UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant APRIL L. WESTBROOK
United States Air Force

ACM 35615

9 November 2005

Sentence adjudged 9 April 2003 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, and reduction to E-3.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrea M. Gormel.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major James K. Floyd, and Major M. Leeann Summer.

Before

BROWN, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

Contrary to her pleas, the appellant was found guilty of two specifications of making a false official statement and an assault consummated by a battery upon a child under the age of 16, in violation of Articles 107 and 128, UCMJ, 10 U.S.C. §§ 907, 928. The military judge sitting alone as a general court-martial sentenced the appellant to a bad-conduct discharge, confinement for 7 months, and reduction to E-3. The convening authority approved the findings and sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant raises two issues for our consideration: (1) Whether her court-martial conviction should be set aside because the court-martial was not properly convened by a general court-martial convening authority; and (2) Whether the evidence is legally and factually sufficient to sustain her conviction for signing two false official statements. Finding that the appellant's court-martial was properly convened and that the evidence is legally and factually sufficient, we affirm.

Background

On 17 August 2002, the appellant, a single mother, took her then nine-month-old son to the hospital after he began vomiting, sweating profusely, and became lethargic. The appellant told the hospital staff that her son had fallen off the couch onto his head and then started vomiting and sweating soon after. When medical personnel initially examined the baby, they discovered bleeding under the brain. Further evaluation and monitoring found bilateral retinal hemorrhages in both eyes with a final diagnosis of Shaken Baby Syndrome. The baby was treated in a Pediatric Intensive Care Unit for nine days.

On 19 August 2002, Dr. Susan Ryan, a pediatrician, informed the appellant that her son had been diagnosed with Shaken Baby Syndrome. She also told the appellant that falling off of a sofa would not have caused the baby's injuries. As a result, Dr. Ryan told the appellant that she was required to file a report with the Department of Social Services (DSS). After receiving Dr. Ryan's report, a social worker from the DSS visited the appellant on 21 August 2002, to discuss the baby's condition. During the baby's hospitalization, the appellant said she did her own research using the Internet to learn more about Shaken Baby Syndrome. On 28 August 2002, the appellant filed an official statement with the Child Development Center (CDC) requesting a change in daycare providers because it was "likely" that her son's then daycare provider, Lora Hubbard, or someone else "may have caused" her son's injuries.

On 7 September 2002, the appellant filed a Department of Defense (DD) Form 2527, "Statement of Personal Injury – Possible Third Party Liability Champus," wherein she wrote, "I believe my childcare provider Lora Hubbard was at fault. The injuries my son sustained is [sic] from being shaken or dropped. Since myself and Lora are the only people who watch Chris I believe she may have cause [sic] this, I can not prove it thoug[h]."

On 3 October 2002, Air Force Office of Special Investigations Special Agent (SA) Charles Hinshaw interviewed the appellant. During the questioning, the appellant stated that she remembered quickly picking up her baby and shaking him twice when she found him playing with an electrical socket. The appellant also showed SA Hinshaw how she shook her baby by gesturing with her hands. The appellant agreed to provide a written

statement explaining her version of how her son was injured. In this statement, the appellant said she had "blocked this incident out of my mind because I did not want to deal with it" and so she "wouldn't feel anymore pain." She concluded her statement by saying "[w]hat I told everyone is what I believed to be true at the time but this is the truth as I can see it."

Jurisdiction

The appellant asserts that the convening authority, the 9th Air Force Provisional commander (9 AF(P)/CC), was without jurisdiction to try the appellant and to take action in this case because he was not authorized to convene general courts-martial. Specifically, the appellant argues that the Secretary of the Air Force withdrew general court-martial convening authority from the 9 AF(P)/CC, when he promulgated Special Order GA-001, dated 8 October 2002. In that Order, he omitted 9 AF(P) from the list of general court-martial convening authorities. We disagree. The Secretary never intended to withdraw authority from 9 AF(P)/CC, which was explained in his 26 June 2003 memorandum.

Therefore, we conclude that the Secretary of the Air Force did not divest the 9 AF(P)/CC of authority to convene general courts-martial. *See United States v. Hardy*, 60 M.J. 620 (A.F. Ct. Crim. App. 2004), *pet. denied*, 60 M.J. 459 (C.A.A.F. 2005).

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to support her conviction for making two false statements. Specifically, the appellant argues that the government did not present evidence beyond a reasonable doubt that the appellant knew at the time she made the statements that they were false.

Article 66(c), UCMJ, requires that we approve only those findings of guilt we determine to be correct in both law and fact. In doing so, this Court is required to conduct a de novo review of the legal and factual sufficiency of the case before us. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency requires us to review the evidence in the light most favorable to the government. *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). If any rational trier of fact could have found the elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *United States v. Richards*, 56 M.J. 282, 285 (C.A.A.F. 2002) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We may affirm a conviction only if we also conclude, as a matter of factual sufficiency, that the evidence proves the appellant's guilt beyond a reasonable doubt. *Washington*, 57 M.J. at 399 (citing *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002)); *see also United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)). We must assess the evidence in

the entire record and take into account the fact that the trial court saw and heard the witnesses. *Id*.

In this case, the appellant implicated her son's daycare provider as the cause of her son's injuries on both the statement to the CDC and the DD Form 2527. In her first statement, the appellant wrote, "As a single parent, only myself and Laura (sic) watch my son. In fact we are caring for him 95% of the time. So [since] I know I didn't cause these injuries, [i]t is likely that she may have caused them. Or maybe someone else in the household. Just like I explained to Ms. Knox, [the Shaw Air Force Base Family Child Care Coordinator] I am not accusing her of doing this but my son has unexplained injuries. If Lora and I watch him most of the time then who am I supposed to suspect."

The appellant then made similar statements in her second statement. "I thought the injuries was [sic] from a fall off my couch. But the doctors and nurse said that these injuries were inflicted on my son. I was glad I took him to the hospital because if I didn't I would have never found out about these injuries. I believe my childcare provider may have caused these injuries to my son. She is currently under investigation." The appellant also wrote, "I believe my child care provider Lora Hubbard was at fault. The injuries my son sustained is [sic] from being shaken or dropped. Since myself and Lora are the only people who watch Chris I believe she may have cause [sic] this. I cannot prove it though."

The appellant's statements, quoted above, on their face, contradict her admission to SA Hinshaw during the interview on 3 October 2002. Following the timeline of the events as they unfolded, the appellant filed both false statements after Dr. Ryan gave the appellant the diagnosis of her son's injuries. After talking with Dr. Ryan and the nurses at the hospital, the appellant researched her son's condition using the Internet. Additionally, a social worker from the DSS visited the appellant before she filed both statements.

Although the appellant acknowledges that the two statements contradict her later admission to SA Hinshaw, she asserts that she believed the statements were true at the time she made them. Therefore, she did not have the requisite intent to deceive. Additionally, the appellant argues that because she qualified her first statement with the words "I believe," the statement is not false, but merely her own belief regarding the injuries. We disagree.

The fact that the appellant researched Shaken Baby Syndrome after Dr. Ryan explained the diagnosis of her son to her, demonstrates that the appellant knew that Dr Ryan did not believe that the baby sustained his injuries after a fall from the couch. When Dr. Ryan told the appellant that she was sending her report to the DSS, the appellant was faced with the possibility that others might believe that she injured her son. When actually confronted with that speculation, the appellant implicated her daycare

provider. After weighing the evidence, and making allowances for not having personally observed the witnesses, we are not convinced that the appellant honestly believed that her son's daycare provider, or anyone else for that matter, caused her son's injuries. Nor are we convinced that she suddenly remembered she was actually the person who shook her son while talking to SA Hinshaw.

Therefore, we are convinced beyond a reasonable doubt that the appellant is guilty of making two false official statements. *Turner*, 25 M.J. at 325; Rule for Courts-Martial 916(e). Furthermore, in addition to factual sufficiency, we find that the evidence is such that a rational factfinder could have found the appellant guilty of all elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court