UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RODGER J. DAY
United States Air Force

ACM 36423

9 May 2007

Sentence adjudged 21 May 2005 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 90 days, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was convicted by officer members, contrary to his pleas, of making a false official statement, reckless endangerment, and obstruction of justice, in violation of Articles 107 and 134, UCMJ, 10 U.S.C. §§ 907, 934.[1] Consistent with his plea of not

[1] We note the Court-Martial Promulgating Order does not properly reflect the findings of Specification 2 of Charge III. This specification was modified during the trial as reflected in Appellate Exhibit I (B). The members found the

guilty, those same members found him not guilty of involuntary manslaughter, in violation of Article 119, UCMJ, 10 U.S.C. § 919. The members sentenced the appellant to a bad-conduct discharge, confinement for 90 days, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence as adjudged.

We examined the record of trial, the assignments of error, and the government's reply thereto. The appellant contends the evidence is legally and factually insufficient to sustain his convictions of reckless endangerment and making a false official statement. He also contends trial counsel's sentencing argument was improper.

Background

The appellant, his wife, and two children[2] lived in base housing at Little Rock Air Force Base, (LAFB) Arkansas. On 26 September 2003, the appellant was at home with the children while his wife went out. The appellant put the children to bed and then went to bed shortly thereafter. At approximately 0400 hours on 27 September 2003, O.J.H.D. awoke the appellant. The appellant got up, went into O.J.H.D.'s room, changed his diaper, applied paste to his son's diaper rash, and propped a bottle in his mouth using a teddy bear found in the crib to do so. In addition, the appellant tucked O.J.H.D. in his crib with blankets (including a quilt) before going back to his room to go to sleep.[3] The appellant woke up at about 0900 hours on 27 September 2003.[4] He noticed his son had not awakened him between 0400 and 0900 hours. This was unusual because normally O.J.H.D. would awaken the appellant sometime during those hours. When the appellant checked on his son, he found him lying still on his back with his mouth and nose covered by the quilt. According to the appellant's written statement, he took his son out of the crib, went to the living room, and started checking him for signs of life. He then changed his son's diaper and got dressed before calling 911 for help. He took approximately 45 minutes between the time he first noticed his son lying motionless and the time he called 911. According to the appellant, he tried to revive his son via CPR before calling 911, but was unable to do so.

The appellant informed the 911 dispatcher, Ms. E.M., he found his son lying *face down*, his lips were blue, and he was not moving. Ms. E.M. instructed the appellant how to perform CPR on his infant son. The appellant continued to perform CPR on O.J.H.D. until the fire department arrived. The appellant told Mr. J.T. and Mr. W.P., firemen from

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appellant guilty of the offense as it is set forth in that appellate exhibit. We order that a new Court-Martial Promulgating Order be published to accurately reflect the member's findings of Specification 2 of Charge III.

[2] The appellant's son, O.J.H.D., was approximately 9 weeks old on 27 September 2003 and weighed about 11 pounds. His stepdaughter, S., was approximately 22 months old on 27 September 2003.

[3] The quilt weighed approximately six pounds. O.J.H.D. was placed on his back on an adult sized pillow.

[4] The appellant's wife had not yet returned to their home at the time he woke up. The appellant was the only adult in the home at all relevant times on 26 and 27 September 2003.

the LAFB Fire Department, he found his son *face down* in the crib. The firemen began performing CPR on the appellant's son. Once the paramedics arrived, O.J.H.D. was transported by ambulance to a local off base hospital. Unfortunately, O.J.H.D. could not be saved and was declared dead at 0953 hours on 27 September 2003.

Legal and Factual Sufficiency of Reckless Endangerment and False Official Statements Convictions

The appellant argues the evidence is legally and factually insufficient to sustain his conviction for reckless endangerment of O.J.H.D. He finds support for this position because the members were not convinced beyond a reasonable doubt that he was guilty of killing O.J.H.D., as evidenced by the fact that they declined to convict him of either involuntary manslaughter or the lesser included offense of negligent homicide.

He also contends the evidence is legally and factually insufficient to sustain his conviction for making false official statements to Mr. J.T., Mr. W.P., and Ms. E.M. He argues his statements were not "official" because they were made to civilians and were not related to his military duties.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Despite the appellant's contentions to the contrary, we conclude there is *overwhelming* evidence in the record of trial to support the member's findings of guilty of reckless endangerment and making false official statements, in violation of Articles 107 and 134, UCMJ. *See Manual for Courts-Martial*, Part IV, ¶¶ 31a-c, 100a.b (2005 ed.); *United States v. Teffeau*, 58 M.J. 62, 68-69 (C.A.A.F. 2003); *United States v. Goldsmith*, 29 M.J. 979, 980-84 (A.F.C.M.R. 1990).

We are also convinced beyond a reasonable doubt that the appellant's care of O.J.H.D., amounted to reckless endangerment, and that his false statements to the 911 operator and the LAFB firemen were false official statements within the meaning of Article 107, UCMJ. *See Teffeau,* 58 M.J. at 68-69; *Goldsmith,* 29 M.J. at 980-84; *Turner*, 25 M.J. at 325; *see also* Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Trial Counsel's Sentencing Argument

The appellant argues that the trial counsel's statement made during sentencing argument wherein he said, "the thing to remember is that a punitive discharge classifies and describes the accused's service. That's what it is describing, not his person. A person who serves honorably should be rewarded with an honorable discharge. A person who does not should not be rewarded as such," was improper because it blurs the distinction between a punitive discharge and an administrative discharge. We note trial defense counsel made no objection at trial to this argument, nor did the trial defense counsel ask the military judge to read the members an instruction to cure the allegedly inappropriate argument.

Failure to object to improper argument prior to instructions to the members on sentencing constitutes a waiver of the objection, absent plain error. *See* Rule for Courts-Martial 1001(g); *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

We examine the trial counsel's argument in its entirety to determine whether counsel crossed the line and made an improper argument. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). The record of trial in this case does not support the appellant's contention. The trial counsel was not attempting to mislead the members by suggesting a bad-conduct discharge as a simple labeling of the appellant's service. Moreover, a prosecutor may argue during sentencing that a bad-conduct discharge is a proper way to characterize an accused's service or enlistment. *United States v. Britt*, 48 M.J. 233, 234 (C.A.A.F 1998); *United States v. Brown*, ACM 34336 (A.F. Ct. Crim. App. 2 Oct 2001) (unpub. op.). It follows therefore, that the trial counsel's argument was not improper and was not error, plain or otherwise.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator