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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman RICHARD F. PERICAS
United States Air Force

ACM 33825 (f rev)

7 May 2003

Sentence adjudged 14 May 1999 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Kurt D. Schuman.

Approved sentence: Dishonorable discharge, confinement for 10 years, and reduction to E-1.

Appellate Counsel for Appellant: Frank J. Spinner (argued), Colonel Beverly B. Knott, Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, Major Terry L. McElyea, Captain James M. Winner, and Captain Patience E. Schermer (on brief).

Appellate Counsel for the United States: Major Linette I. Romer (argued), Colonel LeEllen Coacher, Colonel Anthony P. Dattilo, Lieutenant Lance B. Sigmon, and Captain Suzanne Sumner (on brief).

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

PER CURIAM:

A general court-martial comprised of officers and enlisted members found the appellant guilty, contrary to his pleas, of two specifications of committing indecent acts upon his daughter, MLP, a child under 16 years of age, and one specification of assault consummated by a battery upon his daughter, CMP, a child under 16 years of age. The court-martial found the appellant not guilty of five other specifications alleging indecent acts with his children. The sentence adjudged and approved was a dishonorable discharge, confinement for 10 years, and reduction to E-1.

This Court affirmed the findings and sentence in an unpublished opinion, *United States v. Pericas*, ACM 33825 (A.F. Ct. Crim. App. 9 Oct 2001) (unpub.op.). Our superior court granted review, set aside that decision and ordered a new review under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *United States v. Pericas*, 58 M.J. 20 (2002) (summary disposition). On 22 April 2003, we heard oral argument on two issues raised by the appellant regarding whether the evidence was factually sufficient to sustain the findings of guilty of indecent assault and battery upon a child under 16 years of age. We find no error and affirm.

The appellant married Charlene Pericas in 1989. She had a child, CMP, from a prior relationship. The appellant entered active duty in the Air Force in 1991, and was stationed at Charleston Air Force Base (AFB), South Carolina. The appellant and his wife had four more children: ANP, MLP, RDP, and CP. The marriage was turbulent, occasionally erupting into violence.

The family moved to Hickam AFB, Hawaii, just before Christmas in 1997. Financial difficulties arising from the high cost of living in Hawaii put further strain on the marriage, and exacerbated the domestic discord. On 2 April 1998, the appellant kicked his young son, RDP, and punched his wife when she tried to intervene, resulting in punishment under Article 15, UCMJ, 10 U.S.C. § 815. Efforts at resolving their domestic differences proved unsuccessful. The appellant's wife and children returned to the United States on military orders, and arrived in Arkansas on 8 May 1998.

The appellant implored his wife to return to Hawaii with their children. In a series of letters introduced into evidence, he admitted that he had been abusive and lavished praise upon her. On 15 May 1998, the appellant's wife obtained a six-month protective order from the Arkansas court, based upon the appellant's prior assault. The appellant's wife also sought counseling. She was diagnosed with depression and a dependent personality disorder, and was given medication.

About two months after arriving in Arkansas, the appellant's wife was in the bathroom brushing her hair, and MLP was sitting on the toilet holding a large stuffed bear. MLP began to rub the bear's crotch, and Mrs. Pericas told MLP not to do that. The child replied, "that's what daddy did to me," or words to that effect. The appellant's wife immediately called her counselor and was referred to Valerie Swearingen, another counselor who worked with children. On 2 July 1998, MLP saw Mrs. Swearingen and described to her indecent acts committed by the appellant.

The Air Force Office of Special Investigations (AFOSI) learned of the case and began an investigation. In a videotaped interview later admitted at trial, MLP told investigators the appellant committed indecent acts upon her. The other children in the family were interviewed and also reported offenses by the appellant. CMP alleged that

on one occasion while punishing her, the appellant struck her repeatedly until she involuntarily urinated.

A medical examination revealed that the condition of MLP's hymen was abnormal in a manner consistent with repeated penetrating injuries. Doctor (Dr.) Jerry Gordon Jones, a physician certified by the American Board of Pediatrics and the Director of the Children At Risk Program of the Arkansas Children's Hospital, later testified about the results of his medical examination of MLP. He found that the posterior portion of MLP's hymen was very narrow, "consistent with an object passing between the lips, the labia, and into the genital cleft, and impacting the hymen at the base of the genital cleft causing injury to it." He found the condition of MLP's hymen to be "highly suspicious" of sexual abuse.

The AFOSI arranged a telephone call from the oldest child, CMP, to the appellant on a pretext, hoping to elicit an admission. CMP told the appellant that MLP said he sexually abused her. The appellant adamantly denied sexually abusing his children and accused his wife of fabricating the allegations. During the conversation, CMP stated, "You made me pee in my pants when you punched me one time so hard." The appellant replied, "Yeah, I wonder why, [CMP], I didn't punch you either, young lady. I slapped you." He went on to complain that, "You kicked my biological daughter out of our house," and said, "And I was angry. I had [sic] a lot of things wrong when I'm angry, just like your mom has [sic]."

The appellant contends the evidence is legally and factually insufficient to support the conviction for indecent acts upon MLP and battery upon CMP. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Reed*, 54 M.J. 37, 41 (2000). 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," the court is "convinced of the accused's guilt beyond a reasonable doubt." *Reed*, 54 M.J. at 41 (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). After carefully reviewing the evidence in the record of trial and considering the arguments of counsel, we find the evidence was legally and factually sufficient to support the convictions.

MLP's statements about what the appellant did to her were credible. Her descriptions of events were couched in language appropriate to a child of her age. She related other sensory perceptions, such as sounds, smells, and feelings, indicating that she remembered the events. Although MLP did not remember every detail and at times wandered off the topic, her testimony about the essential facts was consistent throughout the investigation and trial.

The appellant's main contention, at trial and on appeal, was that the appellant's wife influenced the children to make false accusations in order to secure custody of the children after their divorce. The argument is not persuasive, however. The appellant's history of violent outbursts provided an ample basis for her to maintain custody of the children. Moreover, the allegations did not surface when Mrs. Pericas was seeking the early return of dependents from Hawaii, or when she sought a protective order keeping the appellant away from her and the children. The allegations surfaced only after the move was complete and the protective order was in place, at a time when there was no pending challenge to her custody of the children. We further note that when the allegations arose, Mrs. Pericas called her counselor, not the police. Most importantly, there is no evidence that Mrs. Pericas was aware of the abnormal condition of MLP's hymen before the allegations arose. The suggestion that Mrs. Pericas induced her child to fabricate a story that was, coincidentally, entirely consistent with the unique physical condition of MLP's hymen is far-fetched.

The appellant also argues that MLP's testimony was contaminated by the bias and improper influence of others, including the appellant's wife and children. We find no evidence that MLP's testimony was tainted by others. While there is evidence the children were somewhat alienated from the appellant by the time of trial, there is no indication the situation existed prior to the initial reports of offenses or otherwise tainted MLPs testimony.

The appellant contends that his conviction for assault and battery upon CMP is legally and factually insufficient. Specifically, he does not dispute that he struck his daughter, but instead maintains that the force he used against CMP was within the scope of proper parental discipline. We are convinced beyond a reasonable doubt that the appellant's battery of CMP, consisting of multiple blows to the head, hips and legs, was not lawful parental discipline because it was motivated by anger and resentment, rather than a desire to correct her behavior, and because it was excessive.

Finally, the appellant contends his sentence is inappropriately severe. During the sentencing proceedings, the defense presented the testimony of the appellant's psychiatrist, who testified the appellant suffered from bipolar disorder, a severe mental disease that is a "life-long chronic illness." He explained that the extreme moods swings that characterize the disease could only be controlled if the appellant is careful about taking his medication. On cross-examination, he admitted that the structured environment of confinement would help assure that the appellant took his medication and received continued treatment. The prosecution also presented evidence of the appellant's poor military record, including two letters of reprimand, three punishment actions under Article 15, UCMJ, and a prior conviction by special court-martial. Considering the severity of the offenses and all the aggravating and extenuating circumstances, we find appropriate the sentence adjudged and approved.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator