assault with a dangerous weapon, and assault with intent to commit grievous bodily harm. *MCM*, Part IV, para 54. Depending upon the evidence at trial, assault can be a lesser-included offense of murder. *See United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990); *MCM*, Part IV, para. 43d(2)(b).

We conclude that the military erred in failing to instruct the panel on assault with a dangerous weapon and assault and battery because appellant’s pretrial statement sufficiently raised the issue whether he intended to inflict great bodily harm on PFC Hartsfield. Appellant admitted that he accompanied PVT Soto and PFC Perez to PFC Hartsfield’s room knowing that they intended to beat up PFC Hartsfield, but appellant denied helping them to kill PFC Hartsfield. Appellant emphasized that he was PFC Hartsfield’s friend, that he was not involved in the fights between PVT Soto and PFC Hartsfield and that he accompanied PVT Soto and

PFC Perez to PFC Hartsfield's room because he did not want to be a "pussy." Inside the room, appellant denied striking PFC Hartsfield and insisted that he did not act as a lookout. When he realized that PFC Perez and PVT Soto intended to suffocate PFC Hartsfield, appellant told them to stop and unsuccessfully tried to push PFC Perez off PFC Hartsfield.

As to prejudice, under the facts of this case we are not convinced beyond a reasonable doubt that the military judge's failure to properly instruct the panel on lesser-included offenses did not contribute to the verdict of premeditated murder. The mere fact that the panel found appellant guilty of the greater offense of premeditated murder does not mean that appellant was not prejudiced. Like our superior court in *United States v. Wells*, 52 M.J. 126 (C.M.A. 1999), we cannot guess at what the panel members would have concluded had they been properly instructed by the military judge. Absent an instruction that they were required to determine appellant's intent, the panel members may have improperly focused their deliberations on the intent of PFC Perez and PVT Soto. Under the facts of this case, had the panel members been properly instructed, they may have determined that appellant did not share and was not aware of his co-actors' intent to kill PFC Hartsfield. In short, they may have believed appellant. We refuse under these facts to depart from the principle that "an appellate court does not normally evaluate the credibility of evidence presented in a case to determine harmless error" *Id.* at 131. Appellant's intent is a question of fact more appropriately resolved by a properly instructed court-martial, rather than speculated upon by this court.

Conclusion

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

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

