UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CLIFTON E. HUEBNER
United States Air Force

ACM 37696

07 June 2013

Sentence adjudged 8 April 2010 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Grant L. Kratz.

Approved sentence: Dishonorable discharge, confinement for 14 years, and reduction to E-1.

Appellate counsel for the appellant: Lieutenant Colonel Gail E. Crawford; Captain Travis K. Ausland; Captain Luke D. Wilson; and Frank J. Spinner (civilian counsel).

Appellate counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Naomi N. Porterfield; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SANTORO
Appellate Military Judges

OPINION OF THE COURT

SANTORO, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his plea, of one specification alleging that he engaged in unlawful sexual contact by intentionally touching the genitalia and anus of his 14-month-old son, ECH, with an unknown object on a single occasion, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence was a dishonorable discharge,

confinement for 14 years, and reduction to E-1. The appellant argues that (1) the military judge erred by admitting other-acts evidence pursuant to Mil. R. Evid. 414, (2) his sentence is inappropriately severe, and (3) he received ineffective assistance of counsel. As we agree that the admission of the Mil. R. Evid. 414 evidence was an abuse of discretion because there was insufficient evidence that it was the appellant who caused those prior injuries, and because we are unable to say that the error was harmless, we reverse.[1]

Background

ECH began attending the Minot Air Force Base (AFB) Child Development Center (CDC) in August 2008. On Monday, 26 January 2009, when the appellant brought ECH to the CDC, he told an employee that ECH had a "bruise on his bottom." Later that morning, during ECH's first CDC diaper change of the day, a child care assistant observed what she characterized as severe bruising around ECH's anus, underneath his testicles, and one of his "butt cheeks." The aide notified the CDC director, who also examined ECH. Another of the CDC personnel on duty had also been working the previous Friday and had not observed similar marks on ECH that day. A pediatrician at the Minot AFB hospital examined ECH and opined that ECH's injuries were "consistent with non[-]accidental trauma, or child abuse."

At trial, the prosecution presented evidence from two CDC employees about their observations of ECH on 26 January 2009, as well as evidence of prior bruising between September and December 2008 (the Mil. R. Evid. 414 evidence). An Air Force Office of Special Investigations (OSI) case agent testified about the investigation and his interviews of the appellant, and two physicians testified about the bruising and their opinions as to causation. Ultimately, the members convicted the appellant as charged.[2]

Mil. R. Evid. 414 Evidence

The 26th of January was not the first time that ECH had arrived at the CDC with apparent injuries or bruising. CDC personnel kept a small black book in each of their care rooms in which they recorded injuries or abnormalities with the children in their care. There were six prior entries regarding ECH, all of which the prosecution sought to admit, pursuant to Mil. R. Evid. 414, as evidence of the appellant's commission of prior acts of child molestation.

[1] Our disposition of the first assigned error makes it unnecessary to address the remaining issues.

[2] Despite charging the offense as a violation of Article 120, UCMJ, 10 U.S.C. § 920, the prosecution never contended that the appellant's conduct was sexual in nature, at least not in the traditional sense. In charging this conduct as child molestation, the prosecution argued that Article 120's definition of "sexual contact" as touching with the intent to "abuse" brought these injuries within its ambit. As trial counsel put it while arguing on the motion to admit the Mil. R. Evid. 414 evidence, a person who strikes a child on the buttocks with the intent to abuse (not punish), even absent any indicia of sexual intent, is nonetheless properly convicted of abusive sexual contact of a child under the UCMJ.

The defense objected to the admission of any evidence concerning these prior injuries. The nature and extent of these prior injuries was not significantly challenged for purposes of admissibility; rather, the defense argued that there was insufficient evidence to establish that the appellant was the one who caused the injuries and insufficient evidence that the injuries met the definitions of a sexual act or child molestation as required before evidence becomes admissible pursuant to Mil. R. Evid. 414.

Mil. R. Evid. 414(a) provides, in pertinent part, that in a court-martial "in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter for which it is relevant." The admissibility analysis has three prongs: (1) whether the accused is charged with an offense of sexual assault or child molestation, (2) whether the evidence proffered is evidence of the accused's commission of another offense of sexual assault or child molestation, and (3) whether the evidence is relevant under Mil. R. Evid. 401 and 402. *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000). *See also United States v. Bare*, 63 M.J. 707 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007); *United States v. James*, 60 M.J. 870 (A.F. Ct. Crim. App. 2005), *aff'd*, 63 M.J. 217 (C.A.A.F. 2006).

If the evidence meets the threshold requirements for admissibility under Mil. R. Evid. 414, the court must also conduct a Mil. R. Evid. 403 balancing test. Some of the factors to be examined include the strength of proof of the prior act(s), the probative weight of the evidence, the potential to use less-prejudicial evidence, the potential to distract the fact-finder, the time needed to prove the prior act(s), temporal proximity, frequency, the presence or lack of intervening circumstances, and the relationship between the parties. *Wright*, 53 M.J. at 482-83 (citations omitted).

The evidence the prosecution sought to introduce was as follows: (1) on 3 September 2008, ECH had "two yellowing bruises in his pelvic area," which a witness described as above the penis, each about the size of a finger, separated by the approximate size of a male hand; (2) on 9 September 2008, ECH had a "black and blue bruise on his scrotum"; (3) on 8 October 2008, ECH had "two very small red marks on the inside portion of his butt cheeks" that a witness described as purple/red, approximately dime-sized, and close to the anus; (4) on 18 November 2008, ECH had "a bruise on each side of his butt cheeks"; (5) on 20 November 2008, ECH had "a new bruise on the left cheek of his bottom" and fussed when having his diaper changed on both the 19th and 20th of November; and (6) on 15 December 2008, ECH's scrotum was "very red."

The military judge heard evidence and argument on the motion and admitted all evidence of injury or bruising except the 15 December 2008 evidence, finding that because the witness who observed that evidence characterized it as "more environmental in nature than the result of an impact," it was not evidence of a prior act of child

molestation. The military judge also excluded that portion of the 20 November 2008 evidence concerning ECH's being "fussy" as it did not qualify as evidence of an offense of child molestation.

We review a military judge's admission of propensity evidence for an abuse of discretion. *United States v. Yammine*, 69 M.J. 70, 73 (C.A.A.F. 2010). If the military judge makes findings of fact, we review the findings for clear error. *Bare*, 63 M.J. at 710. We review conclusions of law de novo, including whether the admitted evidence meets the threshold requirements of Mil. R. Evid. 414. *Id.* When the military judge conducts a proper balancing test under Mil. R. Evid. 403, we will not overturn the ruling unless there is a clear abuse of discretion. *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998) (citations omitted).

With regard to whether the appellant was the one who caused the injuries, the military judge made only two findings of fact: that the appellant had sole physical custody of ECH during the relevant time frame and that ECH's mother had supervised visitation beginning after Thanksgiving 2008. This latter finding, that ECH's mother's visitation began after Thanksgiving 2008, was clearly erroneous. A civilian court order submitted by the prosecution granted ECH's mother visitation commencing on 29 July 2008.[3]

Although the military judge's ruling set forth the proper legal standards and tests, there was no analysis of that portion of the test requiring that the evidence establish by a preponderance of the evidence that it was the appellant who caused the injuries at issue. Instead, with regard to prong two, the military judge concluded only that "the factfinder could find by a preponderance of the evidence that each of the remaining incidents occurred, qualify under the definition of 'sexual contact,' and as such are chargeable under the UCMJ, specifically under Article 120."

While we believe it is implicit in his ruling that he concluded that the evidence was sufficient to establish that the appellant caused the bruises, we are without the benefit of his analysis as to how he arrived at that conclusion in light of the other evidence presented on the motion. In such a situation, we consider whether the record below was sufficiently developed to enable us to conduct a more expanded analysis. *See Bare*, 63 M.J. at 711.

The parties did present evidence on the matter that was not discussed in the military judge's ruling, but that additional evidence serves only to muddy the waters regarding who caused ECH's injuries. For example, on 23 June 2008 (prior to any of the Mil. R. Evid. 414 acts), the appellant reported to the North Dakota Department of Human

[3] A Child Development Center worker did testify that the appellant told her, after Thanksgiving 2008, that ECH's mother had supervised visitation. However, the witness' testimony was not that the visitation began after Thanksgiving, but rather that the conversation *about* visitation occurred after Thanksgiving.

Services that when he picked up ECH from the Minot Police Department for a two-week visit (apparently as part of a supervised custody transfer), he observed bumps on the base of ECH's neck, scratches on both knees, a bruise below the rib cage, a bruise on the back of his left leg, and a bruise on his cheek.

On 19 August 2008, the appellant again reported seeing bruises on ECH after a visitation with his mother on 17 August 2008. On this occasion, the appellant reported that ECH's mother had him at the base bowling alley for approximately two hours and, when the appellant was changing ECH's diaper after that visit, the appellant saw red marks on ECH's buttocks, bruising on his sides, and a bruise on his hair line. Air Force Security Forces personnel responded and took photographs of ECH's injuries, then turned the investigation over to the OSI. There was no evidence concerning the outcome of that investigation, if one was conducted.

ECH was cared for by at least 16 different CDC staff members during the week surrounding the charged time frame. There was no evidence concerning whether that number of caretakers was typical or atypical and no evidence about how many total caretakers would have had access to him during the September to December period. The CDC has surveillance cameras in every room that stream video to the CDC director's office; however, there was no evidence concerning whether anyone ever observed anything that would include or exclude the CDC workers as the source of ECH's injuries.

Although not presented to the military judge during the motion session, evidence adduced at trial suggested that ECH's mother's visits with him were always supervised because she had a seizure disorder. Also not offered during the motion session, an OSI agent testified before the members that he participated in two interviews with the appellant. Both interviews focused exclusively on the days preceding the charged incident; agents apparently never inquired into the facts and circumstances of the Mil. R. Evid. 414 incidents.

There was no evidence or argument presented concerning (1) whether the September through December injuries did or did not follow ECH's mother's visitations or his attendance at the CDC or any other child care facility; (2) whether the appellant was on extended leave to care for his son; or (3) any other evidence from which a factfinder could conclude when the injuries actually occurred and whether ECH was with the appellant at the time.

The prosecution's position with regard to whether the appellant caused the injuries to ECH was set forth in one paragraph, in an argument that spans 26 pages in the record of trial. Trial counsel argued that because the appellant had custody of ECH[4] and that

[4] Although the prosecution argued that the appellant had sole physical custody, the civilian court's order characterized its custody determination as "interim custody" with "supervised visitation."

nobody else ever picked ECH up from the CDC, that satisfied the prosecution's burden to establish by a preponderance of the evidence that the injuries were caused by the appellant.

In *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003), our superior court considered whether admission of certain uncharged misconduct evidence was admissible in a prosecution for child abuse. Although the evidence in *Diaz* was offered under Mil. R. Evid. 404(b), the primary issue was whether the evidence was sufficient to establish that it was the accused who committed the uncharged acts. The *Diaz* Court concluded that, where there was minimal evidence to establish when and how the victim suffered her injuries and no direct evidence linking those injuries to the accused, the fact that multiple people had access to the victim was properly considered when determining whether the accused committed those acts. The Court ultimately held that the military judge abused his discretion in admitting those prior acts as the evidence was insufficient to link them to Diaz.

While circumstantial evidence may meet the prosecution's burden, *see United States v. Levitt*, 35 M.J. 108 (C.M.A. 1992) (discussing evidentiary requirements under Mil. R. Evid. 404(b) to establish that the accused committed the acts alleged), it must still be sufficient to enable a reasonable factfinder to conclude, by a preponderance of the evidence, that the accused committed the acts alleged *and* survive the Mil. R. Evid. 403 balancing test.

As noted above, the military judge's only finding of fact regarding whether the appellant caused the injuries to ECH was that the appellant was his custodian. We conclude that fact alone, under the circumstances of this case, is insufficient to establish by a preponderance of the evidence that the appellant caused ECH's injuries. We are therefore compelled to find that the admission of the Mil. R. Evid. 414 evidence was an abuse of discretion.

Finding error, we test for prejudice. We review de novo whether a non-constitutional error had a substantial influence on the members' verdict in the context of the entire case. *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (citations omitted). In answering this question, we consider four factors: (1) the strength of the Government's case, (2) the strength of the defense's case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. "When a fact was already obvious from . . . testimony at trial and the evidence in question would not have provided any new ammunition, an error is likely to be harmless. Conversely, when the evidence *does* provide new ammunition, an error is less likely to be harmless." *Yammine*, 69 M.J. at 78 (internal quotation marks, punctuation, and citations omitted).

With regard to the charged injury, the Government's case consisted of testimony that the appellant told CDC workers that ECH had a bruise on his bottom, photographs of

that bruise, the appellant's admissions to investigators that the January bruises "just appeared," the appellant's statements to investigators excluding ECH's mother as the source of the injury, and expert medical testimony that the bruise was consistent with a non-accidental injury. As noted earlier, the Government's theory was that the appellant's intent in causing the charged injury was "to abuse." Absent evidence of motive – and none was present in this case – establishing that intent circumstantially through a single injury would have been far from a certainty. However, when coupled with evidence of repeated injuries over several months' time, the circumstantial evidence begins to suggest more strongly an intent to abuse. Put another way, the Mil. R. Evid. 414 evidence was the new ammunition the prosecution needed to establish the requisite intent and, in fact, trial counsel made that very argument to the members. We cannot hold that the error in its admission was harmless.

Post-Trial Review

Because the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable, we examine and balance the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972) to determine whether the appellant's due process rights have been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006).

We will grant relief to an appellant who has been denied the due process right to speedy post-trial review and appeal unless we are "convinced beyond a reasonable doubt that the constitutional error is harmless." *United States v. Toohey*, 63 M.J 353, 363 (C.A.A.F. 2006). In *Moreno*, the Court of Appeals for the Armed Forces provided a non-exhaustive list of the types of relief available for denial of speedy post-trial review, with the nature of any relief dependent on and tailored to the circumstances of the case. *Moreno*, 63 M.J. at 143. Such options include a reduction in confinement or forfeitures; setting aside some or all of a sentence; "a limitation upon the sentence that may be approved by a convening authority following a rehearing"; and dismissal of the charges, with or without prejudice. *Id*. However, even in instances where post-trial delay was not harmless beyond a reasonable doubt, this Court cannot provide relief where "there is no reasonable, meaningful relief available." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

Having applied the *Barker* criteria in the case before us, we will assume, without deciding, that the appellant's due process rights were violated as a result of the post-trial review delay. Such a finding, however, does not entitle the appellant to relief unless it would be both reasonable and meaningful. *See Rodriguez-Rivera*, 63 M.J. at 386. Considering the totality of the circumstances, including the serious nature of the alleged offense and the fact that the vast majority of the appellate delay was occasioned by the

appellant's 19 requests for enlargement of time to submit appellate matters, we find that any relief we might afford to the appellant at this time would not be reasonable and would be disproportionate to any harm the appellant experienced as a result of the delay. Prospectively limiting the characterization of a potential punitive discharge, restricting the amount of confinement, or otherwise limiting the possible sentence the appellant might receive at a possible rehearing would amount to an undeserved windfall and is neither reasonable nor warranted under the circumstances of this case. Moreover, we find that the post-trial delay was not "so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system" and, therefore, we decline to grant relief on those grounds. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006).

Conclusion

For the foregoing reasons, the findings of guilt and the sentence are set aside. The record of trial is returned to The Judge Advocate General. A rehearing is authorized.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court