UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant DAVID A. VALOIS
United States Air Force

ACM 36841

31 March 2009

Sentence adjudged 15 June 2006 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dismissal and confinement for 25 years.

Appellate Counsel for the Appellant: Frank J. Spinner, Esquire (civilian counsel) (argued), Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Chadwick A. Conn, Major Lance J. Wood, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: G. Matt Osborn (argued), Colonel Gerald R. Bruce, and Major Jeremy S. Weber.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

The appellant was charged with murder by engaging in an act inherently dangerous to another and evinces a wanton disregard of human life, in violation of Article 118(3), UCMJ, 10 U.S.C. § 918(3). After pleading to the lesser included offense of involuntary manslaughter, in violation of Article 119, UCMJ, 10 U.S.C. § 919, a military judge, sitting alone, found the appellant guilty of the greater charged offense. The military judge sentenced the appellant to a dismissal, forfeiture of all pay and allowances, and 50 years of confinement. The convening authority approved the

dismissal and reduced the confinement to 25 years, consistent with the provisions of a pretrial agreement.

The appellant asserts three assignments of error before this Court: (1) the evidence is not legally and factually sufficient to support the finding of guilty to murder; (2) the military judge abandoned an impartial role and should have recused himself under Rule for Courts-Martial (R.C.M.) 902(b)(3) after making multiple statements reflecting that he determined guilt on an essential element before all of the evidence had been presented during findings; and (3) the military judge committed prejudicial error as a matter of law by refusing to consider leniency in determining a sentence.

Background

On 25 August 2005, the appellant's son, AV, was born in Dayton, Ohio. On 2 October 2005, at approximately 1215, after the appellant, his wife, KV, and AV, had returned from Church, Mrs. KV left to have lunch with her friends. This was the first time that Mrs. KV, who had been recovering from a cesarean section childbirth, had left AV alone with the appellant. Shortly before Mrs. KV left, AV started to fuss because he was getting hungry. Mrs. KV made a bottle and gave it to the appellant for him to feed AV while she was at lunch. Before she left, Mrs. KV asked the appellant if she should bring AV with her. The appellant indicated he would be fine with AV.

When AV was one week old, Mrs. KV observed a bruise on his cheek, which the appellant admitted he caused by sucking too hard on AV's cheek. A week or so later, Mrs. KV observed that AV had small bruises on his nose, cheeks, and shoulder. After this incident, she discussed with the appellant proper way of handling a baby.

At trial, Special Agent (SA) RH, Air Force Office of Special Investigations (AFOSI), Detachment 101, Wright-Patterson Air Force Base (AFB), testified about the interview he and another agent conducted with the appellant concerning what occurred after Mrs. KV departed for lunch. According to the appellant, he was sitting on the couch watching television and surfing the internet, and AV was lying on the sofa on his stomach to the appellant's right. The appellant admitted that he struck AV on the back of his head with his left hand four to five times. The appellant told SA RH that he could not stop AV from crying and could not take the crying any longer. The appellant stated, "I hit him with my hand. He was a defenseless child and I hit him. I just couldn't make him stop crying." After he struck AV, the appellant stated that he picked AV up "roughly" and put him in the bassinette. In response to why he put AV in the bassinette, the appellant said he "didn't want to hit him again." Approximately 30 minutes later, the appellant removed AV from the bassinette and held him on his shoulder. The appellant told SA RH that he "felt like a piece of shit, and . . . just wanted to hold his son."

When Mrs. KV returned home around 1530, AV was lying on the appellant's chest. The appellant was watching a game on the television and had his laptop computer on his lap. Mrs. KV picked AV up and immediately noticed something was wrong. AV was cold and very pale, and it appeared that he was not breathing properly. The appellant and Mrs. KV immediately rushed AV to the emergency room at Wright-Patterson AFB.

Upon arrival at the Wright-Patterson AFB emergency room, the medical staff observed that AV was critical and in a life threatening situation. His color and tone were poor, and his heart rate was 50-60, well below the normal heart rate of over 100 for a baby. The medical staff placed a breathing tube in his trachea to assist with ventilation, and an I.V. to give him fluids was placed in his leg bone because his veins had collapsed. The emergency room staff contacted Dr. KJ (then Major), a pediatric emergency room physician, who now works at Children's Medical Center (CMC) in Dayton. Dr. KJ testified that upon his arrival, he examined AV and observed that it appeared AV was in shock. The right side of AV's head was mushy and felt crepitus (a term used to describe a crunchy kind of feeling usually felt when the bone is broken), which indicated that he might have a skull fracture. AV's pupils were uncreative which indicated that he probably had a significant brain injury. His neurological state was also poor; AV was not responsive and was not moving. After examining AV, Dr. KJ spoke with the appellant and Mrs. KV. The appellant indicated that AV had been fussy that day so he decided to give him a bath. Otherwise, AV had been fed and went to sleep. Both parents denied that AV had experienced any trauma. Dr. KJ then explained that AV was critically ill and they needed to transport him to CMC.

Once at CMC, AV was initially examined by Dr. DD, who concluded AV had multiple skull fractures with intracranial bleeding, i.e., bleeding inside the brain. AV was experiencing hemorrhagic shock due to a lack of blood supply and oxygen to the tissues of the body, which leads to a state of circulatory dysfunction, which causes a person to become critically ill.

AV was moved from the emergency room for a CAT scan and was then taken to the intensive care unit (ICU). The CAT scan showed there were fractures to AV's skull, especially on his right side, and a potential fracture on his left side. The CAT scan also showed that there were areas of bleeding in the brain, the brain was starting to swell, and the brain was being deprived of oxygen. AV had suffered a severe neurological injury. Dr. AV, the attending physician at CMC, testified that AV had lost a lot of blood and most of the blood was inside his scalp because his scalp was continuing to swell.

After AV was in the ICU, Dr. AV spoke with the appellant and Mrs. KV. He informed them that AV had skull fractures, he had internal bleeding to the head, he was in shock, and many of his organs were affected by the shock. AV's cardiovascular system was not able to maintain its own blood pressure, his urinary system was not working, and his gastrointestinal system was in shock and malfunctioning. Dr. AV asked

what had happened that day, and the appellant told him AV had been fussy so he gave him a bath. Both parents denied having any idea how AV may have sustained skull fractures. The appellant did not admit that he had hit AV.

After Dr. AV left, Mrs. KV confronted the appellant and asked him what had happened. The appellant admitted that he had hit AV three times on the head but he felt that could not have caused the injuries because he hit him with an open hand. Mrs. KV told the appellant that he needed help, and knowing that AFOSI would be arriving shortly, she instructed the appellant to tell the truth.

The following morning, 3 October 2005, Mrs. KV was informed that AV's condition had worsened and his potential for survival was low. At her request, the appellant was permitted to see AV one last time. Later that day, after Mrs. KV was informed by a neurologist that nothing further could be done for AV and if he survived he would be in a vegetative state, Mrs. KV made the decision to take AV off of life support. AV expired shortly thereafter.

The government called Dr. MP, Deputy Coroner, Montgomery County Coroner's Office, as a witness. Dr. MP testified that the cause of death was blunt force trauma of the head. He testified that there was a lot of bleeding, especially for a child the size of AV, and he discussed the five skull fractures AV sustained, to include the impact points. He described the amount of force that would have been necessary to cause the extensive brain injuries as "considerable force."

The government then called Dr. CC, Director of Child Abuse Services at the Children's Hospital of Philadelphia, who is an expert in pediatric medicine, child abuse, and abusive head trauma. Based upon her review of the medical records, she opined that AV died of "multiple severe blunt force impact to his head that led to severe overwhelming bleeding and subsequent shock that led to failure of multiple organs." She also testified that in a majority of child abuse cases that she sees, the injuries to a baby are generally severe rotational injury to the brain, known as "shaken baby" syndrome. In these cases the baby dies from brain death but the other organs in the body are normally fine. In AV's case, he did not die from brain death but "died from the massive amount of bleeding in his scalp around his skull that led to hemorrhagic shock, which was quite unusual and extraordinary."

Dr. CC described the amount of force the appellant used as "a severe amount of force." Due to the amount of bleeding and the fact AV went into shock and died from these injuries, Dr. CC opined that this was a result of "severe blows to the head." She further testified that a slap would not cause a skull fracture and that the appellant would have had to hit AV with the boney part of his hand. The appellant also should have heard a sound when he fractured AV's skull. Additionally, Dr. CC testified that after being struck, AV would have felt some pain but shortly thereafter, he would have been

unconscious due to the multiple blunt force blows to his head that caused his brain injury, losing half of his blood volume, and being in shock. Finally, Dr. CC testified that she has seen hundreds of cases of head trauma, but it is extremely rare to see the kind of constellation of injuries presented by AV.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain the conviction of murder under Article 118(3), UCMJ. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), 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 factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

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). "Whether an unlawful killing constitutes murder or a lesser offense depends upon the circumstances." *United States v. Nichols*, 38 M.J. 717, 719 (A.C.M.R. 1993)

To be found guilty of Article 118(3), UCMJ, the government must prove that the act was inherently dangerous to another and showed a wanton disregard for human life, and that the appellant knew that death or great bodily harm was a probable consequence of his actions. In defining "wanton disregard", the *Manual for Courts-Martial, United States (MCM)* (2005 ed.) states, "Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm." *MCM*, ¶ 43.c.(4)(a). In defining "knowledge", the *Manual* states, "The accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act. Such knowledge may be proved by circumstantial evidence." *MCM*, ¶ 43.c.(4)(b). The main difference between Article 118(3), UCMJ, and Article 119(2), UCMJ, is that under Article 119, UCMJ, the act of the appellant must constitute "culpable negligence", which the *Manual* defines as,

> [A] degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which,

> when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission.

MCM, ¶ 44.c.(2)(i). An example is pointing a pistol in jest and accidentally pulling the trigger.

Considering the multiple skull fractures and extensive brain injuries that AV sustained and the severe amount of force the appellant must have used to cause those injuries, we find there was ample evidence presented to the trier of fact to prove that the appellant's acts were inherently dangerous, and he knew that death or great bodily harm was a probable consequence of his actions. Further, 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 appellant's guilt beyond a reasonable doubt. Accordingly, we find the evidence is legally and factually sufficient to sustain the conviction for murder under Article 118(3), UCMJ.*

Recusal

The second assignment of error is that the military judge abandoned his impartial role and should have recused himself after making multiple statements reflecting that he determined guilt on an essential element before all of the evidence had been presented.

"An accused has a constitutional right to an impartial judge." *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008) (quoting *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999)). "[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). A military judge shall disqualify himself where he "has expressed an opinion concerning the guilt or innocence of the accused." R.C.M. 902(b)(3). "[M]ilitary judge[s] should broadly construe grounds for challenge but should not step down from a case unnecessarily." R.C.M. 902(d)(1), Discussion.

"Whether the military judge should disqualify herself is viewed objectively, and is 'assessed not in the mind of the military judge [her]self, but rather in the mind of a reasonable man . . . who has knowledge of all the facts.'" *McIlwain*, 66 M.J. at 314 (quoting *Wright*, 52 M.J. at 141). "On appellate review, [we] will reverse a military judge's decision on the issue of recusal only for an abuse of discretion." *Id.* "Failure to object at trial to alleged partisan action on the part of a military judge may present an inference that the defense believed that the military judge remained impartial." *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007) (citing *United States v. Burton*, 52

* In *United States v. Nichols*, 38 M.J. 717 (A.C.M.R. 1993), our Army brotheren held that where an infant died after being struck with as many as 11 blows to the head, the evidence was factually sufficient to support the appellant's conviction for unpremeditated murder under Article 118(2), UCMJ, 10 U.S.C. § 918(2).

M.J. 223, 226 (C.A.A.F. 2000)). When an appellant does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review. *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001).

Specifically, the appellant asserts that the military judge determined that the "knowledge" element under Article 118(3), UCMJ, had been proven prior to hearing all of the evidence. The appellant points to two comments the military judge made during the proceedings. The first time was during a colloquy during the testimony of SA RH when the military judge and counsel were discussing the admissibility of uncharged misconduct concerning how the appellant initially lied to AFOSI when he denied knowing what happened to his son. The government was offering the evidence to show that by being dishonest the appellant had knowledge his actions would cause severe bodily harm to AV. During the discussion, the military judge commented, "I think you've put on enough evidence from what I've heard thus far . . . to show that the accused knew, assuming that the testimony is as trial counsel has proffered, to show that the accused knew that by . . . slapping his infant son on the face on multiple occasions, that the probable consequences of such would cause death or grievous bodily harm."

The second time occurred in addressing the defense objection to a portion of Dr. CC's expert testimony concerning the normal reaction of parents to accidental head injuries of infants. The military judge commented, "Well, I will allow it with respect to the issue of whether or not such an act would be inherently dangerous to another and showing a wanton disregard for human life. But with respect to the other element, I think there has been sufficient evidence as to whether the accused knew that the probable consequences of his actions would result in death or great bodily harm." Both of the comments occurred while the military judge was fulfilling his role in determining the admissibility of evidence and at no point did the military judge ever indicate the government had proven the "knowledge" element beyond a reasonable doubt.

Based upon our review of the record of trial, the legality, fairness, and impartiality of the trial were not put into doubt by the military judge. The military judge is presumed to know the law, and there were many instances in which he ruled against the government. *See United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). In short, the appellant received a fair trial.

Prejudicial Error

The third assignment of error is that the military judge committed prejudicial error by refusing to consider leniency in determining a sentence. Prior to announcing the sentence, the military judge commented,

> I would just note for the record that I certainly considered the multiple character statements that were provided on behalf of Lieutenant Valois.

> Many of them asked for leniency. It's the Court's opinion that leniency is not the responsibility of the Court. It's not within the purview of the Court. It's within the purview of the convening authority to decide if he or she will grant leniency. It's the purview of this Court to adjudge what it believes to be a fair and just sentence, taking into account the needs of good order and discipline in the military, the needs of Lieutenant Valois and also the welfare of society; not necessarily a lenient sentence or a light sentence, but by the same token not a harsh sentence either; one that is fair and appropriate.

No objection was made at trial.

"We review a military judge's consideration of sentencing factors under an abuse of discretion standard." *United States v. Green*, 64 M.J. 289, 292 (C.A.A.F. 2007) (citing *United States v. McDonald*, 55 M.J. 173, 178 (C.A.A.F. 2001)). "We evaluate a claim of judicial bias by considering, in view of the sentencing proceeding as a whole, whether a reasonable person would doubt the court-martial's legality, fairness, and impartiality." *Id.* at 292-93 (citing *Burton*, 52 M.J. at 226). "If the military judge comments on the sentence, the remarks may be reviewed on appeal to determine whether the military judge relied on inadmissible matter in determining the sentence." *Id.* at 291. As referenced earlier, the defense's failure to object at trial to the alleged partisan action by the military judge may present an inference that the defense believed that the military judge remained impartial. *Foster*, 64 M.J. at 333 (citing *Burton*, 52 M.J. at 226).

Normally, a failure to object at trial constitutes waiver of the issue unless there was plain error. *See United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001); *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001). To constitute plain error, the appellant must show not only that the error was obvious and substantial, but also that it "had an unfair prejudicial impact on the jury's deliberations." *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, n. 16 (1985)). Furthermore, the error must be viewed in the context of the particular case. *Id.* To do so, the appellant's claim must be evaluated against the entire record.

The appellant has not shown that the military judge failed to consider the appropriate sentencing factors in the UCMJ and the *Manual*. The appellant relies on *United States v. Heriot*, 21 M.J. 11 (C.M.A. 1985), a members case where our superior court stated that a court member should be excused when he "asserts, without ever wavering, that under no circumstances will he even consider adjudging some type of lenient sentence." *Heriot*, 21 M.J. at 13. However, our superior court went on to state that very few members actually have an inflexible attitude towards sentencing and in those cases where a member indicates he will not be fair, impartial, and open-minded, the military judge should give the member additional instructions to remind him of his responsibilities. *Id.* at 13-14.

In this case, the military judge specifically stated that he considered all of the character statements submitted by the appellant. The military judge further stated that he adjudged what he believed to be a fair and just sentence, taking into consideration the needs of the Air Force, the appellant, and society as a whole. Considering the military judge's comments in their entirety, we find that the military judge did not abuse his discretion in determining an appropriate sentence in this case.

Additionally, even if the military judge committed error, we find the error to be harmless. Considering the severity of the offense committed in this case and that the approved sentence was 25 years less than the adjudged sentence of 50 years, the appellant has not shown how he was prejudiced by the military judge's comments. Accordingly, this assignment of error is without merit.

Timely Post-Trial Processing

We note that this case has been with this Court in excess of 540 days. In this case, the overall delay between the trial and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (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). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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; *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