

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

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

UNITED STATES OF AMERICA

v.

**MICHAEL S. JACQUEZ
CAPTAIN (O-3), U.S. MARINE CORPS**

**NMCCA 201200201
GENERAL COURT-MARTIAL**

Sentence Adjudged: 27 January 2012.

Military Judge: CAPT David Berger, JAGC, USN.

Convening Authority: Commanding General, 3d Marine
Logistics Group, Camp Foster, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol E.H. Robinson,
Jr., USMC.

For Appellant: LCDR Brian Mizer, JAGC, USN.

For Appellee: Capt Samuel C. Mooore, USMC.

10 October 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.**

McFARLANE, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of making a false official statement in violation of Article 107, Uniform Code of Military Justice, 10 U.S.C. § 907. The appellant was also convicted, pursuant to his pleas, of willfully disobeying a superior commissioned officer and adultery, in violation of Articles 90 and 134, UCMJ, 10 U.S.C. §§ 890 and 934. The

appellant was sentenced to a punitive reprimand, a \$7000.00 fine, confinement for six months if the fine was not paid prior to the convening authority's action, and dismissal from the Marine Corps. Pursuant to a pretrial agreement, the convening authority suspended the fine for twelve months from the date of his action, and otherwise approved the sentence as adjudged.

The appellant raises one assignment of error: that the evidence is not factually and legally sufficient to prove the appellant made a false official statement. Having examined the record of trial and the parties' pleadings, we conclude that the appellant's conviction for making a false official statement cannot withstand the test for factual sufficiency and must be set aside and dismissed. We further conclude that the remaining findings of guilty are correct in law and fact and, following our corrective action, that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant was a Marine Corps Judge Advocate stationed in Okinawa, Japan. While in Okinawa, the appellant became friends with a female co-worker, TW. Although TW was married to another Marine Corps officer, the appellant's relationship with TW eventually matured over the course of their two year friendship into a sexual relationship. It is this relationship, and the appellant's failure to follow a no contact order regarding TW, that led to his guilty pleas regarding adultery and disobeying a superior commissioned officer.

Prior to the appellant and TW's relationship becoming adulterous, TW had a sexual encounter with another Marine officer that she eventually viewed as a sexual assault. TW initially believed that the encounter was consensual, but several months later concluded that her alcohol consumption that evening left her without the capacity to consent. The appellant reported TW's alleged assault to the Naval Criminal Investigative Service (NCIS) eight months after the fact. During his report to NCIS, the appellant attempted to conceal his adulterous relationship with TW. Those attempts led to allegations that the appellant made a false official statement.

II. Factual Sufficiency

A. Principles of Law

Issues of factual sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The elements of false official statement are: (1) that the accused made a certain statement; (2) that the statement was false; (3) that the accused knew it to be false at the time; and (4) that the accused made the statement with the intent to deceive. Art. 107, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 31.

With respect to the second element, unresponsive answers to unambiguous questions that are "technically, literally, or legally true cannot form the basis for such a conviction, even if the statement succeeds in misleading or confusing the questioner."¹ *United States v. Arondel De Hayes*, 22 M.J. 54, 55 (C.M.A. 1986) (citing *Bronston v. United States*, 409 U.S. 352 (1973)). Rather, "literally true, but unresponsive answers are to be remedied through more precise questioning." *Id.* at 56 (citations omitted).

B. Analysis

The appellant was charged with making a false statement to NCIS on divers occasions that he and TW "were friends and nothing more, or words to that effect." The sole witness against the appellant with respect to this charge was Special Agent Wheeler, the person to whom the statements were allegedly made. Special Agent Wheeler testified that the appellant presented himself at the NCIS office one afternoon and reported that his friend had been sexually assaulted. Special Agent Wheeler testified that the appellant detailed the events of the night in question, and stated that he was reporting the assault due to his status as a mandatory reporter under the sexual assault regulations. Special Agent Wheeler also testified that

¹ Although *Arondel De Hayes* involved charges of false swearing under Article 134, UCMJ, the holding is equally applicable to Article 107, UCMJ, charges.

at the end of the interview he was concerned about the nature of the appellant's relationship with TW, and how that could impact the case. That concern led to the following exchange between the trial counsel and Special Agent Wheeler at trial:

Q: So what did you do in response to that concern?

A: It was towards the end of the interview when - before I had told him that I was going to follow up with one of the supervisors, I just asked him, you know, not for nothing, you know, is there anything more to this than friendship *or words to that effect*.

Q: Why do you say that on the end, or words to that effect?

A: *I can't remember exactly the phrase that I used to, you know, a close friendship, good friends, I can't remember exactly, you know, what type of friendship it was that I had asked about. But it was - the nature of the question was, is there anything more to this than a friendship?*

Q: And had Captain Jacquez - how had he described his relationship with [TW] to begin with?

A: As a friend. *I can't remember in the beginning if it was related as a close friend or best friends. Friendship for sure. I can't recall if he had speculated that in the beginning or said that, excuse me.*

Q: Do you have any doubt that when you later asked him the question, that you asked him whether the relationship had anything more than friendship?

A: *To that effect, yes.*

Q: How did Captain Jacquez respond to that question?

A: He stated they were close friends, good friends.

Record at 214-15 (emphasis added).

Special Agent Wheeler then testified that the appellant came back to NCIS several days later to make a written statement in support of the sexual assault investigation. As part of that statement, which was introduced as a prosecution exhibit, the appellant wrote:

[TW] and I have been friends for a couple of years. I would regularly hangout with her and her husband [JW],

and they would allow me to sleep in their guest room when we had gone out late. Through this friendship, [TW] and I developed something of a big brother and little sister relationship.

Prosecution Exhibit 10.

Regarding that statement, and Special Agent Wheeler's further questioning of the appellant about his relationship with TW, the record reveals this exchange between the trial counsel and Special Agent Wheeler:

Q: Special Agent Wheeler, was there anything in that statement specifically that raised your concern to ask Captain Jacquez again?

A: Just the nature of their relationship.

Q: What I mean, is there anything that you read - - you mention that you read Captain Jacquez's statement. Was there anything that he wrote that influenced you to ask him that question?

A: His description of the relationship, big brother and sister -- or little sister relationship, the third paragraph.

Q. When you asked that question, how did Captain Jacquez respond?

A. Similar to his interview on the 15th. *I can't remember the exact words that he used*, but I know that I used, you know, the phrase that he put in there, big brother and little sister, and asked him the question this time around. You related that it's just a good - you know, good, close friendship, something to that effect. Big brother, little sister, how he phrased it.

Record at 232-33 (emphasis added).

During cross-examination, Special Agent Wheeler admitted that he did not take any notes or otherwise record the conversations at issue, and that his focus at the time was on the sexual assault, not on the nature of the appellant's relationship with TW.

This evidence is not sufficient to convince this court of the appellant's guilt beyond a reasonable doubt, as is required by Article 66(c), UCMJ.

In this particular area of the law, where guilt or innocence can hinge on the inclusion or exclusion of a single

word ("we are friends" vice "we are *just* friends"), we are not willing to find the appellant guilty beyond a reasonable doubt based entirely on Special Agent Wheeler's impressions of what was said some sixteen months earlier, rather than on any recording or notes - or even memory - of the exact words used. While Special Agent Wheeler undoubtedly believed that he asked the appellant unambiguous questions, and received clear, responsive, and untruthful answers, he cannot say with any degree of certainty what was actually said. His inability to recall the exact language that the appellant used gives us a reasonable doubt as to the appellant's guilt.²

III. Sentence Reassessment

Having set aside the false official statement charge, we must now "assure that the sentence adjudged is appropriate for the offenses of which the accused has been convicted [and that] the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). Because our action on findings does not dramatically change the sentencing landscape so as to negate our ability to reassess the sentence, remand for a rehearing on sentence is unnecessary in this case. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006).

Here, the gravamen of the case was not the false official statement that the appellant allegedly made to NCIS, but rather the adulterous relationship he carried on with the wife of a friend and fellow Marine officer: a combat aviator who was deployed to Afghanistan during most of the adulterous affair, and who learned of his wife's desire for a divorce - a desire he did not share - while deployed. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after considering the entire record, we are satisfied beyond a reasonable doubt that, even if the false official statement charge had been dismissed at trial, the military judge would have adjudged, and the convening authority approved, a sentence no less than that actually adjudged in this case.

² Even if we took Special Agent Wheeler's testimony as a precise and accurate retelling of the relevant conversations, we would still not be convinced of the appellant's guilt beyond a reasonable doubt. When asked by Special Agent Wheeler if "there [was] anything more to this [relationship] than friendship" the appellant is reported to have said "they were close friends, good friends." Record at 214-15. That answer falls far short of the alleged response of "friends and nothing more, or words to that effect."

IV. Conclusion

The findings of guilty to Charge IV and its sole specification, false official statement, are set aside and Charge IV and its specification are dismissed with prejudice. The remaining findings are affirmed. The sentence as adjudged and approved by the convening authority has been reassessed and is affirmed.

Senior Judge PAYTON O'BRIEN and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court