IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **C.A. PRICE** **D.A. WAGNER**

UNITED STATES

v.

Denando D. DANTE
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200302059 Decided 30 August 2005

Sentence adjudged 6 November 2002. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Air Station, Cherry Point, NC.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to mixed pleas, of aggravated assault of a child under 16 years of age and two specifications of obstruction of justice, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 10 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged. The pretrial agreement had no effect on the adjudged sentence.

The appellant asserts three assignments of error. First, the appellant's guilty plea to the sole specification of Charge II, obstruction of justice, was not provident because he was trying to mislead medical personnel vice criminal investigators. Second, the military judge erred in failing to dismiss one of the two obstruction of justice specifications as an unreasonable multiplication of charges. Third, the evidence adduced at trial was legally and factually insufficient to support the appellant's conviction of aggravated assault.

After considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

On the evening of 2 September 2001, the appellant and his wife, Sheryl Dante, brought their 2-year-old daughter, Sydney, to the emergency room with what X-rays revealed was a spiral fracture of the left leg. During the military judge's inquiry into the providence of the appellant's guilty pleas to two charges of obstruction of justice, the appellant stated that, while en route to the hospital, he had asked Sheryl to tell medical personnel that the injury occurred while she was playing with Sydney. When they arrived at the hospital, both the appellant and Sheryl told medical personnel the story they had manufactured, that the injury had occurred while Sheryl was throwing Sydney in the air and catching her. In fact, the injury had occurred while Sydney was alone with the appellant and Sheryl was in the shower. The appellant stated during providence that he had asked his wife to lie and had lied himself in order to mislead medical personnel because he was aware that they would likely get the Department of Social Services and Naval Criminal Investigative Service involved in a case where they suspected child abuse and that suspicion would be heightened if a male had caused the injury. Both the appellant and his wife later admitted to investigators that the injury had, in fact, occurred while the appellant was with Sydney.

In addition to a severely broken leg, the treating physicians found bruises on Sydney's cheek and jaw, a scratch on her neck, abrasions on her left inner thigh, bruising on her right outer thigh, and bruising on her left thigh directly overlaying the fracture. Both the emergency room physician and the duty pediatrician who treated Sydney testified that the injuries were indicative of child abuse. They both stated that a spiral fracture of the type she suffered required both a significant force on the bone accompanied by a torsion or rotation of the bone. Both concurred that the femur, as one of the strongest bones in the body, requires a significant amount of force, such as one might see in a vehicular accident, to cause a break. They also stated that a fracture of the femur would require more than the weight of a body falling, it would also require some external force and a significant twisting force.

Both doctors agreed that Sydney's fracture could not have been caused in the manner described to them by the parents on the evening of 2 September 2001. Both doctors admitted that it was possible to cause a spiral fracture to the femur by catching a falling child, but that there would have to be a significant twisting force applied.

At trial, neither the appellant nor Sheryl testified. Sheryl's prior deposition testimony was introduced into evidence. According to her deposition, the appellant commonly resorted to "whipping" Sydney with a belt when she continued to misbehave in spite of lesser disciplinary efforts. On the evening of 2 September 2001, the appellant came to get Sheryl while she was in the shower and told her that he thought Sydney's leg was broken. Sheryl found Sydney lying on a bed, with a twisted leg and a swollen left thigh. Sheryl admitted during the deposition that she previously told authorities that the appellant told her that he had grabbed Sydney when she was trying to get away from him. She also admitted that she told authorities that Sydney knew what she would get if the appellant got angry.

Sufficiency of Evidence

The appellant claims that the evidence adduced at trial was not sufficient to support the finding of guilty to aggravated assault. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd,* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

The circumstantial evidence of guilt in this case is overwhelming. Both treating physicians saw signs of child abuse that were confirmed by the statements of the parents. The fracture itself indicates the intentional application of significant force accompanied by torsion, normally only seen in vehicular accidents. The appellant's wife, after admitting she lied initially about the incident to protect her husband, told authorities that the appellant told her he had grabbed Sydney while she was trying to get away from him. She also stated that the appellant asked her to lie to medical personnel to protect himself from exposure to authorities. There was more than enough evidence presented at trial for a rational fact-finder to establish guilt on each element of the offense and we, ourselves, are convinced beyond a reasonable doubt of the appellant's guilt.

Conclusion

The remaining two assignments of error are without merit. Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court