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

BEFORE

C.L. CARVER **R.W. REDCLIFF** **J.L. FALVEY**

UNITED STATES

v.

Ronald R. RICHARDSON, Jr.
Ensign (O-1), U.S. Naval Reserve

NMCCA 200000366 Decided 29 July 2004

Sentence adjudged 8 July 1999. Military Judge: R.J. Kreichelt. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Naval Air Station, Pensacola, FL.

LT TRAVIS OWENS, JAGC, USNR, Appellate Defense Counsel
LT C. GRAMICCIONI, JAGC, USNR, Appellate Government Counsel

FALVEY, Judge

The appellant was tried by a general court-martial, before a military judge sitting alone. In accordance with his pleas, the appellant stands convicted of assaulting a child under the age of 16 (four specifications) and assault with a means or force likely to produce death or grievous bodily harm (two specifications), in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The adjudged and approved sentence includes a dismissal and confinement for seven years.

We have examined the record of trial, the appellant's assignments of error, and the Government's reply. Following that examination, 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. Our analysis follows.

Background

The appellant pled guilty to multiple assaults on a two-year-old child on two different occasions. On 14 October 1998,

the appellant was a flight student at Naval Air Station, Whiting Field, Florida. On that day, he was baby-sitting his 8-month-old daughter and two other children including two-year-old Bailey Jensen who would become the victim of appellant's assaultive conduct. While baby-sitting, the appellant became annoyed with Bailey and assaulted him by striking him on the head at least twice with a closed fist and later by picking him up and throwing him approximately 3 feet onto a couch upon which were toys and other items. As a result of these assaults, Bailey suffered bruising on his back and head.

Two days later, on 16 October 1998, appellant was again baby-sitting his daughter and Bailey. As before, appellant became annoyed with Bailey's conduct and grabbed him by the shoulder and struck him on the side of the head with his hand with enough force and in a manner likely to cause death or grievous bodily injury. This blow dazed Bailey and caused him to begin shaking. After a short period, Bailey began to fuss, again annoying appellant, who struck Bailey again on the side of the head with enough force and in a manner likely to cause death or grievous bodily harm. Shortly thereafter, the appellant realized that Bailey had soiled his diaper. In response, the appellant grabbed Bailey around the crotch and buttocks area with his hands, squeezing and bruising his genitals. The appellant was angry and used force well beyond that necessary to pick Bailey up. After the appellant changed Bailey's diaper, Bailey was walking in front of the appellant, but not fast enough for him. Consequently, the appellant struck Bailey in the back of his head with his hand and Bailey fell to the floor. After falling to the floor, Bailey lay there whimpering and the appellant demanded that he get up. Bailey tried to get up, but collapsed. The appellant then picked him up and found him rigid ("stiff as a board"). Eventually, Bailey went limp, his eyes rolled back in his head and he began moaning with labored breathing. The appellant then contacted his wife, a registered nurse, and the two of them took Bailey to the hospital.

Bailey was hospitalized for 13 days and suffered a ruptured eardrum, bruising on his head and back, bruising and swelling of his genitals, and bleeding, swelling, and damage to his brain. Upon his release from the hospital, he could not hold his head up, could not walk, and was fed through a feeding tube. After weeks of physical and occupational therapy, he was able to walk again. At the time of trial, Bailey continued to have some balance problems and was receiving speech therapy for a speech impediment that may have been caused by the traumatic brain injury. The damage to his brain, caused by appellant's assaults, is permanent and may impact his complex reasoning and problem solving ability, and his coordination, balance, and fine motor skills.

The Military Judge's Impartiality

In his first assignment of error, the appellant asserts that the military judge abandoned his impartial role by asking unnecessary aggravating evidence questions and by putting himself in the place of the parents of the victimized child when fashioning his sentence. In his third and related assignment of error, the appellant asserts that the trial counsel advanced a prejudicial sentencing argument by asking the military judge to put himself in the place of the victimized child and his parents.

During presentencing, the appellant elected to give sworn oral testimony as allowed under RULE FOR COURTS-MARTIAL, 1001(c)(2)(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) thereby subjecting himself to cross-examination upon it by the trial counsel and examination by the military judge. After a lengthy direct examination and a thorough cross-examination, the military judge asked a series of questions related to the extent of the injuries inflicted. The military judge prefaced these questions by indicating that he was "asking these [questions] simply because there are a lot of people here in the courtroom or [sic] a lot of information. As long as they have heard some of the information, they need to hear it all, I think, in order to understand the difficult situation that we are in." Record at 367. The military judge then launched into a series of leading questions related to the injuries that the appellant inflicted on the victim.

The appellant contends that these questions were unnecessary because the military judge had already elicited this information during his providence inquiry and it was also contained in other testimony and exhibits. The appellant further contends that in so doing, "[t]he military judge abandoned his 'independent function' to impartially and dispassionately determine a fair and appropriate sentence." Appellant's Brief of 31 Jan 2002 at 16.

Importantly, the appellant did not object to the military judge's prefatory comments or questions at trial. Accordingly, the appellant waived this potential error unless it constitutes plain error. MIL. R. EVID. 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Under plain error analysis, the appellant must demonstrate (1) there was an error; (2) it was plain, clear or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998); *see* Art. 59(a), UCMJ.

A military judge is given wide latitude to ask questions of witnesses, including defendants who choose to make sworn statements during presentencing. Art. 46, UCMJ; *United States v. Acosta*, 49 M.J. 14, 17 (C.A.A.F. 1998). Although the military judge is permitted to "ask questions in order to clear up uncertainties in the evidence or to develop the facts further," a military judge may not abandon his impartial role or conduct questioning in a manner that may appear partisan with respect to

one party. *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995); *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987).

Our review of the record of trial leads us to conclude that the military judge asked appropriate aggravation questions related to the extent of injuries inflicted by the appellant's misconduct. Such questions would have been clearly admissible and appropriate "to develop the facts further" if court members were the sentencing authority and had not been exposed to the providence inquiry. The only issue related to the admissibility and appropriateness of such questions results from the military judge's prefatory comments indicating that he was asking the questions to ensure that trial observers were fully informed. Prior to making these comments, the military judge had heard from numerous character witnesses presented by the appellant who remained in the courtroom after their testimony and who sat through the appellant's sworn statement. Review of the record does not indicate whether any of these witnesses were present the previous day during the providence inquiry. Apparently, the military judge felt compelled to ensure that these observers were fully informed of the injuries resulting from the appellant's misconduct so as to better understand the sentence that would ultimately be imposed. As such, the military judge appears to have been appropriately concerned with ensuring public confidence in the outcome of the trial.

Moreover, even if the military judge erred in asking these questions, we find that the error would not have materially prejudiced a substantial right of the appellant. As the appellant notes, the military judge elicited no information that was not already available to him as the sentencing authority. As such, any perceived error was harmless.

The appellant further contends, however, that the questions posed by the military judge are indicative of his loss of impartiality, and that this is further evidenced by his comments preceding the announcement of sentence. Immediately prior to announcing sentence, the military judge made the following comments:

> The court notes that all parents have dreams and hopes for their children. Parents feel hurt when they see our children hurt. A mere scrape of falling from a bicycle brings pain to the parents as well as to the child, and the scar that results later on the child's leg is something that no parent wants to see because we want our children to be perfect, and we have some parents here now who will not have a perfect child, whose child most likely will not reach the dreams that the child could have had, and the ambitions that the parents have for the child have been dashed. They themselves in a certain sense have been placed in confinement. They are fearful to allow their children to be in any other caregiver's care. As a result, they

> have to be there with the child. So they are not like most parents, able to go off and get away from their children and just enjoy themselves.

Record at 402.

The appellant claims that these comments, and particularly the reference to "our children," demonstrate that the military judge had abandoned his impartiality by placing himself in the "position of a near relative wronged by the accused..." *United States v. Wood*, 40 C.M.R. 3, 13 (C.M.A. 1969). The appellant claims that the above comments reveal that the military judge placed himself in the position of the parents of the abused two-year-old and that he considered the parents to have been victimized by the appellant. Although perhaps ill-advised and inartfully stated, we do not read the military judge's comments to reflect an abandonment of his impartiality. Rather, we view his reference to "our children" as a reference to general parental and societal expectations, rather than inappropriate association with the victims of the appellant's misconduct. We view his reflections on the specific impact of the appellant's actions on the parents of the abused two-year-old as consideration of appropriate victim impact of the evidence under R.C.M. 1001(b)(4).

Considering the entire court-martial from the perspective of a reasonable person, we conclude that the military judge did not put the court-martial's "legality, fairness, and impartiality" into doubt by his questions or comments. *Ramos*, 42 M.J. at 396 (citing *Reynolds*, 24 M.J. at 265).

Trial Counsel's Presentencing Argument

The appellant claims, in his third assignment of error, that the trial counsel impermissibly argued that the military judge should put himself in the place of the victim and his parents when she urged the military judge to "imagine" what the two-year old-victim and his parents had endured. In her argument on sentencing, the trial counsel stated:

> Imagine [Bailey's] fear when he discovers that he is alone with ENS Richardson again.
>
> . . . .
>
> [ENS Richardson] violently grabs Bailey around the crotch through his diaper as you questioned during providence inquiry, sir, with enough force to cause the bruising that you have in those photos. Ask yourself -- I ask you to imagine to yourself what amount of pain that caused Bailey.
>
> . . . .

> Imagine the pain they went through as parents trying to get their little boy back to where he was prior to the time Ensign Richardson assaulted him.

Record at 373-80.

The appellant contends that the above argument impermissibly asked the military judge to put himself in the place of the victim and his parents. Although the appellant did not object to this argument, he claims that this error constitutes plain error materially prejudicing a substantial right. We conclude that the appellant waived objection to this perceived error and that the plain error doctrine does not supply any relief to the appellant.

First, we do not believe that trial counsel's argument constituted error. Rather than asking the judge to improperly and impermissibly put himself in the victim's place, we view trial counsel's argument as a request for the military judge to appropriately consider the victim's fear and pain. "[A]n argument asking the members to imagine the victim's fear, pain, terror, and anguish is permissible, since it is simply asking the members to consider victim impact evidence." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). Considering trial counsel's entire argument within the context of the entire court-martial, it is clear that trial counsel was merely "attempting to describe the particular situation in which the victim was placed, an entirely appropriate consideration..." *Id*. Second, even if counsel's comments constituted error, the error did not materially prejudice a substantial right of the appellant. The appellant was tried before a military judge alone who is presumed to know and follow the law. "In a military judge alone case we would normally presume that the military judge would disregard any improper comments by counsel during argument and such comments would have no effect on determining an appropriate sentence." *United States v. Waldrup*, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989), *rev*. *denied*, 31 M.J. 383 (C.M.A. 1990). Review of the entire record of trial leads us to conclude that the trial counsel's argument did not affect the sentence adjudged.

Sentence Appropriateness

In his remaining assignment of error, the appellant asserts that that portion of his sentence adjudging confinement of seven years is inappropriately severe. We disagree. Based upon our review of the entire record we find the sentence appropriate in all respects for the offenses and this offender. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Although the appellant presented substantial character evidence and demonstrated appropriate remorse and rehabilitative potential, we note that the appellant subjected a two-year-old child to multiple assaults on two separate occasions. Two of these assaults were with a means and force likely to inflict death or grievous bodily injury.

Moreover, the appellant inflicted injury on the child so as to cause him to be hospitalized in critical condition with considerable doubt as to whether he would survive. Finally, the child suffered permanent brain damage that may have life-long effects. Considering all these circumstances and this offender, we do not find the sentence of a dismissal and seven years confinement to be inappropriately severe.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Senior Judge CARVER concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge REDCLIFF did not participate in this decision.