# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

**UNITED STATES, Appellee**
**v.**
**Sergeant DASHAWNA D. ROBINSON**
**United States Army, Appellant**

ARMY 20220043

Headquarters, Fort Bliss
Robert L Shuck, Military Judge
Colonel Andrew D. Flor, Staff Judge Advocate

For Appellant: Major Rachel P. Gordienko, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Jonathan F. Potter, Esquire; Major Rachel P. Gordienko, JA (on brief).

For Appellee: Captain Anthony J. Scarpati, JA (argued); Colonel Christopher B. Burgess, JA; Major Mark T. Robinson, JA; Captain A. Benjamin Spencer, JA (on brief).

2 June 2023

---

SUMMARY DISPOSITION

---

***This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.***

FLEMING, Senior Judge:

Appellant asserts the evidence is legally and factually insufficient to support a finding of guilty for assault consummated by a battery on a child under the age of sixteen because the government failed to disprove the defense of parental discipline beyond a reasonable doubt. We disagree.

## BACKGROUND

A military judge sitting as special court-martial convicted appellant, contrary to her pleas, of one specification of assault consummated by a battery on a child under the age of sixteen in violation of Article 128, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 928. The military judge sentenced appellant to a bad-

conduct discharge, confinement for ninety days, and reduction to the grade of E-1. The convening authority took no action on the findings or sentence.

Appellant has two daughters, [redacted] and [redacted] The victim, appellant's five-year-old child [redacted] had a history of disciplinary problems at school. Prior to departing for training at the National Training Center (NTC), appellant told [redacted] that she would receive one physical strike for each notification of misbehavior that appellant received from AM's teacher. Upon returning from NTC, appellant learned of fifteen notices AM's teacher issued regarding AM's misbehavior. Appellant did not immediately strike her daughter regarding these notices, however, but waited a day or two to allegedly ensure she was in the right state of mind to discipline [redacted]

On the evening of the offense[1], appellant directed [redacted] to lie on her bed. [redacted] removed her shorts and shirt but kept on her underwear and a sports bra. The military judge found that appellant then struck [redacted] fifteen times with a cellphone charging cord.[2] Appellant noticed the striking left marks on [redacted] that appeared increasingly severe over the next few days. Appellant alleged [redacted] did not report pain or request any type of care and, apart from the visible marks, did not appear to be in any discomfort or hindered from her usual activities.

A few days later on the evening of 8 October 2021, while visiting her father, Specialist (SPC) JM, he observed marks on AM's legs and buttocks and called law enforcement. Special Agents from the United States Army Criminal Investigation Command (CID) took photos of AM's injuries 24, 48, and 72 hours after receiving SPC JM's report. The photographs depicted looped shaped marks and two places where the skin was broken on AM's thighs and lower legs. On 10 October 2021, SPC JM took [redacted] to the hospital, where she received no treatment, reported no pain, and was discharged the same day.

During appellant's court-martial, government counsel asked [redacted] four substantive questions. [redacted] testified she remembered having marks on her legs, that she got the marks from when "[her] mom whooped [her]," that she was struck with a power cord, and when asked how it felt, she responded, "it hurt." During cross-examination, [redacted] testified she was hit "because I wasn't being good in school."

At appellant's trial, the government's expert in pediatric abuse testified the marks photographed on [redacted] were "not consistent with routine bumps and bruises from play, or parental discipline." He further testified, "this kind of injury [requires] a significant amount of force, that...is not likely to occur in the course of

---

[1] Both parties agree the date was either 2 or 3 October 2021.

[2] Appellant contends she threatened to use a charging cord but exchanged it for a thin belt prior to striking [redacted]

routine play, accidental play, or normal accepted parental discipline." From his review of the photographs of the marks on [redacted] the doctor opined "in a typical person, those injuries would have caused a significant amount of pain," and expressed that the "presence of multiple marks on multiple parts of her body makes me concerned that this was excessive parental discipline." Later in his testimony, the expert explained his belief that parental discipline becomes excessive "once that discipline leaves marks that persists [*sic*] beyond just those few minutes to hours consistent with just being lightly struck."

## LAW AND DISCUSSION

When an accused at court-martial raises the defense of parental discipline, "the [g]overnment ha[s] the additional burden of refuting beyond a reasonable doubt appellant's defense of parental discipline." *United States v. Rivera*, 54 M.J. 489, 490 (C.A.A.F. 2001). Our superior court has repeatedly applied the standards of the Model Penal Code to define parental discipline. *See Rivera* 54 M.J. at 491; *United States v. Robertson*, 36 M.J. 190, 191 (C.M.A. 1992); *United States v. Brown*, 26 M.J. 148, 150 (C.M.A. 1988). "[T]he use of force by parents or guardians is justifiable if (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of...misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation...." *Brown*, 26 M.J. at 150.

This court reviews questions of legal and factual sufficiency de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). "'The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Rosario*, 76 M.J.at 117 (quoting *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014)). "When applying this test for legal sufficiency, 'this Court is bound to draw every reasonable inference from the evidence...in favor of the prosecution.' *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (quoting *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)).

The National Defense Authorization Act for Fiscal Year 2021 amended Article 66(d)(1)(B) regarding our factual sufficiency review as follows:

> (B) FACTUAL SUFFICIENCY REVIEW
>
> (i) In an appeal of a finding of guilty under subsection (b), the Court [of Criminal Appeals] may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in

> proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-
>
> (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (2) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. The amendment to Article 66(d)(1)(B) applies only to courts-martial, as here, where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021.[3] *Id.* at 3612.

The question is whether we are clearly convinced the finding of guilty, which required the military judge to reject appellant's parental discipline defense beyond a reasonable doubt, was against the weight of the evidence.[4]

***Legal Sufficiency Review***

Viewing the evidence in the light most favorable to the government and drawing every reasonable inference in favor of the government, we find a rational trier of fact could have found beyond a reasonable doubt not only the essential elements of the crime but also that the defense of parental discipline did not apply.

The marks on [redacted] were still visible and photographed between six and seven days after she was struck by her mother. Based on the same images, in conjunction with the testimony from [redacted] and the government expert in pediatric abuse that AM's marks "in a typical person, . . . would have caused a significant amount of pain," a

---

[3] Neither party in their brief or during oral argument cited the correct standard for our factual sufficiency review.

[4] See Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, Para. 2-5 (29 Feb. 2020) [Benchbook].

rational factfinder could have reasonably inferred appellant's use of force was known to create a substantial risk of causing extreme pain and the defense of parental discipline did not apply beyond a reasonable doubt. Finding the evidence legally sufficient, we next turn to our factual sufficiency review.

***Factual Sufficiency Review***

In conducting our factual sufficiency review, we are *not* clearly convinced appellant's conviction was against the weight of the evidence, and therefore find her conviction factually sufficient.

We find appellant's use of force was intended for a proper purpose of safeguarding the welfare of her child through the punishment of misconduct. *Brown*, 26 M.J. at 150. We similarly find appellant's use of force was not *designed* to cause "death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation." *Id.* Proper parental motive and a lack of design to cause the requisite harms, however, are not absolute bars to conviction under the parental discipline defense. Courts must also analyze whether "the force used is...known to create a *substantial risk* of causing death, serious bodily injury, disfigurement, *extreme pain* or mental distress or gross degradation...." *Id.* (emphasis added).

The prosecution expert testified the extent of the injuries caused by each strike, namely the marks persisting for days after the strikes, was indicative that the force appellant used in striking [redacted] was "excessive." The expert further testified that, based on the location and type of injury, each strike to [redacted] would be associated with a significant amount of pain. Although the force used was not known to create a substantial risk of causing death, serious bodily injury, disfigurement, or gross degradation, the force used on [redacted] should have been known by appellant to create a substantial risk of extreme pain to [redacted]

The expert testified each mark came from a strike that, standing alone, "would be consistent with a significant amount of pain" in a person with a "normally functioning neurologic system." Fifteen such strikes on a five-year-old child creates a substantial risk of causing extreme pain. Under this scenario, we are not clearly convinced the finding of guilty, which required the military judge to reject appellant's parental discipline defense beyond a reasonable doubt, was against the weight of the evidence.

## CONCLUSION

On consideration of the entire record, the findings of guilty and sentence are Affirmed. [5]

Judge HAYES and Judge MORRIS concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[5] The convening authority approved appellant's request to defer and waive automatic forfeitures for a period of six months for the benefit of appellant's two dependent children. The Entry of Judgment incorrectly states the waiver of automatic forfeitures was approved to be paid to the caregiver of one, but not both, of appellant's dependent children. It is corrected to reflect the waiver as approved and to be paid to both Ms. DP and SPC JM.