UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman WILLIAM A. EWING, JR.
United States Air Force

ACM 37891

6 August 2013

Sentence adjudged 07 January 2011 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: William C. Muldoon.

Approved Sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Major Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ORR, HELGET, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial, the appellant was convicted, contrary to his pleas, of assault consummated by a battery on a child under 16 years of age and child endangerment, in violation of Articles 128 and 134, UCMJ; 10 U.S.C. §§ 928, 934. A panel of officer members sentenced him to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances and reduction to E-1. The convening authority disapproved the adjudged forfeitures and approved the remainder of the sentence as adjudged.

On appeal, the appellant contends (1) the evidence is factually and legally insufficient to prove his guilt of assault, (2) the child endangerment specification brought under Article 134, UCMJ, fails to state an offense because it fails to allege the terminal element, (3) the child endangerment specification is multiplicious or an unreasonable multiplication of charges, and, pursuant to *United States v. Grostefon*, 12 M.J. 481 (C.M.A. 1982), that he received ineffective assistance of counsel.

Background

The appellant's active duty wife gave birth to their first child on 30 December 2009. On 28 February 2010, the appellant was home alone with the infant. He text-messaged his wife while she was at church, saying the infant had accidentally bumped his head on the headboard of their bed and ended up with a small bump near his eye area. When she got home, she checked and saw a tiny mark near the infant's left eye but he was acting normally.

The next day, having completed her six weeks of maternity leave, the appellant's wife returned to her job on base. She worked swing shifts in order to stay with the infant in the mornings. Before she went to work, she would deliver the child to one of her friends, Airman First Class (A1C) TM. For about two weeks, A1C TM babysat the infant each work day for 5-7 hours until the appellant picked the child up. On a few occasions during the first two weeks of March 2010, the infant was cared for by other women, including Ms. BK (once for no more than three hours), Ms. ADM (three or less times for no more than an hour or two each time), and A1C GS (twice for approximately 11 hours).

On 9 March 2010, the appellant was home alone with the infant while his wife attended a volunteer activity and work on base. Later that night, the appellant called to say the infant had a slight fever, was spitting up, and appeared fatigued. She left work and the couple took the infant to the emergency room, where he was diagnosed with a respiratory virus. According to his mother, the child's condition improved only slightly after the hospital visit.

On the night of 14 March 2010, the appellant was again home with his son. He called his wife at work and advised her that the infant had been crying and had a rash on his face. The appellant said he looked up the rash on the Internet and had given the child a bath, which improved the rash and calmed him down. When she returned from work, the appellant's wife looked at the sleeping child and thought the rash looked more like bruising. The appellant told her their son had been sleeping on a pillow and started crying, and the appellant thought he was having an allergic reaction. The couple decided to watch the rash since it had improved after the bath.

The next morning, however, the infant was completely fatigued and did not want to eat or move. The appellant's wife was unable to get an appointment on base and was

given a next-day referral for an off-base provider. At that appointment on 16 March 2010, the doctor looked at the rash and immediately measured the infant's head circumference. Referring to the infant's records, the doctor realized the circumference had jumped from its size at his recent one-month checkup (37.5 cm to 45 cm). The unnatural head growth, vomiting, and petechial hemorrhages (broken blood vessels) led her to suspect intracranial pressure. The infant was immediately sent to the pediatric intensive care unit (PICU) for admission.

While in the PICU, the infant was examined by Dr. KM, a board-certified pediatrician who was part of a multi-disciplinary team of physicians, law enforcement, and social workers that specialized in potential cases of child abuse. She testified as an expert in child abuse pediatrics. During her examination, Dr. KM observed the child was very fussy, with a high-pitched cry and he was not focusing or tracking well with his eyes. His head appeared swollen and he had petechial bruising across his eyes and nose (which happens due to accidental or abusive trauma such as an airway obstruction), a broken blood vessel in the white of his right eye (from pressure on his face or direct trauma to the eye) and retinal hemorrhaging in the back of his eyes (which is rarely seen except in cases of abusive head injury).

Testing revealed the infant had bleeding on both sides of the brain and his skull was separating due to fluid collection in the hematomas. These hematomas are caused by bleeding on the surface of the brain after the brain impacts the inside of the skull following a sudden deceleration of the head. Some of the infant's symptoms were consistent with him suffering neurological impairment from that injury. Four rib fractures in various stages of healing were also found during the testing.

After receiving this information from civilian law enforcement, agents from the Air Force Office of Special Investigations interviewed the appellant under rights advisement. The appellant admitted to placing his hand over his child's mouth to stop his crying, and holding it there until the child "went to sleep." He also showed the investigators how he rocked the child in a manner that moved the child's head up and down.

The appellant was charged with three specifications for assaulting the child between 10 and 17 March 2010, by inflicting grievous bodily harm, namely (1) holding his hand over the infant's mouth, causing suffocation to unconsciousness, (2) vigorously shaking the infant, causing bilateral subdural hematomas, and (3) shaking, throwing, or squeezing the infant, causing fractured ribs. He was convicted of the lesser included offense of assault consummated by battery on a child under 16 for each specification. The appellant was also charged with, but acquitted of, inflicting grievous bodily harm on

the child in the form of a fracture or bruise to the left femur and the right tibia.[1] Lastly, he was charged with, and convicted of, endangering his child between 1 February and 17 March 2010 by shaking, grabbing, squeezing, or suffocating him in a culpably negligent manner, resulting in the grievous bodily harm of fractured ribs, unconsciousness, petechial hemorrhaging, scleral hemorrhages, subdural hematomas, and neurological impairment.

Factual and Legal Sufficiency

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The appellant contends the evidence is not factually and legally sufficient to sustain his convictions for assaulting his son because the evidence does not establish a "feasible timeline" for the child's injuries and the Government failed to produce all of the parties who had access to the child.

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, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *as quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F 2002) (quoting *Turner*, 25 M.J. at 324). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The elements of assault consummated by a battery on a child under 16, as charged here, are that (1) the appellant did bodily harm to his son, (2) the bodily harm was done with unlawful force or violence, and (3) his son was under the age of 16. *See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 54.b.(2) (2008 ed.). "Bodily harm" is

[1] Following the close of the Government's case, the military judge granted the defense motion for a finding of not guilty for these two grievous bodily harm specifications, pursuant to Rule for Courts-Martial 917, but instructed the panel on the lesser included offense of assault consummated by a battery on a child under 16. The members ultimately acquitted the appellant of that lesser offense for both specifications.

defined as "any physical injury to or offensive touching of another person, however slight." *Id.* "Unlawful force" is defined as "an act of force done without legal justification or excuse." *Id.*

The appellant contends the evidence is insufficient to sustain his conviction because none of the evidence shows beyond a reasonable doubt that he caused his son's injuries. He specifically notes that the Government's evidence did not establish a specific timeline or causation for the infant's injuries and five other potential suspects had access to the child and could have caused his injuries.

The appellant's wife and A1C TM, the infant's primary babysitter, both testified under oath at trial. The appellant's wife testified about her interaction with the infant during the time frame of his injuries and did not describe any actions that could have caused his injuries. A1C TM also testified, and expressly denied doing anything to harm the infant, including hitting, squeezing, or suffocating him. The Government did not call the other three women who had access to the infant but, in our view, this does not create a reasonable doubt in the case, especially since these three women had minimal contact with the infant during the relevant time frame. Additionally, the appellant's wife testified that she never noticed the infant acting any differently after spending time with these four other women.

Furthermore, although the medical professionals were unable to provide an exact date or dates on which the child was physically harmed, we do not find that sufficient to create a reasonable doubt in the case.

The appellant admitted to abusing his son on 14 March 2010, the day the infant supposedly received a rash from lying on a pillow. He told OSI that he had been tired after a long day at work and, when the infant kept crying and would not take a bottle, he covered the infant's mouth with his hand to "filter out the noise" every time the infant cried. Saying he felt "aggravated" and "agitated" by the crying, he admitted he could feel the suction from the child trying to take a breath and that the infant's arms eventually dropped to his side and the infant "went to sleep." The infant's condition rapidly declined after this event. The appellant also admitted "swaying" the infant that day in a manner that caused the infant's head to go up and down and that he may have done it to the point where the child's injuries could have occurred. He also described the 28 February 2010 incident that resulted in the baby hitting the headboard. The appellant was awakened by the crying baby next to him and grabbed him by the lower abdomen. Because he did not have a good grip on the infant, the appellant ended up swinging him around in a manner that resulted in him hitting the head board "hard" with a "thud."

Dr. KM testified that the some of the actions described by the appellant in his taped interview could have caused the brain injuries suffered by his son, if they were done with sufficient force. The infant's petechial rash, facial bruising, and neurological

symptoms were consistent with the appellant's statement that he put his hand over his eyes, nose, and mouth. She also testified that rib fractures like those suffered by the infant typically occur when a person has their hands or arms clenched around the ribcage and squeeze the child while shaking it.

Given the totality of the evidence presented at the trial, including the interview of the appellant, we find beyond a reasonable doubt that the appellant assaulted his son in a manner that caused him to lose consciousness and suffer subdural hematomas and fractured ribs. We find the evidence sufficient to convince us, and a reasonable fact finder, that the appellant inflicted and caused the injuries found during the 16 March 2010 examination.

Failure to State an Offense

The appellant was charged with one specification of child endangerment, pursuant to Article 34, UCMJ, for endangering his son between 1 February and 17 March 2010 by shaking, grabbing, striking, squeezing, or suffocating him in a culpably negligent manner, resulting in the grievous bodily harm of fractured ribs, unconsciousness, petechial hemorrhaging, scleral hemorrhages, bilateral subdural hematomas, neurological impairment, and fractured or bruised legs. The military judge granted the appellant's motion for a finding of not guilty, pursuant to Rule for Courts-Martial (R.C.M.) 917, as to the words "fractured or bruised legs," after he found the evidence did not support that those alleged injuries constituted "grievous bodily harm."[2] The panel convicted him of the reminder of the specification as charged, except for the word "striking."

The appellant alleges the specification should be set side and dismissed because it fails to allege the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2). We agree.

Whether a charge and specification state an offense and the remedy for such error are questions of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); R.C.M. 307(c)(3).

Because the appellant did not complain about the missing element at trial, we analyze this case for plain error and in doing so find that the failure to allege the terminal element was "plain and obvious error that was forfeited rather than waived." *United*

[2] The court-martial order does not reflect this action by the military judge. We hereby order that this error be corrected.

States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2012). *See also United States v. Gaskins*, 72 M.J. 225, 232 (C.A.A.F. 2013). In the context of a plain error analysis of defective indictments, the appellant has the burden of demonstrating that (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *Id*. at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). In the plain error context, "the defective specification alone is insufficient to constitute substantial prejudice to a material right." *Id*. at 215 (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). Therefore, reviewing courts "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (quoting *Cotton*, 535 U.S. at 633; *Johnson v. United States*, 520 U.S. 461, 470 (1997)). If so, the charging error is considered cured and material prejudice is not demonstrated. *Id*. at 217.

Our superior court recently reinforced *Humphries* in *Gaskins*, observing, with regard to Article 134, UCMJ, specifications of indecent acts with a child and indecent assault, that:

> Where, as here, (1) Appellant's trial occurred before this Court's decision in [*United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011)], (2) no mention or evidence of the terminal element is extant in the record of trial, and (3) the evidence at trial did not otherwise notify Appellant of the Government's theory of criminality, or show that Appellant nonetheless did defend against the terminal element, it is impossible to guess what Appellant's strategy might have been had the Government alleged the terminal element and put Appellant on notice of which theory of criminality it was pursuing. Cases, like this one and *Humphries*, where the Government fails to (1) allege an element of the offense, (2) mention its theory of criminality with respect to the terminal element, and (3) put on any direct evidence of the terminal element are simply inapposite to those Supreme Court cases in which the Government put on evidence that went directly to the omitted aggravating factor or element, unless we disregard the sage reminder from *Fosler* that the elements of Article 134, UCMJ, are distinct and non-fungible.
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> In this case, the Government relied solely on evidence of the bad acts, the first element of Article 134, UCMJ, to prove the offenses at trial. The military judge instructed the members in the disjunctive, telling them that they could find Appellant guilty of the Article 134, UCMJ, specifications if they concluded that Appellant's conduct was either prejudicial to good order and discipline or service discrediting. Under these circumstances, both Appellant and this Court lack knowledge of a matter of

> critical significance – namely, on which theory of criminality Appellant was tried and convicted.

Gaskins, 72 M.J. at 234 (citations omitted).

Here, there is no evidence of the missing element "somewhere extant in the trial record." As in *Gaskins*, the Government failed to allege the terminal element, mention its theory of criminality with respect to the terminal element in its opening statement or case-in-chief, or introduce any direct evidence of the terminal element. The military judge instructed the members in the disjunctive and the trial counsel argued the following relative to the terminal element:

> [The child] was treated downtown by physicians at a local hospital. Seeing an Air Force member as a child abuser. Not only does child abuse in the Air Force bring prejudicial [sic] to good order and discipline, but it is absolutely of a nature to bring discredit on all of us who wear the uniform.

We are also mindful that in *Humphries*, our superior court also allowed the Government to cure any error by demonstrating that the missing element was "essentially uncontroverted." *Humphries*, 71 M.J. at 215-16. However, as the *Gaskins* Court noted, cases such as this are "simply inapposite" compared to the Supreme Court cases in which the Government put on evidence that went directly to the omitted aggravating factor or element. *Gaskins*, 72 M.J. at 234. Since the Government never introduced evidence in this case concerning the missing element, we do not find that the missing element was "essentially uncontroverted."

In sum, we can find nothing in the record that reasonably placed the appellant on notice of the Government's theory as to which clause of the terminal element of Article 134, UCMJ, he violated.[3] Given the mandate set out by our superior court in *Humphries* and *Gaskins*, we are compelled to set aside and dismiss the child endangerment specification.[4]

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[3] In the Article 32, UCMJ, 10 U.S.C. § 832, investigation report covering this specifications, the investigating officer (IO) listed both prongs of the terminal element when listing the elements of the offense. In discussing the evidence that supported the specification, however, the IO did not discuss the element at all. The Government argues that we should adopt Judge Stucky's dissenting view that the Article 32, UCMJ, hearing provided the appellant with sufficient notice of the Article 134, UCMJ, terminal element. *See United States v. Humphries*, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting). We note this rationale did not persuade the majority in *Humphries* and decline to apply it here.

[4] Because we are setting aside the child endangerment specification, we do not address the appellant's contention that this specification is multiplicious with the assault specifications or constitutes an unreasonable multiplication of charges.

Ineffective Assistance of Counsel

Pursuant to *United States v. Grostefon*, 12 M.J. 481 (C.M.A. 1982), the appellant contends his trial defense counsel were ineffective for failing to interview three of the women who served as caregivers for the appellant's son in an effort to determine whether they were the source of the baby's injuries. After reviewing the record of trial, we find that trial defense counsel effectively represented the appellant throughout his court-martial.

We review claims of ineffective assistance of counsel de novo, *United States v. Wiley*, 47 M.J. 158 (C.A.A.F. 1997), under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* at 687; *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). An appellant's burden is heavy because counsel is presumed to have performed in a competent, professional manner and, to overcome this presumption, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001) (citations omitted). We apply a three-part test to determine whether an appellant has overcome the presumption of competence:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions . . . ?
>
> 2. If they are true, did the level of advocacy fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers?
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> 3. If ineffective assistance of counsel is found to exist, is . . . there . . . a reasonable probability that, absent the errors, [there would have been a different result]?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (internal quotation marks and citations omitted).

Applying the *Strickland* test, we find the appellant has not met his burden of establishing that his trial defense counsel were ineffective. His assertion is based on the lack of evidence in the record that shows his trial defense counsel interviewed Ms. BK, Ms. ADM, and A1C GS prior to trial. Even assuming that allegation is correct, we do not find this to constitute ineffective assistance of counsel. The defense counsel vigorously litigated this case on the appellant's behalf, including arguing to the panel that any one or more of these women could have harmed his son while they were babysitting him. Given the ongoing criminal investigation, it is highly unlikely any of the women would have

"confessed" to the defense team that she, not the appellant, had harmed the child. If, during such an interview, the women denied harming the child, such a pretrial approach may have actually limited the defense counsel's ability to argue that these women were viable suspects that had been ignored by law enforcement and prosecutors. Although this alternate-perpetrator strategy was ultimately unsuccessful, we find the appellant has not met his heavy burden of overcoming the presumption that his defense counsel were competent during their representation of him.

Sentence Reassessment

Having found error regarding the child endangerment specification, we must consider whether we can appropriately reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, this Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales*, 22 M.J. at 307-08. Under this standard, we have determined that we can discern the effect of the errors and will reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*.

Most of the evidence that serves as the basis for the appellant's conviction for endangering his son was also admissible as proof that he was guilty of the assault specifications. The panel convicted the appellant of assault and battery for (1) holding his hand over the infant's mouth, causing suffocation to unconsciousness, (2) vigorously shaking the infant, causing bilateral subdural hematomas and (3) shaking, throwing, or squeezing the infant, causing fractured ribs. For the endangerment specification, he was convicted of doing these same actions and causing these same injuries. Through that specification, he was also convicted of causing petechial and scleral hemorrhaging and neurological impairment. However, medical testimony at trial revealed these injuries are related to and/or symptoms of the child's brain injury and having his airway obstructed. Therefore, this evidence would have been admitted before the members even in the absence of the child endangerment specification.

Thus, the panel would have heard the exact same medical evidence at trial, even if the appellant had never been charged with child endangerment. Similarly, even if the panel had not been told the appellant had a duty of care towards his child, the members would already innately understand that parents have such a duty when living with and

caring for their newborn children, and that this duty includes not harming the child in the manner alleged here.

We recognize that the child endangerment specification did account for three years of the nine year maximum sentence the appellant faced following his conviction, so there has been a change in the penalty landscape following our dismissal of the specification. However, having considered the entire record of trial and the principles of *Sales* and *Moffeit*, we are confident the appellant would have received no less than the sentence he was adjudged at his trial. Furthermore, we find such a sentence is appropriate, correct in law and fact, and, based on the entire record, should be approved.

Conclusion

The finding of guilty to Charge II and its Specification are set aside and dismissed. The remaining findings and the sentence, as reassessed, are correct in law and fact, and no other error prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings as modified, and the sentence as reassessed, are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).