UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARK E. COOPER
United States Air Force

ACM 37240

17 April 2009

Sentence adjudged 19 March 2008 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: Gordon R. Hammock and Jennifer L. Cline (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Matthew C. Hoyer, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Ryan N. Hoback.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

HEIMANN, Senior Judge:

Consistent with the appellant's plea, a military judge sitting as a general court-martial found him guilty of aggravated assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant admitted to breaking the femur of his five-week-old child. The adjudged sentence consisted of a bad-conduct discharge, confinement for 18 months, and reduction to E-1. The convening authority reduced the confinement to 15 months but otherwise approved the sentence as adjudged.

On appeal, the appellant raises one issue before this Court. He contends that his plea is improvident because he did not admit to actions that established culpable

negligence or, alternatively, the likelihood of the foreseeable harm. For the reasons set forth below, we deny the appellant's claim that his plea is improvident and affirm.

Providence of the appellant's plea to aggravated assault

Under Article 45, UCMJ, 10 U.S.C. § 845, Rule for Courts-Martial (R.C.M.) 910, and *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), and its progeny, there are specific requirements governing guilty pleas in the military justice system. Prior to accepting a guilty plea, the military judge must provide detailed advice to the accused and ensure that the accused understands the meaning and effect of his plea. R.C.M. 910(c). A military judge may not accept a plea of guilty without first determining that the plea is voluntary and there is a factual basis for it. R.C.M. 910(d)-(e).

We will not set aside a guilty plea on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We consider the entire record in conducting our review. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995); *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002).

The appellant pled guilty to aggravated assault with a means or force likely to produce death or grievous bodily harm under Article 128(b)(1) of the UCMJ. The elements of aggravated assault under Article 128(b)(1), UCMJ, are:

> (i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
>
> (ii) That the accused did so with a certain weapon, means, or force;
>
> (iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and
>
> (iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 54.b.(4)(a) (2008 ed.). On appeal, the appellant makes two separate arguments attacking his plea.

In the first argument, the appellant contends the military judge failed to establish facts necessary to show the appellant "believed the probable result of his actions was grievous bodily harm or death." His argument rests primarily on the contention that the judge failed to have the appellant admit that the victim's injuries were foreseeable and thus "no objective basis exists to support the plea."[1] The appellee responds by highlighting that the appellant admitted to the judge that a five-week-old child is fragile, unable to provide resistance, and that he used excessive force in handling the infant.

We begin by agreeing with the appellant's assertion that the fourth element is satisfied whenever the appellant admits that the "grievous bodily harm was the natural and probable result" of his actions. *See United States v. Weatherspoon*, 49 M.J. 209, 212 (C.A.A.F. 1998) (choking and kicking a person not resisting likely to produce grievous bodily harm); *United States v. Dacus*, 66 M.J. 235, 240 (C.A.A.F. 2008) (grievous bodily harm likely even though risk of transmitting HIV to sex partner extremely low because magnitude of harm great). Significant to these cases is the concept that "likely to produce" has "two prongs: (1) the risk of harm and (2) the magnitude of the harm." *Weatherspoon*, 49 M.J. at 211 (citing *United States v. Joseph*, 37 M.J. 392, 396-97 (C.M.A. 1992); *United States v. Fernandez*, 121 F.3d 777, 780 (1st Cir. 1997)). In the appellant's case, he freely admitted that he used excessive force in his handling of a five-week-old infant. As such, he admitted the risk of harm was significant. At the same time, he admitted that the infant was fragile, thus admitting that the magnitude of potential harm was great. Finally, we note that the appellant offered nothing inconsistent with the judge's conclusion or the appellant's admissions that both the risk and the magnitude of harm involved in dealing with an infant are significant. *See United States v. Mayo*, 50 M.J. 473, 474-75 (C.A.A.F. 1999) (evidence legally and factually sufficient to sustain aggravated assault conviction for breaking the femur of a 19-month-old where the appellant picked up his son and threw him to the ground).

In the appellant's second argument, he contends the plea is not provident because the military judge failed to have him admit facts necessary to establish culpable negligence. He further contends that his plea "rested on culpable negligence," not "specific intent." The appellant goes on to argue that this failure undermines the conclusion that the foreseeable consequence of the appellant's conduct was the broken femur. In support of this argument the appellant relies on the discussion he had with the military judge on the issue of culpable negligence, which included questions related to the foreseeable consequences of his conduct.

While we acknowledge that the military judge may have confused the issue somewhat, culpable negligence in a charge of aggravated assault is relevant only to the third element of the charge. *United States v. Redding*, 34 C.M.R. 22, 24 (C.M.A. 1963).

[1] On the appellant's claim that the judge misstated the law regarding foreseeable consequences of a battery, we rely upon the post-trial affidavit from the court reporter acknowledging the error in transcription and conclude this issue is resolved.

It is not relevant to the analysis of the likely impact of the battery itself, which is limited to the points made above. In admitting to the third element, the appellant was left with the choice of acknowledging that the battery on his son was either an intentional act or was the product of culpable negligence. This of course is distinguished from a showing of specific intent as to the desired consequences of an assault. *Id.* In the appellant's case, he freely admitted to the military judge that he intentionally pushed his son down and that the amount of force he used was specifically intended. He also told the judge that the amount of force he used to overcome his son's resistance to being set down "was excessive for a six-week old child." [2] As for the appellant's attempts to connect the issue of culpable negligence to the fourth element – that the means or force was used in a manner likely to produce death or grievous bodily harm – we find this argument to be misplaced.

In sum, we are satisfied that the appellant admitted to the military judge that he used excessive force when dealing with his five-week-old child. He admitted that he was frustrated with both his wife and his child and that he deliberately forced his child down onto a changing table despite the child's resistance. He acknowledged that the force was sufficient to immediately break his son's femur and he offered no lawful explanation for his conduct. In the end, he admitted he intentionally battered his son and that the potential of grievous bodily harm to the infant was likely. He also raised no matters inconsistent with his plea of guilty. As such, we find the appellant's plea provident and the military judge did not abuse her discretion in accepting the plea.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[2] The child was five weeks old plus one day at the time of the offense.