

**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.

**Anthony V. WILSON
Machinist's Mate First Class (E-6), U. S. Navy**

NMCCA 200300734

Decided 13 February 2007

Sentence adjudged 31 March 2001. Military Judge: W.J. Dunaway.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander Navy Region Southeast, Jacksonville, FL.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel
MR. FRANK J. SPINNER, Civilian Appellate Defense Counsel
Capt RICHARD VICZORKE, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 convicted the appellant, contrary to his pleas, of murder (unpremeditated) and five specifications of aggravated assault, in violation of Articles 118 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 928.¹ The appellant was sentenced to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged but in an act of clemency suspended execution of all confinement in excess of 40 years for 40 years from the date of his action.

The appellant raises four assignments of error. First, he asserts that the evidence was legally and factually insufficient to support a finding that he intended to murder or commit aggravated assault on his 2-7 week old son or his 2-10 week old

¹ The appellant pled guilty to three of the specifications of aggravated assault excepting the words "intentionally" and substituting "with a means likely." In each instance, the appellant was found guilty of the excepted words.

daughter. Second, the appellant avers that the military judge abused his discretion when he excluded the testimony of a defense expert on coerced confessions. Third, the appellant argues that the approved sentence is inappropriately severe and is disparate from other similar cases. Finally, the appellant asserts that the convening authority acted illegally when he suspended confinement over 40 years for a period of 40 years from the date of the convening authority's action.

We have examined the record of trial, the assignments of error and the Government's response. 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. Arts. 59(a) and 66(c), UCMJ.

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.

There are four elements to the offense of murder: (1) that a certain named or described person is dead; (2) that the death resulted from the act or omission of the appellant; (3) that the killing was unlawful; and (4) that, at the time of the killing, the appellant had the intent to kill or inflict great bodily harm upon a person. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 43b(2).

There are also four elements to the offense of aggravated assault: (1) that the appellant attempted to do, offered to do, or did bodily harm to a certain person; (2) that the appellant did so with a certain weapon, means, or force; (3) that the attempt, offer, or bodily harm was done with unlawful force or violence; and (4) that the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm. MOM, Part IV, ¶ 54b(4).

The appellant does not dispute that his 7-week old son is dead and that prior to his son's death he did great bodily harm to his son; that subsequently he did great bodily harm to his

daughter;² that the death and the great bodily harm resulted from forceful physical acts by the appellant; and that the force used in the aggravated assaults and murder was unlawful. Record at 1379-81. Specifically with respect to the murder, the appellant admits that, in an effort to stop his 7-week old son from crying, he intentionally and forcefully struck his son repeatedly on the back with the heel of his hand. *Id.* at 1377, 1379, 1382. He further admits that when he struck his child he intended to cause harm. *Id.* at 1385.

Similarly, with respect to the aggravated assaults, the appellant admits that on several separate occasions, in an effort to stop his 2-7 week old son and 2-10 week old daughter from crying he intentionally and forcefully squeezed each child in the rib cage area causing dozens of fractured ribs. He further acknowledged that on one occasion he intentionally dropped his infant daughter to the floor which resulted in a fractured skull. *Id.* at 1393, 1403, 1406, 1409, 1415, 1417. While acknowledging that the force used in each instance was likely to cause death or grievous bodily harm, he nonetheless asserts that he did not intend in any of the charged instances to kill or inflict great bodily harm upon his children.

It may be inferred that a person intends the natural and probable consequences of an act purposely done. MCM, Part IV, ¶ 43c(3)(a). Testimony by medical experts at trial revealed that the appellant's son had been the victim of a minimum of 3-4 aggravated assaults during his short 7 weeks of life. Record at 1566. In fact, the medical experts each testified that in decades of practice they had never seen such extensive abuse. *Id.* at 1587, 1669. The pathologist who conducted the autopsy testified that the infant son showed evidence of six bruises on his back in the area the appellant admits forcefully striking the infant with the heel of his hand on the day he died. *Id.* at 1522. Further, the autopsy revealed a total of 52 separate fractures of the infant's ribs which were in various stages of healing indicating that the injuries had been sustained over a period of at least 4 weeks. *Id.* at 1539-1553, 1562.

Consistent with this medical testimony, the appellant testified during the providence inquiry that on three occasions he responded to his son's crying by picking him up and forcefully squeezing around the child's rib cage. The appellant went on to note that the child would shriek and then he'd put the child down. *Id.* at 1390, 1394. He offered similar testimony regarding the charged instances with his daughter. The appellant acknowledged that the squeezing around the rib cage was a force likely to

² The aggravated assault and subsequent murder of the appellant's son occurred between 24 July and 12 September 1998. The various aggravated assaults of the appellant's infant daughter occurred between 18 August and 4 November 1999. The son's death was initially ruled accidental but later, following injuries to the daughter, the son's body was exhumed and a new autopsy was performed leading to the instant charges.

produce death or grievous bodily harm. *Id.* at 1392. An expert witness in the areas of pediatrics and child abuse, testified that an adult squeezing an infant's ribs with sufficient force to break them would hear the baby's bones break. *Id.* at 1640. On at least one occasion, the appellant acknowledged hearing a "popping noise" inside his infant daughter as he was squeezing her ribs. *Id.* at 1409.

We further note that the appellant made an exculpatory statement to local civilian law enforcement authorities on the day after his son's death in which he wholly omitted any mention of his violent assaults which he now agrees directly caused his infant son's injury and subsequent death. Prosecution Exhibit 8. That he would omit mention of his violent acts is strong evidence of the appellant's consciousness of guilt.

Considering the evidence cited above as well as the rest of the record of trial in the light most favorable to the Government, we find beyond a reasonable doubt that a rational trier of fact could have found that the appellant understood the severe life-threatening injuries he was causing his son and daughter and that he therefore intended the natural and probable consequences of his actions. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; see also Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is also convinced beyond a reasonable doubt both of the appellant's intent to inflict great or grievous bodily harm to his son and daughter and of his guilt of the charged instances of unpremeditated murder and aggravated assault. *Turner*, 25 M.J. at 325; see also Art. 66(c), UCMJ.

Exclusion of Defense Expert Testimony

The appellant next asserts that the military judge erred when he granted a Government motion *in limine* to exclude the testimony of Dr. Richard J. Ofshe, a social psychologist (Appellate Exhibit LXVI). Dr. Ofshe testified on the motion for the defense; the Government presented affidavits by Professor Paul G. Cassell, a law professor, (Appellate Exhibit LXVII), and Lieutenant Colonel (LtCol) Nancy Slicner, an Air Force psychologist (Appellate Exhibit LXVIII). After hearing arguments, the military judge granted the motion (Appellate Exhibit LXXII).

A military judge's rulings regarding expert witnesses are reviewed for an abuse of discretion. *United States v. Billings*, 61 M.J. 163, 165 (C.A.A.F. 2005). The proponent of expert testimony must establish the following: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) that the probative value of the expert's testimony outweighs the other considerations outlined in the evidence rule. *Id.* at 166.

The focus of the appellant's contention appears to be that, in a judge alone forum, the military judge erred when he determined that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.³ The appellant asserts that a military judge routinely is exposed to inadmissible evidence which he is presumed to be able to disregard. Appellant's Brief and Assignment of Errors of 8 May 2006 at 8. The appellant's reference to the military judge's finding, however, takes the words wholly out of context. The military judge's lengthy written opinion notes first of all that the vast majority of Dr. Ofshe's proposed testimony does not appear to have the potential to "assist the trier of fact to understand the evidence or to determine a fact in issue." Appellate Exhibit LXXII at 6.

In essence, the military judge found that Dr. Ofshe's theory regarding coercive interrogations was not based on rigorous scientific analysis or even subject to scientific testing but was rather Dr. Ofshe's own subjective review of a group of particularly selected cases. By way of example, at one point Dr. Ofshe testified that his theory concerning the impact of certain police interrogation techniques on the danger of false confessions was as intuitive as the fact that the sun will come up each day. Essentially he argues that we can't necessarily prove causation but we just know how it works. *Id.* at 5, Record at 1202.

The military judge's finding that the proffered theory was not scientifically sound was wholly supported by the affidavits of Professor Cassell and LtCol Slicner. Professor Cassell, after noting that he is familiar with Dr. Ofshe's research, opines that Dr. Ofshe's theories "have not been sufficiently tested... have an unacceptably high rate of error... depart from accepted standards... and have not been accepted in the relevant scientific community. . . ." Appellate Exhibit LXVII at 2. LtCol Slicner, opining more generally on research into the causes of false confessions, observes that to her knowledge there are no "scientifically reliable studies" that associate particular personality traits or the nature of the interrogation with false confessions. She opines that one cannot "hold so many unusual and diverse variables constant in order to study the effect of one or more clearly identifying variables." Appellate Exhibit LXVIII at 2.

Having determined that Dr. Ofshe's theory was not based on sufficient scientific rigor to be reliable and that it was not widely accepted within the relevant scientific community, the military judge went on to rule that the witness could testify only to his rather commonsensical opinions that "false

³ We note that at the time the military judge made his admissibility ruling the appellant had requested sentencing by members. It was only later that he changed his request to sentencing by judge alone. Record at 1344.

confessions do occur" and that "some persons have, after certain techniques have been used, made false confessions." Appellate Exhibit LXXII at 5. The military judge then found, as the appellant asserts, that the opinions Dr. Ofshe could legitimately testify to were not beyond the experience of the average member and therefore of such minimal value as to be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The underlying basis for the military judge's decision, however, was that Dr. Ofshe's expert opinion testimony was not scientifically reliable. We find, therefore, that there was ample evidence supporting the inadmissibility of Dr. Ofshe's expert testimony and that the military judge did not abuse his discretion when he excluded it.

Sentence Appropriateness and Sentence Disparity

The appellant summarily claims his sentence is inappropriately severe. He offers no case-specific reasons for this assertion but makes an oblique reference to racial discrimination in the context of the case of a "Caucasian officer, Lieutenant Commander (LCDR) Klemick." The appellant goes on to opine generically that LCDR Klemick's case was somehow similar to his own and that the LCDR was apparently given a pretrial agreement limiting his confinement to seven years.

As a general matter, we should not engage in comparing the sentences imposed in different cases. *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Sentence comparison is appropriate, however, in closely-related cases involving highly disparate sentences. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). The appellant bears the burden of demonstrating that cases are closely-related and that the sentences are highly disparate. Once the appellant meets that burden, the Government must show that there is a rational basis for the disparity. *Id.* at 288.

The appellant has provided no evidence beyond the assertions of counsel, which are not evidence, regarding the facts and circumstances of the "LCDR Klemick" case or how it is similar to the appellant's case. The appellant has, therefore, failed to meet his burden. We find that portion of this assignment of error alleging disparate treatment to be without merit. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). The appellant's final assignment of error regarding the suspension period associated with the convening authority's act of clemency is equally without merit.

Conclusion

The approved findings and sentence are affirmed

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court