

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**PRESTON D. WALKER
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100463
GENERAL COURT-MARTIAL**

Sentence Adjudged: 26 April 2011.

Military Judge: LtCol R.Q. Ward, USMC.

Convening Authority: Commanding General, 2d Marine Aircraft
Wing, II Marine Expeditionary Force, Cherry Point, NC.

Staff Judge Advocate's Recommendation: Col Stephen C.
Newman, USMC.

For Appellant: LT Toren G. Mushovic, JAGC, USN.

For Appellee: LT Joseph M. Moyer, JAGC, USN.

26 September 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PRICE, Judge:

A general court-martial composed of members with enlisted representation convicted the appellant, pursuant to his pleas, of making a false official statement and, contrary to his pleas, of one specification of murder, in violation of Articles 107 and 118(3), Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 918(3). The appellant was sentenced to confinement for 25 years, forfeiture of all pay and allowances, reduction to pay

grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.¹

The appellant raises five assignments of error:² (1) the military judge erred in denying the defense's challenge for cause against LtCol W, who demonstrated an inherent bias against mental disorders, and the error violated LCpl Walker's Article 41, UCMJ, right to exercise his peremptory challenge; (2) the military judge erred by denying a defense motion for a mistrial, when a Government expert witness testified that [JW's] cause of death was shaken baby syndrome; (3) the military judge erred by failing to instruct the members on involuntary manslaughter under Article 119(b)(2), UCMJ, on a theory other than culpable negligence; (4) the evidence is factually and legally insufficient to affirm the appellant's conviction for murder; and, (5) the appellant was deprived of his right to speedy post-trial review when over 125 days elapsed between the date of sentencing and the date the CA took action.

After consideration of the pleadings of the parties and reviewing the entire record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

In May 2010, the appellant spent the evening in his home with his 26-month-old daughter, JW, while his wife was away at work. The following morning JW was discovered unresponsive in her bed. The appellant and his wife then sought medical assistance. JW was unresponsive, suffering from respiratory failure and suspected head trauma. After extensive medical care and testing, JW was pronounced dead the next day. The cause of death was determined to be "non-accidental head trauma" with numerous traumatic head and other injuries noted in the autopsy report.

The appellant initially claimed that JW had slipped on a recently mopped staircase, but showing no sign of injury he put

¹ To the extent that the CA's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543, 544 (N.M.Ct.Crim.App. 2011).

² Assignments of Error 2-5 are raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

her to bed. After being presented with evidence in conflict with his account by Naval Criminal Investigative Service special agents, the appellant confessed to striking and killing JW. In a video-recorded sworn statement, the appellant said that he was upset with JW as she was "crying that night" and left her bedroom on several occasions contrary to his direction. He claimed that while standing at the top of a staircase between JW's bedroom and the master bedroom, the appellant felt a tug on his pants. He claimed that the tug startled him and that while recalling memories of abuse he endured as a small child, that he turned quickly, twisted his hips "like he was taught in the Marine Corps" and used his full body weight to punch JW in the face. As a result of this punch JW was propelled down the stairs and came to rest on a landing.

He stated that he then returned to his bedroom and played a video game. Several minutes later he checked on JW, she was lying still on the landing and was not crying or moving. The appellant claimed that she was breathing and her eyes were fluttering. Fearing repercussions if he reported what had happened to authorities or his wife, the appellant then carried JW to her bedroom and placed her in her bed, where he found her still motionless the next morning.

The appellant pled guilty to one specification of making a false official statement and not-guilty to one specification of unpremeditated murder, but guilty to a lesser included offense of involuntary manslaughter in violation of Articles 107 and 119(b)(2), UCMJ, respectively.

The Government theory of murder at trial was that the appellant killed JW with a single punch, which was an inherently dangerous act that evinced a wanton disregard to human life. Record at 194. In order to prove that the punch thrown by the appellant was inherently dangerous, the Government introduced testimony from at least three medical doctors describing the act as, "potentially very dangerous," "inherently dangerous," or "reckless and very dangerous." *Id.* at 566, 575, 604. The defense counsel did not seek to rebut this testimony and conceded in his closing argument that the punch which killed JW was "an inherently dangerous act." *Id.* at 837.

The defense theory focused almost exclusively on the appellant's ability to appreciate the probable consequences of his actions, even stating, "[h]e did not think . . . hitting his child in that manner was going to cause a subdural hematoma to this child, and that is why he has pled not guilty to murder.

And that is the only reason." *Id.* at 839. Specifically, the defense introduced expert testimony that the appellant had cognitive and executive limitations preventing him from understanding the probable consequences of his actions. *Id.* at 752-54. In addition, the defense presented evidence that the appellant had himself been the victim of extensive physical abuse as a child.

Additional facts necessary to resolve the assigned errors are included therein.

Challenge for Cause and Right to Exercise a Peremptory Challenge

Following group and individual *voir dire*, the defense counsel challenged Colonel (Col) S, Lieutenant Colonel (LtCol) W and Gunnery Sergeant (GySgt) D for cause. The military judge granted the defense challenge of GySgt D, but denied the challenges for cause of Col S and LtCol W. The appellant then exercised his peremptory challenge against LtCol W, but before doing so noted that he would have used his "peremptory challenge against Colonel [P] had all [of his] challenges for cause been granted." Record at 424.

The appellant now asserts that the military judge abused his discretion in denying the defense challenge for cause against LtCol W and that the military judge's error essentially deprived him of his statutory right to exercise a peremptory challenge. More specifically, he asserts that the military judge's error in denying the defense challenge for cause of LtCol W "forced [the appellant] to use his peremptory challenge to cure the military judge's error," and that the President's revision of R.C.M. 912(f)(4)³ essentially deprived the appellant of his "Article 41(b), UCMJ, statutory right to a meaningful peremptory challenge." Appellant's Brief of 13 Jan 2012 at 5 and 19 respectively.

Discussion

The Uniform Code of Military Justice provides that "[e]ach accused and trial counsel are entitled initially to one peremptory challenge of the members of the court." Art. 41(b)(1), UCMJ. Pursuant to his authority to prescribe rules for trial by courts-martial, the President established procedures to implement this statutory right in R.C.M. 912. Art. 36, UCMJ. We review questions of statutory interpretation

³ RULE FOR COURTS-MARTIAL 912(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

de novo. *United States v. Nerad*, 69 M.J. 138, 141-42 (C.A.A.F. 2010).

Prior to a 2005 revision, R.C.M. 912(f)(4) expressly allowed the defense to preserve review of a denied challenge for cause and still use its peremptory challenge against that member, if that party stated that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted. R.C.M. 912(f)(4), MCM (2002 ed.). However, in 2005, the President promulgated amendments to the Manual for Courts-Martial which materially altered R.C.M. 912(f)(4). See Executive Order 13387 - 2005 Amendments to the Manual for Courts-Martial, United States (October 14, 2005). The relevant portion of the current rule reads:

Waiver. . . . When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review.

R.C.M. 912(f)(4), MCM (2008 ed.).

Therefore, the plain language of R.C.M. 912(f)(4) in effect at the time of the appellant's misconduct, trial, and this appeal reflects that the appellant's successful use of a peremptory challenge against LtCol W waived further review of his unsuccessful challenge for cause of LtCol W. However, the appellant invites this court to conclude that the President exceeded his statutory authority to prescribe rules for military courts by making this amendment to R.C.M. 912(f)(4). Appellant's Brief at 12, 14-15. We decline that invitation and conclude, consistent with the plain language of R.C.M. 912(f)(4), that successful use of a peremptory challenge by either party against a member precludes appellate review of any denial of a challenge for cause against that member. We reach this conclusion for the following reasons:

First, "[t]here is no constitutional right to a peremptory challenge." *United States v. Wiesen*, 56 M.J. 172, 177 (C.A.A.F. 2001) (citation omitted); see also *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) ("we have long recognized [that] peremptory challenges are not of federal constitutional dimension") (citations omitted); Appellant's Brief at 14-15.

Second, the appellant was availed of his statutory right to initial exercise of "one peremptory challenge of the members of

the court" when he successfully challenged LtCol W. Art. 41(b)(1), UCMJ. The plain language of this statutory entitlement includes no explicit or implicit limitations or caveats relevant to the issue in controversy.

Third, the President's promulgation of the 2005 amendment to R.C.M. 912(f)(4) was within his authority to "prescribe rules" including "[p]retrial, trial, and post-trial procedures [for courts-martial] by regulations, which shall, so far as he considers practicable, apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts[.]" Art. 36, UCMJ. We are not persuaded by the appellant's argument that the President's revision of R.C.M. 912(f)(4) was "contrary to or inconsistent with [the UCMJ]." *Id.*

On the contrary, the amendment to R.C.M. 912(f)(4) reflects the President's intent to conform military practice to federal practice, including the "hard choice" faced by those tried in federal district courts of whether to use a peremptory challenge on a member unsuccessfully challenged for cause. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), App. 21 at A21-62 (citations omitted). This stated intent explicitly conforms with Congress' grant of authority to the President to prescribe rules under Article 36, UCMJ. Another stated purpose of the amendment is to limit appellate litigation.

Notably, in addressing a Government challenge to the pre-2005 version of R.C.M. 912(f)(4) the Court of Appeals for the Armed Forces acknowledged that the rule was subject to future change, stating:

Until RCM 912(f)(4) is modified or rescinded, a military accused is entitled to its protection. It does not conflict with the Constitution or any applicable statute. *Martinez-Salazar* does not preclude the President from promulgating a rule saving an accused from the hard choice faced by defendants in federal district courts -- to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury.

United States v. Armstrong, 54 M.J. 51, 55 (C.A.A.F. 2000) (citing *Martinez-Salazar*, 528 U.S. at 314).

Clearly, the President subsequently decided to rescind and modify R.C.M. 912(f)(4), actions well-within his statutory

authority under Article 36, UCMJ, and consistent with Article 41(b)(1), UCMJ. We conclude that the appellant's successful use of a peremptory challenge against LtCol W waived further review of his unsuccessful challenge for cause of LtCol W, and we resolve this assignment of error against the appellant.

Motion for Mistrial

The appellant alleges that the military judge erred in denying the defense motion for a mistrial after a Government expert witness testified that JW's injuries were consistent with "the type of bleeding pattern you see with Shaken Baby Syndrome." Record at 555, 558-60. We disagree.

"The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." 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 . . . [such as] when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members" R.C.M. 915(a), Discussion.

The decision to grant a mistrial lies within the discretion of the military judge; an appellate court must not reverse the decision absent clear evidence of abuse of that discretion. A curative instruction is the "preferred" remedy for correcting error when the court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused. Absent evidence to the contrary, this Court may presume that members follow a military judge's instructions.

United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

At trial, a doctor and Government expert in trauma, surgical critical care, trauma surgery, and intensive care testified that hospital records of JW's treatment at the second of three hospitals where she received treatment referenced retinal bleeding. The following colloquy with trial counsel occurred:

Expert: This is an indicator of is [sic] that the patient has been shaken extremely violently. This is,

basically, the type of bleeding pattern you see with Shaken Baby Syndrome.

TC: Is that consistent with a blunt force trauma strike as well?

Expert: Blunt force strike, no. This is someone who has been shaken very, very violently. This is the sort of stuff that would, could kill babies and small children.

Record at 555-56.

Individual military counsel immediately requested an Article 39(a), UCMJ, session, the members were excused from the courtroom, and he then objected asserting that this testimony was "getting into an area of uncharged misconduct" *Id.* at 556. Individual military counsel then moved for a mistrial, arguing that a curative instruction would be insufficient to overcome the impact of the Government expert's testimony. *Id.* at 556-58.

The military judge denied the defense's motion for a mistrial in favor of a curative instruction to the members. *Id.* at 559. The military judge determined that the testimony was not so prejudicial as to warrant a mistrial, considering that the appellant had previously admitted to striking his daughter in the face and causing her death and had pled guilty to the lesser included offense of involuntary manslaughter. *Id.* The military judge instructed the members to "completely disregard[]" the statement "concerning indication of retinal bleeding in [J.W]" and the description of what may have caused it, "as if you had not heard it to begin with." Record at 560. He then asked "[i]s there any member who cannot follow that instruction?" and all members responded negatively. *Id.*

The record reflects that the trial counsel apparently elicited the objectionable testimony unintentionally and that neither party argued or otherwise asserted that the appellant's shaking of J.W. caused her death. The record also reflects that from *voir dire* through closing statements and instructions on findings, the parties focused on the charged cause of death and that the primary issues in controversy were: (1) whether the appellant's striking JW in the face with a closed fist, causing her to fall backwards down the stairs, hitting her head on the

steps, was inherently dangerous to another, and (2) whether the appellant, given a variety of mental health issues and his own history as a victim of child abuse knew that death or great bodily harm was a probable consequence of his actions.

We note that the appellant's admission, including a video-recorded demonstration of how he violently shook his daughter in an unsuccessful attempt to awaken her the morning after punching her in the face and knocking her down the stairs from which she never awakened, was admitted into evidence without defense objection prior to the doctor's objected to testimony. Prosecution Exhibit 8 at 13:45-13:54 and PE 10 at 10.

Moreover, the military judge: (1) provided an appropriate curative instruction as soon as the members returned to the courtroom following the objected to testimony; (2) confirmed that each member could disregard the objected to testimony, and (3) provided further instruction on uncharged misconduct including "[s]imply stated, any evidence of prior acts of abuse by the accused may not be used to infer that he is guilty of the charged offense." Record at 826; Appellate Exhibit LXXIX at 5.

Under these unique circumstances, we conclude that the military judge did not abuse his discretion in declining to order a mistrial and that his curative instruction served to prevent any prejudice to the appellant. *Taylor*, 53 M.J. at 198.

Conclusion

We find the appellant's remaining assignments of error to be without merit. Accordingly, the findings and the sentence, as approved by the CA, are affirmed.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court