IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20091092
Specialist (E-4) **JEREMY C. CLIFTON,** United States Army, Appellant	)	USCA Dkt. No. 12-0486/AR

Kristin B. McGrory
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0692
USCAAF No. 35014

JACOB D. BASHORE
Major, Judge Advocate
Branch Chief, Defense
Appellate Division
USCAAF No. 35281

IMOGENE M. JAMISON
Lieutenant Colonel, Judge Advocate
Deputy Chief, Defense
Appellate Division
USCAAF No. 32153

PATRICIA A. HAM
Colonel, Judge Advocate
Chief, Defense Appellate Division
USCAAF No. 31186

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Specialist (E-4) **Jeremy C. Clifton,** United States Army, Appellant	)

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT DETERMINED THE MILITARY JUDGE COMMITTED ERROR BY DENYING A PANEL MEMBER'S REQUEST TO CALL TWO ADDITIONAL WITNESSES FOR QUESTIONING, BUT FOUND THIS ERROR TO BE HARMLESS.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2008) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On November 12 and December 1-4, 2009, an enlisted panel sitting as a general court-martial tried Specialist (SPC) Jeremy C. Clifton [hereinafter appellant] at Fort Carson, Colorado. Contrary to his pleas, the panel found appellant guilty of false official statement and aggravated assault by a means likely to cause death or grievous bodily harm, in violation of Articles 107 and 128, UCMJ, 10 U.S.C. §§ 107, 128 (2008). The panel sentenced appellant to reduction to E-1, confinement for six months, and a bad-conduct discharge. The convening authority approved the adjudged sentence and deferred the automatic forfeitures until action.

The Army Court affirmed the findings and the sentence on April 23, 2012. (JA 1). Appellant was notified of the Army Court's decision and personally petitioned this Court for review on May 8, 2012. On August 6, 2012, this Honorable Court granted appellant's petition for review.

Statement of Facts

Appellant's family consists of his wife, Mrs. KC, and his two young daughters, AC and KC. (JA 12). His youngest daughter, KC, was born on 3 December 2009. (JA 25). On February 9, 2009, KC was removed from the Clifton's custody after x-rays revealed that KC suffered from multiple fractures to her ribs, clavicle, and skull. (JA 44, 48, 118, 130, 164).

Following an investigation, appellant was charged with the aggravated assault of KC by squeezing her on the chest and by causing her to strike her head. (JA 7).

At trial, appellant's theory of defense was that Mrs. KC, appellant's spouse, injured the child. Appellant's counsel set forth, "Specialist Clifton is never alone with [KC]; he's never in the house alone with her. He never has exclusive access to [KC]. The only one that has exclusive access to [KC] is her mom, [Mrs. KC]." (JA 12). Appellant's counsel informed the panel that all of the evidence would point to Mrs. KC as the perpetrator of the crime and that appellant did not have the opportunity to injure KC. (R. at 11-24). This was especially true where appellant was out-of-town the two weeks before KC's injuries were discovered. *Id.*

The first witness the government called was Mrs. KC. Mrs. KC testified that, on February 9, 2009, she and appellant took KC to her two-month exam. (JA 43). During the exam, Mrs. KC informed the doctor that KC had run a high fever and was admitted to the emergency room on February 7, 2009. *Id.* As a result of this information, the doctor recommended additional testing to discover the cause of KC's illness. *Id.* Following the testing, Mrs. KC and appellant were informed that KC suffered from multiple rib fractures. (JA 44). KC was immediately removed from the Clifton home and placed in foster

care. (JA 48). The Army Criminal Investigation Division (CID) never interviewed Mrs. KC. However, she did give a statement to the German authorities on February 23, 2009, and denied injuring KC. *Id.*

On cross-examination, Mrs. KC admitted that appellant was never home alone with KC; Mrs. KC was the primary caregiver of the children; Mrs. KC was constantly home alone with the children; and she previously admitted to that she fractured KC's femur. (JA 58-67). Mrs. KC further testified that in late January 2009, appellant left for training and was absent through the first week of February 2009. (JA 34). Mrs. KC "believed he left on the 25th of January" and returned on February 6th. (JA 35). Appellant did return the weekend in between his training but he was with his wife the entire time. (JA 37, 41).

While appellant was absent, Mrs. KC had a lot of anxiety about being alone with the kids. *Id.* She also contemplated confessing that she was the cause of KC's most recent injuries so that KC would be returned to the Clifton home. (JA 67). On re-direct, Mrs. KC informed the panel that she did not cause the injuries to KC and that appellant was alone with the children when she showered. (JA 69-71).

In support of its theory of the case, the government also called four medical professionals. The first witness, Major (MAJ) Thomas Ellwood, performed KC's two-month exam on February

9, 2009, and discovered the fractured ribs. (JA 87-90). MAJ Ellwood testified that KC's broken ribs were consistent with abuse and not likely caused by an accident. (JA 87). He further testified that osteogenesis imperfecta or "brittle bone" disease was ruled out as a cause of KC's injuries. (JA 94-97). During cross-examination, MAJ Ellwood stated that, although the German authorities did not pursue an investigation into KC's previous femur injury, he believed the injury to the femur was consistent with child abuse. (JA 103, 110). Major Ellwood did not testify that appellant caused KC's injuries.

Doctor Robert Hicks, a radiologist, and Dr. Tanya McDonald, a pediatrician, were also called as government witnesses. (JA 114, 171). Both witnesses testified that the injuries to KC's ribs, clavicle, and skull were consistent with child abuse. (JA 87, 172). The injuries appeared to be healing and most likely occurred several weeks before KC's two-month exam on February 9, 2009. (JA 119, 182). On cross-examination, both witnesses testified that KC's previous femur injury was consistent with child abuse. (JA 182, 190). Doctor Hicks and Dr. Martin could not say who caused KC's multiple injuries. (JA 141, 194-95).[1]

[1] The government also called two investigators from CID. Special Agent Ortiz testified regarding appellant's February 10, 2009, sworn statement and Special Agent McMullen testified regarding appellant's February 24, 2009, statement. In his February 24, 2009, statement, appellant admitted to squeezing KC. (JA 221-30). Throughout the trial, the defense argued this particular

In his closing statement to the panel, appellant's trial defense counsel reiterated the defense theory of the case. He stated, "26 January Specialist Clifton goes to Vilseck, he comes back; and as you found out he finds out that his baby is broken . . . he's gone and [Mrs. KC] is at home alone with [KC]. This is the only time at which any child could have been hurt that badly and not have the other parent notice." (JA 249). While appellant's trial defense counsel acknowledged that appellant did provide a statement admitting to causing the injuries to KC, the defense maintained this admission was unlawfully coerced. (JA 20, 251-253).

Following closing statements and the military judge's instructions, a panel member requested the court-martial recall two witnesses for additional questioning. The following colloquy occurred:

> MEM: Yes, your honor, is it too late to recall two of the witnesses? I actually have two questions.
>
> MJ: Well, who are they?
>
> MEM: Either Dr. Ellwood or one of the other medical doctors.
>
> MJ: They've all been permanently excused.
>
> MEM: Okay.

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statement was the product of coercion and was not accurate. (JA 256).

MJ: So, yes, it would be.

MEM: And Mrs. Clifton, has she been permanently excused?

MJ: She has not been permanently excused. However, we have closed all of the evidence.

MEM: Okay.

(R. at 875).

The military judge did not review the intended questions before summarily denying the panel member's request. Although offered the opportunity by the military judge, the trial counsel and defense counsel did not object to the military judge's ruling and the witnesses were not recalled. (R. at 876).

The Army Court of Criminal Appeals determined the military judge abused his discretion when he summarily denied the panel member's request to recall the two additional witnesses. (JA 1). The Army Court held, "[w]hile affording counsel an opportunity to object . . . 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." *Id.* The Army Court went on to find that the error did not have "a substantial influence on the findings" and affirmed the findings and sentence. (JA 1-7).

Summary of Argument

The military judge abused his discretion when he summarily denied a panel member's request to recall two witnesses for additional questioning. Contrary to the findings of the Army Court, this abuse of discretion was not harmless because "the military judge's error materially prejudiced the substantial rights of the appellant" and as a result, appellant is entitled to relief. *Unites States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005).

Error and Argument

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT DETERMINED THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING A PANEL MEMBER'S REQUEST TO RECALL WITNESSES FOR QUESTIONING, BUT FOUND THIS ERROR WAS HARMLESS.

Law

The ability of the members to request evidence is statutory. Article 46, UCMJ. Article 46, UCMJ, states in pertinent part that "[t]he trial counsel, the defense counsel, *and the court-martial* shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." (emphasis added); *see United States v. Martinsmith,* 41 M.J. 343, 347 (C.A.A.F. 1995).

Rule for Courts-Martial [hereinafter R.C.M.] 921(b) also permits the members to "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." *See United States v. Rios,* 64 M.J. 566, 568 (Army Ct. Crim. App. 2007) (holding that the military judge abused his discretion by summarily denying the members' request to rehear the testimony of two witnesses).

Rule for Courts-Martial 801(c) contains a similar provision, stating that "[t]he court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge." The Military Rules of Evidence [hereinafter Mil. R. Evid.] also contain a provision reiterating the members' ability to call and interrogate witnesses as well. *See* Mil. R. Evid. 614(a). This Court has also made clear that "even after the court members have begun their deliberations, they may seek additional evidence." *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982).

However, the right of the court members to obtain additional information is not absolute. *Id.*, 14 M.J. at 25. A military judge may properly exercise his or her discretion and deny a member's request for additional evidence. *Id.* Prior to exercising that discretion, this Court has set forth a non-exclusive list of factors the judge must consider. In determining whether to grant a member's request for additional

information, the military judge should consider the "[d]ifficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness [or evidence] 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." *Id.* at 26. Additionally, a military judge cannot exercise his discretion without obtaining some indication from the members who they intend to call. *Id.*

A court reviews a military judge's denial of a member's request for additional information for an abuse of discretion. *United States v. Carter,* 40 M.J. 102, 104 (C.M.A. 1994). An abuse of discretion exists only if the judge's decision was "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. McElhaney,* 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller,* 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers,* 25 M.J. 61, 62 (C.A.A.F. 1987)). If the court finds that the military judge abused his discretion, the government must demonstrate "the error did not have a substantial influence on the findings." *United States v. Berry,* 61 M.J. 91, 97 (C.A.A.F. 2005).

Analysis

a. The military judge abused his discretion when he summarily denied a panel members request to recall two witnesses.

Here, the military judge failed to analyze any of the factors set forth in *Lampani,* or any factors at all, prior to summarily denying the member's request for additional evidence. Clearly, a military judge cannot exercise his discretion in an informed manner without obtaining some indication from the court members as to their reasoning for recalling the witnesses.

A plain reading of the UCMJ, the Rules for Courts-Martial, the Military Rules of Evidence, and repeated holdings in case law reveals that the military judge clearly abused his discretion. *See Lampani,* 14 M.J. at 26 (holding that the court members "were at liberty to request that witnesses be called or recalled or to have testimony reread by the court reporter even though they had commenced their deliberations[, and,] to the extent that the military judge indicated to the contrary, he was wrong"); *United States v. Lents,* 32 M.J. 636, 638 (A.C.M.R. 1991) (military judge abused his discretion by summarily denying the members request for additional evidence); *United States v. Carr,* 18 M.J. 297 (C.M.A. 1984) ("[i]n view of the court-martial's right to call witnesses, the military judge should have given a more positive answer to the court member's question.").

Furthermore, the judge's negative response was based on an erroneous premise. Merely because a witness is excused does not exempt him from recall. *See Lampani,* 14 M.J. at 26. This is

especially true for a witness such as Mrs. KC, who was still readily available and was not permanently excused. There is no indication that recalling Mrs. KC or "one of the experts" would result in a delay to the trial proceedings. It is also not likely that the testimony was subject to a claim of privilege considering the requested witnesses had already testified during the trial. *See Martinsmith,* 41 M.J. at 348 ("[w]e note that the evidence sought by the member was protected by a qualified Manual privilege and was not subject to compelled discovery by a court-martial.").

Also, hearing additional testimony from a witness would not necessarily require "reargument, instructions, and that type of thing." *Id.* In this regard, the judge would have considerable discretion, which, of course, would be guided by the nature and scope of the additional evidence presented. *Id.* Here, however, the military judge failed to elicit the precise questions the panel desired to ask the witnesses, and was thus not equipped to exercise his discretion. See *Lampani*, 14 M.J. at 26 (a military judge cannot exercise his discretion without all of the relevant information). Thus, the military judge abused his discretion in summarily denying a panel member's request to recall two witnesses.

b. The military judge's error was not harmless

Contrary to the Army Court's finding, the government failed to prove that "the error did not have substantial influence on the findings." *Berry*, 61 M.J. at 97. Because the military judge failed to elicit the precise questions the panel members would have asked the witnesses, it is difficult to predict with any specificity the exact questions that would have been asked of these witnesses. However, what is clear is that both Mrs. KC and "one of the experts" were vital and important witnesses for the theory of defense presented at trial. Thus, it is not apparent from the record that appellant's defense counsel made a tactical decision not to object to the military judge's denial in recalling the requested witnesses.[2]

Appellant's case is clearly distinguishable from *Lampani* where this Court determined, based on the facts present in the record, that Lampani was not prejudiced by the military judge's error because Lampani's counsel most likely made a tactical decision not to object to the military judge's ruling. In coming to this conclusion, this Court stated, "When we examine the extensive discussion after the court had reopened for further instructions, it is evident that the members were focusing on the first two charges-larceny and conspiracy. Therefore, appellant certainly could not have been prejudiced by

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[2] The absence of a defense objection to the military judge's actions does not equate to waiver. *Lampani*, 14 M.J. at 27.

the judge's error as to those charges on which he was acquitted." 14 M.J. at 26. This Court clearly focused on the fact that Lampani was acquitted of the relevant charges and recalling the requested witnesses could have resulted in a finding of guilty on those charges. This Court held, "its sole relevance to the charges of which appellant was convicted is that the testimony of such a witness might have persuaded the court members to find appellant guilty of conspiracy and larceny." *Id.* at 27. Thus, the record establishes that Lampani's attorney "most likely" recognized the harm that could come from recalling the witnesses and thus, did not object to the military judge's ruling.[3]

In this case, it is not evident from the record that appellant's counsel made a tactical decision not to object to the military judge's ruling. This is especially true where recalling the requested witnesses could have bolstered the defense theory of the case. Throughout the trial, the defense presented a consistent theory implicating Mrs. KC as the

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[3] Appellant would urge this Honorable Court to overturn that portion of *Lampani* which allows a Court to speculate regarding the tactics of a trial defense attorney. While it is possible that a defense attorney intentionally would not object to a military judge's denial, it is always just as likely that the failure to object was unintentional. Without an exchange on the record between the trial attorney and military judge, addressing a military judge's denial of recalling witnesses, a Court will always be left to speculate that the actions were in fact a trial strategy-speculation which could directly prejudice the appellant.

perpetrator of the crime. (JA 11-20, 249-50). On cross-examination of Mrs. KC, the defense was able to show that Mrs. KC was KC's primary caregiver; appellant worked during the day and Mrs. KC was home alone with the children; Mrs. KC previously admitted she caused KC's femur to fracture; appellant was gone for over two weeks in January and February; Mrs. KC was anxious and stressed over being alone with the children; and that Mrs. KC contemplated confessing to the causing KC's most recent injuries. (JA 58-67).

Additionally, the government "experts" all testified that KC's fractured femur was consistent with child abuse. (JA 141, 194-95).[4] They further testified that they could not determine if appellant or Mrs. KC caused the injuries to KC. *Id.* Hence, there is no indication in the record that appellant's attorney intended to prevent the panel members from requesting to recall Mrs. KC and one of the doctors, as each of the witnesses provided beneficial information for the defense theory of the case. This makes appellant's case clearly distinguishable from *Lampani,* where this Court could easily look to the record to determine that a failure to object was a trial tactic of the defense attorney because the requested witnesses would only provide negative information for Lampani.

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[4] Major Martin testified that Mrs. KC's account of an accidental fall was not consistent with KC's injured femur. (JA 194-95).

The Army Court erroneously assumed that re-calling these witnesses would be prejudicial to appellant. However, the court cannot make that enormous leap in this case. It is just as likely, when looking at the record, that the panel believed the theories the defense presented and sought to re-call the witnesses to expand upon those theories. Thus, one cannot determine with any precision that the trial defense counsel made a tactical decision to not object to recalling the witnesses. The testimony of such a witness might have persuaded the court members to find appellant not guilty of the charged offense. This case is unlike *Lampani* where one could look to the record and definitively determine that recalling witnesses would result in prejudice to appellant. Therefore, the error was not harmless because the government cannot prove the error did not have a substantial influence on the findings. See Berry, 61 M.J. at 97. Speculating that recalling the witnesses would prejudice appellant is not enough to overcome the government's burden in this case. The Army Court erred in its ultimate conclusion.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss the Specification of Charge II and remand appellant's case for a sentence rehearing.

Kristin B. McGrory
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060-5546
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Clifton*, Crim.App.Dkt.No. 20091092, USCA Dkt. No. 12-0486/AR, was electronically filed with both the Court and Government Appellate Division on September 5, 2012.

MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737