UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NATASHA S. JUSTICE
United States Air Force

ACM 37446

14 July 2011

Sentence adjudged 27 March 2009 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Mark L. Allred.

Approved sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Marla J. Gillman; and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Charles G. Warren; Major John M. Simms; and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BRAND, Chief Judge:

Contrary to her plea, the appellant was convicted of one specification of endangering a child by failing to get medical attention which resulted in severe traumatic brain injury and cortical blindness, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The adjudged and approved sentence consists of a bad-conduct discharge.

[1] In accordance with her plea, she was acquitted of maiming the same child, in violation of Article 124, UCMJ, 10 U.S.C. § 924.

On appeal, the appellant avers that the military judge erred when he failed to give a proper special instruction about the appellant's right to plead Not Guilty, and the military judge erred when he denied a Motion in Limine and allowed a social worker to testify about an unavailable witness' statements when the statements were testimonial hearsay. Finding no prejudicial error, we affirm.

Background

On 29 June 2007, when the appellant's son, JWJ, was six weeks old, she took him to the hospital emergency room because he was having seizures. Upon examination, it was determined that JWJ had severe head trauma. It was also discovered that there were broken ribs and a skull fracture. Additional doctors were called in and tests were conducted. It was determined that the injuries were inflicted, non-accidental. The appellant asked if it was shaken baby syndrome.

Prior to taking JWJ to the hospital that Friday, the appellant noticed him spitting up blood that prior Sunday, he was also spitting up and sleepy on Wednesday, and he had a swollen head on Thursday. She was also overheard by TSgt CPH in the emergency room saying to her husband, "if we'd brought [JWJ] in on Tuesday when he was coughing up blood maybe this wouldn't have happened." Weeks later, the appellant posted a statement on the MySpace social networking website that JWJ had made a complete recovery.

At the announcement of the findings, the appellant collapsed, fell to the floor and had physical symptoms similar to convulsions. She and her counsel requested that she not be present for the sentencing phase of the trial and the announcement of sentence. The military judge granted her request.

In sentencing, the prosecution re-called JWJ's pediatric neurologist and also called the foster mom. As the doctor testified, JWJ is a blind, underdeveloped child with severe brain trauma, and ". . . we always hope that the brain may be [sic] can rewire itself and try to pick up the slack of what was hurt. I think in [JWJ]'s case it was so widespread and bilateral that there was just not much hope of that." JWJ will not be able to roll over, sit, crawl or walk.

Sentencing Argument

"The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument." *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 221 (C.A.A.F. 2007). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the [appellant]." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). The question of whether the comments are fair

must be resolved by viewing them within the entire context of the court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). Additionally, "[i]t is appropriate for trial counsel—who is charged with being a zealous advocate for the government—to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Baer*, 53 M.J. at 237 (citing *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975)).

In the beginning of the assistant trial counsel's sentencing argument, he commented on the appellant's "complete refusal to accept responsibility for what happened." Trial defense counsel immediately objected, stating "She has every right to have this court prove her guilty and the government has the burden to prove her guilty." The military judge overruled the objection, but sua sponte gave the following instruction to the members: "[T]he accused has an absolute right to remain silent, to the extent that there's been any suggestion otherwise from the trial counsel you must disregard that. . . . you've been reminded that the accused is to be sentenced only for the offense of which she's been found guilty." At the conclusion of providing the sentencing instructions to the members, the military judge queried the counsel as to any objections to the instructions or requests for further instructions. Neither side had any objections or requests.

Trial counsel's comment was improper. However, the danger of unfair prejudice was immediately averted when the trial defense counsel objected and the military judge immediately provided the members with an instruction which they indicated they would follow. There is no evidence that the error materially prejudiced the appellant, and we are convinced that it did not.

Admissibility of Statements

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Under an abuse of discretion review, we examine a military judge's findings of fact by using a clearly-erroneous standard and we review conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (quoting *Ayala*, 43 M.J. at 298)).

The question of whether statements at issue here are inadmissible hearsay under *Crawford v. Washington*, 541 U.S. 36 (2004), is a question of law that we review de novo. *See United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007). If they are testimonial, then they are only admissible if the witness is unavailable to testify and the accused had prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 59. *Rankin* provides us with the three-part test to distinguish testimonial and non-testimonial

hearsay: (1) Was the statement elicited or made in response to law enforcement or prosecutorial inquiry; (2) Did the statement involve more than a routine and objective collection of unambiguous factual matters; and (3) Was the primary purpose of making or eliciting the statements the production of evidence with an eye toward trial? *Rankin*, 64 M.J. at 352; *see also United States v. Davis*, 547 U.S. 813, 827-28 (2006) (statements were non-testimonial where primary purpose was to enable assistance in an emergency). If the statements are determined to be non-testimonial, the final part of the analysis requires the application of hearsay exceptions and guarantees of trustworthiness. *Rankin*, 64 M.J. at 353.

At trial, the defense counsel made a motion in limine to preclude both Special Agent (SA) AB and Ms. SY from testifying as to statements made by Mr. WJ, the appellant's husband. The military judge made extensive findings. We conclude that those finding are supported by the record and they are not clearly erroneous; therefore, we adopt those findings as our own and apply them to the issue before us. Additionally, the military judge, applying the correct standard of the law, made extensive conclusions. The military judge found the statements made to SA AB were classic *Crawford* hearsay and testimonial, so he ruled they were inadmissible. However, he found that the statements to Ms. SY were not testimonial and had guarantees of trustworthiness. The military judge further found that the statements made by Mr. WJ, when taken as a whole, were apparently made with the appellant's agreement.

Ms. SY was not working for the police or the prosecution. She was a social worker assigned to the Central Child Welfare Services. She was concerned for the safety issues of JWJ. Ms. SY conducted two family interviews. One was a joint interview in July 2007, and the appellant did most of the talking. Mr. WJ basically told Ms. SY that, when he left for work, JWJ was sleeping. At the second interview in August 2007, the appellant and Mr. WJ were interviewed separately. Finally, Ms. SY was present when the Mr. WJ testified in a Family Court proceeding in February 2008. Mr. WJ spoke about injuries, who the primary care givers were, and a "near-accident." Ms. SY testified that the testimony of both parents was very similar.

Ms. SY was not eliciting statements for law enforcement or prosecutorial inquiry. The questions involved a routine and objective collection of unambiguous factual matters. The primary purpose of the collection of the statements made by both the appellant and Mr. WJ was for the safety of JWJ and not the production of evidence with an eye toward trial. The statements at issue, those made by Mr. WJ and testified to by Ms. SY, were non-testimonial in nature and were admissible under the applicable Military Rules of Evidence (M.R.E.), specifically M.R.E. 401, 403 and 807, as well as applicable case law. The military judge did not abuse his discretion.

Assuming arguendo that the statements were admitted erroneously, we would have to determine whether the constitutional error was harmless beyond a reasonable doubt in

light of the entire record. *United States v Blazier*, 69 M.J. 218, 227 (C.A.A.F. 2010). We conclude that it was harmless in light of the entire record.

Post-Trial Delay

In this case, the overall delay between the date this case was docketed with the Court and the completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review of her appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court