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

Before
R.E. VINCENT, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN A. DELGADO
CRYPTOLOGIC TECHNICIAN ADMINSTRATIVE SEAMEN RECRUIT (E-1), U.S. NAVY

NMCCA 200800346
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 January 2008.
Military Judge: CAPT Dennis Bengtson, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces, Japan, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: CAPT L. Cantor, JAGC, USN; **Addendum:** CDR B.J. Cordts, JAGC, USN.
For Appellant: LT Heather Cassidy, JAGC, USN.
For Appellee: LT Timothy Delgado, JAGC, USN.

8 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A general court-martial, composed of officer members convicted the appellant, contrary to his pleas, of one specification of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10 U.S.C. § 919.[1]

[1] The appellant was charged with murder and wrongfully and recklessly causing bodily injury to [KD], in violation of Articles 118 and 134, UCMJ. He was convicted of the lesser included offense of involuntary manslaughter. The Article 134 offense was withdrawn prior to trial.

The appellant was sentenced to confinement for 45 months and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.[2]

The appellant raises two assignments of error: (1) Whether the military judge erred by denying the appellant's request for expert assistance in the following fields: ophthalmology, neurology, and forensic pathology; and (2) whether the evidence was factually sufficient to prove that the appellant unlawfully killed his daughter by shaking her to death.

After considering the record, the appellant's brief and assignments of error, the Government's answer, the appellant's reply brief, and oral argument, we conclude that the military judge abused his discretion in denying the production of Ronald H. Uscinski, M.D., a neurosurgeon, as a defense expert witness, and that denial of this expert witness resulted in a fundamentally unfair trial. We will set aside both the findings and the sentence in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Factual Background

During the early morning hours of 15 July 2006, the appellant's infant child [KD] stopped breathing while in his care at their home. At the time, the appellant's wife was at work. The only other person in the appellant's home was a family friend, Petty Officer [DK], who testified that the appellant awakened him between 0600 and 0630 on 15 July 2006 and told him that [KD] was not breathing. Petty Officer [DK] immediately administered cardiopulmonary resuscitation while the appellant called 911 and requested emergency assistance. Record at 943.

The responding paramedics transported [KD] to a local hospital. [KD] was eventually resuscitated and transported to another hospital for additional medical treatment. However, on 17 July 2006, medical personnel informed the appellant and his wife that [KD] was brain dead and they decided to remove their child from life support systems.

Captain (CAPT) James L. Caruso, MC, USN, the Regional Armed Forces Medical Examiner and a forensic pathologist, performed an autopsy on 19 July 2006. On 5 January 2007, after consulting with numerous medical specialists at the Armed Forces Institute of Pathology, CAPT Caruso's autopsy report concluded that the death was the result of homicide. Prosecution Exhibit 25.

[2] The charges were referred on 1 June 2007 and trial took place between 18 June 2007 and 18 January 2008. The appellant's case was docketed with the court on 20 May 2008. The appellant filed his brief and assignment of errors on 22 August 2008, the Government filed its answer on 5 December 2008, and the appellant filed a reply brief on 12 December 2008. This court conducted oral argument on 1 April 2009.

Requests for Expert Consultants and Witnesses

The Government's evidence largely consisted of expert testimony from two physicians and the testimony of seven other physicians, who either treated [KD] between 15 and 17 July 2006 or assisted CAPT Caruso while he was preparing the autopsy report.[3] The Government's theory of the case was that [KD] suffered a subdural hematoma, bilateral retinal hemorrhaging, and rib fractures, injuries often found in shaken baby syndrome cases, and that the appellant had caused these injuries by shaking her.

The appellant's theory at trial was that shaking an infant alone, without any evidence of cranial trauma or impact, cannot cause a subdural hematoma and bilateral retinal hemorrhaging. Therefore, [KD]'s injuries were not consistent with solely being shaken. This theory was supported by a lack of evidence of any bruising or external injuries. Accordingly, the appellant requested expert consultants and witnesses on numerous occasions. Most significantly, the appellant requested the production of Dr. Uscinski as both an expert consultant and witness. The defense proffered to both the CA and military judge that Dr. Uscinski was a relevant and necessary witness as one of the nation's foremost medical experts of shaken baby syndrome. They also proffered that Dr. Uscinski held the medical opinion that shaking alone, without any evidence of cranial trauma or impact, cannot cause a subdural hematoma and bilateral retinal hemorrhaging, a minority-held theory among medical experts. Appellate Exhibits XI, XVI, and XIX.

The CA provided Major Martin, USAF, a pediatrician with expertise/training in fatal child abuse, as a substitute expert consultant. AE XIX at 3. Of note, she believed that an infant could be harmed through shaking alone, a viewpoint which was opposite of the defense's theory and Dr. Uscinski's proffered expert testimony. Record at 165.

The appellant's expert consultant and expert witness requests submitted to the CA and Motions to Compel the Production of Expert Consultants and Witnesses[4] filed with the trial court are outlined in the following chart:

[3] The Government also presented testimony concerning the appellant's demeanor and behavior after he discovered [KD] was not breathing.

[4] The appellant's motions were labeled as Motions to Compel. However, under RULE FOR COURTS-MARTIAL 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), the defense may request the production of a consultant and/or witness. Accordingly, in this opinion, we refer to the appellant's motions as "Motions to Compel the Production of . . . ".

Request/Motion	Resolution
5 May 07: Defense request to CA for ophthalmologist and neurologist as expert consultants submitted. AE III, exhibit 9.	Unclear from record
13 Aug 07: Defense request to CA for Dr. Uscinski, neurosurgeon, and Dr. Leestma, neuropathologist, as expert consultants submitted. AE XIX at 1-2.	5 Sep 07: CA denied request for Dr. Uscinski and Dr. Leestma. Authorized Major Martin, USAF, pediatrician with expertise in fatal child abuse, as substitute expert consultant. AE XIX at 3.
17 Aug 07: Defense Motion to Compel the Production of Dr. Uscinski as expert consultant and witness filed. AE XI.	27 Aug 07: Argument on motion. MJ reserved ruling until CA acted on 13 Aug 07 request. Record at 117-27. 7 Dec 07: MJ denied motion as to both expert consultant and witness. Record at 208-09.
26 Nov 07: Defense request to CA for Dr. Gardner, ophthalmologist, Dr. Lantz, forensic pathologist, and Dr. Kraznokutzky, neuroradiologist, as expert consultants submitted. AE XIX at 4-5.	3 Dec 07: CA denied request for Dr. Gardner, Lantz, and Kraznokutzky. However, the CA indicated that the Government would make an adequate substitute expert available as soon as expert consultant identified. AE XIX at 6.
2 Dec 07: Defense Motion to Compel the Production of Dr. Gardner, Dr. Lantz, and Dr. Kraznokutzky, as expert consultants and witnesses filed. AE XVII.	7 Dec 07 MJ denied motion as to both expert consultant and witness on 7 Dec 07. Record at 208-09.
13 Dec 07: Motion to Reconsider the Motion to Compel the Production of Expert Witnesses as to Dr. Lantz filed. AE XXV.	Unknown – not mentioned in record
Date unknown: Defense Proposed Findings of Fact for Motions to Compel the Production of Expert Witnesses submitted. AE XXXIX.	7 Dec 07: MJ permitted counsel to submit proposed findings of fact on the Motions to Compel Expert Consultants and Witnesses. Record at 210. Record of trial does not reflect that MJ adopted the appellant's proposed findings of fact or entered his own findings of fact into the record.

Military Judge's Rulings on Motions for Expert Consultants and Witnesses

During a 27 August 2007, Article 39(a), UCMJ, session, the military judge noted that the CA had not acted on the appellant's 13 August 2007 request to authorize Dr. Uscinski as an expert consultant. Record at 121-24. Accordingly, he determined that the appellant's Motion to Compel the Production of Dr. Uscinski as both an expert consultant and witness (AE XI), was premature and decided not to hear argument or rule on the motion until the CA acted on the request. *Id.* at 117-27.

The next Article 39(a), UCMJ, session was held on 7 December 2007. During this session, the military judge heard argument concerning the appellant's 2 December 2007 Motion to Compel the Production of Dr. Gardner, Dr. Lantz, and Dr. Kraznokutzky, as expert consultants and witnesses. AE XVII. It was also during this session that both counsel reminded the military judge that he had not ruled on the appellant's 17 August 2007 Motion to Compel the Production of Dr. Uscinski as an expert consultant and witness. Record at 174. They also informed the military judge that the CA had denied the appellant's 13 August 2007 request to authorize Dr. Uscinski as an expert consultant. *Id.* at 175.

After hearing testimony from Major Martin and argument from counsel on all requested expert consultants and witnesses, the military judge denied the appellant's two motions to compel the production of consultants and witnesses and stated:

> The court finds that the government has appointed to the defense team a medical expert with very impressive credentials with particularly noteworthy training and experience. As the defense has acknowledged, Major Martin is clearly an expert comparable to the government's expert.
>
> The court also finds that this pending request was filed well beyond the time set for witness requests, apparently being whole or in part to a change in the defense theory of the case, but very late nonetheless.
>
> The court is not persuaded that the experts requested are necessary within the meaning of the rule. Nor is it evident to the court what they could accomplish for the accused beyond what Major Martin can accomplish. Nor is the court persuaded that with Major Martin's assistance, the defense is unable to gather and present evidence that the requested experts would be able to develop.

Id. at 208.

Applicable Law

In accordance with Article 46, UCMJ, "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." This ensures that "'[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'" *United States v. McAllister,* 64 M.J. 248, 249 (C.A.A.F. 2007)(quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

The President has set forth the prescribed regulations for the production of witnesses and evidence in RULE FOR COURTS-MARTIAL 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). More specifically, R.C.M. 703(d) authorizes employment of experts to assist the defense at Government expense when their testimony would be "necessary." If a CA denies a request, the appellant may renew the request before the military judge. A military judge "shall determine whether the testimony of the expert is relevant and necessary . . . ." *Id.*

We review a military judge's decision regarding expert witnesses for abuse of discretion. *United States v. Billings,* 61 M.J. 163, 166 (C.A.A.F. 2005). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

Legal Analysis

Our review of the military judge's decision is hampered by the paucity of his findings of fact and conclusions of law.[5] Regarding the expert witness portion of the two motions, the military judge did not provide any specific findings of fact detailing the basis for his conclusion that they were not filed in a timely manner. Additionally, he did not provide any specific findings addressing the relevancy of the witnesses'

[5] Since R.C.M. 703(d) required the military judge to determine whether the testimony of the experts was relevant and necessary, it was naturally incumbent upon him to provide his essential findings of fact and conclusions of law concerning the (1) relevancy and (2) necessity, of the appellant's requests *contemporaneously* with his ruling. This could have been accomplished by entering detailed findings of fact and conclusions of law on the record at the time of his ruling and/or by use of written findings of fact and conclusions of law attached as an appellate exhibit to the record. Adherence to these requirements not only minimizes the possibility of error, but also enhances the integrity and discipline of the trial court decision making process. *See United States v. Doucet*, 43 M.J. 656, 659 (N.M.Ct.Crim.App. 1995).

testimony, and the record does not reflect specific findings of fact to support his legal conclusion that the expert witnesses were not necessary.

We specifically find the military judge's finding of fact concerning the portion of the appellant's Motion to Compel the Production of Dr. Uscinski as an expert witness to be clearly erroneous, and further conclude it was influenced by an erroneous view of the law pertaining to production of expert witnesses.

As aforementioned, on 13 August 2007, the appellant requested that the CA authorize Dr. Uscinski as an expert consultant. *See* AE XIX at 1-2. On 27 August 2007, after noting that the CA had not yet acted on the appellant's request, the military judge deferred hearing argument and ruling on the appellant's 17 August 2007 Motion to Compel the Production of Dr. Uscinski as both an expert consultant and witness. Record at 117-27. Accordingly, his 7 December 2007 conclusion that the Motion to Compel Production of Dr. Uscinski as an expert witness was untimely was inconsistent with his previous decision to defer ruling on that motion. Based on our review of the record of trial and in the absence of any supporting findings of fact, we conclude that this finding of fact was clearly erroneous.

Our analysis concerning whether the military judge abused his discretion does not end here. Upon review of the record, it appears that the military judge was also influenced by an erroneous view of the law governing expert assistance and, accordingly, he failed to conduct the relevancy and necessity determination required under R.C.M. 703(d). The appellant's Motion to Compel the Production of Dr. Uscinski proffered that he was one of the nation's foremost medical experts and a proponent that shaking alone could not cause the type of injuries that [KD] sustained. The motion also contained a synopsis of his qualifications as a neurosurgeon, his extensive research in this specialized field of study, as well as a description as to why he was a relevant and necessary expert witness. As aforementioned, during the 7 December 2007, Article 39(a), UCMJ, session, Major Martin, the appellant's expert consultant, acknowledged the two views concerning "shaken baby syndrome", and specifically stated that it was her opinion that shaking a baby can cause the injuries [KD] had. Record at 165. This medical opinion was consistent with the medical opinion of Captain Tamara Grigsby, MC, USN, the Government's expert consultant and witness, and the Government's theory of the case. Major Martin also testified that the appellant could benefit from "other expertise in addition to mine." *Id.* at 160.

During oral argument on the motion, the military judge queried the trial defense counsel if they planned to call Dr. Uscinski as an expert witness regardless of whether the Government was compelled to produce him. *Id.* at 198-99. The appellant's prior representation that Dr. Uscinski was retained for preliminary consultation was not relevant, and certainly not

dispositive to the military judge's required R.C.M. 703(d) inquiry. In accordance with R.C.M. 703(d), the military judge was required to determine if Dr. Uscinski was a relevant and necessary expert witness and, if so, order the Government to either produce him or provide an adequate substitute.

Yet, the military judge mistakenly focused solely on the timeliness of the appellant's motion and the representation that he had retained, and might continue to retain, Dr. Uscinski. It is abundantly clear from the record that the military judge did not determine whether Dr. Uscinski's expert testimony was relevant and necessary. Accordingly, he abused his discretion by failing to adhere to the requirements mandated by Article 46, UCMJ, and R.C.M. 703(d).

Having concluded that the military judge abused his discretion, we must determine if he committed "constitutional error by depriving [the appellant] of his right to present a defense . . . ." *McAllister*, 64 M.J. at 251. If so, "the test for prejudice on appellate review is whether the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996)(quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)); *McAllister*, 64 M.J. at 251.

This was a contested general court-martial dependent upon complex scientific and medical evidence. There were no eyewitnesses and no physical evidence that the appellant harmed [KD] on 15 July 2006. Additionally, the appellant had not made any incriminating statements. The Government relied heavily on medical evidence and expert witness opinions that [KD]'s injuries and subsequent death was directly caused by shaking. CAPT Caruso readily acknowledged that his autopsy report took almost six months to complete because, of the 1500 autopsies he had performed, this was a "[v]ery difficult case". Record at 1107. He also opined that another pathologist could have "issued an undetermined manner of death to that person's reasonable degree of medical certainty". *Id.* at 1108.

The military judge's ruling effectively denied the appellant "a meaningful opportunity to present [expert witness] evidence, which challenged the Government's scientific proof, its reliability, and its interpretation, [and] denied appellant a fair trial." *United States v. Van Horn*, 26 M.J. 434, 438 (C.M.A. 1988). As we previously discussed, Dr. Uscinski held the medical opinion that shaking alone without any evidence of cranial trauma or impact, cannot cause a subdural hematoma and bilateral retinal hemorrhaging, a theory that was the centerpiece of the appellant's defense. Major Martin, the appellant's expert consultant, who did not testify on the merits, acknowledged that she was not a proponent of this view and that the defense could benefit from other experts. Therefore, we find constitutional error because the military judge's ruling effectively denied the appellant "the right to present a defense - a defense to the

linchpin of the prosecution case." *McAllister*, 64 M.J. at 252(citation and internal quotation marks omitted).[6]

We must now "determine whether the Government has sustained its burden of demonstrating that this constitutional error was harmless beyond a reasonable doubt." *Id.* The Government argues that the defense's theory was presented to the members through the testimony of CAPT Caruso, one of the Government's expert witnesses, who testified at trial that pure shaking alone without impact could not cause injury or death to an infant. Record at 1118. However, CAPT Caruso was qualified as an expert in the field of forensic pathology and did not have any qualifications indicating that he was a specialist in diagnosing shaken baby syndrome. Moreover, he had opined that [KD]'s death was a homicide since her injuries were inflicted by another individual and that there could be impact to an infant's head without external evidence of trauma. *Id.* at 1138; PE 25.

On the other hand, Dr. Uscinski, a neurosurgeon and one of the nation's foremost medical experts on shaken baby syndrome, was a proponent of the defense's theory of the case. In any event, the military judge never determined that CAPT Caruso, or anyone else, was an adequate substitute for Dr. Uscinski. *See* R.C.M. 703(d); *see also Van Horn*, 26 M.J. at 438.

Accordingly, we conclude that the military judge abused his discretion and that this error denied the appellant "a meaningful opportunity to present" critical expert evidence, including testimony, to challenge the Government's scientific proof and its reliability, and to present their defense. *Van Horn*, 26 M.J. at 438; *see McAllister*, 64 M.J. at 252. An error of this magnitude was not harmless beyond a reasonable doubt.[7]

Finally, we note that if we had determined that the military judge's abuse of discretion was not a constitutional error, "the appropriate standard is whether the court-martial's finding of

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[6] We acknowledge that "neither the convening authority nor the military judge was required to provide the [appellant] with [Dr. Uscinski] the particular expert [the appellant] requested." *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005). However, as we noted, the military judge did not make any relevance and necessity determination concerning the Motion to Compel the Production of Dr. Uscinski as an expert witness and did not make a determination whether an adequate substitute should be appointed.

[7] As a result of our decision, we need not decide whether the military judge erred in denying the portion of the appellant's 17 August 2007 motion pertaining to Dr. Uscinski as an expert consultant and the appellant's 2 December 2007 Motion to Compel the Production of Dr. Gardner and Dr. Lantz as expert consultants and witnesses. AE XI and XVII. We note that on 3 December 2007, the CA denied the appellant's request for Dr. Gardner, Dr. Lantz, and Dr. Kraznokutzky to be appointed as expert consultants, but directed the Government to appoint an adequate expert consultant substitute. AE XIX at 6. We further note that the military judge denied the appellant's motion to authorize these three medical experts as consultants because they were not "necessary" even though the CA had already previously determined that an expert consultant substitute would be appointed.

guilty was substantially influenced by the error." *McAllister*, 64 M.J. at 250. Applying the four-part prejudice test, we also conclude that the military judge's abuse of discretion substantially influenced the guilty verdict. The Government's case, which was largely based on scientific and medical evidence presented through two expert witnesses and seven physicians was mainly circumstantial and not strong. The appellant's defense was clearly weakened by the military judge's denial of the Motion to Compel the Production of Dr. Uscinski as an expert witness. Additionally, the appellant was attempting to present expert testimony that supported his theory of the case, the materiality and quality of which cannot be questioned.

Factual Sufficiency

In order to ensure the appellant's rights under Articles 44 and 66(c), UCMJ, we have reviewed the appellant's second assignment of error alleging that the evidence is factually insufficient to sustain his conviction that he unlawfully killed his daughter by shaking her to death. After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, we find that the evidence in this case factually sufficient. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66, UCMJ. However, having found that the military judge abused his discretion and committed a constitutional error which deprived the appellant of his constitutional right to a fair hearing, the findings and sentence will be set aside and a rehearing is authorized.

Conclusion

The finding of guilty and the sentence are set aside. The record is returned to Judge Advocate General and a rehearing is authorized.

Judge PRICE and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court