

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist JEREMEY C. CLIFTON
United States Army, Appellant

ARMY 20091092

Headquarters, V Corps
Charles Kuhfahl, Military Judge
Colonel Flora D. Darpino, Staff Judge Advocate (pretrial)
Lieutenant Colonel Randolph Swansiger, Staff Judge Advocate (post-trial)

For Appellant: Lieutenant Colonel Jonathan F. Potter, JA; Captain Tiffany K. Dewell, JA; Captain Kristin McGrory (on brief).

For Appellee: Major Amber Williams, JA; Major LaJohnne A. White, JA; Captain Julie A. Glascott, JA (on brief).

23 April 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

Per Curiam:

A military panel composed of officers and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of false official statement and aggravated assault¹, in violation of Articles 107 and 128 of the Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 928 (2006) [hereinafter UCMJ]. The panel sentenced appellant to a bad-conduct discharge and confinement for six months. The convening authority approved the sentence as adjudged.

¹ Appellant was found not guilty of the charged offense of assault in which grievous bodily harm is intentionally inflicted upon a child under the age of sixteen, but guilty of the lesser included offense of aggravated assault by a means likely to cause death or grievous bodily harm.

This case is before us for review pursuant to Article 66, UCMJ. Before this court appellant alleges five assignments of error, the fourth of which merits discussion, but no relief.

FACTS

After closing arguments by counsel and instructions on findings by the military judge, but before the members closed to deliberate, a panel member, MSG H, asked the military judge if it was “too late to recall two of the witnesses” because he had “two questions.” Based upon further inquiry by the military judge, MSG H stated the first witness he wanted to recall was “[e]ither Dr. Ellwood or one of the other medical doctors.” The second witness MSG H wanted to recall was appellant’s wife, Mrs. Clifton.

In response to MSG H’s request to recall Dr. Ellwood or another medical doctor, the military judge immediately disapproved the request because the medical doctors had “been permanently excused.” In response to MSG H’s request to recall Mrs. Clifton, while not finding her to have been permanently excused, the military judge immediately disapproved the request because “we have closed all of the evidence.” The military judge asked both counsel whether they had an objection to his response to MSG H’s request to recall these witnesses. Both counsel stated they had no objection.

LAW AND DISCUSSION

Standard of Review

We review a military judge’s denial of a panel member’s request to recall a witness for an abuse of discretion. *United States v. Lampani*, 14 M.J. 22, 26 (C.M.A. 1982); *United States v. Rios*, 64 M.J. 566, 568 (Army Ct. Crim. App. 2007).

The Members’ Right to Call Witnesses

Article 46, UCMJ, affords panel members the “opportunity to obtain witnesses and other evidence” Rule for Courts-Martial 921(b) further provides that during deliberations, “[m]embers may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.” In addition, Military Rules of Evidence 614(a) states that members may request to call or recall witnesses to testify at court-martial.

In *Lampani*, our superior court, while finding court members do not enjoy an absolute right to obtain additional evidence, identified the following factors the

military judge must consider in responding to court members' requests to obtain witnesses:

Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the objections of the parties to reopening the evidence are among the factors the trial judge must consider.

Lampani at 26.

While affording counsel an opportunity to object to his rulings, and thereby arguably meeting the fourth factor described in *Lampani*, it is not clearly apparent from the record that the military judge considered the first three *Lampani* factors before disapproving MSG H's request. As such, we find the military judge abused his discretion. This does not end our analysis, however.

Prejudice

Under Article 59(a), UCMJ, in order to grant relief, the military judge's error must have materially prejudiced appellant's substantial rights. Because the error is a nonconstitutional one, the government must demonstrate "the error did not have a substantial influence on the findings." *Rios*, 64 M.J. at 569 (quoting *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (additional citations omitted)).

In regards to MSG H's request to recall "Dr. Ellwood or another medical doctor", four medical doctors, including Dr. Ellwood, testified during appellant's court-martial. All four doctors, three pediatricians and a radiologist, were called by the prosecution. Each doctor was cross-examined by defense counsel and was also subject to questioning by the military judge and panel members.

Appellant's spouse, Mrs. Clifton, was called as a prosecution witness. Mrs. Clifton's testimony at trial comprises approximately fifty pages in the record. She was subjected to an extensive cross-examination by defense counsel. When the military judge afforded the panel members the opportunity to question Mrs. Clifton, they chose not to.

Pursuant to our superior court's decision in *Lampani* and this court's prior decision in *Rios*, the absence of a defense objection to the military judge's actions does not equate to waiver. As was the case in *Lampani* and *Rios*, the decision by appellant's defense counsel not to object to the military judge's decision not to recall two witnesses was consistent with their trial strategy and did not prejudice appellant. *Lampani*, 14 M.J. at 27; *Rios*, 64 M.J. at 569.

First, in regards to the testimony of the medical doctors, appellant's counsel, through cross-examination, developed alternate theories as to how the infant victim, K, had sustained her injuries. The military judge left it to the panel members' memory as to whether K might have suffered the injuries at issue as a result of having osteogenesis imperfecta, which is also known as "Brittle Bone Disease."² Undoubtedly, appellant's counsel saw no tactical advantage in supporting a request to recall a medical doctor and the lack of a defense objection to the Military Judge's decision reflects that strategy.

Second, appellant's primary theory at trial, as contained in his opening statement and closing argument, was the evidence was insufficient to convict appellant of the assault charge. In addition, appellant repeatedly posited that given a

² During his closing argument, appellant's counsel stated,

Members of the panel, we also have what I call kind of a list of small possibilities It's just some small possibilities, some things to consider because [appellant] vs. [Mrs.] Clifton, there are some other options out there. One is OI, osteogenesis imperfecta, a small possibility but **it was never excluded by any tests, so they can't exclude it.** They can only keep testing until the tests keep coming back negative, but as I said, we can't say there's no test proving that a child didn't have OI... [T]he first MD that testified [Dr. Ellwood] said we cannot –**'all we can do is keep running tests. We're at the point where we can't run anymore [sic] tests,' but he never said-and nobody ever said, 'We've done all the test[s] of OI and we've proven that there's no way that could have happened.'**

R. at 834-35 (emphasis added). This argument reflects a generous interpretation of Dr. Ellwood's testimony wherein he stated, as a result of K's genetic testing, biopsy, and x-ray survey, ". . . **we had no evidence to support the diagnosis of osteogenesis imperfecta . . . or any of its cousins.**" R. at 423 (emphasis added). In response to a question from a panel member, Dr. Ellwood further testified,

Those tests, to the extent that they apply and are associated with [K's] examinations and history, . . . are considered about as conclusive as the medical system can afford that [K] does not suffer [sic] brittle bone disease. . . . Essentially, your honor, we have no more tests.

R. at 438 (emphasis added).

choice between appellant and Mrs. Clifton, Mrs. Clifton was much more likely to have assaulted K. Appellant based the latter theory predominantly on Mrs. Clifton's greater access to K; Mrs. Clifton's stress caused by appellant spending two consecutive work weeks (Monday morning – Friday evening) away from the family; and Mrs. Clifton's failure to seek medical treatment for K's injuries contemporaneously with their occurrence (thereby implying she was the person who had inflicted the injuries).

Appellant's counsel was able to elicit testimony from Mrs. Clifton to support this theory during cross-examination of Mrs. Clifton. Appellant's counsel had also argued to the panel that the government had failed to prove beyond a reasonable doubt appellant was guilty of the charged offenses, as Mrs. Clifton was much more likely to have injured K than appellant. During Mrs. Clifton's testimony, appellant's counsel deliberately chose not to ask Mrs. Clifton whether she had intentionally injured K. When the trial counsel asked Mrs. Clifton on re-direct whether she had ever intentionally injured K, appellant's counsel objected. The military judge overruled the objection and Mrs. Clifton denied she had ever "intentionally injured," "squeeze[d]" or "shake[n]" K. Appellant's counsel did not want to afford Mrs. Clifton a single opportunity to deny the allegations and surely did not want her back on the stand to refute his closing argument. Again, defense counsels' decision to not object to the military judge's decision to preclude Mrs. Clifton from recall was consistent with their theory of the case.

The government's evidence in this case, to include appellant's written confession that he squeezed K "pretty hard because I remember her arms lifting up on their own", was sufficient to convict appellant of aggravated assault by a means or force likely to produce death or grievous bodily harm upon a child under the age of sixteen.³ Instead of prejudicing appellant, we find the military judge's refusal to grant the panel's request likely benefited appellant.

Although we find the military judge abused his discretion in denying the request to recall witnesses, we find this error did not have a substantial influence on the findings nor did it materially prejudice appellant's substantial rights.

CONCLUSION

On consideration of the entire record and the submissions of the parties, to include those matters raised personally by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we hold the findings of guilty and the sentence as approved by the convening authority to be correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

³ This confession was also the basis that supported appellant's conviction for falsely stating to a CID Special Agent that he had not squeezed K.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.", is written over the printed name.

MALCOLM H. SQUIRES, JR.
Clerk of Court