**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Senior Airman JACKIE L. PURCELL III**
**United States Air Force**

**ACM 38125**

**23 September 2013**

Sentence adjudged 23 February 2012 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Matthew D. van Dalen (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

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

Before

ORR, ROAN, and SANTORO
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of aggravated assault upon JP, his 17-day-old son, by striking him on the head with a force likely to produce death or grievous bodily harm on 15 April 2011, and one specification of assault consummated by a battery upon JP by striking him on the body between 30 March and 14 April 2011, both in violation of

Article 128, UCMJ, 10 U.S.C. § 928.[1] The adjudged and approved sentence was a bad-conduct discharge, confinement for 18 months, and reduction to E-1. The appellant argues: (1) The military judge erred by denying his motion for relief for an alleged discovery violation; (2) His trial defense counsel were ineffective by failing to move to suppress his pretrial confession; and (3) The military judge erred in his determination that there was sufficient evidence to corroborate the appellant's confession.[2] We disagree and affirm the findings and sentence.

*Background*

On the evening of 15 April 2011, the appellant was at home with JP while the appellant's wife (JP's mother) was out overnight with friends. JP was fussy and crying and remained so despite the appellant's attempts to soothe him with bottles, fresh diapers, and walking him around the house. At various times during the evening, the appellant attempted to contact his wife to ask her to return home; she initially told him she would return home shortly but then failed to do so and stopped answering his calls.

JP slept on and off overnight. At around 0900 the next morning, with JP still crying and in discomfort, the appellant took him to a neighbor's house for assistance. Immediately upon seeing JP's condition, the neighbor told the appellant that he had to take JP to the hospital immediately or she would call 911 and Security Forces. The appellant's wife returned home around 0945 and slept until around 1100. She and the appellant then took JP to the hospital. JP had bruising on the side of his face, front and back of the neck, and ear; linear bruising on the right side of his abdomen extending downward toward his genitalia; bruising on his left abdomen; bruising on his inner-right thigh; bruising on his back; bruising on his right shoulder; a skull fracture; subdural hemorrhaging; subarachnoid hemorrhaging; swelling of the brain; contusions of brain tissue; damaged nerve axons; and a rib fracture.

The State of Louisiana's Department of Child and Family Services (DCFS) arrived at the hospital while JP was being evaluated. During the investigation that ensued, the appellant admitted to Air Force Office of Special Investigations (OSI) agents that he struck JP four times on 15 April 2011, twice on the back of the head and twice on the spine. The appellant also admitted that some of JP's other injuries resulted from his getting angry, losing control, and hitting JP "wherever" on four occasions the previous two weeks (nearly JP's entire life).

[1] The appellant was acquitted of the greater offense of aggravated assault for his striking JP on the torso and an additional aggravated assault specification alleging that he shook JP with a force likely to produce death or grievous bodily harm, in violation of Article 128, UCMJ, 10 U.S.C. § 928.
[2] All issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

*Discovery of State-held Information*

The appellant asserts that the military judge erred in failing to grant his request that the Government produce the name of the person who made the initial report to DCFS.

We review a military judge's ruling on a request for production of evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Rule for Courts-Martial (R.C.M.) 701(a)(2)(A) requires that the Government disclose certain information that is "within the possession, custody, or control of military authorities." *See United States v. Lofton*, 69 M.J. 386, 390 (C.A.A.F. 2011) (trial counsel has no duty to disclose that which is not within the Government's custody or control). However, a party cannot be made to produce evidence if it is "destroyed, lost, or otherwise not subject to the compulsory process." R.C.M. 703(f)(2). If the evidence is of "central importance" to a fair trial, the military judge shall grant a continuance or otherwise attempt to produce the evidence. *Id*.

No component of the federal Government knew who made the DCFS report at issue. Louisiana state law explicitly prevents disclosure of the reporter's name, even in response to a subpoena. LA. REV. STAT. ANN. § 46:56(F)(8)(b) (2010). Trial counsel did, however, obtain and provide to the defense the DCFS report, redacted as required by state law. In order to resolve the discovery dispute, the military judge proposed, and the DCFS attorney agreed, to have DCFS certify whether the reporter's name was contained within the parties' proposed witness lists. DCFS later confirmed that the initial reporter's name was known to the parties and included on the prospective list of witnesses.

The name of the individual who reported the assault was never within the military's possession, custody, or control, and the record makes clear that the prosecution pursued this information, but was stymied by state law. Although DCFS would not confirm the name of the initial reporter, the military judge did convince DCFS to confirm that the reporter's name was included on the prospective witness lists (and was therefore a person known to the parties). Upon our review of the record, we conclude that the identity of the reporter was not of such central importance that would necessitate a continuance or other relief. We therefore conclude that the military judge did not abuse his discretion in denying the defense relief as the information was protected from compulsory process by state statute. Further, even were we to assume error, we find no prejudice. As the military judge stated: "This does not appear to be a case where exculpatory information is found in a report; indeed, there is no substantive factual information about the events in question at all. This issue only pertains to the names of potential witnesses, witnesses the DCFS has already indicated that both sides already know."

*Ineffective Assistance of Counsel*

The appellant alleges that trial defense counsel were ineffective by failing to move to suppress his pretrial confession. He asserts that his confession was obtained involuntarily because he had been awake for 27 hours prior to his OSI interview. We ordered the submission of affidavits from both trial defense counsel. Having considered the affidavits and the record of trial, we need not order additional fact-finding to resolve the assigned error. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). This court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009); *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We do not second-guess the strategic or tactical decisions made by trial defense counsel unless the appellant can demonstrate specific defects in counsel's performance that were "unreasonable under prevailing professional standards." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (citing *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004)). We consider (1) whether there is a reasonable explanation for trial defense counsel's actions, (2) whether trial defense counsel's level of advocacy fell below the performance expected of fallible lawyers, and (3) if trial defense counsel was ineffective, whether there was a reasonable probability that, absent the error, there would have been a different result. *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

Trial defense counsel's affidavits establish that they did consider making a motion to suppress based on the appellant's claim to have been awake for an extended period. They made the tactical decision not to do so, but instead to raise the issue upon cross-examination of the OSI agent during the Government's case-in-chief. Among the reasons trial defense counsel cited for not seeking suppression were that the appellant told them that although he had been awake "for a long time," he was not tired at the time of the interrogation; that the appellant was inconsistent about how long he had been awake, varying between 13 and 27 hours; that his demeanor during the interview was not consistent with claims that his will had been overborne; that he had declined breaks when offered; that he had made nearly the same statements to several members of the DCFS after his OSI interview; and that by being questioned about these facts prior to trial, the agent would be more prepared to field those questions when asked during the case-in-chief. Both trial defense counsel concluded that the likelihood of suppression was slim and that the better tactical decision would be to attempt to confuse the agent or portray him as less-than-thorough during cross-examination.

Under these circumstances, we conclude that there was a reasonable explanation for counsel's actions and that their performance did not fall below the level expected of fallible lawyers. Therefore, we conclude that the appellant's trial defense counsel were not deficient and as such, not ineffective.

*Corroboration*

The appellant next asserts that his confession was insufficiently corroborated and therefore inadmissible against him. We review a military judge's decision to admit the confession for abuse of discretion. *United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998).

Mil. R. Evid. 304(g) states that "independent evidence, either direct or circumstantial," must be introduced to corroborate "the essential facts admitted to justify sufficiently an inference of their truth." The amount of corroboration required is "very slight." *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988). *See also United States v. Baldwin*, 54 M.J. 464, 465 (C.A.A.F. 2001).

The appellant does not meaningfully dispute that his confession with respect to the assaults on 15 April 2011 (Specification 1 of the Charge) was sufficiently corroborated; rather, he appears to argue that his admissions about the assaults prior to 15 April 2011 (Specification 2 of the Charge) were not corroborated. Specifically, he asserts that "any medical documentary evidence produced violated his Sixth Amendment right to confront his accuser."[3]

To corroborate the appellant's confession that he had assaulted JP "wherever" on four occasions prior to 15 April 2011, the Government introduced medical testimony and documentation that the bruising on JP's torso, chest, abdomen, and thighs could not be explained by the appellant's description of the 15 April 2011 assault and would have occurred by other means. Two physicians testified that the injuries to JP's abdomen were consistent with the appellant's admission that he had struck JP prior to 15 April 2011. In reaching this conclusion, the physicians relied upon medical records and photographs of JP's injuries, all of which were admitted at trial.

We therefore find that the amount of evidence was much more than slight, and therefore sufficient to corroborate the appellant's confession in all respects.

[3] We reject the appellant's assertion that his Sixth Amendment confrontation rights were violated when the medical professionals – witnesses whom he confronted and cross-examined – relied in part upon documentation made and photographs taken by others when reaching their conclusions. U.S. CONST. amend. VI; *United States v. Blazier*, 69 M.J. 219, 224 (C.A.A.F. 2010).

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court