UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ROCIO MASK
LOGISTICS SPECIALIST SEAMAN (E-3), U.S. NAVY

NMCCA 201100399
GENERAL COURT-MARTIAL

Sentence Adjudged: 6 May 2011.
Military Judge: CAPT James Redford, JAGC, USN.
Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.
Staff Judge Advocate's Recommendation: LCDR E.M. Baxter, JAGC, USN.
For Appellant: LT Ryan Mattina, JAGC, USN; LT Daniel W. Napier, JAGC, USN.
For Appellee: Maj Paul Ervasti, USMC.

14 August 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PAYTON-O'BRIEN, Senior Judge:

The appellant was convicted, contrary to her pleas, by officer and enlisted members,[1] at a general court-martial, of

[1] We note that after the court-martial was assembled, the trial counsel, when listing the participants in the court, noted that there were 14 members, including Machinist's Mate First Class SF. Record at 202. However, Petty Officer SF's name does not appear on any of the convening orders; no *voir*

attempted voluntary manslaughter and failure to obey a military protective order, violations of Article 80 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 892. She was sentenced to confinement for 5 years and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant avers two assignments of error: (1) that the evidence was legally and factually insufficient to prove that she specifically intended to kill her husband and did not act in self-defense; and (2) the trial counsel improperly elicited testimony concerning the appellant's invocation of her Fifth Amendment right to remain silent. Appellant's Brief of 10 November 2011 at 1.

Factual Background

This case involves a sad history of domestic violence by both husband and wife toward each other over a lengthy period of time. Sadly, on 1 January 2011, a verbal argument between them tragically turned into yet another violent episode which ended in the appellant stabbing her husband, JM, in the abdomen.

On that day, the appellant, the victim and their two children, spent the day together shopping and dining. Later in the evening at their home, the appellant decided to take a nap because she had duty the next day. JM took care of the children while she napped. Although JM described his wife as "in a bad mood,"[2] they were getting along fairly well that day. However, the atmosphere drastically and quickly changed.

When the appellant awoke from her nap in the evening, she found her kids asleep and JM playing a PlayStation 3 video game on the television in the living room. The video game was an online multiplayer game with voice chat capability. JM was utilizing a wireless telephone headset to speak with his cousin, XM, who was playing the same online game as JM, although XM was physically located in San Diego, California. JM and XM could communicate and hear each other via their headsets, and XM changed his settings to allow for JM's voice to broadcast

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dire was conducted with her; no court-martial member questionnaire is included in Appellate Exhibits XI-XXIV; her name is not referenced further in the record of trial; and she does not appear to have participated in the court-martial proceedings. The inclusion of Petty Officer SF's name appears to be a scrivener's error in the record of trial.

[2] Record at 848.

through XM's television speakers. This allowed XM to overhear a portion of the ensuing incident between JM and the appellant.

When the appellant first awakened from her nap and joined JM in the living room, she sat with JM on the couch where they talked while he was playing his game. Soon thereafter, the appellant retrieved a computer and sat nearby to use it. The appellant asked JM for the information and password to his Facebook[3] account. Because JM could not recall his password, he told the appellant she could change it. After accessing JM's Facebook account, an argument ensued between the appellant and JM about the content of JM's Facebook page, which escalated and turned violent. The appellant commenced yelling and cursing at JM, and then repeatedly hitting him with the computer modem that she had yanked from the wall. JM tried to block the appellant's strikes, and on one occasion when he put up his arm to block it, the modem flew back and hit the appellant in the face causing her a bloody nose. JM thereafter attempted to retreat and diffuse the situation by going into a bathroom. When he came out about five minutes later, JM discovered the appellant still very angry with him. The appellant bent JM's video game disc and then commenced using both hands to hit him all while yelling and cursing at him. JM backed away from the enraged appellant, attempting to deflect her striking him. JM ultimately backed into the kitchen, where the appellant grabbed a large kitchen knife from the sink, which she thrust into his abdomen. After stabbing him, the appellant angrily stated, "That's what you get, m-----f-----."

Not surprisingly, the police were called.[4] Numerous law enforcement personnel descended upon the marital house. The appellant claimed JM tried to strangle her and she acted in self-defense by stabbing him. The Naval Criminal Investigative Service (NCIS) also became involved with the investigation. Ultimately, because their children were home at the time of the incident, GM, a social worker from the State of Illinois child protective services agency, commenced a child abuse and neglect investigation. GM was first present at the marital house, immediately after the incident between the appellant and DM, wherein she retrieved the children and took them into state custody. After charges were preferred, GM attempted to interview the appellant on base, at the Transient Personnel Unit

[3] Facebook is an online social networking service and website owned and operated by Facebook, Inc.

[4] JM called 911 from his cellular telephone after the appellant left the kitchen and failed to administer proper first aid to him.

barracks, due to the ongoing child abuse and neglect case. When GM first arrived and indicated to the appellant she wished to interview her about the incident with her husband, the appellant told GM that her attorney told her "not to talk with anyone." Record at 744. GM indicated that she was going to cease the interview and depart, however before GM could leave, the appellant said, "Oh, I can talk to you." Thereafter, GM clarified that the appellant desired to talk with her without an attorney, and then GM took a statement her in which she provided her version of the events of New Year's Day. During that interview, the appellant told GM, "I should have killed JM as well as myself." At trial, the Government offered GM as a witness and solicited testimony, without objection, that the appellant had initially told GM that her attorney advised her not to speak to anyone.

The defense theory at trial was that the appellant acted in self-defense because JM was choking her.

Social Worker's Testimony

The appellant asserts that the Government improperly elicited testimony at trial from GM that the appellant asserted her Fifth Amendment right to remain silent during the child abuse and neglect case interview. We must determine whether the appellant's initial statement to GM was an invocation of her right to silence. We find that it was not.

Whether there has been an improper reference to an accused's invocation of constitutional rights is a question of law we review *de novo*. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (citing *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002)). GM, a social worker with the State of Illinois, was not interrogating the appellant as a criminal suspect but rather conducting a child abuse and neglect investigation to determine the proper resolution for the children's placement. The record is utterly devoid of any indication that GM was acting in concert with military investigators or that military officials at Great Lakes were in control of the state child protective service agency. As such, GM was not required to read Article 31(b) or *Miranda* warnings to the appellant. *United States v. Moreno*, 36 M.J. 107, 117 (C.M.A. 1992). Nonetheless, the appellant could invoke her Fifth Amendment right to remain silent in response to any questioning by GM. *United States v. Traum*, 60 M.J. 226, 230 (C.A.A.F. 2004). However, under the facts of this case, we find the appellant did not invoke her right to remain silent when she

declared to GM that her "attorney told her not to talk to anyone" before thereafter agreeing to GM's interview of her. *See Michigan v. Mosley*, 423 U.S. 96 (1975); MILITARY RULE OF EVIDENCE 305(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Although our superior court has held that no particular words or actions are required to exercise one's right to remain silent, its invocation must be unequivocal before questioning must stop. *United States v. Sager*, 36 M.J. 137, 145 (C.M.A. 1992). There was no unequivocal assertion by the appellant of her right to silence. *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). *See also Davis v. United States*, 512 U.S. 452 (1994); *Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994).

Here, the record reveals that the appellant never indicated to GM she wanted to actually remain silent. She merely told GM that her attorney had advised her not to speak to anyone. As soon as GM indicated she would then leave and not take a statement, the appellant immediately followed up with the statement that "Oh, I can talk with you." Assuming *arguendo* that the appellant's first statement referencing what her attorney advised her was an equivocal or ambiguous reference to her right to remain silent, she immediately clarified her own statement and advised the social worker that she would not exercise her right to remain silent. Since the appellant clearly did not exercise her constitutional right to remain silent, GM's testimony was not improper.

Legal and Factual Sufficiency

Issues of legal and factual sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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 essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. In contrast, when we examine for factual sufficiency we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our factual sufficiency review with the understanding that we did not see or hear the witnesses. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be

free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). We conclude that the evidence was both legally and factually sufficient.

For the offense of attempted voluntary manslaughter, the Government was required to prove: (1) that the appellant did a certain act, that is: stab JM in the stomach with a knife; (2) that such act was done with the specific intent to kill JM without justification or excuse; (3) that such act amounted to more than mere preparation; that is, it was a substantial step and a direct movement toward the unlawful killing of JM; and (4) that such act apparently tended to bring about the commission of the offense of voluntary manslaughter. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 4(b) and 44(b); Record at 1040, Appellate Exhibit XXXIX. Voluntary manslaughter is committed, when a person with an intent to kill or inflict great bodily harm unlawfully kills a human being in the heat of sudden passion caused by adequate provocation. MCM, Part IV, ¶ 44(c)(1)(a). Passion means anger, rage, pain or fear which prevents clear reflection.[5]

The appellant claims that the evidence is insufficient because: (1) the victim in this case had a history of domestic abuse against the appellant; (2) the appellant stabbed the victim only one time; (3) her statement to the victim at the time of the incident and her statement to the social worker were taken out of context and not an indication of her intent to kill; and (4) she acted in self-defense. We disagree.

It is clear from the review of the record of trial that evidence exists which proves every element of attempted voluntary manslaughter. After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder, in this case the members, could indeed have found all the essential elements of attempted voluntary manslaughter beyond a reasonable doubt. *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006). Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not personally see the victim's testimony or that of the other percipient witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt as to this charge. *Turner*, 25 M.J. at 325.

Conclusion

[5] Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 3-44-1 (1 Jan 2010).

After carefully examining the record of trial, the appellant's two assignments of error, and the pleadings of the parties, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ. We affirm the findings and the sentence.

Senior Judge MAKSYM and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge MAKSYM participated in the decision of this case prior to detaching from the court.