

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Robert M. SHAW
Machinist's Mate Third Class (E-4), U. S. Navy**

NMCCA 200600728

Decided 22 March 2007

Sentence adjudged 29 July 2005. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

Maj RICHARD D. BELLISS, USMC, Appellate Defense Counsel
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge, sitting as a general court-martial, found the appellant guilty, following mixed pleas, of making a false official statement, maiming, and two specifications of assault consummated by a battery in violation of Articles 107, 124, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 924, and 928. The appellant was sentenced to confinement for six years, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence, as adjudged.

The appellant raises five assignments of error. In his first three assignments of error, the appellant asserts that the evidence was legally and factually insufficient to prove him guilty beyond a reasonable doubt of Charge II (maiming); Specification 2 of Charge III (assault/battery by shaking); and Specification 3 of Charge III (assault/battery by slapping). The appellant's fourth assignment of error avers that the military judge erred by allowing a Government expert to offer "human lie detector" testimony. Finally, the appellant argues that the military judge erred by admitting uncharged acts/misconduct evidence.

We have considered the record of trial, the appellant's five assignments of error, the Government's answer, and the appellant's reply.¹ We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.² Arts. 59(a) and 66(c), UCMJ.

Background

After being away from home for several hours on the morning of 2 January 2005, the appellant's wife returned to find that her five-month-old son, J, was in a state of near unconsciousness, breathing shallowly and irregularly. Record at 478-79. During her absence, the infant had been in the sole care of his father, the appellant. The appellant and his wife took J to the medical clinic at Schofield Barracks, Hawaii where the infant was evaluated, placed in an ambulance, and driven along with his mother to Tripler Army Medical Center (Tripler). *Id.* at 482. At Tripler, J was treated with emergent medical care, *id.* at 483, and initially diagnosed with a subdural hematoma. Further examination led to diagnoses of bilateral subdural hematomas with acute and chronic changes, bilateral retinal hemorrhages, and retinoschisis. *Id.* at 143-46. Taken together, these injuries were both significant and life-threatening. Absent swift medical intervention, the child could well have died. *Id.* at 169. The examining physicians generally believed that his injuries were caused by a rapid acceleration/deceleration of J's head. Shaken Baby Syndrome was believed to be the most likely mechanism of the injuries. *Id.* at 147.

Subsequent investigations by the Naval Criminal Investigative Service (NCIS) resulted in the appellant being charged, *inter alia*, with two specifications of assault and battery and one specification of maiming his five-month-old son. At trial, the appellant pled guilty to assaulting his son with a means likely to cause death or grievous bodily harm - a lesser included offense to maiming. He also pled guilty to assault and battery by "jerking" as opposed to "shaking" his son and of making a false official statement to NCIS regarding the infant's injuries. *Id.* at 25-26. The Government went forward on the remaining assault and battery charge involving slapping, the greater offense of maiming, and on the excepted term "shaking." The appellant was ultimately found guilty of the greater offense of maiming, assault and battery by "shaking" as opposed to "jerking" his son, a second specification of assault and battery by slapping his son, and the false official statement.

¹ We commend the appellate defense counsel for the forthright, cogent and thoughtful articulation of the issues in the appellant's brief.

² The appellant's Motion for Oral Argument is denied.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

Maiming (Charge II):

There are three elements to the offense of maiming: (1) that the appellant inflicted a certain injury upon a certain person; (2) that the injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and (3) that the appellant inflicted this injury with an intent to cause some injury to a person. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 50b.

The appellant argues that there was no direct evidence in the record that he had the specific intent to injure J. Appellant's Brief of 24 Oct 2006 at 6. The appellant acknowledges that the medical records and direct testimony of the Government's medical experts could reasonably lead to a conclusion that J was the victim of Shaken Baby Syndrome. He argues, however, that evidence that this injury occurred does not equate to evidence that the appellant intended to injure his son.

We concur that, standing alone, this medical evidence does not prove a specific intent to injure. This evidence does not stand alone, however. There was also evidence that the appellant had been informed prior to the incidents charged, both through hospital literature and personal discussions during home visits by a neonatal intensive care nurse, that infants are fragile beings and that certain types of potentially injurious handling were to be avoided. Testimony specifically indicated that the appellant had been briefed on Shaken Baby Syndrome both in terms of the mechanical aspects of how it occurred as well as the very real potential for serious injury to the child. Record at 231.

It is fundamental to the law that an individual may be presumed to intend the natural and probable result of an act,

purposely done. *United States v. Valdez*, 40 M.J. 491, 494 (C.M.A. 1994). We concur with the appellant that there is strong evidence that his actions may very well have been driven by frustration. Appellant's Brief at 7. It is also true, however, that the appellant was well aware that actions such as shaking or even jerking an infant could reasonably be expected to cause at least some injury. The intent element of maiming requires only that the appellant have intended to inflict some injury to the child; not that he intended to inflict the specific injuries suffered by his son.

We are convinced that a rational fact finder could have found the appellant guilty of this offense. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to Charge II.

Assault and Battery by "shaking":

With respect to Specification 2 (shaking), the appellant asserts that there is no direct evidence that he "shook" as opposed to "jerked" his son on the day in question. As the appellant acknowledges above, however, there was ample medical evidence that the infant was shaken on more than one occasion with sufficient force to cause injury. Record at 175. Further, there was the testimony of a fellow-detainee who indicated that the appellant acknowledged shaking his son but that he didn't mean to hurt him. *Id.* at 357. We are convinced that a rational fact finder could have found the appellant guilty of this specification. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to Specification 2 of Charge III.

Assault and Battery by "slapping":

With respect to Specification 3 (slapping), the appellant again asserts that there is no direct evidence that he slapped his son other than his own inculpatory statement to NCIS. Absent corroboration, the appellant asserts, this statement standing alone cannot support a finding of guilty. We agree with the appellant's statement of the law but not with his ultimate conclusion. Generally a confession is corroborated when independent evidence supports its truthfulness or reliability. *United States v. Rounds*, 30 M.J. 76, 79 (C.M.A. 1990). The amount of corroboration needed in military courts may be very slight. *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988). It is sufficient if the corroboration sufficiently supports the essential facts contained in the appellant's statements to justify a jury inference of their truth. *Opper v. United States*, 348 U.S. 84 (1954).

In the instant case, there was circumstantial corroboration from at least two witnesses. Each testified that the appellant would become frustrated and angry if his infant son failed to respond favorably to his parenting efforts. One witness

testified to seeing the appellant angrily slap the bottom of a car carrier J was seated in with sufficient force to spin it around 180 degrees. Record at 256-57. Another witness testified to seeing the appellant in a store waiving his finger angrily in his infant son's face while screaming that the child should "shut the f**k up." *Id.* at 277. Further, the appellant himself testified during the providence inquiry that when he became frustrated with his son's failure to respond appropriately his response would become aggressive and often forceful with the child. *Id.* at 69, 74, 91.

While the various episodes do not directly corroborate the specific slap at issue, they do strongly corroborate the "essential facts" outlined in the appellant's description of what was apparently a routine sequence of events. In each instance, J would act in a manner that irritated the appellant. The appellant would then try to change the child's behavior and would become intensely frustrated when his son failed to respond as desired. This frustration would inevitably build and at a certain point explode into a wholly inappropriate and aggressive physical action directed at the child. Evidence of other similar instances of this repeated and consistent chain of events leading to a violent act by the appellant against his son is sufficient corroboration for the appellant's inculpatory statement.

We are convinced that a rational fact finder could have found the appellant guilty of this specification. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to Specification 3 of Charge III.

Human Lie Detector

The appellant next argues that the military judge erred when he permitted the Government's expert forensic pediatrician to testify that the appellant's explanation for his son's injuries was inconsistent with her clinical observations of the child's injuries. Specifically, the appellant objects to the following exchange between trial counsel and the expert:

Q. So it would be fair to say that the story that the accused brought out in this case is highly unlikely?

. . . .
A. [J] may have been spun in the Exersaucer. In my opinion, it didn't account for the severity of the injuries at the time of his admission on January 2nd.

Record at 193-94

An expert may testify about matters within his or her area of expertise where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. MILITARY RULE OF EVIDENCE 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). An expert may not, however, testify regarding the credibility or

believability of a victim or opine as to the guilt or innocence of an accused. *United States v. Brooks*, _ M.J. _, No. 06-0060, 2007 CAAF LEXIS, 71 at 3 (C.A.A.F. Jan. 30, 2007)

We agree with the appellant that an expert in child abuse may not act as a human lie detector. There are three reasons supporting this prohibition. First, determination of truthfulness exceeds the scope of a witness' expertise, for the expert lacks specialized knowledge to determine if someone is telling the truth and therefore cannot assist the trier of fact as required under MIL. R. EVID. 702. Second, such testimony violates the limitations of MIL. R. EVID. 608. Third, human lie detector testimony encroaches into the exclusive province of the court to determine the credibility of witnesses.

In the instant case, however, the witness was not exceeding the scope of her expertise. While the trial counsel's question may have been treading dangerously near the line, the clear and plain meaning of the expert's response was that in her professional opinion, the type of rotational movement described by the appellant was unlikely to have caused the specific injuries she observed when she was assessing and treating the victim. In fact, the witness went on to describe specific scientific testing she'd commissioned to determine specifically what forces would be exerted on an infant in the Exersaucer under the circumstances described by the appellant during his providence inquiry. Record at 185-86. While her testimony undoubtedly undermined the appellant's version of events, it was not a "thinly veiled opinion" that the appellant was lying. Appellant's Brief at 18. We find, therefore, that the military judge did not abuse his discretion when he permitted the challenged testimony.

Evidence of Uncharged Acts and Misconduct

The appellant argues that the military judge erred when he admitted evidence of other crimes, wrongs, or acts under MIL. R. EVID. 404(b). The admission of such evidence is analyzed with the three-part test outlined in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). The evidence is inadmissible if it fails any of the three prongs. *United States v. Humpherys*, 57 M.J. 83, 91 (C.A.A.F. 2002).³ The appellant specifically avers that the evidence failed to meet the second prong of the *Reynolds* test insofar as it did not make a fact of consequence more or less probable.

The appellant cites to *United States v. Hays*, 62 M.J. 158, 163 (C.A.A.F. 2005) for the proposition that when determining if

³ The three-part *Reynolds* test addresses: (1) whether the evidence reasonably supports a finding by the court that the appellant committed prior crimes, wrongs, or acts; (2) whether the evidence makes a fact of consequence more or less probable; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

such evidence is admissible evidence of intent, the court is to consider whether the appellant's state of mind in the commission of both the charged and uncharged acts is sufficiently similar to make the evidence relevant. Appellant's Brief at 20-21. While it is true that the Government offered the specific instances of conduct as evidence of the appellant's intent to injure his son, it was also, as the appellant concedes, offered as evidence of motive (*i.e.* frustration and jealousy) and absence of mistake. *Id.* at 20.

The specific instances of conduct raised in Appellate Exhibit V and the 17 references to specific testimony cited by the appellant in his brief are relevant to the questions of whether the appellant was aware that roughly handling a five-month-old infant created a significant and real chance for injury and whether the appellant was motivated by frustration and employed aggressive responses when his son was being fussy; and whether the appellant's conduct and apparent attitude following the final incident was consistent with an accidental injury. The gravamen of the appellant's case was that the injuries inflicted on J were accidental and wholly unintended.

Evidence that the appellant was aware of the strong likelihood that at least some injury could result from shaking, jerking, or slapping a five-month-old child tends to negate a claim of accidental injury. Evidence of his ongoing frustration, aggressive approach to parenting, and apparent lack of concern for the injuries suffered by his son also suggest a possible motive for the charged actions and negate a claim of accident and/or that the injury was unintended. While we concur that the relevance of some of the instances of conduct was somewhat tenuous, such considerations more properly go to the weight the military judge gave a particular piece of evidence, not to its admissibility or relevance. A military judge is presumed to follow the law and consider evidence only for its lawful purpose.

Conclusion

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court