

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
L.T. BOOKER, E.C. PRICE, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JAMES J. BOSTON  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200900157  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 04 November 2008.  
**Military Judge:** LtCol David Oliver, USMC.  
**Convening Authority:** Commanding General, III Marine Expeditionary Force, Okinawa, Japan.  
**Staff Judge Advocate's Recommendation:** LtCol D.J. Bligh, USMC.  
**For Appellant:** LT Brian Korn, JAGC, USN.  
**For Appellee:** Capt Robert Eckert, USMC.

**11 May 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PRICE, Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10 U.S.C. § 919. The appellant was sentenced to confinement for six years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the findings and sentence as adjudged.

The appellant raises two assignments of error: (1) that the military judge erred by denying his request for expert assistance

in biomechanics, and (2) that the evidence was factually insufficient to prove that he unlawfully killed his daughter.

After careful examination of the record of trial, the appellant's brief, and the Government's answer, 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.

### **Background**

On 28 January 2008, the appellant's two-month-old daughter [TB] stopped breathing while in his care at their off-base residence in Okinawa, Japan. She was initially treated in Okinawa before being transported to the Balboa Naval Hospital in San Diego, California, where she died on 10 February 2008. Record at 408, 492, 672, 834. An autopsy report prepared by the San Diego County Medical Examiner's Office concluded that the cause of death was **"complications of resuscitated cardiopulmonary arrest due to head injuries, and the manner as homicide."** Prosecution Exhibit 20 at 6.

The appellant was charged with the unpremeditated murder of [TB] "by means of shaking her with his hands." Contrary to his pleas, he was convicted of the lesser included offense of involuntary manslaughter. See Arts. 118 and 119, UCMJ. The trial was hotly contested, including extensive and contradictory expert witness testimony.

At trial, the Government's theory was that [TB] died as a result of injuries inflicted by the appellant. The Government presented evidence that [TB] suffered severe brain injuries, bilateral retinal hemorrhaging, and posterior rib fractures indicative of nonaccidental trauma.

The defense's primary theory was reasonable doubt as to guilt. The defense raised numerous issues with the evidence, including: positing an alternate cause of death (e.g., re-bleed of birth induced chronic subdural hematoma); expert testimony that shaking alone, without evidence of cranial impact or neck trauma, could not cause [TB]'s brain and retinal injuries; and that the posterior rib fractures could be attributable to resuscitation efforts.

Additional background necessary to resolve the assigned errors is included below.

### **Military Judge's ruling denying production of Dr. Van Ee**

At trial, the appellant moved to compel production of Dr. Van Ee, Ph.D., an expert witness in biomechanical engineering. AE-IV at 7-8. During a colloquy with the military judge regarding that motion, the defense counsel indicated "[b]ut at

least then the defense would like him as a [] consultant to look at the case and to offer some opinion . . . ." Record at 105.

The military judge subsequently denied the "defense motion to produce Dr. Van Ee [as an expert witness]," but made no ruling on the defense request that he be provided as an expert consultant. *Id.* at 122-23.

The appellant contends that the military judge abused his discretion by denying Dr. Van Ee's assistance. Appellant's Brief of 29 Jul 2009 at 8. He argues that Dr. Van Ee would have explained that [TB] could not have sustained her injuries from being shaken, that the military judge's ruling denied his constitutional right to present a defense, and resulted in a fundamentally unfair trial.

The Government answers that the military judge did not abuse his discretion, as the appellant failed to establish the relevance and necessity of Dr. Van Ee's testimony. The Government also asserts that the appellant received a fundamentally fair trial, as the appellant was provided five expert witnesses including the "foremost anti-shaken baby expert in the civilian sector," and that the appellant suffered no prejudice as the request for Dr. Van Ee's expert assistance was relevant to a then pending, but subsequently withdrawn defense motion.<sup>1</sup> Government Answer of 14 Sep 2009 at 12-13. We agree.

We will first address the military judge's denial of the defense request to produce Dr. Van Ee as an expert witness, and then analyze his failure to rule on the defense request that Dr. Van Ee be provided as an expert consultant.

### **Production of Expert Witness**

All parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Art. 46, UCMJ. "Each party is entitled to the production of any witness whose testimony on a matter in issue . . . would be relevant and necessary." RULE FOR COURTS-MARTIAL 703(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

We review a military judge's ruling denying production of an expert witness for an abuse of discretion. *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997) (citing *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)) (further citation omitted); see also *United States v. Schwartz*, 61 M.J. 567, 572 (N.M.Ct.Crim.App. 2005), *aff'd*, 64 M.J. 199 (C.A.A.F. 2006). We

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<sup>1</sup> The military judge ordered production of a defense requested ophthalmologist and neurosurgeon. Record at 122-23. Prior to trial, the convening authority approved defense requests for expert "consultants and/or witnesses" in forensic pathology, neuropathology, pediatric radiology, and neuroradiology. AE IV at 16-18, and 24.

will not set aside a judicial denial of a witness request "unless [we have] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (quoting *Houser*, 36 M.J. at 397) (internal quotation marks and citation omitted).

Relevant factors include, but are not limited to: "issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits . . .; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness . . . ." *Id.* at 4 (internal quotation marks and citation omitted). The Court of Appeals for the Armed Forces has determined that in order to require production of an expert witness, the moving party must establish: (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) whether the probative value of the testimony outweighs other considerations. *Id.* (quoting *Houser*, 36 M.J. at 397).

In the motion, trial defense counsel indicated Dr. Van Ee would testify that shaking without evidence of impact "cannot cause subdural hematomas, eye injuries or brain injuries without [also injuring the neck]," and, in support of that motion, provided several articles and studies. AE IV at 7. During an 8 September 2008 hearing, the military judge and counsel discussed Dr. Van Ee's expected testimony and the military judge's concerns with the testimony's reliability and relevance due to discrepancies between the proffer and defense provided articles. During this colloquy, trial defense counsel indicated Dr. Van Ee would testify "in accordance with the articles," then asserted he needed to consult with Dr. Van Ee to provide more specificity. Record at 98, 104-05.

On 11 September 2008, the military judge denied the defense motion and noted:

In denying the defense motion to compel production of Doctor Van Ee, the court finds the defense has failed to establish that Doctor Van Ee's testimony would be both logically and legally relevant. It is not entirely clear what Doctor Van Ee would testify to, however, even assuming that he could be called to testify to conclusions similar to those expressed in the biomechanical studies presented in [AE-IV], the court finds that such opinions would not be logically relevant or legally relevant under Military Rule of Evidence 403 . . . [The court also finds that the defense failed to establish that evidence's admissibility] under Military Rules of Evidence 702 and 703. The court finds based upon the evidence presented that the scientific community has yet to establish what amount of force is necessary to

produce various physical findings such as retinal hemorrhaging, diffused axonal injury, and subdural hematomas in infant humans. Because this threshold cannot be established, it is hard to see what matter of any legal relevance a biomechanics expert could testify to. Because the defense has not met its burden with regard to Doctor Van Ee, the defense motion is denied.

*Id.* at 123-24.

We conclude that the military judge did not abuse his discretion by denying the defense motion to produce Dr. Van Ee as the defense failed to establish either the relevance or necessity of his testimony.

First, the trial defense counsel provided inconsistent proffers of Dr. Van Ee's expected testimony, and failed to establish the scientific basis for, or reliability of the initial proffer that shaking without evidence of impact "cannot cause subdural hematomas, eye injuries or brain injuries without [also injuring the neck]" defense. AE IV at 7; Record at 98, 104-05, 123-24; see *Ruth*, 46 M.J. at 4. The military judge noted that the literature reflected the level of force necessary to produce "retinal hemorrhaging, diffused axonal injury, and subdural hematomas in infant[s]" was unknown, therefore a biomechanical engineer couldn't scientifically determine whether that unknown level of force was greater or less than the level of force required to injure the neck. *Id.* at 101-103, 123-24; see also MILITARY RULES OF EVIDENCE 702 and 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We agree.

Second, trial defense counsel failed to establish the necessity of producing Dr. Van Ee as a witness. R.C.M. 703(b)(1); see also *Ruth*, 46 M.J. at 4. Even assuming, as the military judge did, that Dr. Van Ee would testify consistent with the defense provided studies that evidence was available through other means and cumulative with the expected testimony of, Dr. Uscinski, another witness requested in the same motion.

Specifically, trial defense counsel acknowledged the proffers lacked specificity, that Dr. Van Ee had not yet conducted experimentation essential to rendering an expert opinion, and that an alternative to his testimony, albeit inconsistent with defense counsel's desires, was to cross-examine Government witnesses, presuming they testified contrary to the literature provided by the defense, based upon that literature. Record at 103-05. Of note, trial defense counsel provided no further evidence supporting the relevance and necessity of Dr. Van Ee's testimony prior to the military judge's ruling three days later.<sup>2</sup>

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<sup>2</sup> Trial defense counsel provided supplemental evidence in support of another expert witness request during this timeframe. Record at 122; AE XVII.

Similarly, Dr. Uscinski's expected testimony, articles he'd authored and the summary of testimony he provided in a Kentucky case submitted in support of compelling his production were cumulative with the articles offered in support of production of Dr. Van Ee. AE IV at 5-6, 33-34, 52-53.

Even assuming the defense made the requisite showings of relevance and necessity, the appellant suffered no prejudice, as Dr. Uscinski testified consistent with both the articles he'd authored and the additional articles offered in support of compelling Dr. Van Ee's production, including response to one question posed by the military judge. Record at 1015-27. Further, at least two Government witnesses, a neurosurgeon and a neuropathologist, provided testimony which corroborated those portions of Dr. Uscinski's testimony. *Id.* at 598-610, 1185.

The military judge's conclusion that the defense had not established the relevance or reliability of Dr. Van Ee's testimony was consistent with his role as "gatekeeper." See *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007); *Houser*, 36 M.J. at 397; MIL. R. EVID. 403, 702 and 703. The defense did not establish, by a preponderance of the evidence, that Dr. Van Ee's testimony was relevant or necessary, and we conclude that the military judge did not abuse his discretion by denying the motion to compel his production.

#### **Expert Consultant**

An accused is entitled to an expert's assistance "before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006) (quoting *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)) (internal quotation marks and additional citation omitted). To demonstrate necessity "the accused must show a reasonable probability exists both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id.* (internal quotation marks and citations omitted).

"To test the adequacy of this showing of necessity . . . the defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *Id.* (citations omitted). We will not overturn a military judge's ruling on a request for expert assistance absent an abuse of discretion. *Id.* at 217 (citation omitted).

We will assume without deciding that trial defense counsel's comments during litigation of the motion to produce Dr. Van Ee as an expert witness, including "[b]ut at least [we] would like him as a [] consultant to look at the case and to offer some opinion," constituted a request for expert assistance. Record at

105. We will also presume the military judge's failure to rule on this motion constituted error. See R.C.M. 801(a)(4) (military judge shall "rule on all interlocutory questions").

Trial defense counsel indicated that if his request for expert assistance were granted, he would "give [Dr. Van Ee] the materials and see what studies are out there," and that "[Dr. Van Ee] would take the facts of this case, make a model, determine what is the force that would require [sic], and what's the force that would be required given the specific facts of this case." Record at 104-05. Trial defense counsel's abbreviated comments failed to establish the necessity of Dr. Van Ee's expert assistance.

First, the defense counsel failed to establish why the expert assistance was needed. *Lee*, 64 M.J. at 217. The primary basis for the impromptu request for Dr. Van Ee's expert assistance was apparently to establish the relevance and necessity, or lack thereof, of his production as a witness. Trial defense counsel acknowledged he didn't know what Dr. Van Ee's opinion was or would be, but noted, if as anticipated, a Daubert hearing would likely be necessary. Record at 104-05.

From the record, we can deduce that defense counsel expected Dr. Van Ee, in an estimated 15 hours, to conduct all required calculations and modeling and then determine the force required to support his opinion that shaking without evidence of impact "cannot cause subdural hematomas, eye injuries or brain injuries without [also injuring the neck]." AE IV at 7. This brings us full circle to the military judge's observation that the literature provided by the defense reflected the level of force necessary to produce "retinal hemorrhaging, diffused axonal injury, and subdural hematomas in infant[s]" was unknown, therefore a biomechanical engineer couldn't scientifically determine whether that unknown level of force was greater or less than the level of force required to injure the neck. See *supra* text at 3-5; Record. at 101-03, 123-24; see also MIL. R. EVID. 702 and 703. The speculative nature of this argument and paucity of evidence do not establish why expert assistance in biomechanics was required.

Second, defense counsel did not establish why he was unable to gather and present the evidence that the expert assistance would be able to develop. *Lee*, 64 M.J. at 217. Trial defense counsel are "expected to educate themselves to attain competence in defending an issue presented in a particular case, using a number of primary and secondary materials that are readily available." *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999) (internal quotation marks and citation omitted). "Due process requires that the accused be given the 'basic tools' necessary to present a defense, but defense counsel is responsible for doing his or her homework." *Id.*

Third, Dr. Uscinski, an expert in neurosurgery and one of the nation's foremost medical experts on shaken baby syndrome, was provided as an expert to the defense. He shared Dr. Van Ee's general opinion and authored three articles submitted by trial defense counsel on the motion that included sections on injury biomechanics as they relate to shaken baby syndrome. AE IV at 32, 43, 47. Although not a biomechanical engineer, Dr Uscinski was well-versed in the subject, and testified consistent with the articles submitted by the defense at trial. Record at 1015-18, 1023-27. This cured any potential prejudice caused by the military judge's failure to rule on the defense request for Dr. Van Ee as an expert consultant.

In addition to the apparent use of Dr. Van Ee's expert assistance to establish the relevance and necessity of his expected testimony, the defense also suggested his assistance would support the defense motion challenging the admissibility of expected Government witness testimony regarding Shaken Baby Syndrome or Shaken-Impact Syndrome. Record at 103-06, 125; AE XIII (citing R.C.M. 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)). However, the defense failed to request an adequate substitute, though given the opportunity to do so, and subsequently withdrew their *Daubert* motion. Record at 124-25, 179.

On the facts of this case, we conclude that the defense failed to make an adequate showing of necessity, that the appellant was not prejudiced by the military judge's presumed error, and that the appellant received a fundamentally fair trial.

### **Factual Sufficiency**

In his second assignment of error, the appellant contends that the evidence is factually insufficient to support his conviction of involuntary manslaughter. He asserts that, based upon the same medical evidence, Government experts and "equally credible" defense experts came to different but "equally plausible" conclusions as to what caused [TB's] death. Appellant's Brief at 16-19. The appellant then asserts that given the competing theories "it is impossible to determine beyond a reasonable doubt what caused [TB's] injuries," and that we should set aside the findings and sentence. *Id.* at 19. We disagree.

#### **A. Background**

On 28 January 2008, the appellant took his two-month-old daughter [TB] to his neighbor's apartment and asked her to request emergency assistance. Record at 646-49. [TB] was brought to a nearby hospital in Okinawa, Japan, and later transported to a hospital in San Diego, where she died on 10 February 2008. *Id.* at 408, 492, 672, 834.

The Government's evidence at trial primarily consisted of expert testimony from physicians who either treated or examined [TB], or conducted the autopsy. The Government's theory was that [TB] died as a result of injuries inflicted by the appellant. Diagnoses of nonaccidental abusive trauma were supported by evidence of subdural hematomas, bilateral retinal hemorrhaging, and multiple rib fractures, including posterior rib fractures. The Government also presented the appellant's statements to the Naval Criminal Investigative Service (NCIS).

At trial, the defense provided alternate explanations for [TB]'s injuries, and offered an alternate theory of the cause of her death - a chronic subdural hematoma caused by birth trauma that re-bled and led to a build up of intracranial pressure. The defense attributed the broken ribs to CPR. The defense also argued that shaking an infant alone, without any evidence of cranial impact or neck trauma, could not have caused [TB]'s brain and retinal injuries.

## **B. Principles of Law**

We are required to conduct a *de novo* review of factual sufficiency of each approved finding of guilty. Art. 66(c), UCMJ; see also *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The elements of involuntary manslaughter are: (i) that [TB] is dead; (ii) that the death resulted from the act or omission of the accused; (iii) that the killing was unlawful; and (iv) that this act or omission of the accused constituted culpable negligence. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 44b(2). Culpable negligence is defined as "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." *Id.* at ¶ 44c(2)(a)(i).

## **C. Discussion**

We note the appellant's assertions that the case against him "rested entirely on the interpretation of clinical findings," that the defense experts were "equally credible," and the defense expert conclusions to what caused [TB's] death were "equally plausible" are unsupported by the record. Appellants Brief at 16-19.

First, in addition to the medical evidence, the appellant's three videotaped interviews with NCIS were admitted into evidence. *Id.* at 415-16, 419, 913; Prosecution Exhibits 14, 16, 18, 23-25. In the first interview the appellant stated that [TB] was on his bed and fell over on her face, her heart was not

"beating very well," and she was not breathing. PE 23 at 18, 20-22. The appellant denied shaking [TB], and stated she never fell on any hard surfaces. PE 23 at 36, 42, 44. During the second interview, in response to repeated questions regarding a possible skull fracture the appellant stated "[TB] might have hit her head on the door" while he was running with her in his arms. PE 24 at 32-39. He again denied shaking [TB]. *Id.* at 41-42, 48. During the appellant's third interview he told NCIS that the door hit [TB], and that he did shake her once to see if she would react in an attempt to revive her, but maintained that he was not trying to hurt her. PE 25 at 5, 14-17.

The appellant's demeanor and inconsistencies in his statements to NCIS, including his belated admission regarding [TB's] head hitting the door and admitted shaking of [TB] after multiple denials, provide substantial evidence of guilt with respect to the second and fourth elements of involuntary manslaughter.

Second, the appellant's assertion that the defense experts were "equally credible" is belied by the members' findings and the record. The members were presented with competing theories of the cause of [TB's] death and properly instructed on the meaning of reasonable doubt including; "[t]he proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt." Record at 1679; see also *United States v. Ashby*, 68 M.J. 108, 123 (C.A.A.F. 2009) ("Absent evidence to the contrary, the members are presumed to follow the military judge's instructions"). The members' findings suggest that they did not find the defense experts testimony with respect to the cause of death "equally credible." Witness credibility determinations are particularly significant when, as here, there are competing theories presented through expert witnesses.

In addition, the defense experts concluded the brain injuries were likely caused by the re-bleed of a chronic subdural hematoma. Key to this conclusion was medical history provided to those experts by the appellant and his wife indicating [TB] had previously experienced a fall and, prior to 28 January 2008, stopped breathing on a number of occasions.

At trial, [TB]'s mother testified about a short fall and 4-5 incidents where [TB] stopped breathing (only two of which she claimed to personally witness having been informed of the other instances by the appellant) and the appellant breathed into her nose. Record at 1452-54; 1459-61. At trial, [TB]'s primary treating pediatrician, a neurosurgeon, and the forensic pathologist who conducted the autopsy, all testified that [TB]'s injuries were inconsistent with a short fall. *Id.* at 477-88, 548, 725. Significantly, neither parent reported the previous fall or breathing stoppages to medical professionals when they allegedly occurred or as medical history, in response to direct questioning by at least two treating physicians, at any time during the almost two weeks between [TB's] injury and death. *Id.*

at 476, 833-38. Moreover, the appellant did not mention the alleged previous fall or breathing difficulties during his three extended interviews with NCIS.

In contrast, the Government's experts asserted that [TB]'s injuries were acute, and that the primary evidence of abusive trauma was the presence of subdural hematomas, bilateral retinal hemorrhages, and eight fractured ribs including posterior rib fractures. *Id.* at 529, 673-74, 840-44, 911. The injuries were believed to be caused by sudden acceleration and deceleration motions, impacts against a soft surface, and/or squeezing. *Id.* at 532, 733, 792, 1339-40, 1419.

After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt. *Turner*, 25 M.J. at 325; see Art. 66(c), UCMJ.

#### **Conclusion**

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge BOOKER and Judge PERLAK concur.

For the Court

R.H. TROIDL  
Clerk of Court