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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MATTHEW R. MCVEIGH
ENGINEMAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201200161
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 December 2011.
Military Judge: CAPT David Berger, JAGC, USN.
Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.
Staff Judge Advocate's Recommendation: LCDR K.A. Elkins, JAGC, USN.
For Appellant: LT Ryan Mattina, JAGC, USN.
For Appellee: Maj David Roberts, USMC; Maj Paul M. Ervasti, USMC.

28 May 2013

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.

MODZELEWSKI, Senior Judge:

A panel of members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of two specifications of involuntary manslaughter and one specification of assault consummated by battery on a child under 16 years of age, in violation of Articles 119 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 919 and 928. The members sentenced the appellant to forfeiture of all pay and allowances,

reduction to the pay grade E-1, confinement for 12 years, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

The appellant now assigns five errors: (i) that his convictions were legally and factually insufficient; (ii) that the charges should have been severed; (iii) that the military judge erred in refusing a novel instruction requested by the defense; (iv) that the military judge should have granted an investigative assistant to the defense; and (v) that the military judge should have dismissed one of the involuntary manslaughter convictions when he found them to be multiplicious, or in the alternative, that the two involuntary manslaughter convictions constitute an unreasonable multiplication of charges. On the fifth assignment, we concur that the convictions for involuntary manslaughter under Article 119(b)(1) and 119(b)(2), UCMJ, constitute an unreasonable multiplication of charges and will provide relief in our decretal paragraph.

I. Background

On 18 September 2009, the appellant's wife called 911 to report that their baby, BE, was limp and not breathing. He was rushed to the hospital, where a CT scan showed massive brain swelling, consistent with a traumatic head injury. The baby died two days later, on 20 September 2009, having lived just fourteen months. At trial, the appellant was charged with killing his son under both theories of involuntary manslaughter: killing BE by culpable negligence and killing BE while perpetrating a battery upon him.[1]

The baby had suffered earlier injuries, which began shortly after his birth. When he was only one month old, BE was diagnosed with a broken arm; he and his older sister were then removed from the home by state authorities and placed in foster care for six months. In a subsequent civil proceeding regarding potential return of the children to the family home, the appellant's wife accepted responsibility for the baby's injury, blaming her addiction to controlled substances. Upon the baby's return to the home, her access to BE was restricted, and BE's care fell largely to the appellant. In the short months between BE's return to the family and his death, day-care providers noticed various injuries, became suspicious, and urged the appellant to seek medical care for his son. Those injuries, the

[1] Additionally, the appellant was charged with the murder of his son under Article 118, UCMJ, but was acquitted of that charge.

broken arm from August 2008 and other injuries, revealed during the baby's autopsy form the basis for the assault charge and specification.

At trial, a medical examiner testified that the manner of death was homicide. Four different experts testified that BE's injuries were consistent with an inflicted head trauma.[2] Two of the experts believed that BE was the victim of violent shaking, while a third testified that his head likely impacted a hard surface, perhaps as a result of the shaking. No expert could precisely determine the moment of the fatal blow, but the findings were consistent with the injury having occurred the morning that BE was rushed to the hospital, and the experts testified that BE would likely have become unresponsive shortly after the injury. One expert, taking into account all of the clinical facts, concluded that the injury occurred sometime after the appellant fed BE juice[3] and laid him down, approximately 30 minutes before the 911 call.

The defense did not challenge the determination that BE was killed by unlawful violence, but instead focused on the experts' uncertainty about the time of fatal injury, which was related to the broader defense theory that the appellant's wife killed BE. A defense expert suggested that the fatal injury could have occurred the prior night, which opened the possibility that the appellant's wife was the source of the fatal injury. BE had been vomiting the day before he died. The appellant had taken him to the hospital and then slept on a couch in the family's first-floor living room near BE. His wife slept in her second floor bedroom that night, and she testified that she checked on BE twice during the night.

There was also a period on the morning of BE's death during which BE may have been home alone with the appellant's wife, because the appellant left to take his daughter to day care. The record is less than clear on this point, however, because the appellant initially told both investigators and his wife that he brought BE with him to drop off his daughter, and only later changed his account to say that he had left BE at home.

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[2] The injuries included severe retinal bruising and brain swelling so extensive that BE's "greatly swollen brain erupt[ed] through the top of the head." Record at 718.

[3] The expert explained that the severity of BE's injury would have prevented him from drinking juice after it was inflicted. "[Y]ou can dribble juice into a dead body . . . but if you're drinking it, that requires coordinated activity, and you can't do that with a massive fatal head injury . . . ." *Id*. at 868.

Two other witnesses recalled seeing the appellant during his trip to day care that morning and they did not recall seeing BE with him. In any event, the appellant's wife testified that the first time she saw BE that morning was after she heard an unusual cry from BE, and the appellant came into her bedroom saying that something was wrong.

The appellant's wife testified that, at the hospital, the appellant apologized repeatedly to BE, and to her aunt and uncle, who had come to provide support. She claimed that more than once he said "there goes my career." Record at 599. The appellant's then leading petty officer visited the appellant at the hospital and testified that the appellant was concerned about what other people were saying, and then stated, "I can't believe any of this is happening . . . I didn't mean for this to happen, I'm . . . so sorry." *Id*. at 984.

II. Factual and Legal Sufficiency

The appellant's convictions are both factually and legally sufficient under Article 66(c), UCMJ.

A. Factual Sufficiency

The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We may be convinced beyond a reasonable doubt even when there are conflicts in the evidence, as there are here. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999). The appellant calls our attention to the lack of "direct evidence" of his guilt, but the circumstantial case leaves us with no reasonable doubt as to his guilt.[4] As noted above, the central question in this case was who killed BE, not the cause or manner of his death. Several significant aspects of this case include:

1. As BE's primary caretaker, the appellant had far more access to his son than anyone else, including his wife. Her recovery from addiction limited her role in the household and the earlier court order left her rarely, if

[4] There was ample expert testimony that BE's earlier injuries and his eventual death were all caused by the unlawful acts of violence, and that the amount of force required to inflict the head trauma would have meant that whoever killed him was at least culpably negligent when violently shaking BE, the required *mens rea* for one of the involuntary manslaughter specifications.

ever, alone with the children. She did not see BE every day, even though they shared the same house. According to the appellant's statements, she had either limited or no contact with BE outside the appellant's presence on the morning at issue.

2. As BE's primary caretaker, the appellant seemed outwardly concerned with his son's well-being and injuries, but when questioned about those injuries his responses were evasive and inconsistent. He offered various explanations for BE's visible injuries, including that they resulted from his attempts to stand or walk, or were a reaction to an antibiotic, or were the result of rough play.[5] He told his wife that the injuries occurred at day care, or because the cat scratched BE, or because he fell over on a toy.

3. On two occasions, the appellant admitted, or made near-admissions, to having inflicted injuries that form the basis for the assault conviction,[6] while firmly denying that his wife bore any responsibility for those injuries. He also informed criminal investigators that his wife "would never hurt the children," and that he had never seen her "spank the children . . . . nothing physical." Prosecution Exhibit 12 at 3.

4. The appellant's wife was the one who called 911 upon seeing the appellant holding BE's unresponsive, limp body. The appellant, who was trained in first aid and lifesaving, suggested that they dress BE, pack him up and drive him to the hospital themselves even though his "lips were blue." Record at 592; PE 12 at 2. In addition, the appellant's statements and affect during the phone conversation with the 911 operator were odd and equivocal. PEs 2 and 3.
5. The appellant's repeated apologies to multiple individuals at the hospital within hours of the fatal injuries to BE were indicative of a guilty conscience. These apologies

[5] The appellant blamed his daughter for the rough play, but one of the babysitters testified that she had never seen the appellant's daughter behave that way with BE. The babysitters also never saw BE attempt to stand or walk. When one of the babysitters asked about BE's inability to move his arms, the appellant claimed not to know the cause, even though he knew that BE had already broken his arm once in his short life, several months earlier.

[6] The appellant told a babysitter that certain bruises were his "fault," because he had pushed the child too hard to walk. Record at 496. His wife testified that he told her, on another occasion, that he may have broken the child's arm. Record at 603.

were not rendered in isolation, but were interlaced with his concerns over his career and the reactions of others.

6. The appellant lied to investigators about whether he brought BE with him on the trip to day care on the morning of BE's death. At trial, the defense focused on excusing the lie to investigators by arguing that, given the court order forbidding his wife from being alone with the children, the appellant would not have wanted to admit leaving BE at home with his wife. But that argument does not explain why the appellant told his wife the same lie on the day of BE's death.

Although the defense focused on attacking the appellant's wife's credibility at trial, we nevertheless find her account of her husband's behavior credible, as it is corroborated by the testimony of other witnesses and the evidence. We may believe part of one witness's testimony and disbelieve another when evaluating factual sufficiency under Article 66(c). *Lepresti*, 54 M.J. at 648. Although her credibility was flawed, the matters on which the wife was impeached ultimately lacked a persuasive nexus to her account of BE's death.[7] As a whole, her testimony is supported by the broader Government case. Even if we were to give little or no weight to her testimony, we find the remaining evidence of record, including the appellant's admissions, multiple statements and actions, sufficient to convince us beyond a reasonable doubt of his guilt.

B. Legal Sufficiency

We turn briefly to the appellant's assertion regarding legal sufficiency. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offenses. *Turner*, 25 M.J. at 324. *Turner* requires us to view the evidence in a light most favorable to the Government and, having done so, it is apparent that these convictions are legally sufficient.

III. Severance

[7] The defense sought to impeach the appellant's wife with her earlier statement to the judge in the child abuse proceeding (six months before BE's death) that she was responsible for BE's injuries. She explained during this trial that she lied in that proceeding because an appointed lawyer told her to take responsibility and seek drug rehabilitation, so that her husband could keep the children. She testified that she believed she and her husband would lose the children if she did not follow this advice.

The military judge did not abuse his discretion by declining to sever the assault specification, because there was no indication that joinder with the remaining charges made the appellant's trial unfair.

"Unlike civilian practice, military practice favors the joinder of all known charges, save in a case where such joinder threatens manifest injustice." *United States v. Silvis*, 31 M.J. 707, 709 (N.M.C.M.R. 1990) (citations omitted), *aff'd,* 33 M.J. 135 (C.M.A. 1991); *see also* RULES FOR COURTS-MARTIAL 601(e)(2) and 906(b)(10), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). It is the appellant's burden to show that his trial was manifestly unjust, *United States v. Giles*, 59 M.J. 374, 378 (C.A.A.F. 2004), a claim we analyze according to the three factors articulated in *United States v. Curtis*, 44 M.J. 106, 128 (C.A.A.F. 1996):

> (1) Whether the findings reveal an impermissible crossover of evidence;
>
> (2) Whether the evidence of one offense would be admissible proof of the other;
>
> (3) Whether the military judge provided a proper limiting instruction.

In doing so, we review the military judge's determination that there was no manifest injustice for an abuse of discretion. *Giles*, 59 M.J. at 378.

A. Impermissible Crossover

"One factor which carries great weight is the findings, themselves, which may reveal whether or not an impermissible crossover caused the presence of a charge on which the evidence was strong to result in conviction of charges on which the evidence was relatively weak." *Silvis*, 31 M.J. at 709 (citations omitted). The appellant argues that the evidence of the assault was so weak that the evidence of manslaughter must have crossed over in the members' minds.

We disagree with the appellant's appraisal of the evidence. The strength of the assault evidence was not so different from the manslaughter evidence that we can characterize one charge as "weak" and the other as "strong." To be sure, there was far more scientific evidence related to BE's death presented at trial. Of course, investigation of a death often triggers

increased investigative scrutiny, as well as more sophisticated and comprehensive scientific testing, than investigation of a suspected assault. But neither the appellant's defense at trial, nor his claim on appeal, rest on the strength of proof of how BE was assaulted or how he was killed. Instead, the defense theory called into question the identity of the perpetrator.

On this question, the Government made the same two basic arguments in support of both the manslaughter charge and the assault charge: 1) the appellant had far more access to the child than his wife, and 2) he behaved guiltily when confronted. So despite the sheer volume of medical and expert evidence related to BE's death relative to the assault, the Government's case for the assault and the manslaughter in fact carried similar weight. We are further convinced that there was no spillover because, although the same two arguments supported each charge, the trial counsel drew on separate evidence. When discussing the assault charge, he emphasized the appellant's exclusive responsibility for his son and his evasiveness about the injuries, as well as the appellant's wife's testimony that the appellant admitted to possibly having broken his son's arm as early as 2008. When discussing the baby's death, the trial counsel reviewed other testimony about the appellant's proximity to and interaction with his son immediately before BE's death, and his apologies at the hospital. The clear differences in the content of the evidence supporting each charge convince us that the appellant has not shown any risk of crossover.

B. Evidence of Assault Admissible to Prove Manslaughter

The appellant relies heavily on *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003), as an example of the Government's impermissible reliance on evidence of prior injuries to convict a father of killing his young child. But even *Diaz* recognizes that "'when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime.'" *Id.* at 94 (quoting *United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973)).

Nevertheless, facts unique to a particular case may disqualify such evidence. In *Diaz*, there was simply no link between the prior injuries and the appellant. The trial counsel even admitted that he did not offer the evidence to show that the appellant was the source of the injuries, but rather to show that the victim was an abused child. *Id*. at 94. Here, in contrast, the evidence of prior injuries was paired with

testimony about the appellant's strange behavior when questioned about them, including two instances when he came close to an admission of guilt. When we also consider the appellant's far greater access to BE and the fact that the charged injuries occurred in the months immediately preceding BE's death, it is apparent to us that they are admissible as other acts relevant to prove the identity of the killer under *United States v. Reynolds,* 29 M.J. 105 (C.M.A. 1989). *Compare United States v. White*, 23 M.J. 84, 87 (C.M.A. 1986).[8]

We also note that, although this step of the *Curtis* analysis follows the approach to questions under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), "the rules regarding admissibility of uncharged misconduct [are not] the primary test for severance." *United States v. Curry*, 31 M.J. 359, 375 (C.M.A. 1990).

C. Limiting Instruction

The military judge gave proper limiting instructions both before and after the presentation of evidence, Record at 283-84, 1328-29, which further supports our determination that he did not abuse his discretion in denying the defense motion for severance. "An abuse of discretion will be found only where the defendant is able to show that the denial of a severance caused him actual prejudice in that it prevented him from receiving a fair trial . . . ." *United States v. Duncan*, 53 M.J. 494, 497-98 (C.A.A.F. 2000) (citations and internal quotation marks omitted). The appellant simply has not shown us that his trial was unfair.

IV. Denial of Investigator

"A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion" and we find none in this case. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

The appellant has identified numerous ways in which a criminal investigator might have been *helpful* to him, but he has not made the required showing that the investigator was *necessary*. *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001). The "necessity" standard has two prongs. To establish

[8] In *White*, the evidence of prior injuries was similarly paired with evidence that the appellant frequently cared for the child alone, as well as testimony by the wife that she did not inflict the injuries and had reason to believe her husband did inflict them. 23 M.J. at 86-87.

the first prong, that an expert would be of assistance to the defense, the appellant "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." *Bresnahan*, 62 M.J. at 143 (citation omitted). *See also United States v. Freeman*, 65 M.J. 451, 459 (C.A.A.F. 2008). The second prong asks whether "denial of expert assistance would result in a fundamentally unfair trial." *Bresnahan*, 62 M.J. at 143. The appellant must prevail on both prongs by a "reasonable probability." *Id*.

The appellant's arguments in favor of expert assistance prove nothing to a reasonable probability, and thus are sufficiently like those in *Bresnahan* that we reach the same outcome. There, the appellant insisted that he required an expert in false confessions, but the Court denied relief because he never made a showing that his confession was actually false. *Id*. Likewise, this appellant has not shown that an investigator's surveillance would have found anything, or that more discovery would have been reviewed or witnesses contacted, but for the denial of assistance.[9] If the appellant is even now unable to identify a concrete, non-speculative result of the denial, the significance of which undermines the fairness of his trial, it is evident that the appellant has failed to show that the expert assistance was necessary. Instead, the appellant has shown only the "mere possibility of assistance," which does not satisfy his burden. *Id*.

V. Proposed Instruction

The defense counsel at trial requested an instruction that informed the members that only the appellant, and not his wife, was subject to the jurisdiction of the military justice system. Presumably, such instruction would dispel any impression that the convening authority thought the appellant was solely culpable.

Here, the appellant has not shown that his proposed instruction was "necessary" or "critical" to the fairness of his trial, such that the military judge abused his discretion by

[9] In his ruling on the motion, the military judge found that the defense did not request assistance from the Naval Criminal Investigative Service to locate any witness or evidence, and that the defense team had not identified either a single witness it could not locate or a single piece of discovery that was difficult for counsel to understand without an investigator's assistance. Appellate Exhibit XX at 2.

failing to give it. *United States v. Zamberlan*, 45 M.J. 491, 492-93 (C.A.A.F. 1997). A military judge "has substantial discretionary power in deciding on the instructions to give." *United States v. Carruthers*, 64 M.J. 340, 345 (C.A.A.F. 2007).

Even assuming that the proposed instruction passes the first two steps of the three-part test used to evaluate such requests (i.e., the proposed instruction is both correct and not substantially covered in the main instructions), the military judge did not abuse his discretion. *Carruthers,* 64 M.J. at 346. The request fails at the third step: the appellant has not shown that the instruction "is on such a vital point in the case that the failure to give it deprived [him] of a defense or seriously impaired its effective presentation." *Id.* (citations and internal quotation marks omitted). There is no suggestion anywhere in the record that any member harbored a misunderstanding about the meaning of referral or jurisdiction. Like the expert request, this proposal was based on speculation, and thus cannot be "vital," "necessary" or "critical" within the meaning of those terms in military jurisprudence.

VI. Unreasonable Multiplication of Charges

The appellant stands convicted of two specifications of involuntary manslaughter in violation of Article 119(b)(2), UCMJ, in the killing of BE. Charge II. The record is somewhat unclear as to whether the military judge considered these specifications multiplicious, or unreasonably multiplied for purposes of findings or sentencing. We note that this trial occurred shortly before the Court of Appeals for the Armed Forces further clarified the meaning of those terms in *United States v. Campbell*¸ 71 M.J. 19 (C.A.A.F. 2012). Still, we discern the military judge's intent from his actions. He merged the specifications rather than dismiss either one, which suggests that he did not consider them to be multiplicious. And indeed, these specifications are not multiplicious, since each contains an element that the other does not: culpable negligence with respect to the killing in Specification 1, and general intent with respect to the battery in Specification 2. Although we do not find these offenses multiplicious, for the reasons below we do conclude that they are unreasonably multiplied for sentencing.

We note that the military judge's merger of the two specifications of involuntary manslaughter for sentencing obviated any potential sentencing prejudice to the appellant arising from the Government's alternate charging strategy.

However, the appellant was nonetheless convicted of two separate specifications of involuntary manslaughter in the killing of his son. After consideration of the factors articulated in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), we conclude that the two convictions for involuntary manslaughter unreasonably exaggerates the appellant's criminality. Thus, we will merge the specifications in our decretal paragraph. *See, e.g., United States v. Ducharme*, 59 M.J. 816, 820 (N.M.Ct.Crim.App. 2004).

Because the two specifications were merged for sentencing below there has been no change in the penalty landscape, and thus no need to reassess the sentence. However, assuming without deciding that merger of the two specifications of involuntary manslaughter into one specification changes the penalty landscape, we find no drastic change to that landscape. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the members would not have adjudged a sentence less than that approved by the convening authority.

Conclusion

Specification 2 of Charge II is hereby merged with Specification 1 of Charge II. Specification 1 of Charge II is amended by inserting the words, "while perpetrating an offense directly affecting the person of [BE's name], to wit: a battery," between the words "by culpable negligence" and "unlawfully kill." Specification 2 of Charge II is dismissed and the former Specification 1 of Charge II, with the foregoing language added, is now the sole Specification of Charge II. The findings as modified and the sentence as approved by the convening authority are affirmed.

Judge PRICE and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court