UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSE R. SALDANA, IV
United States Air Force

ACM 37598 (f rev)

29 June 2012

Sentence adjudged 11 September 2009 by GCM convened at Buckley Air Force Base, Colorado. Military Judge: Grant L. Kratz.

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Phillip T. Korman and William E. Cassara (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

UPON FURTHER REVIEW

ORR, Chief Judge:

Contrary to his pleas, a general court-martial composed of a panel of officers convicted the appellant of three specifications of assault consummated by a battery upon a child under the age of 16 years, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The adjudged sentence consisted of a dishonorable discharge, confinement for 2 years, and reduction to the grade of E-1. The appellant raises two issues for our consideration: (1) Whether the evidence is legally and factually sufficient to prove beyond a reasonable doubt that the appellant assaulted DEM by causing two fractures to the right arm and one

fracture to the right leg, as alleged in Specification 1 of the Charge and that the appellant assaulted DEM by throwing him onto the ground and striking his head against the appellant's leg, as alleged in Specification 2 of the Charge; and (2) Whether the appellant's constitutional and regulatory rights were violated by the misconduct of the president of the panel, who failed to disclose that he had received legal training for his role as a military magistrate. We heard oral argument on this case on both of the appellant's assignments of error. After considering the record of trial, the briefs, and arguments of counsel, we ordered a fact finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to assist us in determining whether the appellant was entitled to a new trial in light of an incorrect voir dire response by the president of the panel. After reviewing the uncontested results of the *DuBay* Hearing, we find no error that materially prejudices a substantial right of the appellant and affirm.

Background

The appellant and his wife, AS, frequently babysat the two children of SSgt CM. SSgt CM's youngest child, DEM, was 13 months old and his brother, JM, was two and a half years old. On 31 December 2008, SSgt CM dropped off her two sons at the appellant's home so the appellant's wife could watch them overnight. The next morning DEM began to cry in his playpen so the appellant picked him up. According to the appellant, DEM's lips were chapped and he noticed blood that either came from DEM biting his lip or his tongue. As a result, DEM cried so hard that he started to gargle with his spit. The appellant turned him over so the spit could drain out of his mouth. Because DEM was not cooperating, the appellant said he opened DEM's mouth a bit to try and get the blood out. As the appellant turned DEM over, DEM knocked his head on the appellant's knee. AS said that she came downstairs on the morning of 1 January 2009 when she heard DEM crying. She saw the appellant was holding DEM and wiping blood from his mouth when she came down the steps.

Later that day, the appellant and his wife noticed bruising on DEM's forehead. After they talked, the appellant put DEM back in the playpen but as he did so, he dropped DEM. The appellant put a bottle in DEM's mouth and went upstairs. SSgt CM picked her sons up around 1130 on New Years Day. She and AS discussed the bump on DEM's forehead and the two of them concluded that DEM probably bumped his head on the playpen sometime during the night. SSgt CM dropped her sons off at the appellant's home again around 1630 on 1 January 2009 so the boys could spend the night. SSgt CM mentioned that DEM was fussy so she gave him some medicine for a cold. On the morning of 2 January 2009, AS noticed a bump and scrapes on DEM's forehead. DEM seemed uninterested in eating breakfast. When SSgt CM picked up her boys around 1130 the following morning, AS and the appellant told her that they thought DEM was dehydrated. SSgt CM brought the boys back that evening around 1630 for another overnight stay. AS noticed that DEM's arm shook when he held a sippy cup. He also did not eat or drink much that day. SSgt CM picked the boys up around 1130 on 3 January

2009 and believed something was wrong with DEM. As a result, she took him to the Rocky Mountain Urgent Care Clinic. Dr. RF examined DEM and initially opined that DEM was suffering from an upper respiratory infection. He noted that DEM's lips appeared dry and chapped, but found no abnormalities in his mouth. Dr. RF noted no evidence of child abuse and diagnosed DEM with a virus and told SSgt CM to take him to the emergency room (ER) if his conditions worsened. SSgt CM noticed that DEM was fussy but otherwise seemed to be doing alright. The following morning she noticed that DEM's eye was swollen and he was not using his right arm. When she realized that DEM's right arm was sensitive to the touch, she called AS and asked her to accompany her to the ER. A doctor in the ER determined that DEM had two fractured bones in his right forearm, a fracture in his right leg, abrasions inside his mouth, a knot on the back of his head, and bruising behind his left ear. Dr. AC, a pediatrician from the University of Colorado Health Sciences Center evaluated DEM after his visit to the ER. She testified that DEM was "an ill-appearing child who had obvious signs of external trauma and bruising to his face." She noted a large bruise and abrasion to DEM's upper left forehead, a black eye, swelling on his right arm, obvious bruising and swelling on his left ear, and swelling behind his ear on the back of his neck. After looking at the X-rays she determined that DEM had a fractured right arm and leg. She testified that the fractures could have been either accidental or non-accidental. She could not rule out roughhousing with his brother JM as a possible cause of DEM's injuries. When pressed she said DEM's injuries were most likely non-accidental physical abuse. Dr. KA, the Chief of Pediatric Radiology at David Grant Medical Center, examined DEM's X-rays taken on 4 January 2009. She concluded that the X-rays were taken between zero and fourteen days after the injuries occurred. She could not determine whether they were accidental or non-accidental. However, she did state that grabbing a child by his wrists and squeezing or pulling it generally would not cause a transverse fracture similar to DEM's. His fracture was most likely caused by a perpendicular impact. She also agreed that it was possible for a child JM's size to cause a facture similar to DEM.

Legal and Factual Sufficiency

In his first assignment of error, the appellant contests the legal and factual sufficiency of this case. In short, he contends that the evidence is insufficient to find him guilty of Specifications 1 and 2 of the Charge. He argues that, given the fact that other adults had the opportunity to cause DEM's injuries, the Government did not prove he was guilty of Specifications 1 and 2 beyond a reasonable doubt. We disagree.

The law for resolving the issue of legal and factual sufficiency is found in *United States v. Turne*r, 25 M.J. 324 (C.M.A. 1987). Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), the Court of Military Review has the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of Military Appeals are themselves convinced of the accused's guilt beyond a reasonable doubt. The standard of review for legal and factual sufficiency of the evidence is de novo. *United States v Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

After reviewing the record of trial we are convinced beyond a reasonable doubt that the appellant caused the injuries to DEM. Detective WC of the Aurora, Colorado Police Department questioned the appellant and his wife AS concerning DEM's injuries. AS denied being present when DEM was injured but told Detective WC that on one occasion she heard DEM crying and ran downstairs to check on him. When she got downstairs she saw the appellant holding DEM and blood was coming out of DEM's mouth. During the interview, AS provided consent for Detective WC to search her home. In fact, she showed Detective WC the specific garbage bag where she placed two tissues containing DEM's blood. The appellant told Detective WC that he may have caused the injuries to DEM's mouth and arms but he did not know how DEM's leg was broken. In fact, he said, "I'll take responsibility for his [DEM's] mouth. I could have shoved the – because I did give him a bottle when he woke up. I could have shoved it a little hard." He then explained that he shoved a bottle into DEM's mouth out of frustration to settle him down. He also said he could see how DEM got the bruise on his head. He admitted that he was going to put DEM down and because he was "kind of lazy," he "let DEM plop" on the floor. DEM fell on the back of his head after landing on his butt. He then said he picked DEM up by either his wrists or forearms and then sat him down to clean him. He also admitted dropping DEM a second time as he put him into his playpen.

Given the appellant's version of the events coupled with the scientific and medical evidence presented at trial, we find that the appellant's assertion that JM or another caregiver caused DEM's injuries is not credible.

Challenge of a Panel Member

In his second assignment of error, the appellant asserts that his right to a fair and impartial panel was violated by the misconduct of the president of the panel. He asks this Court to set aside the findings and sentence and to order a rehearing.

In the instant case, during voir dire, the president of the panel, Colonel (Col) MC, responded in the negative to the military judge's question, "Has anyone had any legal training or experience other than that generally by military members of your rank and position?" However, Col MC had been previously appointed and briefed on his duties as a military magistrate. Thus, the appellant argues that Col MC's negative response to the military judge's question was dishonest thereby negating his chance to effectively exercise his right to a peremptory challenge.

In determining when an appellant is entitled to a new trial due to an incorrect voir dire response, our superior court follows the test set by the United States Supreme Court: (1) did a member fail to honestly answer a material question during voir dire, and (2) would a correct response have provided a valid basis for challenge for cause. *United States v. Sonego*, 61 M.J. 1, 3 (C.A.A.F. 2005) (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). In attempting to satisfy this first question of the *McDonough* test, where an appellant makes a "colorable claim" of juror dishonesty, he is "entitled to an evidentiary hearing at which he can fully develop the answer." *Sonego*, 61 M.J. at 4.

Consistent with our superior court's decision in *Sonego*, on 9 January 2012, this Court ordered a *Dubay* hearing to determine whether Col MC was dishonest in his response and whether a correct response from him would have provided a valid basis for a challenge for cause. During the hearing, Col MC testified that he remembered the question in controversy. He stated:

> My understanding of the question was, "Did you have any legal training that was above and beyond what was commensurate with my job in the military and my experience and rank." And I just did not consider this -- didn't even enter my mind . . . .
>
> Even after this came up and I started realizing that this was maybe what it was about, I still don't consider this legal training.

After having an opportunity to hear Col MC's testimony and observe his demeanor, the military judge prepared his findings of fact. He determined that:

> During his testimony, Col [MC's] demeanor was forthcoming, sincere, and there was no indication in his body language that he was attempting to be evasive or conceal information. He answered all questions in a direct and straightforward manner, not appearing to couch his answers in a light most favorable to himself.
>
> This court finds that Col [MC] was not attempting to be dishonest but instead was merely answering the question in a manner consistent with a commonsense interpretation based upon a plain reading of the question's language. In a sense, under Col [MC's] understanding of the question, he was indeed truthful and forthcoming. The crux of the difference in interpretation relies a great deal on what an individual defines as "specialized" legal training. In Col [MC's] mind, such would include much more lengthy, in-depth training, perhaps at a different location that provided such legal training.

He concluded by finding that Col MC was not being dishonest when he answered the question as to whether he had any specialized legal training or experience. We agree.

The appellant has not met the first prong of the test by demonstrating that Col MC failed to answer a material question on voir dire honestly. Therefore, his assertion that he was denied his constitutional right to a fair and impartial panel is without merit.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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