UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RANDALL W. GILLILAND
United States Air Force

ACM 37895

07 June 2013

Sentence adjudged 16 February 2011 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Scott E. Harding (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Robert D. Stuart and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of aggravated assault on a child under 16 years of age, in violation of Article 128, UCMJ, 10 U.S.C. § 928.[1] The adjudged and approved sentence

[1] The military judge found the appellant guilty of this offense by exceptions and substitutions. The appellant was also acquitted of making a false official statement and child endangerment.

consisted of a bad-conduct discharge, confinement for 18 months, and reduction to the grade of E-1.

On appeal, the appellant asserts the evidence is factually and legally insufficient to sustain his conviction, the military judge committed plain error when he admitted a video recording that included the appellant's polygraph interview, and the record of trial is incomplete because it does not contain a transcript of that interview nor establish at what point the video recording was played. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant's daughter was born in January 2010. She had some health problems after she was born, including jaundice, vomiting, and colic-like symptoms. Over the next four months, she was treated several times per week at the base clinic as the medical providers attempted to determine the reason for her persistent vomiting. The appellant's wife estimated the baby was sick 60-75 percent of the time. Immunologists at a local civilian hospital ultimately diagnosed the infant with a rare allergy syndrome to milk protein.

The appellant's wife testified about anxiety she experienced following her difficult labor and delivery, as well as her concern over the health of her child. She was prescribed medication to assist with her anxiety. When the infant was approximately six weeks old, her mother returned to work part-time at the base youth center. While both parents were at work, the baby was left with several individuals on base. At times, the appellant would pick his daughter up there and would be alone with her for an hour or so before his wife returned from work.

On 18 May 2010, the appellant and his wife brought the baby to the base clinic to be seen for fussiness and constipation. When the pediatrician examined the baby, she noticed the baby's left leg was flexed upward in an unusual manner. The parents did not have any information on how long this had been going on, although the mother relayed that the baby had also been moving her left arm less than the right. Unable to diagnose the problem, the doctor ordered hip x-rays, which were normal. After the appointment, the appellant's wife called the pediatrician several times to report the child was fussy, irritable, and appeared to be in pain.

The parents brought the child back to the clinic for a follow-up on 21 May 2010, and this time the pediatrician observed the swelling in the left hip and thigh had increased. Concerned, the pediatrician sent the child to a nearby civilian hospital for further testing. X-rays taken there revealed a recent fracture of the baby's left femur as well as fractures of the child's ribs, left humerus, and left tibia which were in various stages of healing. An expert in the field of diagnostic radiology determined these

fractures were in different stages of healing, meaning the injuries had been suffered over a period of time.

After agents from the Air Force Office of Special Investigations (AFOSI) were notified about the child's injuries, they interviewed the appellant on 21 May 2010. In that interview, the appellant said the injuries may have been caused when a toolbox weighing 15 pounds had fallen on the child's legs about a week earlier while she was in her car seat. He also speculated the child may have been injured when the large family dog stepped on her.

After ruling out the babysitters due to their sporadic access to the child, the agents considered the appellant's wife to be the primary suspect. However, during two interviews, on 21 July and 9 August 2010, the appellant admitted to causing the baby's injuries. Orally and in a written statement, he said he had gotten frustrated with the baby on at least a dozen occasions between March and May. On different occasions when she would not stop crying and he was home alone with the baby, the appellant described squeezing her tightly, forcibly pulling her legs up to her body, pulling her arm hard while dressing her, and pushing her left leg with such force that he heard a "pop." He agreed these actions could have caused her injuries and that he had an anger problem.

A medical doctor with expertise in pediatrics and child abuse testified that the appellant's description of what he did to his daughter were consistent with the injuries she suffered. This doctor also ruled out the possibility that the child's injuries were caused by or exacerbated by any underlying medical condition and found it unlikely that the injuries were caused by toolbox or dog scenarios presented by the appellant.

After her injuries were discovered, the baby was taken from the custody of her parents and placed in foster care. The appellant and his wife, along with their attorney, attended a neglect hearing held in the local civilian court on 5 August 2010. There, the appellant admitted to the district court judge that he injured the child and caused the fractures. Following that hearing, the appellant's wife regained custody of the baby and moved to Arkansas.

Factual and Legal Sufficiency

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we approve only those findings of guilty we determine to be correct in both law and fact. We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Moreover, "[i]n resolving legal sufficiency questions, [we are] bound

to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). *See also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant was convicted of aggravated assault on a child under the age of 16 years. The elements of that offense are: (1) the accused did bodily harm to his daughter; (2) the accused did so with certain force, namely squeezing, pulling, pushing, and twisting the baby's hands, arms, legs, torso and body; (3) the bodily harm was done with unlawful force or violence, through the forceful application of his hands; (4) the means or force was used in a manner likely to produce death or grievous bodily harm; and (5) the child was under the age of 16.

At trial, the defense attacked the validity of the appellant's statements, arguing they were not confessions and had resulted from pressure from the AFOSI agents. The defense also argued that other individuals could have been responsible for the injuries, including the appellant's wife and the child's babysitters. The appellant's wife testified for the prosecution, describing how their daughter was sometimes alone with the appellant during the four months before the fractures were discovered and denying that she harmed the child. In response, the defense presented evidence that the appellant's wife had suffered some mental health problems following the birth of the baby and expert testimony that she possessed significant risk factors for potential child abuse. The military judge found the appellant guilty, rejecting these alternative theories presented by the defense.

The appellant argues the evidence is factually and legally insufficient to uphold his conviction because: (1) the medical evidence does not establish a specific time frame for or cause of the baby's injuries, thus leaving open the possibility that the child's injuries could have been caused by babysitters, the appellant's wife, or the toolbox/dog scenario, and (2) the appellant's wife submitted a letter in clemency admitting her belief that she caused the injuries. We disagree.

After considering the evidence admitted at trial, we find the evidence both factually and legally sufficient to uphold the appellant's conviction. A reasonable fact finder could have found all the elements beyond a reasonable doubt and we are personally convinced of the appellant's guilt beyond a reasonable doubt. The appellant's admissions during multiple interviews with AFOSI described his aggressive and forceful

handling of his newborn daughter, and expert testimony established that the child's injuries were consistent with having been caused by this type of mistreatment.

The appellant also asks us to find the evidence insufficient to uphold his conviction based on a letter from his wife to the convening authority, which purports to describe "what [she] truly believe[s] happened to [her] daughter." She describes being recently prescribed a powerful narcotic for anxiety, falling into a heavy sleep, and awakening with her now-toddler daughter next to her and no memory of the child getting onto the couch. This led her to re-visit the events of 2010. On the day before her daughter's fractured leg was diagnosed, her letter says she felt extremely tired after being given two narcotics for a physical ailment, going to bed with her daughter next to her, awakening to the child's "shrill scream," and finding the child right next to her. She told the convening authority "I truly believe that I caused [her] broken bones by rolling over on her while I was heavily medicated and sleeping." She also claimed to have seen the family dog standing with his paw on the baby's chest, causing the baby to make the same "shrill scream," and thus speculates that the dog's weight broke the baby's ribs.

In evaluating issues of factual and legal sufficiency, we can only consider the evidence presented at trial. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007). That precludes us from utilizing this post-trial letter as part of that review. However, even if we were permitted to consider this letter, we would not find it sufficient to call into question the validity of the appellant's conviction.

Admission of Polygraph Evidence

On 21 July 2010, the appellant was administered a polygraph by AFOSI. The polygraph and the pre- and post-test interviews were recorded. A transcript of the post-test interview was also created. At trial, the Government admitted that transcript, with redactions that the parties had agreed to prior to trial. These redactions removed all references to the polygraph test.

Instead of creating a correspondingly-redacted version of the video-recording, the Government, without defense objection, admitted the complete video-recording. According to the trial transcript:

> The prosecution play[ed] Prosecution Exhibit 9, the DVD video recording of the interview between OSI and the accused on 21 July 2010 for the court. There were portions previously agreed upon between the parties during which the sound was muted. (See Prosecution Exhibit 10 for the redacted verbatim transcript of the 21 July 2010 interview.)

The unredacted video-recording shows the polygraph examiner conducting a 20-minute pre-test interview, connecting the appellant to the polygraph machine and asking

the appellant whether he caused the child's injuries during a 34-minute examination. These exchanges were not contained in any of the transcripts admitted at trial.

The video recording then shows the polygraph examiner unhooking the appellant from the machine and telling him he had failed the test. This latter statement is in the transcript but is redacted. The post-test interview then ensues, lasting approximately 53 minutes.

The appellant raises two issues related to this process. First, he contends the record of trial is incomplete as it does not annotate which portions of the video and audio recordings were played for the fact-finder. Second, he claims the military judge committed plain error by admitting the video-recording into evidence when it showed the appellant being polygraphed and where the context of the subsequent interview demonstrates he failed that examination.

Whether a record of trial is complete is a question of law we review de novo. *United States v. Henry*, 53 M.J. 108, 110-11 (C.A.A.F. 2000). The test for determining whether the record is incomplete is whether the omitted matter constitutes a "substantial" omission from the record, which is analyzed on a case-by-case basis. *United States v. McCullah*, 11 M.J. 234, 236-37 (C.M.A. 1981); *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). A substantial omission from the record of trial which affects an appellate court's ability to conduct meaningful appellate review raises a presumption of prejudice which the Government must rebut. *Abrams*, 50 M.J. at 363; *United States v. Barron*, 52 M.J. 1, 6-7 (C.A.A.F. 1999); *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979). If an appellate court knows sufficient details of the evidence which has been omitted from a record of trial, the court can determine whether its omission was prejudicial to an appellant. *McCullah*, 11 M.J. at 237; *Henry*, 53 M.J. at 111.

Here, it is impossible for us to know precisely which portions of the video-recording were shown to the military judge and which portions were muted while he viewed the exhibit. It is possible that the prosecution did not play the part of the recording that showed the pre-test interview and the polygraph test itself. It is also possible that the muting that occurred during the portions of the interview are redacted in the transcript. However, because that is not clear, we will assess prejudice by assuming the military judge saw and heard the recording of the entire interview, including the polygraph examiner telling the appellant he had failed the polygraph. In light of that, we will assess whether the admission of the entire video-recording was plain error.

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003) (citation omitted);

United States v. Halford, 50 M.J. 402, 404 (C.A.A.F. 1999); *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996). Under a plain error analysis, we grant relief in a case of non-constitutional error only if an appellant can demonstrate that (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

The results of a polygraph examination, the opinion of a polygraph examiner, or any reference to the taking of a polygraph shall not be admitted into evidence. Mil. R. Evid. 707. Thus, the appellant has met his burden of proving the first two prongs of the plain-error test as the military judge committed a plain and obvious error by admitting evidence of the appellant's polygraph into evidence. *United States v. Clark*, 53 M.J. 280, 282 (C.A.A.F. 2000).

As to the final prong of the test, however, the appellant has not persuaded this Court that the error materially prejudiced his substantial rights. As described above, there was significant evidence of the appellant's guilt. The Government did not rely on the polygraph results and, in fact, attempted to take steps to avoid this material being part of the information presented to the military judge. The trial counsel did refer to the appellant's statements to AFOSI as proof of his guilt, but the findings argument does not directly or indirectly refer to the polygraph portion of his July 2010 interview. Although the defense counsel referenced the AFOSI's use of "specialized interrogation techniques" against the appellant, he did so in the context of the defense theme that the appellant had been coerced and pressured into falsely confessing.

Furthermore, "[w]hen the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle [as a] military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000) (citation omitted). Accordingly, we presume the military judge knew the well-established law regarding the use of polygraph evidence in courts-martial and did not rely on such evidence when finding the appellant guilty of assaulting his infant daughter.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Articles 59(a)

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court