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

BEFORE

C.L. CARVER **W.L. RITTER** **R.W. REDCLIFF**

UNITED STATES

v.

Daniel E. BRYANT, Jr.
Hospital Corpsman Second Class (E-5), U.S. Navy

NMCCA 9901169 Decided 9 April 2004

Sentence adjudged 16 July 1998. Military Judge: K.A. Krantz. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base Jacksonville, Jacksonville, FL.

LT I. PAREDES, JAGC, USNR, Appellate Defense Counsel
Maj ROBERT FUHRER, USMC, Appellate Government Counsel

REDCLIFF, Judge:

Contrary to his pleas, officer and enlisted members serving as a general court-martial convicted the appellant of making a false official statement and committing an indecent act upon a child under the age of 12, in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934. The appellant was sentenced to confinement for 40 months and a dishonorable discharge. The convening authority approved the sentence as adjudged, but waived automatic forfeitures for six months as an act of clemency.

We have carefully considered the record of trial, the appellant's five assignments of error contending that the military judge improperly denied three defense motions for mistrial, that there is insufficient evidence to sustain the appellant's conviction of committing an indecent act, and that the appellant's dishonorable discharge is inappropriately severe, as well as a supplemental request for sentence relief due to post-trial appellate review delay. We have also considered the Government's response to these purported errors and will discuss them out of order for sake of clarity.

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. See Arts. 59(a) and 66(c), UCMJ.

Facts

On the night of 13 October 1997, the appellant and his wife Debra rushed their seven-month old daughter "S" to the Howard Air Force Base Hospital in Panama. When "S" was examined at the hospital's emergency room, she was bleeding profusely from a laceration in her vaginal area. The injury was later determined to be a second-degree tear of her perineum, the muscle that extends from the vagina to the anus. A second-degree tear is one that goes through the tissue and actually exposes the muscle. Medical experts that examined "S" or reviewed her medical records all agreed that the injury was caused by the intentional and forceful insertion of an object into her vagina. Due to the fact that the blood had not begun to coagulate and still appeared to be oozing, experts estimated that the injury had occurred within two to three hours of the child being brought to the hospital. A swab test of her vaginal area revealed no traces of sperm or any other type of seminal fluid.

The appellant had been stationed in Panama for about six months. His wife Debra and the baby had just returned on the evening of 12 October 1997 from a two-week trip to North Carolina to visit Debra’s parents. By all accounts the baby was uninjured upon her return from this trip. The appellant and his family spent 13 October 1997 in their government-assigned home. The baby’s diaper was changed several times throughout the day without either parent noticing a vaginal injury. The appellant testified he last changed his daughter’s diaper at about 7:30 p.m. and everything was fine at that point.

At around 9:00 p.m., the three Bryants were in the living room watching television. Debra got up and went into the bedroom (about 10 feet away and separated by a wall) to make the bed. About 15-20 seconds after she began doing this, Debra heard her daughter scream out in pain. She rushed back into the living room to ask the appellant what happened and he told her that he didn’t know. Debra told her husband to bring the baby into the bedroom and lay her down on the bed. When he did this the baby once again yelled out in pain. At this point Debra smelled stool coming from the baby’s diaper. When she opened it up to change the baby, she testified that she saw a few spots of blood. Upon seeing the blood, Debra immediately put the diaper back on the child, and, accompanied by the appellant, she took the baby to the hospital at Howard Air Force Base.

When questioned by Government agents, and again during the trial, the appellant claimed he was playing with "S" by throwing her in the air and catching her after his wife left the living room. He testified that the child screamed for no apparent

reason while in his care and that he never removed the child's diaper during this time.

Sufficiency of the Evidence

The appellant contends in his fourth assignment of error that there is insufficient evidence to prove he committed an indecent act upon his infant daughter. Simply put, the sole disputed issue at trial was who inflicted the injury sustained by "S" on the evening of 13 October 1997. The appellant contends that the Government failed to prove he was that person. We disagree.

At trial, evidence was adduced that "S" suffered a traumatic injury to her vaginal region. It was undisputed that this injury was neither accidental nor organic in origin. Likewise, it was undisputed that "S" was healthy until shortly before her injury was discovered by her mother. Finally, it was undisputed that only the appellant and his wife were present and caring for "S" in their residence when the injury was sustained. Both testified at trial and each denied harming "S". Of significance, the appellant testified substantially in conformance with his wife's version of the chain of events that evening. Namely, that the baby was somewhat fussy the night she was injured and did not want to go to bed, but she was otherwise in good health. Of greater significance, both agreed that Mrs. Bryant was in the bedroom when "S" screamed out in pain and that the appellant was "holding" her at the time she screamed. Both agreed that shortly afterward, Mrs. Bryant undid the baby's diaper and discovered blood in it. Record at 327.

Although Mrs. Bryant refused to believe her husband was capable of harming their daughter, she suspected otherwise. When questioned at trial whether the appellant ever hurt "S," Debra responded, "That night when she cried or before? Just that one instance." *Id*. at 332.

The case agent, Special Agent (SA) Eberhart, Naval Criminal Investigative Service (NCIS), was called as a Government witness and testified that he interviewed the appellant concerning the injury to "S" shortly after her medical procedures were completed. After advising the appellant of his Article 31(b), UCMJ, rights, SA Eberhart asked the appellant how "S" was injured. The appellant's proffered explanation was that he was playing with "S" and throwing her up into the air. When asked if his wife could have hurt "S," the appellant responded by saying that there was "no way." *Id*. at 348.

Dr. Mendez, a pediatric gynecologist, examined and treated "S" for her injury. Testifying on behalf of the Government, Dr. Mendez opined that the injury was caused by someone trying to intentionally force an object inside the baby's vaginal cavity. She also testified about speaking to the appellant on the day she performed surgery on "S". The appellant asked her whether the

injury could be caused by throwing the baby into the air, or from the baby having a congenital weakness in the perineal area. Dr. Mendez ruled out these possibilities through her exam of "S." *Id.* at 276-77.

Another medical doctor, Captain Craig, Medical Corps, U.S. Navy, was called as a Government witness. Dr. Craig described the injury sustained by "S" as "very serious" and rejected as absolutely improbable the hypothesis that such an injury could be caused by throwing the baby into the air and catching her by her diaper. Dr. Craig also rejected self-injury, a forceful bowel movement, or an accidental fall as causes for the injury. Finally, Dr. Craig opined that the injury was caused by something being forcefully inserted into the victim's vagina, an object consistent in size with one or more adult fingers. *Id*. at 377, 379-85, 389-90.

Testifying in his own defense, the appellant stated that he did not see or hear anything that would lead him to believe his wife harmed their baby on the night of her injury. He also testified he said he didn't know what happened to "S" when asked by his wife about the scream. He further testified that he did not know if the injury occurred when he threw "S" into the air, but that was when she screamed. Finally, the appellant conceded that he was alone with "S" at the time she screamed. *Id*. at 438-40, 448-51.

At trial, the appellant’s wife and parents-in-law testified to his loving and caring nature, asserting that he was not capable of purposefully hurting his daughter in any way. Numerous defense witnesses further attested to the appellant's stellar military character, his outstanding performance of duties as a Navy SEAL, and his apparent devotion to his daughter.

Military courts of criminal appeals must determine both the factual and legal sufficiency of the evidence presented at trial. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66, UCMJ. The test for factual sufficiency is whether, after weighing all of the evidence in the record of trial and making allowances for the lack of personal observation, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Id*. at 325. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. *Id*. The term "reasonable doubt" does not mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999). The fact-finder may properly "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

After carefully reviewing the record, we have no difficulty finding that a reasonable fact-finder could find the appellant guilty of committing the alleged indecent act based on the

evidence presented at trial. Both the appellant and his wife, the only possible suspects, testified at trial and were observed by the members. The Government's proof established that a physical injury was inflicted upon "S", that such an injury was caused by an intentional, forceful attempt to insert an object into her vagina, and that the appellant was the only person caring for "S" when she screamed in pain. While the balance of the Government's case was largely circumstantial as to the appellant's causation of the injury, the members who served as the fact-finders in this case were convinced beyond a reasonable doubt that the appellant indecently assaulted "S". We are also convinced beyond a reasonable doubt and, therefore, find the evidence both factually and legally sufficient to sustain the appellant's conviction. Accordingly, we decline to grant relief on this basis.

Motions for Mistrial

Trial defense counsel moved for mistrial on three separate occasions. All three motions were denied by the military judge, who provided corrective instructions to the members. These actions form the basis for the appellant's first, second, and third assignments of error.

As his first basis for a mistrial and first assignment of error, the appellant contends that the trial counsel impermissibly shifted the burden of proof to the defense during voir dire of the prospective members. Specifically, the appellant asserts that it was improper for trial counsel to characterize the prospective witnesses announced to the members as "prosecution witnesses." Trial defense counsel asserted that such a reference could lead the members to conclude that the defense had to put on witnesses, thus shifting the burden of proof to the accused. The record does not support this contention, because the question posed by the trial counsel simply characterized certain witnesses as "prosecution witnesses" because they were going to be called as witnesses by the Government. Additionally, the military judge re-read the list of witnesses and informed the members that the witnesses might also be expected to provide testimony favorable to the defense as well.

The appellant's second mistrial motion and second assignment of error rests on a claim of improper testimony from a prosecution witness who mischaracterized the evidence. During direct examination, Dr. Efthimiadis, a prosecution medical expert, was asked by the trial counsel if anything was found based on swabs taken from the victim's vagina. Dr. Efthimiadis responded that at first he didn't know, but was told that a "pathologist was able to detect sperm." Record at 236. Although the testimony was inaccurate, the record does not support the appellant's claim that the trial counsel intentionally elicited improper testimony. We concur with the military judge's ruling that the witness' answer was unresponsive to the question posed

by the trial counsel because the witness did not discover sperm or any other suspicious substance during the sexual assault exam and merely related incorrect "hearsay." Following an extensive Article 39(a), UCMJ session, the military judge told the members that the witness' testimony was not based on personal knowledge and that the parties stipulated as fact that "there was no evidence of semen, seminal fluid, or sperm found in any sample obtained [from "S"]." *Id*. at 248. We are fully satisfied that the military judge's corrective action remedied any potential for prejudice.

The appellant's third basis for mistrial and third assignment of error flows from trial counsel's sentencing argument. After outlining generally recognized principles of sentencing, the trial counsel exhorted the members to "[t]hink of the nature of the crime and punish it accordingly." *Id*. at 604. He then expanded his argument as follows:

> Members, there is going to come a day, and it may be next week, it may be next month, when people may ask you have you ever served on a court-martial, and you will tell them yes. They will ask you what was it about. Well, it was about a father who sexually violated his 7-month old daughter by sticking his fingers or an object into his (sic) vagina, and he caused a tear that went through the vagina almost to the anus into the perineum. They will ask--you can imagine their surprise. And they are going to ask, well, what did he get? What was the appropriate sentence? What was the just sentence? Was it restriction? Was it two years or three years? Or is the appropriate and the just sentence of punishment and deterrence for this crime the maximum sentence? 12 years of confinement, dishonorable discharge. And I would ask that reduction rate to the pay grade of E-1. *Id*.

While the record does not support the appellant's contention that the argument injected unlawful command influence into the sentencing procedure, we agree with the military judge's determination that the argument was improper. Nonetheless, we concur with the curative approach taken by the military judge that instructed the members to disregard the improper argument and later refocused their responsibility to adjudge an appropriate sentence in accordance with recognized sentencing principles.

A mistrial is a drastic remedy that a military judge should order only when necessary to prevent a miscarriage of justice. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000); *United States v. Barron*, 52 M.J. 1, 4-5 (C.A.A.F. 1999). Furthermore, curative instructions, rather than declaration of a mistrial, are the preferred remedy to correct error when court members have been exposed to inadmissible evidence. *Taylor,* 53 M.J. at 198;

Barron, 52 M.J. at 4-5. Finally, an appellate court should not reverse a military judge's decision to deny a mistrial motion absent a clear abuse of discretion. *Taylor,* 53 M.J. at 198.

After careful consideration of the appellant's contentions and the Government's response, and review of the entire record of trial, we find that the purported errors, separately and collectively, fail to rise to the level of manifest injustice required by RULE FOR COURTS-MARTIAL 915, MANUAL FOR COURTS MARTIAL (1998 ed.). We are satisfied that any adverse impact from the purported errors was neutralized by the curative approaches employed by the military judge. *See Barron,* 53 M.J. at 5. Applying the standard set forth by our superior court that a mistrial should be ordered only in extraordinary cases to prevent a miscarriage of justice, we hold that the military judge did not abuse his discretion by opting to provide curative instructions to the members in lieu of the request for mistrial. *United States v. Seward*, 49 M.J. 369 (C.A.A.F. 1998)(holding a military judge has considerable latitude in determining when to grant a mistrial.) Accordingly, we find these assigned errors without merit and decline to grant relief on these bases.

Sentence Appropriateness

In his fifth and final assignment of error, the appellant argues that his sentence, which includes an unsuspended dishonorable discharge, is inappropriately severe. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Facing a maximum punishment of 12 years confinement, reduction to E-1, total forfeiture of pay and allowances, and a dishonorable discharge, the appellant was sentenced only to confinement for 40 months and a dishonorable discharge. Despite the appellant's outstanding service record and attestations of his good character, the heinous injury inflicted by him upon his infant daughter warrants the severe punishment awarded by the members of his court-martial. Accordingly, we decline to grant the relief requested.

Post-Trial Delay

In a supplemental motion submitted on 10 February 2004, the appellant seeks relief, citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), for the delay in the post-trial processing of his case. Specifically, he claims that because more than five years and seven months have elapsed since his sentence was announced and this court had not yet completed its review of his court-martial, we should disapprove his dishonorable discharge. The appellant alleges no specific prejudice based on this processing delay.

We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentencing relief for unreasonable post-trial

delay even in the absence of actual prejudice. *Id*. at 224. Assuming, *arguendo,* that the post-trial processing delay was unreasonable under the circumstances of this case, the absence of an objection to such delay until two months before the issuance of this opinion is highly relevant to our determination of whether relief is warranted. Such a failure to object is in substantial measure a reflection of the *de minimis* effect of the delay on the appellant. We would expect an appellant to object vigorously if he was truly experiencing significant problems arising from post-trial processing delays. An appellant should not be able to stand silent until the "11th hour" and then expect to benefit by complaining about the delay well after-the-fact. While we do not condone the post-trial processing delay associated with this case and share partial responsibility for it, disapproval of the dishonorable discharge under these circumstances would be an undeserved windfall for this appellant.

We find no prejudice or harm to the appellant, nor do we see any other basis to afford him the requested relief, arising from the post-trial processing delay related to this case. Having carefully reviewed the record in light of our authority and responsibility under both Articles 59(a) and 66(c), UCMJ, we decline to grant relief on this ground and his motion is hereby denied.

Conclusion

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

Senior Judge CARVER and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court