UNITED STATES v. BLANKENSHIP

United States Air Force Board of Review

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ACM 11221*

* Petition for review by USCMA granted, see 21 CMR . For decision of USCMA, see subsequent volumes.

Reporter
20 C.M.R. 881 *; 1955 CMR LEXIS 243 **

UNITED STATES v Airman Third Class PAUL H. ***BLANKENSHIP***, AF 14469187, 67th Food Service Squadron, APO 703

Prior History: [1]** Sentence adjudged 25 April 1955 by General Court-Martial convened at APO 710. Approved sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life.

Core Terms

knife, premeditated, psychiatrist, door, defense counsel, law officer, kitchen, ***murder***, messhall, offenses, belt, kill, instructions, interviews, amnesia, drinks, desk

Counsel: Appearances: Lt Colonel Stanley S. Butt and Major Edmund B. Sigman, appellate counsel for the accused; Lt Colonel Emanuel Lewis and Major John M. Rankin, appellate counsel for the United States.

Judges: DICKSON, CHENEY (absent -- on leave) and LEWIS, Judge Advocates.

Opinion

[*884] Upon trial, the accused pleaded not guilty to but was found guilty of premeditated ***murder***, in violation of Article 118, Uniform Code of Military Justice (Charge I and its specification) and he pleaded not guilty to but was found guilty of assault with intent to commit ***murder***, in violation of Article 134, Uniform Code of Military Justice (Charge II and its specification). He was sentenced to dishonorable discharge, total forfeitures and to confinement at hard labor for life. Evidence of three admissible previous convictions was considered. The convening authority approved the sentence, directing that pending completion of appellate review the accused be confined in the Branch United States Disciplinary Barracks, Camp **[**2]** Cooke, California, and forwarded the record of trial to The Judge Advocate General, United States Air Force, for review by a Board of Review.

The admissible evidence of record establishes that the following events occurred at ***Itami*** Air Base, Japan, on the night of 20-21 January 1955. At 1700 hours Staff Sergeant Argyle and Technical Sergeant Thaxton met in the NCO club, where each had three drinks. At 1800 hours they purchased a bottle of whiskey and left the club, each going to his respective barracks. At about 2030 hours, after having one drink while in the barracks, the two sergeants started to a base basketball game. Enroute they passed messhall #2, and having had no supper, entered with the hope of getting something to eat (R 104). The mess sergeant, Airman First Class Fricks, refused to feed them, though they helped themselves to coffee. They were joined by the accused, ***Blankenship***, who accepted Argyle's offer of a drink, and who in turn invited Argyle and Thaxton to accompany him to messhall #1 where he was working and where he would cook them something. The three of them left messhall #2 about 2145, all in a friendly mood, though Fricks was glad to be rid of them as **[**3]** they were all somewhat intoxicated (R 35, 36, 48, 49). The accused, between the hours of 1800 and 2000, when he went over to messahll #2 to visit, had, while he prepared meat for the next day's menu, drunk three substantial drinks of vodka from a bottle he had obtained earlier that afternoon (R 140, 142).

Upon entering messhall #1 the three men went into a small office adjoining the kitchen, and during the next hour or hour and one-half they had two or three drinks apiece and the accused and Argyle became involved in an agreementative discussion about segregation, rebels and yankees, and the North and South in general. Early in the discussion Argyle, a "Northerner", drew a hunting knife from under his coat, called it his "nigger-killer" and asked the accused to sharpen it (R 105, 141-143). They went into the kitchen, the accused sharpened and returned the knife, Argyle put it back under his outer clothing, and they returned to the office and resumed their conversation (R 109, 143). The other sergeant, Thaxton, had remained in the office, seated behind a desk and reading a newspaper. He was not participating in the argument to any appreciable extent, but soon renewed an earlier **[**4]** request to the accused to see if he could give him some ground coffee (R 143, 189). The accused and Argyle were **[*885]** standing at that time, Argyle blocking the door, and the accused shoved him out of the way so he could leave the office. Argyle

staggered back and dropped into a chair. The accused left the office and Argyle came out of the chair, drawing his knife as he did, and going from the office into the kitchen. Seeing Argyle approaching him in an aggressive manner, knife extended, the accused warned him to "put that damn knife away" and to "come no closer." His warning unheeded, ***Blankenship*** retreated a few steps from the advancing Argyle, and then wrapped his web belt around his right hand, buckle dangling (R 143, 189). Argyle slashed at him, the accused avoided the blow, and in turn struck Argyle in the forehead with his belted fist. Argyle staggered back, fell to the floor, and lay silent and unmoving. The accused jumped on Argyle's prostrate form, took the knife from his relaxed hand, and stuck it into his back between his shoulder blades (R 143, 189, 190). Subsequent examination of Argyle's body revealed more than forty separate wounds (Pros Ex 6; R 98), including **[**5]** three headwounds each of which could have caused death (R 102, 171, 172). The pathologist who wrote the autopsy report testified that, since there was a moderate edema of the brain, the injuries to the head must have been sustained from five to ten minutes before death (R 173). The doctor who determined the fact of death at the messhall concluded from a visual, and somewhat cursory examination, that the cause of death was multiple stab wounds, exsanguinating hemorrhage, and probable head injury (R 62, 70).

Thaxton, who had remained behind the desk in the office, looked up and saw the accused bending over Argyle and twisting and boring something into his back (R 105, 107). The floor area around the body was covered with blood, some of which ran into a floor drain. Seconds later the accused came towards Thaxton, knife in right hand, belt in left, and said "You're next." (R 105). Thaxton grabbed the phone, crouched behind the desk, heard the phone go dead and the accused say, "Sit there and hold it, it won't do any good, I have already cut the wire." (R 105, 128). The accused then went back into the kitchen and Thaxton closed the office door and barricaded it with the desk as soon **[**6]** as he realized that ***Blankenship*** had moved away. The accused returned once and broke the glass from a window in the wall between the office and the kitchen. He returned again, broke the glass in the door window, shoved the barricaded door open and came over the desk at Thaxton who was behind it. He struck Thaxton over the eye with his belt as the latter grabbed his knife hand (R 105, 106, 129). As they fell to the floor ***Blankenship*** again tried to strike with the knife but Thaxton was able to wrest the knife from the accused and he retreated from the office into the kitchen (R 106). The accused followed him into the kitchen and on into the dining area swinging at the knife with his belt buckle (R 39, 108). Thaxton kept retreating and calling for help, and on seeing Airman Fricks at the side door of the messhall tried to unlock it (R 39, 40, 106, 122). The accused continued to swing with his belt causing Thaxton to run from and then return to the door several times, Thaxton yelling at Fricks to break the door down (R 39, 40, 52). The accused then broke off the attack, tried unsuccessfully to unlock the door while standing with his back turned to Thaxton who still had the knife, **[**7]** and then went to a back door, unlocked it and admitted Fricks and others (R 40, 57). The accused then tried to renew his attack on Thaxton and was restrained by Fricks, and subsequently by Air Police who arrived on the scene (R 42, 53, 56).

Shortly thereafter the accused was taken to the base hospital where a doctor examined him and where he was first interviewed by special agents of the OSI. Then, and on the two following days, after appropriate advice as to his rights under Article 31, Uniform Code of Military Justice, he voluntarily gave statements substantially in accordance with the above recital, claiming, however, total loss of memory for the period of time immediately following his first blow with the knife into Argyle's back until he was being restrained by Fricks (Pros Ex 7; R 193). **[*886]** A qualified psychiatrist testified that at the time of the offenses and at the time of trial accused was suffering from amnesia for this period of time (R 250). In his opinion, this amnesia was caused by alcohol and emotional stress, probably rage, and that while it affects the ability to remember, it is not pertinent to whether or not he knew what he was doing (R 252). He further **[**8]** testified that the accused was legally sane at time of the offenses and at time of trial (R 251).

The court was properly instructed on the elements of the offenses charged, on the elements of the lesser included offenses raised by the evidence, on insanity at time of the offenses as a complete defense, on the law of self defense, on the effect of voluntary drunkenness on the accused's mental capacity to entertain the premeditated design to kill in the offense of premeditated ***murder***, and the specific intent to kill in the offense of assault with intent to commit ***murder***, and on the effect of partial mental impairment falling short of legal insanity on the ability to premeditate and to entertain specific intent as to the offenses discussed above. The law officer clearly and concisely recapitulated his instructions on insanity, voluntary intoxication, and partial mental impairment, instructed on the weight to be accorded expert testimony and gave the instructions required by Article 51(c)(1-4), Uniform Code of Military Justice. Although the law officer instructed on insanity as a complete defense to the charges and to all included offenses, we find that that issue was not reasonably **[**9]** raised by the evidence. The United States Court of Military Appeals recently stated that amnesia, to be of significance in the requirement of instructions, must be linked to other evidence suggesting in some measure the existence of a mental state which would serve to negate

criminal responsibility and that amnesia plus intoxication in no wise equates to an issue of legal sanity; furthermore, amnesia in and of itself is a relatively neutral circumstance in its bearing on criminal responsibility (U.S. v Olvera (No. 2761), 4 USCMA 134, 15 CMR 134). This instruction was clearly beneficial to the accused and unquestionably was given out of a desire to give the accused the benefit of any doubt and out of an abundance of caution. We therefore find no fault with the law officer for arriving at a contrary conclusion on this issue.

After it had been in closed session for about three hours the court opened and requested that the law officer repeat his instructions on premeditated ***murder***, unpremeditated ***murder*** and voluntary manslaughter, which he did. The court then recalled Major Green, the Army psychiatrist who had previously testified as to the accused's sanity, and questioned him further **[**10]** concerning the accused's ability to premeditate and to entertain specific intent. He reiterated that in his opinion, although the accused's ability to adhere to the right was diminished because of alcohol and his intense rage, he was still able to harbor intent and premeditation. The basis for this opinion was, "On the basis of the history of the accused which indicates that anger plays a prominent part in his personality and character; on the basis of his own statements to me; on the basis of statements of other witnesses; and finally on the basis of the great number of wounds which were inflicted" (R 319). Trial defense counsel objected to this line of evidence on the grounds that it exceeded the scope of expert testimony and was an invasion of the fact finding province of the court; the same grounds are assigned as error before us.

Specific provision is made in the Manual for Courts-Martial, 1951, for the use of expert testimony. Paragraph 138c provides that an expert witness, one who is skilled in his field, may express an opinion on a state of facts which is within his specialty and which is involved in the inquiry. His opinion, based on his personal observation or on an **[**11]** examination or study conducted by him, may be stated without first specifying the data on which it is based, though on direct or cross-examination he may be required to specify that data. The issue of sanity comes within this **[*887]** provision (MCM, 1951, paragraph 122c).

That a psychiatrist is not confined in his testimony to the narrow statements that the accused did or did not meet the standards of mental responsibility set out in paragraph 121, Manual for Courts-Martial, 1951, is well established (U.S. v Smith (No. 3370), 5 USCMA 314, 17 CMR 314; U.S. v Kunak (No. 3787), 5 USCMA 346, 17 CMR 346). In Kunak, *supra*, the United States Court of Military Appeals quoted, with approval, from paragraph 9(a), TM 8-240, AFM 160-42, May 1953, "Psychiatry in Military Law," the following:

". . . Thus, the medical officer does not discharge his full duty when he reports on the sanity of the accused in general. He must be prepared to say whether the defendant's mental state was such that he was capable of having the degree of intent, wilfulness, malice, or premeditation which the law requires for determination of guilt or for a certain degree of guilt."

In the Kunak case an Army **[**12]** psychiatrist who had examined the accused testified that the accused's mental condition would not affect his capacity to premeditate. The opinions expressed by Major Green, the psychiatrist in our case, are of identical import and do not constitute error. The court was properly instructed as to the weight to be given testimony of expert witnesses, and, as the triers of fact, were free to accord it such weight as in their opinion it deserved (Kunak, *supra;* ACM 8695, Yates, 16 CMR 635). The ultimate decisions as to whether the accused was capable of and *did* premeditate and was capable of and *did* specifically intend to kill were left for the court to decide.

The second assignment of error likewise arises from the testimony of this psychiatrist. A court member asked him why he thought the accused could premeditate and he replied, "In this case I inquired specifically of the defendant in the course of my examination as to his intentions -- I asked the defendant whether it was his intention when he seized the knife to kill the victim" (R 306). Defense objected and his objection was sustained. Later, a court member, although recognizing that the law officer's rulings on **[**13]** matters of law were final asked the law officer to reconsider his ruling. The law officer thereupon, by questioning the witness, established a proper predicate for the receipt in evidence of the statements of the accused to the witness, and reversed his previous ruling on this point. The witness, in his two interviews with the accused on 10 and 16 February 1955, failed to advise him of the offense of which he was suspected. Since the accused had, after being advised in compliance with Article 31b, given three incriminating statements to OSI agents prior to these interviews and since he had been advised of the sworn charges against him on 8 February 1955, two days prior to his first interview with the psychiatrist, it is obvious that he was well aware of the subject concerning which he was being interrogated. Thus, while this failure to state the offense constitutes error it is one which will be deemed prejudicial in only the rare and unusual case (U.S. v Higgins (No. 6216), 6 USCMA 308, 20 CMR 24; U.S. v O'Brien (No. 1915), 3 USCMA 105, 11 CMR 105). There is no showing of such prejudice here. The witness further testified that his warning to the accused apparently antagonized **[**14]** him and he said he didn't wish to answer questions. Thereupon the psychiatrist continued, "That this is your privilege but I want

to be sure that you understand what this proceeding is -- that it is a psychiatric examination which is for the purpose of determining your mental status, and that this will be a matter of great importance at the time of your trial. . . . It will be to your advantage to cooperate in this matter" (R 312). Both of Major Green's interviews with the accused are characterized by objectivity and fairness, and, aside from the above, it is nowhere contended that he took any unfair advantage of the accused. With the evidence in this posture we hold that the above statements of the doctor **[*888]** were not sufficient to induce the accused to make a statement. However, even if we were to conclude otherwise there would be absolutely nothing unlawful in the above set forth "inducement" (U.S. v Howell (No. 5989), 5 USCMA 664, 18 CMR 288). Appellate defense counsel contends that although the statement was never thereafter actually received in evidence it was in effect put before the court by the witness' reference to it in stating the basis for his opinion and **[**15]** that the accused was entitled to a limiting instruction in accordance with paragraph 138c of the Manual for Courts-Martial, 1951:

". . . but if in the course of relating the data [upon which his opinion is based] he refers to matters which, if themselves regarded as evidence in the case, would be inadmissible and might improperly influence the court, as when a psychiatrist testifies that his opinion as to the accused's mental responsibility was based in part on the past criminal record of the accused, the law officer (or the president of a special court-martial) should instruct the court in open session that such matters are to be considered only with respect to the weight to be given to the expert opinion."

In line with our findings as to the circumstances surrounding the giving of this statement as set forth above, nothing inadmissible as evidence was before the court directly, indirectly or by inference and no error was committed. We note a reference in the accused's brief to "past criminal record" in connection with this point, but since a past criminal record was not brought out in the testimony of this witness we dismiss it without further comment.

Appellate defense counsel **[**16]** further urges that, aside from the testimony of the psychiatrist, the evidence is legally insufficient to support the findings of premeditated ***murder***. By the accused's own admission he rendered his assailant unconscious, knelt on his prostrate form, took the knife from his victim's relaxed grip, transferred it from his own left hand to his right hand, and then plunged it into his victim's back. A more deliberate and considered act, though probably done in a few second's time, upon a victim already put completely out of action would be difficult to envision. On this evidence alone the court was justified in concluding that the crime was premeditated (U.S. v Ransom (No. 4107), 4 USCMA 195, 15 CMR 195; U.S. v Edwards (No. 4355), 4 USCMA 299, 15 CMR 299; U.S. v Gravitt (No. 4889), 5 USCMA 249, 17 CMR 249). The mutilation of the victim's head, neck and back (the latter accomplished through the thickness of a winter uniform and an issue overcoat) leaves no room for speculation as to the accused's intent to kill his victim, and having effectively dispatched this victim, his statement to Technical Sergeant Thaxton, "You're next," likewise succinctly expressed what he had in mind for Thaxton, **[**17]** namely, to kill him too.

Trial defense counsel assigns as error, which appellate defense counsel adopts, the effect of the speech of a member of the court who stated his understanding of his duties as a court member at the time he requested the law officer to reconsider his ruling on the admissibility of the accused's statement to Major Green. Specifically, defense counsel contend that the member's statement "Having been placed on orders, I conceive it my duty to do the best job I can to determine whether Airman ***Blankenship*** is guilty of the offense with which he has been charged, or of some other offense of a lesser degree", shows that he did not consider innocence of the accused as a possibility and that therefore he wasn't qualified to render a fair and impartial decision. Although statements of this type do not contribute anything, except the possibility of error, to courts-martial proceedings, when this particular one is taken in context it is simply a poorly worded statement that the court member conceived it his duty to arrive at the truth. We feel constrained to add, however, that, with both sides having rested and with the court having been in closed session for deliberation **[**18]** on its findings for some three **[*889]** hours, it would be ridiculous to expect a court-member not to have been influenced by the evidence before him and his statement does not indicate a mind closed to further suasion by the evidence nor does it constitute an expressed intention to deviate from his sworn duty as a court member (ACM S-8175, Graham, 14 CMR 645). Had a challenge for cause been made on the basis of this court member's comments, it could not properly have been sustained. Further, though it is not the basis of our decision on this point, this case falls within the rule that a challenge to a court member which is based on facts known prior to the conclusion of a trial must be made at that time or it will be considered waived. A failure to act at that time, if the ground of objection is known, as it was here, constitutes a waiver of the objection (U.S. v Thomas (No. 2026), 3 USCMA 161, 11 CMR 161; U.S. v Glaze (No. 2078), 3 USCMA 168, 11 CMR 168).

We have carefully considered other assignments of error made by trial defense counsel and adopted by appellate defense counsel but find no merit therein and no necessity of discussion.

Article 66*(c)* having been complied **[**19]** with, the findings of guilty and the sentence are

Affirmed.

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