UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JASON A. PATE
United States Air Force

ACM 38250

16 December 2013

Sentence adjudged 8 August 2012 by GCM convened at Misawa Air Base, Japan. Military Judge: Mark L. Allred.

Approved Sentence: Bad-conduct discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEBER, Judge:

Contrary to his pleas, a general court-martial composed of officer and enlisted members convicted the appellant of: one specification of maiming his infant son; two specifications of assault consummated by a battery upon a child under 16 years old; one specification of assault in which grievous bodily harm is intentionally inflicted; two specifications of aggravated assault using dangerous means or force upon a child under 16 years old; two specifications of child endangerment by design resulting in grievous bodily harm; one specification of child endangerment by culpable negligence resulting in harm; and one specification of making a false official statement, in violation of Articles 107, 124, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 924, 928, 934. Consistent with his

pleas, the appellant was convicted of one specification of assault consummated by a battery on a child.[1] The members sentenced the appellant to a bad-conduct discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

Before this Court, the appellant alleges two errors: 1) The military judge erred when he instructed the members that assault with means or force likely to produce death or grievous bodily harm was a lesser included offense of assault in which grievous bodily harm is intentionally inflicted; and 2) The military judge abused his discretion when he refused to admit a death certificate that showed that the appellant's wife had a previous child die from unexplained causes four years earlier. Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant's wife, MP, gave birth to the couple's child, AP, in late May 2011. AP was born healthy, and after about two days, MP and AP were discharged. Per standard clinic procedure, the parents watched a video before their release warning them of the dangers of shaking or otherwise physically abusing an infant.

Over the next three months, the appellant brought AP to the base medical clinic several times for various reasons. On one occasion when AP was more than a month old, the appellant brought him to the clinic complaining that AP suffered from constipation, decreased appetite, and fussiness. The appellant also noted that a few times AP cried until his face turned purple and paused breathing for 5-10 seconds. A little over a month later, the appellant brought AP to the clinic complaining that AP would not eat or sleep adequately. At this appointment, the appellant notified the provider that AP would get bruises which would resolve in a few hours or days, and that the appellant did not know how the bruises occurred. None of the appointments revealed any significant medical issue with AP.

On the evening of 9 September 2011, the appellant was home with AP and MP's older son. MP was not home. Late that evening, the appellant called 9-1-1 complaining that AP had bruising, was having difficulty breathing, and was not behaving normally. Emergency medical personnel responded and found AP unresponsive and unable to breathe on his own. On the way to the base urgent care center, AP began to experience seizures. Eventually medical personnel stabilized AP to the point where he could be transferred to a local civilian hospital. Subsequent evaluation revealed that AP suffered injuries such as 18 rib fractures, a broken ankle, liver damage, a subdural hemorrhage and

[1] The appellant was acquitted of four specifications alleging maiming, aggravated assault in which grievous bodily harm is intentionally inflicted, child endangerment by design resulting in grievous bodily harm, and false official statement.

hematoma, eye injuries, and brain damage. Medical experts assessed that AP would suffer life-long consequences from his injuries.

Air Force Office of Special Investigations (AFOSI) personnel interviewed the appellant, who initially denied any knowledge of the source of the injuries. He later made incriminating statements, including an admission that he had squeezed AP's chest. The appellant also made several admissions to the Family Advocacy Officer who coordinated treatment for the family, including statements that he squeezed AP with level 7 force on a scale of 10, he knew he had to pay for hurting AP, he realized that he had done something wrong, and he wished he had a time machine so he could go back to when AP was born so he would not "mess anything up." Medical experts also concluded that some of AP's injuries likely occurred after MP went to work the night of the 9-1-1 call, when the appellant was the sole adult supervising AP.

Military Judge's Instructions

The appellant first alleges that the military judge erred in instructing the members that aggravated assault, dangerous means or force was a lesser included offense (LIO) of aggravated assault, intentional infliction of grievous bodily harm.[2] He contends that the lesser offense requires proof that means or force was used in a manner likely to produce death or grievous bodily harm, an element not necessarily included in the greater offense.

Whether an offense is an LIO is a question of law we review de novo. *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011).

"An accused may be found guilty of an offense necessarily included in the offense charged." Article 79, UCMJ, 10 U.S.C. § 879. As a result, we apply the elements test to determine whether one offense is a lesser included offense of another. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

> Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.

Id. at 470. The elements test "permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses," and as a result "gives notice to the defendant that he may be convicted on either charge." *Schmuck v. United States*, 489 U.S. 705, 716 (1989). "[A]pplying normal rules of statutory interpretation and construction, this Court will determine whether the elements of the LIO would

[2] For ease of reference, we refer to the charged offense simply as "intentional infliction of grievous bodily harm" and the lesser offense as "dangerous means or force."

necessarily be proven by proving the elements of the greater offense." *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012). As normal principles of statutory construction may be employed in this determination, "[t]he elements test does not require that the two offenses at issue employ identical statutory language." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). The ultimate rationale for the elements test is that "[t]he due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted." *Jones*, 68 M.J. at 468 (quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008)).

The elements of the charged offense of intentional infliction of grievous bodily harm are as follows:

(1) That the accused assaulted a certain person;

(2) That grievous bodily harm was thereby inflicted upon such person;

(3) That the grievous bodily harm was done with unlawful force or violence;

(4) That the accused, at the time, had the specific intent to inflict grievous bodily harm; and

(5) That the person was a child under the age of 16 years.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 54.b.(4)(b) (2008 ed.). The offense of assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm contains the following elements:

(1) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(2) That the accused did so with a certain weapon, means, or force;

(3) That the attempt, offer, or bodily harm was done with unlawful force or violence;

(4) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm; and

(5) That the person was a child under the age of 16 years.

MCM, ¶ 54.b.(4)(a).

Of the lesser offense's five elements, the only question involves the fourth element. The appellant argues that the fourth element is not necessarily proven by proving the greater offense, since the greater offense only requires proof that the accused intended to produce death or grievous bodily harm and that grievous bodily harm was inflicted. The appellant argues that it is possible for an accused to inflict grievous bodily harm and to intend such a result but to use a means that is not likely to produce death or grievous bodily harm. By way of example, he notes that a person may intend to produce grievous bodily harm by attacking another with a toothpick, and may by chance achieve that result by nicking the victim's carotid artery. In this scenario, the appellant contends, the greater offense has been proven but the lesser offense has not, because the assailant did not use a weapon, means, or force likely to produce grievous bodily harm.

We agree with the military judge that under these facts, dangerous means or force was a lesser included offense of intentional infliction of grievous bodily harm. This was not a case of one adult attacking another with a toothpick. The two specifications in which the members found the appellant guilty of the lesser offense involved a full-grown adult assaulting a three-month-old infant by subjecting his abdomen and torso to force (causing liver damage) and subjecting his head to force (causing a subdural hemorrhage and hematoma, eye injuries, and brain damage). There is no conceivable situation in this case where the Government could have proven that the appellant intended to cause and actually caused grievous bodily harm in the manner alleged (as required by the greater offense) without also proving that the appellant's actions were likely to produce grievous bodily harm.

The *Manual for Courts-Martial* supports this interpretation. The *Manual* defines "other means or force likely to produce death or grievous bodily harm" this way:

> The phrase "other means or force" may include any means or instrumentality not normally considered a weapon. When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means or force is "likely" to produce that result. The use to which a certain kind of instrument is ordinarily put is irrelevant to the question of its method of employment in a particular case. Thus, a bottle, beer glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm.

MCM, ¶ 54.c.(4)(a)(ii). Therefore, even in the appellant's scenario, attacking someone's jugular with a toothpick could be considered using dangerous means or force. The fact that a toothpick would not ordinarily be used to cause such harm is irrelevant to the analysis. Applying normal rules of statutory interpretation and construction, and keeping in mind that our superior court has not required the two offenses at issue to employ

identical language, we find that proving the greater offense in this particular case would necessarily prove the lesser offense.[3] We therefore find that under the facts of this case, dangerous means or force was a proper lesser included offense of intentional infliction of grievous bodily harm.[4]

Exclusion of Death Certificate

The appellant next alleges that the military judge erred by prohibiting the defense from introducing evidence that MP had a previous child who died of unknown causes as an infant. He argues that this evidence was relevant because it tended to show that MP might have caused AP's injuries.

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

In addition, a military judge has "wide discretion" in applying Mil. R. Evid. 403. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). When a military judge conducts a Mil. R. Evid. 403 balancing test, his ruling "will not be overturned unless there has been a 'clear abuse of discretion.'" *Id.* (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (1998)).

We find no abuse of discretion in the military judge's decision to exclude a death certificate of a previous child born to MP. The proffered death certificate did not list the child's cause of death. Instead, it merely listed the cause of death as "Unknown (internal cause)." The defense proffered no evidence to indicate that any foul play was involved or that the child's mother had anything to do with the baby's death. We agree with the military judge that under these circumstances, the death certificate was not relevant to any issue before the finder of fact. Additionally, we agree that the risks of confusion, unfair prejudice, and waste of time substantially outweighed any marginal relevance the

[3] We also note that the appellant did not allege at trial and does not assert on appeal that he lacked notice as to what offense he could be convicted of or under what legal theory he could be convicted.

[4] While not dispositive, we note as well that the *Manual for Courts-Martial, United States* (*MCM*) (2008 ed.), lists dangerous means or force as a lesser included offense of intentional infliction of grievous bodily harm. *MCM*, Part IV, ¶ 54.d.(7).

document had, as the death certificate may have prompted a "mini-trial" into the infant's cause of death. The military judge's ruling was a proper exercise of his discretion.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).[5] Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] In a footnote, the appellant notes that the convening authority's Action is undated and asks this Court to order a new action. The appellant has not demonstrated any material prejudice to a substantial right, and our review of the record of trial finds no such prejudice. There is no evidence that the convening authority acted prematurely or without providing the appellant an opportunity to participate in the post-trial process. In fact, the appellant submitted a request for clemency that the convening authority considered prior to taking action. As such, we decline to order a new action. We also note that the Government introduced two records of nonjudicial punishment and a record of vacation of suspended punishment imposed upon the appellant. Each of these records indicates that the appellant submitted a written response for the commander's consideration, but those written presentations are not included in the record of trial. Since defense counsel did not identify any favorable documents or object to the introduction of the records, we presume that the record is complete and any error is waived. *United States v. Salgado-Agosto*, 20 M.J. 238, 239 (C.M.A. 1985); *United States v. Merrill*, 25 M.J. 501, 503 (A.F.C.M.R. 1987).