UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class HORACE C. WICKWARE
United States Air Force

ACM 38074

10 October 2013

Sentence adjudged 19 September 2011 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Dawn R. Eflein.

Approved Sentence: Dishonorable discharge, confinement for 22 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Capt Travis K. Ausland; Megan E. Smith, Esquire (civilian counsel); Jack B. Zimmerman, Esquire (civilian counsel); and Terri R. Zimmerman, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

HARNEY, Senior Judge:

A panel of officers sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of unpremeditated murder by engaging in an act inherently dangerous to another; one specification of involuntary manslaughter by culpable negligence; one specification of aggravated assault of a child under 16 years of age; two specifications of child endangerment; and one specification of negligent homicide, in violation of Articles 118, 119, 128, and 134, UCMJ, 10 U.S.C. §§ 918, 919, 928, 934. The members sentenced him to a dishonorable discharge, confinement for

22 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises the following issues: (1) The military judge erred by denying a motion for mistrial based upon ineffective assistance of counsel; (2) The evidence of "all assaultive charges" is factually insufficient; (3) The evidence of child endangerment is factually insufficient; (4) The military judge erred by precluding cross-examination of a key Government witness; (5) The military judge erred by failing to properly instruct the members on immunity; (6) The admission of the appellant's statements to the Family Advocacy Officer was plain error; (7) The charges of unpremeditated murder, involuntary manslaughter, and negligent homicide are multiplicious or, in the alternative, constitute an unreasonable multiplication of charges; and (8) The cumulative error doctrine mandates reversal.

We have considered the record of trial, the assignments of error, and the Government's answer thereto. Finding no error prejudicial to the substantial rights of the appellant, we affirm the findings and sentence.

Background

The appellant and JW were married on 19 June 2008. The appellant enlisted in the Air Force in August 2008 and was stationed at Spangdahlem Air Base (AB), Germany, in January 2009. JW joined the appellant in February 2009, where she remained until January 2010 when she returned to Houston to give birth to their son, CW, on 22 February 2010. The appellant attended CW's birth and returned to Germany after two weeks while JW and CW stayed with family members in Houston. The appellant rejoined them in Houston in June 2010 until July 2010, when he, JW, and CW flew back to Germany. While in Germany, the appellant and JW were CW's primary caretakers.

On 30 July 2010, CW became feverish. According to JW, he was not the same baby "we had brought [sic] to Germany," so she wanted to take CW to the hospital to "see what was going on with his health." The appellant and JW took CW to an off-base German hospital (Wittlich Hospital), where the doctor told them the baby had a stomach virus "or was just sick," and told them to give CW paracetamol for children.[1] At the German pharmacy, JW told the German national she needed paracetamol for children, but CW was unknowingly prescribed the adult dosage.

The appellant and JW administered the paracetamol to CW for a couple of days. JW testified the medicine did not make CW's symptoms go away and he continued to act "abnormally," so she stopped giving him the paracetamol. On 5 August 2010, JW told

[1] The German pediatrician originally instructed the appellant and JW to give CW "Baby Tylenol." At the time, however, there was a recall on Tylenol. The pediatrician then instructed them to go to a German pharmacy to buy children's paracetamol.

the appellant she wanted to take CW back to Wittlich Hospital. CW was admitted to the pediatric ward for bronchitis and elevated liver enzymes. The treating physician determined that CW may have suffered a reaction to the adult dosage of the paracetamol. CW spent five days in the hospital, where he received intravenous fluids to flush his system. He was discharged on 10 August 2010.

On 17 August 2010, the appellant gave CW a bath. When the bath was over, JW went into CW's room, where the appellant was diapering CW. JW testified that she noticed a pink area on CW's shoulder and thought it was perhaps a rash. In fact, CW had received burns from the bath. The next day, JW noticed that the area looked a little worse and told the appellant that they needed to ask the pediatrician about the area during CW's well-baby appointment the next day. The appellant initially agreed. The next morning, however, JW noticed that the burns had scabbed over and CW's whole body was red. She insisted that they needed to take CW to the well-baby appointment so they could "find out what was going on with his body." According to JW, the appellant said he "didn't want to go . . . [they] needed to wait until the burns had healed on [CW's] body" because he "knew the doctor was going to say this was child abuse." Eventually, the appellant agreed to accompany JW and CW to the well-baby appointment at Spangdahlem AB on 19 August 2010.

Doctor (Major) AB, a staff pediatrician at Spangdahlem AB, examined CW during his well-baby checkup. Upon seeing CW, she immediately noticed that his skin was bright red from his neck to his mid-thigh region, and that he had two or three circular, oblong-shaped lesions on his right shoulder that looked as if some skin had peeled off. Additional examination disclosed that CW had marks on his face, redness on his back with scratches, and blistering on his hands and lower forearm. Dr. AB also found a sclera hemorrhage in CW's right eye and bruising on the outer edge of his left ear.

When questioned about the burns on CW, the appellant and JW initially told Dr. AB that "is how he woke up." When Dr. AB challenged this explanation, the appellant told her CW "had a bath [the previous] night and he woke up [that] way; maybe the water was too hot." When Dr. AB asked if they had tested the water, the parents confirmed they had. She further asked if the water was too hot, to which they replied, "He didn't tell us like he normally would that the water was too hot" because he was still playful in the bath. Suspecting child abuse, Dr. AB notified the Family Advocacy Office, who photographed CW's burns. She also informed the appellant and JW to take CW back to Wittlich Hospital for treatment, that they were suspected of child abuse, and that it "was in their best interests" to cooperate with persons involved in CW's case. The appellant and JW took CW to Wittlich Hospital, where he was admitted for treatment of his burns. He was discharged on 22 August 2010.

On the morning of 2 September 2010, the appellant and JW slept on separate couches in the living room; CW was asleep in his crib. JW fed CW between 0200 and

0300 hours. She recalled that during the night the appellant brought CW from his crib to the couch, where he slept on the appellant's chest. JW slept until about 1000 or 1030 hours that morning. She did not remember hearing anything from CW during the time she was asleep. Later that morning, JW was mopping the floor in CW's room in anticipation of a visit from Family Advocacy. The appellant was with CW in the living room, where the baby swing was located. At some point, JW saw the appellant "bend down to put [CW] in the [baby] swing," but clarified she did not actually see him put CW in the swing. The appellant came to CW's room and told JW she needed to come and look because CW seemed to "like his new swing." As the appellant and JW walked into the living room, they saw CW slumped over in the swing; he was not breathing. After initial attempts at CPR failed, the appellant and JW rushed CW to Wittlich Hospital, with JW in the backseat of the car continuing to perform CPR on CW.

CW was still unconscious when he arrived at Wittlich Hospital. He was immediately transferred to a hospital in Bonn, Germany, where he stayed on a respirator and feeding tube until he died on 30 October 2010. At trial, multiple doctors testified that CW suffered fractures in his legs, arms, and ribs, as well as retinal hemorrhaging and bleeding in the brain. His injuries were consistent with shaken baby syndrome, battered child syndrome, and multiple blunt force injuries.

When CW arrived at the hospital on 2 September 2010, German authorities arrested the appellant and JW after being notified of CW's injuries. JW was processed through the German courts, convicted, and sentenced to 5 years in a German prison. The appellant was turned over to the Air Force. The Air Force Office of Special Investigations (AFOSI) opened an investigation, which included a search authorization to search and seize the laptop belonging to the appellant and JW. Forensic examination of the laptop computer revealed two user profiles, "Wick" and "Jenn." The "Wick" profile belonged to the appellant, and the "Jenn" profile belonged to JW. Analysis revealed someone using the "Wick" profile searched "shaken baby syndrome" on 26 July 2010, 29 August 2010, and 30 August 2010, and accessed a website with an article on that topic. Someone using the "Jenn" profile searched "baby lying still" on 11 August 2010. JW testified that she searched "baby lying still" on 11 August 2010 using her profile, but denied ever searching "shaken baby syndrome."

At trial, JW testified for the Government under a grant of immunity. She denied ever shaking CW. The defense attempted to deflect culpability away from the appellant, arguing that the circumstantial evidence showing JW's culpability was stronger than the circumstantial evidence showing his culpability. Additional facts will be included as necessary in our analysis below.

Mistrial, Ineffective Assistance of Counsel, and Petition for New Trial

The appellant argues his defense counsel's "sudden, unexpected vasovagal episode" during closing argument rendered him ineffective. As such, the military judge erred by denying his motion for a mistrial based on ineffective assistance of counsel.[2] The appellant grounds this assertion on a post-trial affidavit filed by one of his three trial defense counsel, Lieutenant Colonel (Lt Col) CH.

In his affidavit, Lt Col CH states that during his findings argument on 16 September 2011, he "experienced an unexpected decline in both [his] physical wellbeing [sic] and [his] mental acuity." He states he became dizzy and light-headed, and began to sweat profusely. He recalls his delivery became flat, weak, and lacking effect. At one point, he considered asking the military judge for a recess, but decided to continue "as best [he] could." He also recalls the reactions of some court members to his condition appeared negative. Lt Col CH states his condition caused him to omit from his argument two points he considered important: (1) JW's culpability through negligence and, by association, the appellant's culpability for CW's injuries and death; and (2) spillover. Lt Col CH states his illness "directly impacted [his] ability to effectively and comprehensively argue on [the appellant's] behalf, it affected how the court members interpreted the case, and, to this day, casts a substantial doubt on the outcome of trial."

At the conclusion of the findings arguments the members began their deliberations. The court recessed in the evening of Friday, 16 September 2011, and was scheduled to reconvene at noon on Saturday, 17 September 2011. That morning, Lt Col CH continued to feel ill. The local area defense counsel, also a member of the defense team, took Lt Col CH to the emergency room. When court reconvened, the military judge conducted a hearing pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a) (Article 39 hearing), during which the appellant, in response to questioning from the military judge, agreed to send the members back into deliberation without all of his attorneys present. After four hours of deliberation, the court recessed until Monday, 19 September 2011. When court reconvened that day, trial defense counsel informed the military judge during an Article 39 hearing that Lt Col CH had been hospitalized and would be unable to participate any further in the court-martial. The appellant agreed to waive his presence for the remainder of the court-martial.

At the same Article 39 hearing, another of the appellant's trial defense lawyers moved for a mistrial, stating that Lt Col CH's medical condition rendered him ineffective and materially deficient "as not being fully responsive to trial counsel's closing, which might unfairly lead members to believe that [Lt Col CH] didn't believe in the defense position. . . . or in [the appellant]." The military judge called Dr. GH, a defense expert, to

[2] On 21 May 2013, the appellant also filed a Petition for New Trial on the grounds that trial defense counsel was rendered ineffective because of the medical episode he experienced during his closing argument on findings. We address the Petition for New Trial in this opinion.

testify about his observations of the argument. After offering her observations of Lt Col CH's closing argument, the military judge invited trial and trial defense counsel to do the same. The military judge ultimately denied the motion for mistrial. The military judge instructed the members that Lt Col CH was ill and hospitalized, and cautioned them not to hold his absence against the appellant or to speculate about his condition. The members resumed deliberations.

1. Mistrial

An appellate court "will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009); *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013). "A military judge has discretion to 'declare a mistrial when . . . manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.'" *Coleman*, 72 M.J. at 184 (citing Rule for Courts-Martial (R.C.M.) 915(a)). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons." R.C.M. 915(a), Discussion. "A mistrial is a drastic remedy and is reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice." *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991).

We find the military judge did not abuse her discretion when she denied the appellant's motion for a mistrial. The military judge properly recognized that counsel's arguments are not evidence. Moreover, in ruling on the motion, the military judge found "the members did not see anything that would lead anybody to believe that [Lt Col CH] does not firmly believe in the position he was espousing or the innocence of his client, or the very heavy burden that the government bears in their attempt to convict [the appellant]." As the record clearly demonstrates and as the military judge specifically found, the findings argument presented by Lt Col CH was "very good." She found that during his argument, Lt Col CH's rate, tone, and fluidity were "normal." He was making eye contact with the members and appropriately referencing his notes. The military judge stated there was nothing that objectively caused her to believe Lt Col CH was dizzy or needed to be stopped in his argument. Rather, his demeanor matched what he was saying and the content of his argument addressed the relevant defense points. Based on the record, we conclude the military judge properly exercised her discretion.

2. Ineffective Assistance of Counsel

The appellant asserts that Lt Col CH's sudden and unexpected medical condition during closing argument caused him to overlook two points. As a result, the appellant argues he was prejudicially denied effective assistance of counsel. In his post-trial affidavit, Lt Col CH asserts that but for his symptoms, he would have (1) argued that JW

was responsible for CW's injuries and death through negligence, not murder, and (2) emphasized the military judge's spillover instruction.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011); *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; [3] and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

The deficiency prong requires the appellant to show his defense counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id.* at 688. The prejudice prong requires the appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In doing so, the appellant "must surmount a very high hurdle." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (citations omitted). This is because counsel is presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Strickland*, 466 U.S. at 689).

To determine whether the presumption of competence has been overcome, our superior court has set forth a three-part test:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Gooch, 69 M.J. at 362 (alterations in original) (citing *United States* v. *Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

[3] U.S. CONST. amend. VI.

Lt Col CH characterizes his own performance during the findings argument as deficient because of his medical symptoms. We disagree. Despite his illness, Lt Col CH's performance during his closing argument on findings was not deficient such that it fell below an objective standard of reasonableness, according to the prevailing standards of the profession. We see no error or omission in his argument that was a product of his illness, nor do we find dispositive his admission that his performance was deficient. *See, e.g., United States v. Eyman*, 313 F.3d 741, 743-44 (2d Cir. 2002) (defense counsel's actions were within the bounds of professional reasonableness; therefore, examination of errors for prejudice unnecessary).

The findings arguments came at the end of a hotly contested trial spread over several days. Both sides zealously advocated their respective positions. The record of trial, and specifically the transcript of his argument, more than satisfies us that Lt Col CH vigorously argued on behalf of the appellant at this stage of the court-martial. We are especially persuaded by the observations of the military judge, who characterized his argument as "very good." Although she noticed he was sweating, she nevertheless found his rate, tone, and fluidity "normal." She noted he made eye contact with the members and appropriately referenced his notes. The military judge further stated there was nothing that objectively caused her to believe that Lt Col CH was dizzy or needed to be stopped in his argument. She found his demeanor consistent with the content of his argument, which addressed relevant defense points. In addition, Lt Col CH responded appropriately to the objections trial counsel lodged during his argument, and lodged his own objections to trial counsel's argument.

Moreover, the two points Lt Col CH states he wanted to argue were already before the members. The record of trial clearly shows the defense strategy was to paint JW as the more culpable party, and that it was she, and not the appellant, who injured CW. This point was emphasized during the defense cross-examination of JW and during Lt Col CH's argument on findings. In addition, the military judge had instructed the members on spillover. Members are "presumed to follow instructions, until demonstrated otherwise." *United States v. Washington*, 57 M.J. 394, 403 (C.A.A.F. 2002) (citing *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)).

Having found that Lt Col CH's performance was not deficient, we need not address the prejudice prong of the *Strickland* test. However, even if we had found his performance deficient, we find the appellant has not met his burden of showing a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different.

Regardless, the appellant argues Lt Col CH's medical condition rendered him ineffective without the need to show any prejudice. To support this argument, the appellant relies on *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, the Supreme

Court noted there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id*. at 658. One such area, the Court stated, "is the complete denial of counsel." *Id.* at 659. In an illustrative footnote, the Court cites several cases where it "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659, n.25.[4] The Court concluded that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance." *Id.* at 662.

Here, we find the surrounding circumstances do not justify a presumption of ineffectiveness on the part of Lt Col CH. Despite the symptoms he experienced during his closing argument, he was neither totally absent nor prevented from assisting the appellant during a critical stage of the court-martial. Lt Col CH presented a closing argument that was constitutionally effective and shows that he assisted the appellant during this stage of the trial.[5] Accordingly, we find the appellant was not subjected to a complete denial of his Sixth Amendment right to counsel under *Cronic*. Applying the *Strickland* standard, we further find Lt Col CH's performance was not deficient and the appellant suffered no prejudice. We also conclude a fact-finding hearing is not necessary for us to resolve this issue. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

3. Petition for New Trial

On 21 May 2013, the appellant filed a Petition for a New Trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873, based upon newly discovered evidence. He raises the same argument presented in the initial assignment of errors: during Lt Col CH's

[4] The Court cited the following as examples: *Geders v. United States*, 425 U.S. 80 (1976) (trial court's order prohibiting accused from consulting with counsel overnight, between direct and cross-examination, deprived accused of right to counsel); *Herring v. New York*, 422 U.S. 853 (1975) (statute authorizing judge to deny counsel the opportunity for summation argument in judge-alone proceeding denies accused right to counsel as accused has a right to be heard in summation before factfinder deliberates); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (statute requiring accused who wanted to testify to do so before other testimony was heard, denied accused due process, as well as assistance of counsel); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment is a critical stage of a criminal proceeding in Alabama, therefore the presence counsel is necessary to assist accused); *White v. Maryland*, 373 U.S. 59 (1963) (preliminary hearing is a critical stage of a criminal proceeding in Maryland, therefore lack of counsel at that stage required reversal of conviction); and *Ferguson v. Georgia*, 365 U.S. 570 (1961) (statute prohibiting counsel to question accused during an unsworn statement denied accused his right to counsel).

[5] The appellant cites two cases supporting his argument: *United States v. Russell*, 205 F.3d 768 (5th Cir. 2000) (holding there was a presumption of prejudice in a trial for conspiracy, where trial defense counsel was unavailable for two days because of illness, defendant did not affirmatively waive his right to counsel, and counsel's absence was during a critical stage of trial because the government continued to put on evidence against co-conspirators); and *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984) (holding that a trial defense counsel who slept through a substantial portion of the trial was inherently prejudicial; no separate showing of prejudice was necessary). We find these cases distinguishable. Unlike *Russell*, Lieutenant Colonel (Lt Col) CH was present during findings argument. He was hospitalized after argument and during findings deliberations. Further, the military judge sought an affirmative waiver of his presence from the appellant. Unlike the sleeping counsel in *Javor*, Lt Col CH was awake and gave his findings argument despite feeling ill.

closing argument, he experienced a "sudden, unexpected vasovagal episode that rendered him ineffective."

The question of whether a petition meets the new trial criteria under R.C.M. 1210(f)(2) is reviewed de novo. *United States v. Denier*, 43 M.J. 693, 699 (A.F. Ct. Crim. App. 1995). Requests for a new trial are disfavored and only granted if manifest injustice would result from denying such a petition. *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). The accused has the burden of demonstrating a new trial is required under R.C.M. 1210(f)(2). *Id.* at 356. An accused may petition for a new trial at any time up to two years after approval of the findings of the convening authority, but his entitlement to a new trial is expressly contingent upon grounds of newly discovered evidence. R.C.M. 1210(f)(2). In order to receive a new trial on these grounds, the appellant must establish:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Id.

We find that Lt Col CH's "sudden, unexpected vasovagal episode" is not newly discovered evidence. His medical condition was already before the military judge at trial. What appears to be "new" is the actual diagnosis of his condition as a vasovagal episode. We do not find the specific diagnosis relevant to the petition for new trial. What is relevant is that Lt Col CH had a medical issue that the military judge concluded was not a basis for a mistrial, and which the appellant had already raised to this Court. He has not submitted any new evidence that justifies a new trial. Therefore, we deny the petition.

Factual Sufficiency

We review issues of factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Washington*, 57 M.J. at 399. 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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw

and heard the witnesses." *Washington*, 57 M.J. at 399. We apply "neither a presumption of innocence nor a presumption of guilt . . . and must make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id.* 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. *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973); Article 66(c), UCMJ. "This awesome, plenary, *de novo* power of review grants" our Court the authority to substitute our judgment for that of factfinder. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

1. Factual Sufficiency: Assaultive Charges

The appellant challenges the factual sufficiency of what he characterizes as the "assaultive" charges: unpremeditated murder, involuntary manslaughter, negligent homicide, and aggravated assault. He asserts the evidence is factually insufficient to identify him as the perpetrator or to show that he satisfied the knowledge element of unpremeditated murder. We disagree and find the evidence factually sufficient to support the appellant's convictions for unpremeditated murder, involuntary manslaughter, negligent homicide, and aggravated assault.

a. Unpremeditated Murder

To convict the appellant of unpremeditated murder under Article 118, UCMJ, the Government must prove the appellant murdered CW by shaking him or by some other use of force. The killing must be unlawful; and the act resulting in death must be intentional, be inherently dangerous to another, and show a wanton disregard for human life. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶¶ 43.b.(3)(a)-(c), (e) (2008 ed.). "Wanton disregard of human life" means "heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm." *MCM*, Part IV, ¶ 43.c.(4)(a). The accused must know that death or great bodily harm is a probable consequence of the inherently dangerous act; that knowledge may be proved by circumstantial evidence. *MCM*, Part IV, ¶¶ 43.b.(3)(d), 43.c.(4)(b).

Much of the evidence of knowledge in this case centered on whether the appellant searched for and accessed an article on "shaken baby syndrome" to show that he knew death or great bodily harm was a probable consequence of the inherently dangerous act. This evidence was gleaned from the testimony of JW and two computer experts, one who testified for the Government and the other who testified for the defense. JW testified that she and the appellant each had a user profile for their laptop. JW's profile was "Jenn," and the appellant's profile was "Wick." According to JW, she and the appellant knew each other's passwords and used each other's profile to access the Internet. As JW explained, "I didn't see a need to log out of my profile just to get on the Internet when the Internet was already available, so whatever profile was up that was the one I used."

Two Internet browsers were installed on the computer: Internet Explorer and Google Chrome. A computer expert was able to see the discrete Internet history for the two profiles associated with Internet Explorer. The "Jenn" profile history primarily contained sites related to shopping, recipes, and Facebook. The "Wick" profile history primarily contained sites related to PlayStation, Facebook, and Vuze (a site for downloading television shows and movies). Google Chrome was used solely under the "Wick" profile, but the browsing history contained a mixture of those websites: PlayStation, Facebook, recipes, and shopping. This indicated that both users appeared to be using the Google Chrome browser while logged in as "Wick."

Between 1120 and 1127 hours local time on 26 July 2010, a user under the "Wick" profile searched the term "shaken baby syndrome" on the Internet using Google Chrome. The user accessed an article based on the search results. That article stated that "25% of all children diagnosed with shaken baby syndrome die from their injuries." In addition, the article stated that "[o]ften infants will also have evidence of non-accidental injuries, including unexplained bruises, rib fractures, or extremity fractures."

At 2157 hours local time on 29 August 2010, someone using the "Wick" profile returned to the first page of the shaken baby article. The user also viewed women's clothing at Target and Amazon websites both before and after viewing the article. The Internet browser used for this session was Google Chrome. At 1133 hours local time on 30 August 2010, a user on the "Wick" profile using Google Chrome returned to view the second page of the shaken baby article. During this session, the user also accessed websites related to Jenny Craig and "Spang yard sales," as well as Fox Sports and "Cowboys." At trial, JW testified she visited websites for Target, Amazon, and Spang yard sales, but denied searching for or accessing an article on shaken baby syndrome.

The appellant typically worked 12-hour shifts. On 26 July 2010, the appellant was scheduled to work his normal 12-hour shift. His work schedule indicates he would have been off-shift by 1120 hours, when the shaken baby article was first accessed. On 30 August 2010, the appellant was also scheduled to work his normal 12-hour shift. His work schedule indicates he would have been off-shift by 1133 hours on 30 August 2010, when the article was again accessed. However, his work schedule indicates he was on shift at 2157 hours on 29 August 2010, when the article was also accessed. One of the appellant's coworkers testified the appellant's work unit did not have wireless Internet access, and that the appellant did not bring his laptop to work.

Under Article 66, UCMJ, we act under a weighty and profound obligation to affirm only those findings of guilt we find correct in law and fact. In doing this we must weigh the evidence ourselves. Although the knowledge element of unpremeditated murder may be proved by circumstantial evidence, we find the circumstantial evidence on this point leaves us speculating about who searched for and accessed the article. We know that *someone* using the "Wick" profile either searched for or accessed an article on

"shaken baby syndrome" on three different dates. We know JW and the appellant used each other's profiles to access the Internet, which casts doubt on the identity of that "someone." We know the appellant was the last person who was alone with CW on 2 September 2010.

We do not know, however, if the "someone" who searched for and accessed the article was the appellant or JW. Certain facts indicate it *might have been* JW who conducted the search (1) because of the other websites searched at or near the same time on 29 and 30 August 2010, and (2) because the appellant was working when the article was accessed on 29 August 2010. Likewise, certain facts indicate it *might have been* the appellant who conducted the search and accessed the article on 26 July 2010 and 30 August 2010 because he *might have been* off-shift and at home during the times when the article was accessed.

Regardless, we find the knowledge element satisfied based on the force employed by the appellant against his 6-month-old son. Several physicians testified during the court-martial. We find the testimony of Dr. ED, a forensic pathologist, particularly helpful on this issue. On direct examination, Dr. ED testified that CW suffered fractured ribs, legs, and arms, as well as brain injuries. She testified the injuries CW suffered were consistent with "shaken baby syndrome," which she described as consisting of "many injuries," not just one kind of injury. Dr. ED stated the shaking required is "very violent," noting "[i]t has to be more than one shake . . . the shaking takes place for 5 to 10 seconds for about 20 to 30 times. One shake is not enough. The shaking has to take place so that the head bounces back and forth." On cross-examination, trial defense counsel asked about the amount of force used to cause the injuries to CW: "We don't know . . . if there was a lot of force, or whether there was a more mild force; is that correct?" Dr. ED affirmed that a violent amount of force was used:

> Typically in a shaken baby – in a shaken baby, it's very, very violent. Imagine a baby, or in this case [CW], he was – he had a weight of 8 kilograms, and he was 77, I think, centimeters tall, and it's like an adult will be shaken by a 6 meter high giant . . . . A mild shaking, for example the baby is crying or the baby --
>
> . . . .
>
> . . . Choked and you are afraid and you shake the baby like "Oh my God" this is not enough --
>
> . . . .
>
> . . . It wouldn't be enough to cause these injuries. These brain injuries that you see during the shaking you would only see in very, very severe cases of car accidents or falls.

Dr. ED confirmed that multiple, violent shakings led to the fractures CW sustained. In her expert opinion, CW's injuries were consistent with shaken baby syndrome.

Against this backdrop, we find the appellant knew death or great bodily harm was a probable consequence of the inherently dangerous act of shaking CW. It is undisputed the appellant was the last person alone with CW on 2 September 2010, before he was found slumped over in his swing and not breathing. The testimony of numerous medical experts convinces us that CW's death resulted from repeated, violent shakings when CW was in the appellant's care on 2 September 2010. *See United States v. White*, ACM 31474 (A.F. Ct. Crim. App. 12 July 1996) (unpub. op.) (several months of caregiving for his twins gave the appellant sufficient experience for him to know that a violent shaking of an infant would cause death or great bodily harm), *rev'd on other grounds*, 47 M.J. 81 (C.M.A. 1997); *United States v. Van Syoc*, ACM 28725 (A.F.C.M.R. 10 January 1992) (unpub. op.) (finding that baby's death caused from repeated, violent shakings while in the exclusive care of the appellant), *rev'd on other grounds*, 36 M.J. 461 (C.M.A. 1993); *United States v. Winter*, 32 M.J. 901 (A.F.C.M.R. 1991) (finding the evidence sufficient to show that the appellant must have shaken an infant with great force and violence, causing the fatal injuries).

We are convinced beyond a reasonable doubt that the Government proved the appellant knew on 2 September 2010 that death or great bodily harm was a probable consequence of the inherently dangerous act, i.e., shaking or some other use of excessive force. Therefore, we find the evidence factually sufficient to find the appellant guilty of unpremeditated murder. Article 66(c), UCMJ; *Turner*, 25 M.J. at 325; *Bethea*, 46 C.M.R. at 224-25.

b. Involuntary Manslaughter, Negligent Homicide, and Aggravated Assault

To convict the appellant of involuntary manslaughter under Article 119, UCMJ, the Government must prove the appellant unlawfully killed CW by shaking or some other excessive use of force, and this act constituted culpable negligence. *MCM*, Part IV, ¶ 44.b.(2)(a)-(d). Culpable negligence means a "negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." *MCM*, Part IV, ¶ 44.c.(2)(a)(i). "[I]nvoluntary 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." *Id.*

To convict the appellant of negligent homicide under Article 134, UCMJ, the Government must prove the appellant unlawfully killed CW by shaking or some other use of excessive force, and that his conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *MCM*, Part IV, ¶ 85.b.(1)-(5). Any unlawful killing that is the result of simple negligence is negligent homicide. *MCM*, Part IV, ¶ 85.c.(1). Simple negligence is the "absence of due

care, . . . an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances." *MCM*, Part IV, ¶ 85.c.(2). Simple negligence is a lesser degree of carelessness than culpable negligence. *Id.*

To convict the appellant of aggravated assault under Article 128, UCMJ, the Government must prove that the appellant assaulted CW, a child under 16 years, by shaking him or causing contact with him with a force likely to produce death or grievous bodily harm, specifically by handling him in a manner to cause bone fractures. *MCM*, Part IV, ¶ 54.b.(3)(c)(i)-(iii).

The facts show that prior to mid-July 2010, CW did not have any major medical issues and did not cry around the appellant. Upon arrival in Germany in mid-July 2010, CW did not respond well to the appellant and JW took CW to the doctor several times. Doctors involved in CW's case ultimately noted he had fractures in his legs, arm, and ribs, retinal hemorrhaging, and bleeding in the brain. The doctors concluded CW's injuries were consistent with shaken baby syndrome, battered child syndrome, and multiple blunt force traumas. The medical testimony also established it takes only five to ten seconds of shaking to cause the injuries CW sustained.

JW testified that when the appellant came home from work, he "usually let [JW] have a break . . . He would take [CW] into the living room so that [JW] could get some sleep." In addition, the appellant's duty schedule in July, August, and part of September 2010 showed he was scheduled to work four days followed by three days off. Other pertinent facts were adduced at trial: JW did not have access to a car when the appellant was working; she was stressed and occasionally had trouble sleeping because of her child care responsibilities; she would have preferred the appellant to work day shift to help out with CW, but he continued to work nights; and she denied ever shaking CW but admitted under cross-examination "[t]here was the opportunity" for her to injure CW.

On 2 September 2010, JW fed CW between 0200 and 0300 hours. Shortly thereafter, CW started to fuss. The appellant picked him up so that CW could sleep on his chest for the rest of the night. At about 1000 or 1030 hours, JW got up; the appellant and CW woke up not too long after JW. The appellant changed CW's diaper in the baby's room and then took him into the living room because he started to cry. JW was cleaning CW's room. According to JW, she saw the appellant "bend down to put him [CW] in the swing, but . . . didn't [actually] see him put him in the swing." She noticed he stopped crying at some point. The appellant came to the room and told her to "come and look because he [the appellant] thinks [CW] likes his new swing." Together they walked into the living room and found "[CW] slumped over . . . [his] whole body was limp." Initial attempts at CPR failed. The appellant and JW then rushed CW to Wittlich

Hospital. Upon arrival at the hospital, CW was unconscious; he remained at the hospital with a respirator and feeding tube until he died on 30 October 2010.

As noted previously, much of the evidence in this case is circumstantial. After weighing the evidence, we find the evidence points to the appellant as the person who shook or used some other excessive force against CW on 2 September 2010 and did so with culpable negligence and, by extension, simple negligence. The evidence shows the appellant was the last person alone with CW on 2 September 2010 before he was found slumped over in his swing and not breathing. The evidence also points to the appellant as the person who handled CW in a manner to cause bone fractures on divers occasions between 15 July 2010 and 2 September 2010. Specifically, the appellant often would give JW a break after arriving home from work, and had some full days off from work when he would have had more time with CW. Finally, JW denied ever shaking CW.

We are aware that JW testified under a grant of testimonial immunity. Even so, we find her testimony credible and note she was cross-examined vigorously by the appellant's trial defense counsel. Given the totality of the circumstances in this case, we are convinced beyond a reasonable doubt that the Government proved the offenses of involuntary manslaughter, negligent homicide, and aggravated assault of a child under 16 years of age beyond a reasonable doubt. Accordingly, we find the evidence factually sufficient to support the appellant's conviction for those offenses. Article 66(c), UCMJ; *Turner*, 25 M.J. at 325; *Bethea*, 46 C.M.R. at 224-25.

2. Factual Sufficiency: Child Endangerment

Child endangerment under Article 134, UCMJ, has the following elements:

(1) That the accused had a duty for the care of a certain child;

(2) That the child was under the age of 16 years;

(3) That the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence; and

(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, ¶ 68a.b.(1)-(4).

Culpable negligence "may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts." *MCM*, Part IV,

¶ 68a.c.(3). "Actual physical or mental harm to the child is not required. The offense requires that the accused's actions reasonably could have caused physical or mental harm or suffering." *MCM*, Part IV, ¶ 68a.c.(4). "The duty of care is determined by the totality of circumstances" and may be established by the parent-child relationship. *MCM*, Part IV, ¶ 68a.c.(7). Our superior court has held that a parent has a duty to provide medical assistance to his or her child. *United States v. Martinez*, 52 M.J. 22, 25 (C.A.A.F. 1999); *United States v. Valdez*, 40 M.J. 491, 495 (C.M.A. 1994). *See also United States v. Robertson*, 37 M.J. 432, 440 (C.M.A. 1993) (Gierke, J., concurring).

In Specification 1 of Charge IV, the appellant was charged with child endangerment by culpable negligence resulting in bodily harm based upon an untreated fracture to CW's left thigh. The members found the appellant guilty of child endangerment by culpable negligence by failing to obtain medical care for CW, but excepted from the specification the words "which resulted in bodily harm" and "an untreated left thigh fracture."

We have reviewed the evidence and find it factually sufficient to support the appellant's conviction for child endangerment. First, the evidence showed CW had several fractured bones, to include his left femur. Dr. LS, an expert radiologist, testified during findings that he reviewed x-rays of CW taken on 6 or 7 September 2010 and found injuries on his "lower extremities that are normally found only cases of in shaking." Dr. LS further testified that the fracture on CW's left leg was older than eight days (from 6 or 7 September 2010), but could not offer a more specific date. Dr. LS also stated that fractured femurs are typical in cases such as CW's because the metaphyses are "not very stable on the bone" and because "the child's leg bone is still growing." This testimony was confirmed by Dr. LT, a United States Army doctor who observed CW's autopsy. He testified that "metaphyseal fractures of the femur" can occur "as the lower extremities are flying around as the baby is being violently shaken."

Second, the evidence showed that on 11 August 2010, JW was concerned that CW, upon returning from the hospital on 10 August 2010, was not moving or lifting his legs in the air, and did not want to "jump on [JW's] legs anymore [or] bounce like he used to." JW told the appellant she wanted to take CW back to the hospital. She testified the appellant told her she wanted to take CW to the hospital "for every little thing" and that she needed to "let him adjust." After the appellant left for work, JW spoke to the Patient Liaison Officer (PLO) about her concerns; the PLO told JW to bring CW back to the hospital. JW did not take CW to the hospital that night because the appellant had their only car and she did not want to call him at work.

Third, the evidence showed that prior to mid-July 2010, CW did not have any major medical issues and did not cry around the appellant. Upon arrival in Germany in mid-July 2010, CW did not respond well to the appellant and JW took CW to the doctor several times. In addition, the appellant's work schedule indicates the appellant had days

off during the charged time period of 10-13 August 2010, and regularly gave JW a break from her child care duties. Finally, JW testified under oath that she did not shake CW. From these facts, we find the appellant knew something might be wrong with CW's legs during the charged time period, had a duty to provide medical care, and endangered his physical health through culpable negligence by failing to obtain medical care for him.

In Specification 2 of Charge IV, the appellant was found guilty beyond a reasonable doubt of the elements discussed previously of child endangerment by culpable negligence resulting in bodily harm based upon CW's untreated burns.

The appellant counters that the evidence is factually insufficient because (1) "it is reasonable to believe" that CW did not need medical treatment for his burns; and (2) because CW "was not harmed" by the appellant's failure to seek medical treatment on his behalf. We disagree and find the evidence factually sufficient. First, the record shows that CW did require medical treatment for his burns. Evidence was admitted that CW sustained first and second degree burns over five percent of his body as a result of a bath the appellant gave him on 17 August 2010. JW noticed that CW's shoulder looked pink immediately after the bath and thought it might be a rash. By the next day, 18 August 2010, JW noticed the burns on CW's body "looked a little worse"; she told the appellant that they needed to ask the pediatrician about it the next day during the well-baby visit. The appellant agreed. On 19 August 2010, the burns had scabbed over and CW's body was red. The appellant told JW they needed to wait until the burns healed on CW's body before taking him to the doctor for fear of being reported for child abuse. At JW's insistence, the appellant agreed to go to the well-baby visit that day. Photographs taken during the examination clearly depict the burns and redness on CW's body.

Furthermore, the record shows CW was harmed by the appellant's failure to seek medical treatment on his behalf. Dr. AB agreed that CW's burns were such that a "normal child would have been in pain when they suffered them," and would have been in pain for "some time afterwards" as he recovered from the burns. She stated the pain accompanying burns to CW's face and shoulder initially would have been "quite painful." In addition, Dr. EN, a pediatrician, testified CW suffered more pain because he was not brought into the hospital for a couple of days to be treated for his burns. He further testified that leaving the burns untreated could have led to an infection.

The appellant argues that CW's burns were not infected, that he did not require skin grafts, and the delay in treatment did not interfere with the healing process. Even so, CW was a 6-month-old infant with first and second degree burns on his body from which he felt pain for three days until he finally received medical care. When viewed in the light of human experience, the facts show the appellant's failure to seek medical treatment for CW's burns resulted in harm to him. The appellant had a duty to provide medical care for CW. He endangered CW's physical health through culpable negligence by failing to obtain medical care for him, and CW suffered bodily harm as a result.

Given the totality of the circumstances, we are convinced beyond a reasonable doubt the Government proved the offenses of child endangerment. We therefore find the evidence factually sufficient to support the appellant's conviction for those offenses. Article 66(c), UCMJ; *Turner*, 25 M.J. at 325; *Bethea*, 46 C.M.R. at 224-25.

Cross-Examination

During an Article 39 hearing, the appellant moved to present evidence through cross-examination that JW would be able to apply for early release from prison, and that she or her attorney intended to use the fact that she testified against the appellant in her application to the German authorities. Trial defense counsel argued this was a valid area for cross-examination because it dealt with JW's credibility. Trial counsel countered that there was no evidence the German authorities would use JW's testimony to grant her early release and JW would testify that she understood her testimony would not be included as part of her application to justify early release. The military judge required the defense to make a good faith showing.[6] The defense called JW to testify on this issue. The following exchange took place between trial defense counsel and JW:

> Q: Mrs. [JW], is it your understanding that you can apply for early release as early as January of 2013?
>
> A: I can put in an application in 2013, but I won't be -- the earliest I can be released is in March 2013.
>
> Q: Alright. And that -- excuse me, that decision is made by another court, is your understanding?
>
> A: Yeah.
>
> Q: And part of what they look at is your good behavior, is that correct?
>
> A: That's correct.
>
> Q: In that application do you intend -- or does your attorney intend on your behalf to include the information that you're testifying against your husband in this court-martial?
>
> A: No.

[6] The military judge characterized the defense request as "collateral consequences" and stated, "Subsequent actions that rely on information or actions that other people may or may not take with respect to [JW], I'm not convinced have any bearing in this case right now."

After dismissing JW from the courtroom, the military judge offered to hear arguments on the matter.

> MJ: [to defense counsel] Do you wish to be heard?
>
> DC: Your Honor, I think that [JW's] testimony was very clear. While the defense finds it highly unlikely that she won't include this information, she was obviously under oath when she made her statement that information against her husband would not be included in her application. The defense has nothing further.
>
> MJ: Alright. So the defense will not be permitted to ask that type of question of this witness.

A military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013); *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011). A decision to limit repetitive cross-examination or to prohibit cross-examination that may cause confusion is also reviewed for abuse of discretion. *United States v. James*, 61 M.J. 132, 133, 136 (C.A.A.F. 2005).

The right to cross-examination has traditionally included the right "'to impeach, *i.e.*, discredit the witness.'" *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). However, an accused is not simply allowed "'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)). "'[T]rial judges retain wide latitude … to impose reasonable limits on [the] cross-examination'" of witnesses. *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011) (omission in the original) (quoting *Van Arsdall*, 475 U.S. at 679). While such limitation on "issues such as bias or motive to fabricate" might violate the appellant's right to confront witnesses, those limitations are appropriate when "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Gaddis*, 70 M.J. at 256. *See also United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000). In evaluating whether an appellant was deprived of a fair opportunity for cross-examination, we consider whether "'[a] reasonable jury might have received a significantly different impression of [the witness]'s credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *Id.* (alteration in original) (quoting *Van Arsdall*, 475 U.S. at 680).

We find the military judge did not abuse her discretion. During the Article 39 hearing, JW denied that she intended to include the fact that she testified against the appellant in her early release package. Counsel was thus "stuck" with JW's answer, and proffered no additional evidence to show that JW intended to act otherwise. The military

judge found this tenuous line of questioning collateral to the case, and properly refused to allow counsel to further inquire into this area. *McElhaney*, 54 M.J. at 130.

Moreover, we find the defense was able to cross-examine JW on other areas that exposed her bias and motive to lie. These areas included the fact that she was testifying against the appellant; that she had been tried and convicted in a German court for crimes related to the injuries and death of CW; that she had lied to Dr. AB about when CW had received the burns on his body; and that she had received immunity to testify. When viewing the totality of JW's testimony, we find the military judge imposed reasonable limits on her cross-examination and left open an opportunity for effective cross-examination. *See Gaddis*, 70 M.J. at 256.

Instruction on Immunity

By letter dated 16 June 2011, the General Court-Martial Convening Authority (GCMCA) notified JW she had been granted testimonial immunity in this case.[7] The letter stated in part: "[Y]our testimony and statements . . . may not be used against you in a later criminal proceeding by an[y] United States federal, state, or military authority. However, this immunity does not bar the use of your testimony, or information derived from it, in prosecuting you for perjury, giving a false statement, or otherwise failing to comply with this order to testify." On direct examination, JW stated she knew she had immunity, which she understood to be "immunity from prosecution from the Department of Justice." On cross-examination, trial defense counsel asked JW, "Now it's your understanding . . . that you're not going to face any criminal charges when you get back to the United States?" JW answered, "Yes, Ma'am."

Defense counsel requested the military judge to instruct the members that JW had transactional, rather than testimonial immunity. The military judge acknowledged that JW understood the immunity to be transactional, but denied trial defense counsel's requested instruction and instructed the members on testimonial immunity. The following exchange ensued:

> MJ: With respect to the evidentiary instructions, defense counsel, under credibility of witnesses I am giving the instruction that [JW] testified under a grant of immunity. Have you had the opportunity to review that instruction?
>
> DC: We have, Your Honor. We believe that it's an appropriate instruction. The defense would, however, request that transactional immunity also be

[7] The letter from the General Court-Martial Convening Authority to JW stated: "By authority vested in me . . . and by the Attorney General of the United States . . . I hereby grant you testimonial immunity and hereby order you to answer any questions posed to you by investigators an[d] counsel pertaining to, and to testify at any proceeding held pursuant to the UCMJ . . . concerning any offenses alleged against the military member identified above."

instructed. It's the defense's understanding that the immunity that was granted by the Department of Justice to [JW] is testimonial in nature; however, given [JW's] testimony on the stand it's clear that her understanding is that she in fact has transactional immunity and that was what was conveyed to the members.

MJ: Trial counsel?

TC: Your Honor, the government believes it would be inaccurate to tell the members that she has transactional immunity when she does not. She may or may not be confused; her testimony may not have been exactly accurate as to what she understood. Regardless, she did not have transactional immunity and we believe it would be incorrect to tell the members that she does.

DC: Your Honor, the Government had the opportunity during redirect of their witness to clarify that issue; they chose not to. Right now the evidence that's before the members is [JW's] understanding that she has transactional immunity with respect to these offenses.

MJ: Well, I understand, defense counsel, but the instruction as written says, "Under this immunity nothing she says and no evidence derived from that testimony can be used against her in a criminal trial." There was some testimony that she can't be prosecuted in the States; that may or may not be entirely accurate. Certainly it's her understanding. But I am giving it as a -- to use the immunity given to evaluate her credibility and because the DOJ immunity was not transactional I do decline to give that particular instruction although your objection is noted and preserved.

The appellant asserts the military judge erred by failing to instruct the members that JW had transactional rather than testimonial immunity. "While counsel may request specific instructions, the military judge has substantial discretionary power in deciding on the instructions to give" and whether the requested instruction is appropriate. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing *United States v. Smith*, 34 M.J. 200, 203 (C.M.A. 1992)); R.C.M. 920(c). "This discretion must be exercised in light of correct principles of law as applied to the facts and circumstances of the case." *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003). The military judge's denial of a requested instruction is reviewed for an abuse of discretion. *Damatta-Olivera*, 37 M.J. at 478. Error occurs if: "(1) the requested instruction is correct; (2) 'it is not substantially covered in the main [instruction]'; and (3) 'it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation.'" *Miller*, 58 M.J. at 270 (citing *United States v. Zamberlan*, 45 M.J. 491, 492-93 (C.A.A.F. 1997) (quoting *United States v. Eby*,

44 M.J. 425, 428 (C.A.A.F. 1996))). *See also Damatta-Olivera*, 37 M.J. at 478. For error to exist, all three prongs of the *Miller* test must be satisfied. *United States v. Barnett*, 71 M.J. 248, 253 (C.A.A.F. 2012).

Applying the three-pronged test, we find the military judge did not err. First, the requested instruction on transactional immunity was not correct under the facts of this case. Although JW may have thought she received transactional immunity, the facts clearly show that she only received testimonial immunity. Trial counsel, trial defense counsel, and the military judge all agreed on this point. The military judge appropriately declined to instruct the members on a fact that was simply untrue. Second, the instructions the military judge gave to the members covered the fact that JW had immunity, the limits of the immunity, and that the members should consider her immunity along with other factors affecting her believability. We find this instruction substantially covered the instruction the defense had requested.

Moreover, we find the requested instruction on transactional immunity was not such a "vital point" in this case. Certainly, JW's credibility and possible culpability was at issue, and the defense team vigorously pursued this line of attack when they cross-examined JW. In our opinion, and from our review of the record, JW's immunity was not the center of the defense strategy, but seems to have been a collateral issue, as evidenced by the few questions on cross-examination and the brief mention in closing argument. Thus, the military judge's decision not to instruct on transactional immunity did not deprive the appellant of a defense or seriously impair its effective presentation.

Statements to Family Advocacy Officer

At trial, the prosecution called Captain (Capt) KH, the former Family Advocacy Officer (FAO) at Spangdahlem AB to testify. Capt KH conducted the assessment interview with the appellant and JW after Dr. AB reported them for suspected child abuse. On the day of the interview, Capt KH contacted the appellant's first sergeant to ask that the unit bring appellant and JW to Family Advocacy for the interview. Capt KH testified about the standard procedure for conducting the assessment interview, the standard Family Advocacy questionnaire that all individuals complete, and the general nature of the interview. Capt KH interviewed each parent separately and then together. She began each interview by asking about possible "life stressors," such as drug or alcohol abuse, work issues, length of military service, and any history of legal action. She then discussed with each parent the allegation of potential child abuse that had been referred to her office.

During the interview of the appellant, Capt KH discussed with him the burns CW received from the bath. She asked him what happened, to which the appellant responded by describing that he had given the baby a bath, that he had noticed redness and peeling after the bath which he showed to JW, and that they decided to get the baby ready for

bed. Capt KH asked the appellant about his adjustment to the baby. He told her the baby cried a lot in his care, which he assumed was because the baby was getting used to him, but that he was "doing okay" with it [the crying]. As Capt KH walked the appellant to the waiting room, he asked her "how he could prove his innocence." She told him the interview was just "for assessment and treatment and [he should] just ask [Family Advocacy] questions and to do his best to follow through with any recommendations." Two days later, Capt KH and a Family Advocacy nurse conducted a home visit at the appellant's home with the consent of the appellant and JW. During this visit, Capt KH and the nurse asked the appellant to demonstrate his routine for bathing CW, inspected CW's room, and then talked with the parents about available parenting classes.

Capt KH did not advise the appellant of his Article 31(b), UCMJ, 10 U.S.C. § 831(b), rights before conducting the initial assessment interview. Trial defense counsel did not object to her testimony at trial. On appeal, the appellant asserts the admission of his statements to Capt KH was plain error. The appellant contends that Capt KH was acting in a law enforcement capacity with a duty to warn him before any questioning, and the record lacks any evidence to show that she was a mental health professional. The Government counters that Capt KH was not acting in a law enforcement role; rather, she was engaged in the assessment and treatment of the appellant and JW. As such, the Government argues the military judge did not have a sua sponte duty to suppress the appellant statements to the FAO, and thus did not err.

To establish plain error, the appellant must show "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) (citations omitted). We review plain error de novo. *Id. See also United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007).

Article 31(b), UCMJ, states:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

In *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981), our superior court held that Article 31(b), UCMJ, "applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry." Accordingly, the Court set forth a two-pronged test to determine whether Article 31(b), UCMJ, applies: (1) if the questioner is acting in an official or personal

capacity, and (2) whether the person being questioned believed the questions to be more than casual conversation. *Id.*

The *Duga* standard was further refined by the Court in *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). In *Loukas*, the Court held that Article 31(b), UCMJ, warnings were not required prior to an aircraft crew chief's questioning of a crew member about drug use, where the questions were limited to those needed to "fulfill his operational responsibilities, and there was no evidence suggesting his inquiries were designed to evade constitutional or codal rights." *Id.* at 389. The *Loukas* Court reiterated that Article 31(b), UCMJ, "requires warnings only when questioning is done during an official law-enforcement investigation or disciplinary inquiry." *Id.* at 387. Whether questioning is part of an official law enforcement investigation or disciplinary inquiry is governed by an objective test. *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991). An investigation is law enforcement or disciplinary when, based on all the facts and circumstances at the time of the interview, "the military questioner was acting or could reasonably be considered as acting in an official law-enforcement or disciplinary capacity." *Id.*[8]

As a rule, health professionals engaged in treatment do not have a duty to provide Article 31(b), UCMJ warnings.[9] A caveat to the rule is if the person is "acting in

[8] Our superior court has applied this objective test in several cases with varying fact patterns. *See, e.g.*, *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006) (an Air Force Inspector General's conversations with a service member filing a complaint extended beyond the boundaries necessary to fulfill his administrative duties and should have been proceeded by an Article 31(b), UCMJ, 10 U.S.C. § 831(b), rights advisement); *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002) (a chaplain was required to give warnings when he abandoned his clerical role and was acting solely as an officer); *United States v. Guyton-Bhatt*, 56 M.J. 484 (C.A.A.F. 2002) (a legal assistance attorney was required to give Article 31(b), UCMJ, warning to a debtor of his client, where the attorney suspected the debtor of committing forgery, planned to pursue criminal action against the debtor as a way to help his client, and used the authority of his position when he called the debtor to gather information); *United States v. Bradley*, 51 M.J. 437 (C.A.A.F. 1999) (a commander, questioning his soldier about whether the soldier had been charged with criminal conduct in order to determine whether the accused's security clearance should be terminated, was not required to give Article 31(b), UCMJ, warnings, since the purpose of the questioning was not for law enforcement of disciplinary purposes); *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997) (Defense Investigative Service agents conducting background investigation were not engaged in law enforcement activities, therefore, they did not have to warn the accused of his rights under Article 31(b), UCMJ).

[9] *See United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994) (a doctor was not required to inform accused of Article 31(b), UCMJ, rights when questioning him about child's injuries even though the doctor thought child abuse was a distinct possibility, as the doctor's questioning was for medical purposes); *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993) (a social worker who was required to report suspected child abuse was not acting as an investigative agent of law enforcement when he counseled the accused with full knowledge that the accused was pending charges for child sexual abuse); *United States v. Fisher*, 44 C.M.R. 277 (C.M.A. 1972) (diagnostic and treatment questioning by health professional is outside the scope of Article 31(b), UCMJ); *United States v. Dudley*, 42 M.J. 528 (N.M. Ct. Crim. App. 1995) (a statement by accused to psychiatrist was admissible, even though psychiatrist had not given accused Article 31(b), UCMJ, warnings as questions were to assess risk of suicide); *United States v. Keyes*, ACM 36621 (A.F. Ct. Crim. App. 29 August 2007) (unpub. op.) (accused's statements to Family Advocacy worker were admissible because the worker was not acting in furtherance of any military investigation).

furtherance of a law enforcement investigation." *United States v. Brisbane*, 63 M.J. 106, 108 (C.A.A.F. 2006). In *Brisbane*, the Court found the Family Advocacy representative should have provided Article 31(b), UCMJ, warnings to the accused after a Family Advocacy committee meeting, which included a legal officer and an AFOSI agent, agreed that she would conduct the initial interview of the accused. The Court opined that the Family Advocacy representative worked in close coordination with AFOSI before and after her questioning of the accused, she suspected the accused of an offense at their first meeting, and evidence of her investigatory purpose could be seen in her first question when she asked the appellant if he committed the crime. *Id.* at 113-14. The Court noted the "cooperative effort" between law enforcement and other members of the military community required by Air Force Instructions "'does not render every member of the military community a criminal investigator or investigative agent,'" but concluded the actions of this particular Family Advocacy representative were more akin to an investigative agent than a social worker. *Id.* at 113 (quoting *United States v. Raymond*, 38 M.J. 136, 138-139 (C.M.A. 1993)).

Turning now to this case, and assessing all of the facts and circumstances at the time of the interview, we hold that Capt KH was not acting in a law enforcement or disciplinary capacity when she interviewed the appellant, and thus did not have a duty to advise him of his Article 31(b), UCMJ, rights prior to the interview on 23 August 2010. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000). As such, the appellant's statements to Capt KH were admissible at trial, and the military judge did not err by failing to suppress those statements sua sponte.

Several facts support our decision. First, the record shows Capt KH was performing duties as a FAO, and not acting in a law enforcement or disciplinary capacity when she interviewed the appellant. Capt KH received the case from Dr. AB, the physician who examined CW and noticed his burns. Capt KH testified she interviewed the appellant and JW for purposes of assessment and treatment. This is borne out by the nature of the questions she asked, such as the focus on life stressors; how the parents managed with CW; how CW acquired the burns; and how the parents bathed CW. Additionally, while Capt KH may not have provided "treatment" in the traditional sense of the word, she and a FAO nurse followed up with the appellant and JW two days later to discuss, among other things, classes for new parents.

Second, Capt KH testified she had planned to interview the appellant and JW after CW's release from the hospital on 23 August 2010. AFOSI contacted her the morning of 23 August 2010 only to tell her CW had been released from the hospital the day before. At that point, Capt KH contacted the appellant's first sergeant to request the unit bring the appellant and JW over to Family Advocacy for the assessment interview. The record contains no additional evidence showing Capt KH worked hand-in-glove with AFOSI as part of an ongoing investigation or she otherwise acted with an investigatory purpose.

In this sense, the case at hand is distinguishable from *Brisbane*. Unlike the Family Advocacy representative in *Brisbane*, who coordinated her actions with AFOSI, the Child Sexual Maltreatment Response Team, and the legal office, Capt KH did none of those things. Rather, the record shows Capt KH discussed the case with Dr. AB prior to the interview, an appropriate step under the circumstances. The record does not show she consulted with AFOSI for any purpose other than to find out CW had been discharged from the hospital on 22 August 2010. Unlike in *Brisbane*, Capt KH was not conducting her assessment interview to determine if the Air Force had sufficient evidence to proceed with a case against the appellant. Rather, she was conducting the interview for purposes of assessment and treatment. Unlike the representative in *Brisbane* who did not provide the appellant any treatment, Capt KH did participate in a follow-up visit to the appellant's home to review bathing procedures for CW and to discuss parenting classes.

Finally, even if it was plain and obvious error for the military judge to not sua sponte suppress the statements the appellant made to Capt KH, we find that such error would not have materially prejudiced a substantial right of the appellant. His statements about how CW got burned and how he could "prove his innocence" are of marginal value when read in light of the allegations and the evidence presented at trial. In fact, these statements point to the fact that the appellant burned CW as he gave the baby a bath. However, the appellant was not charged with *burning* CW, but was charged with child endangerment for *not seeking medical treatment for those burns*. Plus, the record of trial contains other evidence about how CW received his burns, as well as the acts or omissions of the appellant in seeking medical treatment for CW after the bath.

Multiplicity and Unreasonable Multiplication of Charges

Prior to trial, the defense filed a motion to dismiss for multiplicity and to provide appropriate relief based upon unreasonable multiplication of charges. The defense specifically argued that involuntary manslaughter is multiplicious with unpremeditated murder, citing the "normal principals of statutory construction" addressed in *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010).[10] The military judge denied that portion of the defense motion and ruled involuntary manslaughter is not multiplicious with unpremeditated murder.[11] After the members convicted the appellant of unpremeditated

[10] Both sides agreed with the military judge that negligent homicide is not a lesser included offense of either unpremeditated murder or involuntary manslaughter in light of *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). S*ee also United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011) (negligent homicide is not a lesser included offense of involuntary manslaughter); *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011) (negligent homicide is not a lesser included offense of premeditated murder).

[11] In her ruling, the military judge stated that, "[a]though I agree in principal [sic] . . . that the involuntary manslaughter [specification] is a lesser included offense of the Specification in Charge I, under the facts as I understand them to be, the law on this issue is not abundantly clear." She continued to explain, "Article 118, murder, requires proof of an intentional act, and actual knowledge of the probable consequences of that act. Involuntary manslaughter, by contrast, does not require an intentional act, and does not require actual knowledge of the probable consequences."

murder, involuntary manslaughter, and negligent homicide, the military judge merged them for sentencing and instructed the members that they must consider them as one offense. *See United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012); *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)).

We review issues of multiplicity de novo and issues of unreasonable multiplication of charges for an abuse of discretion. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007); *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). We note that recently, our superior court held that involuntary manslaughter is a lesser included offense of unpremeditated murder. *United States v. Dalton*, __ M.J. ___ No. 13-0124/MC (C.A.A.F. 2013), *aff'g in part and vacating on other grounds*, 71 M.J. 632 (N.M. Ct. Crim. App. 2012). Here, the military judge found involuntary manslaughter was not multiplicious with unpremeditated murder. Regardless, we find the appellant has suffered no prejudice because the military judge merged the offenses for sentencing.[12]

Conclusion

The approved findings are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[13] 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). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[12] The appellant argues the cumulative error doctrine entitles him to relief. We disagree. We review de novo the cumulative effect of all errors, both plain and preserved. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011). We find the cumulative error doctrine inapplicable. There was overwhelming evidence of the appellant's guilt and he was not denied a fair trial. *Id. at* 335; *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996).

[13] 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). 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. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to 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. The post-trial record shows no evidence that the delay had any negative impact on the appellant. 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. *Moreno, 63 M.J. at* 135-36. S*ee 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).