

On 21 February 2022, the Court emailed to the parties a draft of the script to be used at the post-trial session.

5. On 23 February 2022, the Court held the post-trial session for consideration of the mistrial motion. After considering the evidence, testimony, and arguments of counsel, the Defense's request for a post-trial mistrial is GRANTED. In support of this ruling, the Court finds by a preponderance of the evidence as follows.

Findings of Fact

Preferral through Empanelment

6. On 26 May 2021, Lieutenant Colonel (LTC) MM preferred court-martial charges against the Accused. The alleged offenses included two Specifications of Sexual Assault, two Specifications of Abusive Sexual Contact, two Specifications of Assault Consummated by a Battery, and one specification of Dereliction of Duty. On 21 July 2021, the General Court-Martial Convening Authority, Major General (MG) CD, referred those same alleged offenses to a general court-martial convened by Court-Martial Convening Order (CMCO) Number 11 (Second Corrected Copy), Headquarters, 82d Airborne Division, dated 15 September 2020. Subsequently, CMCO Number 6 (Second Corrected Copy) dated 11 August 2021 superseded CMCO Number 11. Subsequently, both CMCO Number 4 dated 13 January 2022 and CMCO Number 5 dated 15 January 2022 amended CMCO Number 6 (Second Corrected Copy). As a result of these CMCOs, MG CD detailed 14 members to the initial venire of members for this court-martial. LTC JK was one of those 14 members.

7. During group voir dire, defense counsel asked, "Does anyone personally know [Major] General [CD]?" LTC JK answered in the negative. During group voir dire, the defense counsel also asked, "Is anyone rated by [Major] General [CD]?" LTC answered in the affirmative. During individual voir dire, LTC JK explained that MG CD served as his Senior Rater. Trial counsel asked LTC JK if he ever discussed military justice matters with MG CD. LTC JK answered, "No." Trial counsel also asked LTC JK if MG CD ever expressed or shared his opinions on military justice issues. LTC JK answered, "No." Trial counsel also asked LTC JK if he thought MG CD wanted him to vote a specific way during deliberations. LTC JK answered, "No." Along a similar line of questioning during individual voir dire, the defense counsel asked LTC JK, "Knowing that [Major] General [CD] referred this case to court-martial, and knowing that he picked you to serve on this panel, does that create any perception in your mind of how you think he may want you to vote?" LTC JK answered, "No."

8. After initial instructions, voir dire, and challenges, the panel membership consisted of nine members, including LTC JK. To get to the required eight members for empanelment, the Court Reporter used the random number generator program on the Army Judge Advocate General's Corps' website to randomly assign numbers to the nine remaining members (AE VI). Based on the results of the number assignment process and the excusal of the member with the highest number, the membership of the panel was reduced to the required eight members, including LTC JK. The final seating chart is AE VII. Therefore, along with the seven other remaining members, the Court empaneled LTC JK as a member to this court-martial.

Trial

9. Again, the panel found the Accused guilty of two specifications of Sexual Assault, two specifications of Abusive Sexual Contact, and one specification of Dereliction of Duty. The members found the Accused not guilty of two specifications of Assault Consummated by a Battery. The Military Judge sentenced the Accused to be reduced to the grade of E-1, to be confined for a total of 60 months, and to be dishonorably discharged from the service. On 24 January 2022, the Military Judge signed the STR for this court-martial.

Post-Trial

10. On or about 27 January 2022, while serving in his role as a Battalion Commander, LTC JK met with one of his Soldiers, Sergeant (SGT) ZW, in his office. SGT ZW requested this meeting under LTCs JK's "open door policy." SGT ZW's Battery Commander, Captain (CPT) JS, and Battery First Sergeant (1SG), 1SG JPK, were also present during this open door meeting in LTC JK's office.

11. Shortly after SGT ZW reported to LTC JK's office for this meeting, LTC JK critically commented on SGT ZW's weight and haircut.¹ Specifically, a comment was made to the effect of, "Are we chaptering this fat paratrooper?" This was the tone for most, if not all, of the open door meeting.

12. The primary purpose of this open door meeting was for SGT ZW to plead his case to be relieved of his financial support obligations imposed by Army Regulation (AR) 608-99. To be relieved of the requirement to provide the minimum financial support to one's Spouse as outlined in AR 608-99, a Soldier's Battalion Commander must review and grant that relief. During his open door meeting with LTC JK, SGT ZW attempted to convince LTC JK to approve his request to be relieved from the requirement to provide spousal support in accordance with AR 608-99. LTC JK asked SGT ZW, "what outcome do you want from this?" or words to that effect. SGT ZW responded, "To stop making spousal support payments," or words to that effect. LTC JK denied SGT ZW's request. Specifically, LTC JK said, "That's not going to happen," but LTC JK left open the possibility of re-considering his decision after SGT ZW provided 18 months of financial support in accordance with AR 608-99.

13. At the time of the meeting, SGT ZW faced preferred, but not yet referred, court-martial charges. An Article 32 preliminary hearing was pending. Like the Accused in the above-captioned court-martial, the charges against SGT ZW include allegations of Assault and Sexual Assault. At the time of the post-trial session, the charges against SGT ZW had not been referred to any level of court-martial.

14. The open door meeting lasted between an hour-and-a-half and two-hours. During the meeting, LTC JK told SGT ZW words to the following effect:

a. "You are dumb" or "You are illogical."²

¹ Using its common sense and own experience, the Court notes that SGT ZW did, in fact, appear to be rather heavy when he testified at the post-trial session.

² CPT JS and SGT ZW testified that LTC JK told SGT ZW that SGT ZW was "dumb." When the Court asked 1SG JPK if LTC JK told SGT ZW that he was "dumb," 1SG JPK paused, appeared to be deeply thinking about the question, and answered that he believed LTC JK called SGT ZW "illogical." The Merriam Webster online thesaurus lists "illogical" as a "word related to dumb" (<https://www.merriam-webster.com/thesaurus/dumb>).

b. "I'm truly scared for you."

c. "You don't know how much trouble you are in."

d. "Do you understand the punishment you are facing? I don't think you do. I've sat on six court-martial panels."

15. According to LTC JK, CPT JS, and 1SG JPK, they became concerned during the meeting that SGT ZW was very confused and ill-informed about the legal process as it relates to his own pending court-martial. Allegedly in an effort to counsel SGT ZW about the court-martial process, LTC JK mentioned the Division Commander's role in the process. What exactly LTC JK said about the Division Commander's role in the court-martial process varies depending on the witness.

a. According to SGT ZW, LTC JK stated the following: "Do you understand how the Division Commander picks panel members? He picks them based on effectiveness. He chooses us because we'll get the job done. Like I said. I've sat on six panels, and I've put five people in prison," or words to that effect.

b. According to 1SG JPK, LTC JK mentioned the Division Commander during the meeting. He added that LTC JK informed SGT ZW that the Division Commander selected the panel members who serve on courts-martial.

c. According to CPT JS, LTC JK mentioned the Division Commander during the meeting. He added that LTC JK informed SGT ZW that the Division Commander selected the panel members who serve on courts-martial, but he denied that LTC JK mentioned how or why the Division Commander selects persons to serve as court-martial panel members.

d. According to LTC JK, he never mentioned the Division Commander at all during this meeting.

16. During their conversation regarding the court-martial process, LTC JK also mentioned, by name, one of his Brigade's legal representatives, CPT HB. What LTC JK said about CPT HB during the meeting also varies depending on the witness.

a. SGT ZW testified that LTC JK told him: "I don't know who your attorney is, but you stand no chance against CPT [HB] because she's an animal," or words to that effect.

b. 1SG JPK testified that LTC JK mentioned CPT HB by stating that she is a "good attorney," SGT ZW had a "fight on his hands with CPT HB," and encouraged him to "consult with a good attorney," or words to that effect.

c. CPT JS testified that LTC JK mentioned CPT HB, but did not provide details about what LTC JK said about CPT HB.

d. LTC JK adamantly denied ever even mentioning CPT HB during the open door meeting.

17. Shortly after the open door meeting, SGT ZW informed his TDS attorney what LTC JK told him during the open door meeting, including details about his prior service on six courts-martial

and the Division Commander selecting panel members based on their “effectiveness.” Subsequently, SGT ZW informed others what LTC JK said during the meeting. SGT ZW’s account of what was said during the meeting appears to have remained fairly consistent.

18. On-the-record at the post-trial session, trial counsel conceded as a fact that, during an interview prior to the post-trial session, LTC JK informed a government representative that he never told SGT ZW that he had previously served on six court-martial panels (See transcript of the post-trial session and pages 6-7 of AE XIII). At the post-trial session, SGT ZW, CPT JS, 1SG JPK, and LTC JK agreed that LTC JK did mention his service as a panel member on prior courts-martial during the open door meeting.

19. Including the above-captioned court-martial, LTC JK has served as a court-martial panel member for six courts-martial; three courts-martial at Joint Base Elmendorf-Richardson, Alaska, two at Fort Bragg, North Carolina, and one that “went away” before the trial completed. Four of those courts-martial resulted in convictions, one resulted in a complete acquittal, and the one that “went away.”

20. Prior to this open door meeting, SGT ZW did not know that LTC JK had previously sat on any prior courts-martial as a panel member. SGT ZW certainly did not know that LTC JK had previously served on six prior courts-martial.

21. Prior to this open door meeting, SGT ZW also did not know that the Division Commander selects the initial venire of members at a court-martial.

22. Three senior noncommissioned officers (NCOs) testified during the post-trial session; Sergeant First Class (SFC) KE, SFC BK, and SFC KG. All three of these NCOs served as bailiffs during the trial of the above-captioned court-martial. They all credibly testified that if a panel member made comments similar to those allegedly made by LTC JK during the open door meeting on 27 January 2022, then they would not perceive the trial as having been “fair.” SFC BK analogized the situation to “playing cards when the dealer stacks the deck.”

Law

Significance of a Fair and Impartial Panel

23. The significance of the right to a fair and impartial jury (in the civilian justice system) and a fair and impartial panel (in the military justice system) cannot be overstated. It is one of the fundamental rights for which our country’s founders risked their reputations, fortunes, and lives. It is also one of the fundamental rights for which countless veterans have sworn an oath to defend, and for which many made the ultimate sacrifice.

24. Supreme Court Justices have consistently emphasized the importance of a fair and impartial jury to our system’s overall ability to accomplish its significant goals.

The right to a trial by an impartial [panel] lies at the very heart of due process. Our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose – to provide a fair and reliable determination of guilt. That purpose simply cannot be achieved if the [panel's] deliberations are tainted by bias or prejudice. Fairness and

reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial.

United States v. Comisso, 76 M.J. 315 (C.A.A.F. 2017) (quoting Smith v. Phillips, 455 U.S. 209, 224-25, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (Marshall, J., with whom Brennan, J., and Stevens, J., joined, dissenting) (internal quotation marks omitted) (citations omitted)).

Fair and Impartial Panel Members; Actual and Perceived Fairness and Impartiality

25. “As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.” United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (citing United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994)). “Indeed, ‘impartial court-members are a *sine qua non* for a fair court-martial.” Id. (quoting United States v. Modesto, 43 M.J. 315, 318 (C.A.A.F. 1995)).

26. R.C.M. 912(f)(1) requires impartiality on the part of panel members and provides for their removal if their impartiality is jeopardized: “A member shall be excused for cause whenever it appears that the member: . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.” RCM 912(f)(1)(N). Such substantial doubt arises when, “*in the eyes of the public*, the challenged member's circumstances do injury to the ‘*perception [or] appearance of fairness in the military justice system.*’” United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting United States v. Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006)); accord United States v. Napolitano, 53 M.J. 162, 167 (C.A.A.F. 2000) (“The general focus is ‘on the perception or appearance of fairness of the military justice system.’” (quoting United States v. Schlamer, 52 M.J. 80, 93 (C.A.A.F. 1999))). Comisso, 76 M.J. at 321. In other words, “[s]ubstantial doubt’ exists where the presence of a member on the panel would cause the public to think ‘that the accused received something less than a court of fair, impartial members,’ injuring the public’s perception of the fairness of the military justice system.” Id. at 323.

27. Voir dire is a critical tool for ensuring that the accused is tried by an impartial trier of fact – the “touchstone of a fair trial.” McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984). Voir dire protects an accused’s right to an impartial trier of fact “by exposing possible biases, both known and unknown, on the part of potential jurors.” Id. “The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.” Id. Although these passages refer to the civilian right to an impartial jury under the Sixth Amendment, they hold equally true with regard to servicemember rights under the Fifth Amendment and the Rules for Courts-Martial. See Albaaj, 65 M.J. 167, 168 (C.A.A.F. 2007) (“Where a potential member is not forthcoming . . . the process may well be burdened intolerably.” (quoting Mack, 41 M.J. at 54)). “Without honest and candid disclosures during voir dire, an accused is hamstrung in challenging potentially biased members for cause. See Mack, 41 M.J. at 54; see also United States v. Colombo, 869 F2d 149, 151 (2d Cir 1989).” Comisso, 76 M.J. at 321.

Mistrial Standard

28. “A military judge has discretion to ‘declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.’” United States v. Coleman,

72 M.J. 184, 186 (C.A.A.F. 2013) (quoting R.C.M. 915(a)). “Due process does not require a new trial every time a juror has been placed in a potentially compromising situation.” Smith, 455 U.S. at 217. Further, “[t]he power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons.” R.C.M. 915(a), Discussion.

29. A military judge abuses his or her discretion when that judge denies a motion for a post-trial mistrial if, had the member answered material questions honestly at voir dire, defense counsel would have had a valid basis to challenge that member for cause. Commisso, 76 M.J. at 322. A question is “material” if it has “some logical connection with the consequential facts” of the case, or is “[o]f such a nature that knowledge of the item would affect a person’s decision-making.” Albaaj, 65 M.J. at 170. Plus, a member must demonstrate “complete candor” when answering voir dire questions. Commisso, 76 M.J. at 322. The test for member honesty, dishonesty, and candor is not whether the panel member was willfully malicious or intended to deceive – it is whether the member gave objectively correct answers. Id.

Analysis and Conclusions

Did a member exhibit complete candor when responding to voir dire questions?

30. On this first question, the Court must determine whether the defense met its burden of establishing by a preponderance of the evidence that LTC JK did not exhibit complete candor during voir dire. For the following non-exhaustive reasons, the Court finds that the defense met this burden.³

31. When determining that the defense met this burden, the Court reminded itself of many of the evidentiary and other instructions that it gives to a panel regarding evidence and testimony. Those instructions included, but were not limited to, the following:

a. Direct and Circumstantial Evidence: “Evidence may be direct or circumstantial. ‘Direct evidence’ is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he/she saw it rain would be direct evidence that it rained. On the other hand, ‘circumstantial evidence’ is evidence that tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night. There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.”

b. Credibility of Witnesses: “You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness’s intelligence, ability to observe and accurately remember, sincerity, and conduct in court, friendships, prejudices, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and

³ Prior to the post-trial session, the Court speculated that the witnesses may acknowledge that LTC JK said the things attributed to him by SGT ZW, but LTC JK did not believe these things. In other words, LTC JK did not actually believe that MG CD selected him based on his “effectiveness” and to “get the job done,” but he said these things only to scare SGT ZW and help him understand the significance of his pending court-martial. But, that was not the testimony at the post-trial session. Therefore, to answer the first question, the Court, applying the preponderance of the evidence standard, must study the testimony, examine consistencies and inconsistencies, and make credibility determinations.

how each witness might be affected by the verdict. In weighing a discrepancy or discrepancies by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called. Bear in mind you may properly believe one witness and disbelieve another or several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you."

c. Same Standards: "I have previously advised you that it is your duty as court members to weigh the evidence and to resolve controverted questions of fact. In so doing, if the evidence is in conflict, you will necessarily be required to give more weight to some evidence than to other evidence. The weight, if any, to be given all of the evidence in this case is solely within your discretion, so it is neither required nor expected that you will give equal weight to all of the evidence. However, it is expected that you will use the same standards in weighing and evaluating all of the evidence and the testimony of each witness and that you will not give more or less weight to the testimony of a particular witness merely because of that witness's status, position, or station in life."

d. Prior Inconsistent Statement: "You have heard evidence that before this trial that a witness made a statement or statements that may be inconsistent with testimony here in court. If you believe that an inconsistent statement was made, you may consider the inconsistency in deciding whether to believe the in-court testimony. You may not consider the earlier statement as evidence of the truth of the matters contained in the prior statement. In other words, you may only use it as one way of evaluating the witness's testimony in court. You cannot use it as proof of anything else. For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in-court testimony. You may not, however, use the prior statement as proof that the light was red."

32. The Court finds by a preponderance of the evidence that, during the open door meeting, LTC JK informed SGT ZW that he had served as a panel member on multiple courts-martial. Multiple witnesses, including LTC JK, credibly testified during the post-trial session that LTC JK mentioned, during the open door meeting, his prior service as a panel member. During the post-trial session, however, the trial counsel conceded that LTC JK, during an interview prior to the post-trial session, denied that he told SGT ZW that he had previously served as a court-martial panel member. The Government also included LTC JK's initial denial in the "Argument" section of its written response (AE XIII). The Court considered this prior denial to be a prior inconsistent statement by LTC JK.

33. The Court finds that, during the open door meeting, LTC JK did mention the Division Commander's role in the court-martial process, including the fact that the Division Commander picks the panel members. Although LTC JK denied that he mentioned anything about the Division Commander during the open door meeting, CPT JS, 1SG JPK, and SGT ZW credibly testified that he did. The Court considered this evidence when evaluating the extent to which each witness is either supported or contradicted by other evidence.

34. The Court finds that LTC JK mentioned the Brigade Legal Advisor, CPT HB, during the open door meeting. Although LTC JK adamantly denied this, CPT JS, 1SG JPK, and SGT ZW credibly recounted that LTC JK did mention CPT HB. While there is some confusion regarding exactly what LTC JK said about CPT HB, the Court finds by a preponderance of the evidence that LTC JK stated that she is a “good lawyer” and that SGT ZW should seek good legal representation for himself, or words to this effect. The Court also considered this evidence when evaluating (1) the extent to which each witness is either supported or contradicted by other evidence and (2) each witness’s ability to accurately remember.

35. The most troublesome comments allegedly made by LTC JK are undoubtedly the following: “Do you understand how the Division Commander picks panel members? He picks them based on effectiveness. He chooses us because we’ll get the job done,” or words to this effect. SGT ZW credibly testified that LTC JK said these legally troublesome words. Again, LTC JK testified that he never even mentioned the Division Commander during the open door meeting. In resolving this conflict, the Court finds that the defense met its burden of proving by a preponderance of the evidence that LTC JK did share how and why the Division Commander picks members for court-martial duty. The Court also finds that, after hearing words to this effect from his Battalion Commander, SGT ZW shared them with his TDS attorney. Aware of the potential legal significance of these words, SGT ZW’s TDS attorney shared them with the Accused’s TDS attorney. The following facts provide circumstantial indicia of reliability that support SGT ZW’s version of events.

a. SGT ZW is a 13B. He is not a paralegal. According to his SRB, he has not completed any formal education beyond high school. There is no evidence that he has any legal training or experience that would “clue him in” to the legal significance of the words he attributed to LTC JK. In other words, the statements are simply too random for an average Soldier to wholly fabricate. Stated yet another way, the Court finds it unlikely that SGT ZW, or most any Soldier, would know and appreciate the significance of these legally troublesome words and, as a result, it is too incredible to believe that he just completely made them up.

b. LTC JK’s, CPT JS’s, and 1SG JPK’s testimony lent credibility to the fact that SGT ZW is not sophisticated enough to “make up” these legally significant statements. Their testimony at the post-trial session consistently described SGT ZW as a Soldier who was largely clueless about courts-martial and the intricacies of the legal process. LTC JK stated that he was concerned by SGT ZW’s lack of even a basic understanding of the court-martial process. He added that he was motivated to share his experiences with the court-martial system in part because of his genuine concern for SGT ZW’s obvious legal naivety. It is difficult to imagine that SGT ZW is, on one hand, extraordinarily ignorant about the court-martial process and his legal rights and, on the other hand, devilishly intelligent enough to wholly fabricate these very specific and legally troublesome statements.

c. Why would SGT ZW make up the statements that he attributes to LTC JK? SGT ZW gains little-to-nothing by sharing what was said during the open door meeting. In other words, SGT ZW does not have an obvious motive to fabricate the statements he attributes to LTC JK. The person most likely to “gain” anything from this revelation is the Accused in the present court-martial, not SGT ZW. The Accused and SGT ZW are not in the same Brigade. It did not appear that the Accused and SGT ZW are friends or that they even know each other. LTC JK’s denial of SGT ZW’s AR 608-99 relief likely frustrated SGT ZW, but the Court finds that

this motive to fabricate is too attenuated to connect it to the specific words SGT ZW attributed to LTC JK.

d. On multiple significant and insignificant matters, the Court finds that CPT JS's and 1SG JPK's testimony was generally more consistent with SGT ZW's testimony than it was with LTC JK's testimony.

i. For example, while LTC JK denied even mentioning the Division Commander, CPT JS and 1SG JPK agreed that LTC JK did, in fact, mention the Division Commander during the open door meeting. CPT JS and 1SG JPK also agreed that LTC JK mentioned that the Division Commander picked the panel members who serve on courts-martial. The Court acknowledges that 1SG JPK did *not* support SGT ZW's assertion that LTC JK mentioned how or why the Division Commander selects the members. Overall, however, CPT JS's and 1SG JPK's testimony was generally more consistent with SGT ZW's testimony on other important facts.

ii. As an example of a less significant inconsistency, everyone, except LTC JK, agreed that LTC JK mentioned CPT HB during the open door meeting. In addition to being supported by CPT JS and 1SG JPK, this is another tidbit that is too random for a Soldier to make up. Therefore, the Court finds that LTC JK did mention CPT HB during the open door meeting. The Court recognizes that LTC JK's mentioning of CPT HB is *not* significant to the bigger issues the Court must decide. However, the fact that everyone else convincingly and without hesitation testified that LTC JK did mention CPT HB is a fact that the Court considered when evaluating the witnesses' ability to remember and when making credibility determinations.

e. Everyone's memory is faulty. Fort Bragg is always a very busy place. Battery and Battalion leaders, especially in the 82d Airborne Division, are very busy people. Due to recent world events in Eastern Europe, the operational tempo at Fort Bragg is even busier than normal. The open door meeting on 27 January 2022 lasted for *nearly two hours*. SGT ZW's chain of command should be commended for dedicating so much time to discussing SGT ZW's AR 608-99 issues and pending court-martial with him. That is what leaders are supposed to do. With that said, the Court finds that, given the current optempo and the length of the meeting, it is possible that leaders at that open door meeting may have forgotten some of the details of what was said at that open door meeting.

36. To be clear, the Court is not saying that it found to an "absolute or mathematical certainty" that LTC JK said the things attributed to him by CPT JS, 1SG JPK, and SGT ZW. As all persons' memories are faulty and there is, of course, no recording of the open door meeting, the Court will never know to an "absolute or mathematical certainty" what exactly was said during that open door meeting. The Court is also not saying that it found "beyond a reasonable doubt" that LTC JK said these things. That is also not the standard. If it was, the Court's ruling may be different. The standard to be applied – preponderance of the evidence – is a much lower standard. Again, applying that standard, the Court finds that the defense met its burden of proving that LTC JK said the things attributed to him by SGT ZW.

37. Again, the Court finds that, during voir dire, LTC JK responded to questions, in relevant part, substantially as follows:

Q: Does anyone personally know [Major] General [CD]?

A: [LTC JK answered in the negative].

Q: Is anyone rated by [Major] General [CD]?

A: [LTC answered in the affirmative, later explaining that MG CD was his senior rater].

Q: Have you ever discussed military justice matters with MG CD?

A: No.

Q: Has MG CD ever expressed or shared his opinions on military justice issues?

A: No.

Q: Do you think MG CD wants you to vote a specific way during deliberations?

A: No.

Q: Knowing that [MG CD] referred this case to court-martial, and knowing that he picked you to serve on this panel, does that create any perception in your mind of how you think he may want you to vote?

A: No.

Q: Regarding [MG CD], are you aware that he's the general that actually sent this case to a court-martial?

A: I am now that you mentioned it.

Q: Are you aware that he picks all of the panel members to serve on the panel such as yourself, sir?

A: I understand that he approves the list of panel members, yes.

Q: Imagine he goes down a list, and he sees [LTC JK], and he says "I want [LTC JK] on this panel," okay? Knowing that and knowing the fact that he's the one that sent this to a court-martial, does that create any kind of perception on how he may want you to vote on this case?

A: No.

38. The words used by LTC JK during the open door meeting, especially the more troublesome words, contradict the responses given by LTC JK during voir dire. The Court could attempt to use a "legal scalpel" to attempt to separate and differentiate the answers during voir dire and the comments during the open door meeting. The Court finds that such a legal surgery would be tortured. Instead the Court chooses to use its own common sense, knowledge of the ways of the world, and conscience when comparing the voir dire responses and the open door meeting comments. When doing so, the Court finds it impossible to reconcile (1) an understanding that all panel members must be fair and impartial and give no consideration to what result the convening authority may want, and (2) a statement that the convening authority picked a member because he or she is "effective" and "gets the job done."

Would a correct response have provided a valid basis for a challenge for cause?

39. For the first question, the court was required to carefully study the testimony, evaluate consistencies and inconsistencies, and make credibility determinations. Answering the first question was difficult. Given the answer to the first question, answering the second question was not difficult.

40. A correct response would have provided a basis for a challenge for cause. The Court has zero doubt that if LTC JK said during voir dire, “I believe that the Convening Authority selects panel members based on their effectiveness and he chooses us because we’ll get the job done” or words to that effect, then the Court would have granted a challenge for cause. This is especially true in light of the Supreme Court’s “mandate” that trial judges “liberally grant” defense challenges for cause.

Is a declaration of a mistrial the appropriate remedy?

41. Again, the significance of the right to a fair and impartial jury cannot be overstated. As one of the principal architects of our democracy, John Adams, in 1774, wrote:

Representative government and trial by jury are the heart and lungs of liberty.

In agreement with his political rival, Thomas Jefferson, in 1788, wrote:

I consider trial by jury as the only anchor ever yet imagined by man, by which government can be held to the principles of its Constitution.

Years later, in 1801, our third President eloquently elaborated as follows:

The wisdom of our sages and the blood of our heroes has been devoted to the attainment of trial by jury. It should be the creed of our political faith.

It is against this historical backdrop that the Court analyzes the appropriateness of the Defense’s requested remedy of a mistrial.

42. This Court understands that the “power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons.” R.C.M. 915(a), Discussion. “A military judge has discretion to ‘declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.’” Coleman, 72 M.J. at 186 (quoting R.C.M. 915(a)). “Due process does not require a new trial every time a juror has been placed in a potentially compromising situation.” Smith, 455 U.S. at 217.

43. The Court of Appeals for the Armed Forces held in Commisso that a military judge abuses his or her discretion when that judge denies a motion for a post-trial mistrial if, had the member answered material questions honestly at voir dire, defense counsel would have had a valid basis to challenge that member for cause. Commisso, 76 M.J. at 322. A question is “material” if it has “some logical connection with the consequential facts” of the case, or is “[o]f such a nature that knowledge of the item would affect a person’s decision-making.” Albaaj, 65 M.J. at 170. Plus, a member must demonstrate “complete candor” when answering voir dire questions. Commisso, 76 M.J. at 322. The test for member honesty, dishonesty, and candor is not whether the panel member was willfully malicious or intended to deceive – it is whether the member gave objectively correct answers. Id.

44. For the above-outlined reasons, this Court has already determined that (1) a member was not completely candid when responding to an obviously material question, and (2) if the

member was completely candid, then a valid basis for a challenge for cause would have undoubtedly existed. These findings support the declaration of a mistrial.

45. When there is a question about a juror's or member's fairness and impartiality, the civilian and military appellate courts have made it clear that, when determining whether to grant a mistrial, the trial courts must consider the "appearance of fairness" and the public's "perception" of the process. Commisso, 76 M.J. at 321.

a. This Court harbors no doubt that if members of the public learned that a member made statements similar to those made by LTC JK at the open door meeting, then that would negatively impact the public's perception of the fairness and impartiality of the court-martial. In other words, a member's statement that the convening authority put him on the panel because he "gets things done" would undermine an informed public's confidence of that member's objectivity as a court member and the fairness of the trial itself.

b. When making this finding, the Court need not speculate on this issue. When asked about his perception of the fairness and impartiality of this court-martial if a panel member said the things attributed to LTC JK, SFC BK credibly, bluntly, and astutely testified, "That wouldn't seem fair to me. It'd be like playing cards and the dealer has stacked the deck," or words to this effect.

46. Only after solemn deliberation has this Court decided to GRANT the defense's request for a post-trial mistrial. The Court understands that this ruling will impact all persons involved in this court-martial. But, the importance of ensuring a fair trial – both in actuality and appearance – weighs heavy in the Court's ruling. Nothing in this ruling prohibits the re-trial of the Accused.

Summary

47. Accordingly, the defense motion requesting that the Court declare a post-trial mistrial is GRANTED. In accordance with R.C.M. 915, this declaration of mistrial has the effect of withdrawing the offenses from the court-martial. This declaration of mistrial shall not prevent trial by another court-martial.


G. BRET BATDORFF
COL, JA
Military Judge