UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHADRICK L. CAPEL
United States Air Force

ACM S31819

16 December 2011

Sentence adjudged 23 April 2010 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: David S. Castro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $200.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

HARNEY, Judge:

On 23 April 2010, the appellant was tried by a special court-martial composed of a military judge sitting alone at Moody Air Force Base, Georgia. Contrary to the appellant's pleas, the military judge convicted the appellant of one specification of signing a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907; two specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921; and three specifications of obtaining services under false pretense, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to 6 months of confinement, reduction to E-1, forfeiture of $200.00 pay per month for 6 months, and a

bad-conduct discharge. The convening authority approved the findings and sentence as adjudged but awarded the appellant four days credit for illegal pretrial confinement.

On appeal, the appellant argues that the evidence is legally and factually insufficient to support his conviction for larceny under Specification 3 of Charge II.[1] The appellant also argues that, if this Court finds the evidence legally and factually insufficient to support his larceny conviction, we should also set aside his conviction for signing a false official statement under the Specification of Charge I. Although not raised as an assignment of error by the appellant, we also review de novo his conviction for obtaining services under false pretenses, in violation of Article 134, UCMJ, in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Finding no error prejudicial to the appellant, we affirm the findings and the sentence.

Background

The appellant and the victim, Staff Sergeant (SSgt) TA, were both assigned to the 23rd Component Maintenance Squadron at Moody Air Force Base, Georgia. TA was also the appellant's supervisor. On 23 August 2009, the appellant went to TA's apartment, where they played video games and drank some alcohol. The appellant spent the night at TA's apartment because he had too much to drink. He slept on the recliner in the living room. TA left his wallet with his debit card on his kitchen counter, as was his custom.

About six days later, TA was checking his accounts online and noticed some transactions to six different businesses he did not recognize and did not charge on his debit card. The charges added up to about $2,100.00. TA recalled that the appellant had spent the night at his apartment six days earlier and had access to his wallet and debit card. Suspecting that the appellant may have had something to do with these charges, TA contacted Verizon Wireless, gave the operator the appellant's phone number and asked if there had been a recent payment on that the account. The operator verified that the amount of the appellant's phone bill matched the dollar amount charged against TA's debit card. TA then went to the local authorities and filed a complaint with law enforcement and with his debit card company, Bank of America. Once TA took this action, he received a credit from Bank of America. Bank of America then "charged back" the transaction to the businesses, who suffered the financial loss.

When interviewed by a local detective, the appellant waived his rights and gave a statement. He denied using TA's debit card for any purpose but said that TA had agreed to pay his bills for him. The appellant also testified at his court-martial that he never used TA's debit card without authorization, and again stated that TA agreed to pay his bills to help him get back on his feet. He further testified that TA agreed to buy him a laptop computer in exchange for a Playstation 3 game console, helped him select a Toshiba

[1] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

satellite laptop from BestBuy.com, and gave him his debit card number over the phone for payment.

In addition, SSgt SG testified that the appellant used his computer to make an online purchase of a computer at BestBuy.com on 26 August 2009. The purchase took place while the appellant was at SG's apartment. SG noticed that the information the appellant put into the on-line purchase screen was not the appellant's information. Instead, SG observed that the appellant had placed the order using his e-mail address but under another person's name, which he later recognized as TA's name. When SG confronted the appellant about the differing information, the appellant told him that a "guy" owed him money and gave him the information to buy a computer as payment. SG also noticed that the appellant ordered a Toshiba Satellite laptop computer. SG testified that the appellant returned to his apartment later the same day with a new Toshiba Satellite laptop computer. The online purchase document from BestBuy.com shows the purchase of a Toshiba Satellite computer was made between 1843 and 1936 hours on 26 August 2009. SG testified that the transaction took place at 1100 hours.

The transactions on TA's debit card relevant to this appeal are: (1) Specification 3 of Charge II: BestBuy.com, in the amount of $834.59 for a laptop computer; (2) Specification 1 of Charge III: City of Valdosta, in the amount of $147.41 for water service; (3) Specification 2 of Charge III: Mediacom Communications, in the amount of $306.16 for cable services; and (4) Specification 3 of Charge III: Verizon Wireless, in the amount of $176.97 for cellular phone service.[2] TA testified that he had never used his debit card to pay for any of these items or services for the appellant, nor did he allow the appellant to use his debit card without permission. TA further testified that he did not discuss buying the appellant a laptop computer or give the appellant his debit card information over the phone to buy a Toshiba Satellite laptop computer from BestBuy.com.

Legal and Factual Sufficiency of the Evidence

The appellant challenges his conviction for larceny in Specification 3 of Charge II. He argues that the time of day SG testified he observed the appellant using his computer to order the Toshiba Satellite laptop from BestBuy.com differs greatly from the time on the BestBuy.com receipt. SG testified the appellant used his computer to make the purchase no later than 1100 hours on 26 August 2009. The time of purchase of the laptop computer from the BestBuy.com receipt is 1843 hours on 26 August 2009. As such, the appellant argues that SG's testimony is unreliable and that this Court should set aside his conviction for larceny as legally and factually insufficient. The appellant further argues that, if this Court finds his conviction for larceny legally and factually insufficient, we

[2] The appellant was convicted of using TA's debit card to steal furniture from Farmer's Furniture of a value of $156.00, as alleged in Specification 2 of Charge II. He was acquitted of using TA's debit card to steal a desktop computer from TigerDirect, Incorporated of a value of $549.99, as alleged in Specification 1 of Charge II.

should also set aside his conviction for false official statement in Charge I as legally and factually insufficient.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Moreover, "[i]n resolving legal-sufficiency questions, [we are] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). *See also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). 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 accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

1. Article 121, UCMJ, Larceny Conviction

The elements necessary to prove larceny under Article 121, UCMJ, are as follows:

> (a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;
>
> (b) That the property belonged to a certain person;
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> (c) That the property was of a certain value, or of some value; and
>
> (d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 46.b.(1) (2008 ed.).

Specification 3 of Charge II alleges that the appellant "[d]id, at or near Valdosta, Georgia, on or about 24 August 2009, steal merchandise, of a value of about $834.59, the property of Best Buy, Incorporated." We find the evidence legally and factually sufficient to uphold the appellant's conviction for larceny in Specification 3 of Charge II.

The evidence shows that the appellant did steal merchandise, of a value of about $779.99[3], which belonged to Best Buy, Incorporated. The Best Buy receipt reflects an online purchase made on or about 24 August 2009 for a Toshiba Satellite laptop computer valued at $779.99. The laptop was shipped for pickup at the Best Buy store in Valdosta, Georgia. The receipt contains the appellant's e-mail address, which he confirmed at trial belonged to him. SG testified that the appellant used his computer to make the purchase, that the e-mail address on the screen belonged to the appellant, that the appellant used TA's name to make the purchase, and that the appellant offered that a "guy" owed him money as the reason he used another person's information to make the purchase. Likewise, the appellant confirmed SG's testimony. He stated that he typed in TA's name and debit card information into the purchase screen, used his personal e-mail address, printed out the receipt from his e-mail address, and went to Best Buy to pick up the laptop. The appellant also told SG that TA owed him money to justify using TA's debit card. Moreover, the manager of the Best Buy store in Valdosta testified that a military member who makes an online purchase needs only to show the receipt to pick up the item. SG testified that the appellant returned to his apartment later the same day with a new Toshiba Satellite laptop computer. Finally, TA testified on multiple occasions that he did not give the appellant permission to use his debit card for any reason, to include buying a laptop computer.

Reading the record as a whole, the fact that SG may have been mistaken about the time of day the transaction occurred is outweighed by the abundance of evidence from the appellant himself that supports SG's testimony. The trier of fact "may believe one part of a witness' [sic] testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). The military judge was in the best position to weigh and evaluate the credibility of witnesses and the various parts of SG's testimony. *United States v. Peterson*, 48 M.J. 81, 83 (C.A.A.F. 1998); *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

We have considered the evidence produced at trial with particular attention to the matters raised by the appellant. Considering the evidence in the light most favorable to the prosecution, and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant is guilty of larceny, in Specification 3 of Charge II.

2. Article 107, UCMJ, False Official Statement Conviction

The elements necessary to prove false official statement under Article 107, UCMJ, are as follows:

[3] The original charge sheet stated the value as $834.59, which included sales tax in the amount of $54.60. The military judge substituted the amount of $779.99 when finding the appellant guilty of this specification.

(1) That the accused signed a certain official document or made a certain official statement;

(2) That the document or statement was false in certain particulars;

(3) That the accused knew it to be false at the time of signing it or making it; and

(4) That the false document or statement was made with the intent to deceive.

MCM, Part IV, ¶ 31.b.

The Specification of Charge I alleges that the appellant "[d]id, at or near Valdosta, Georgia, on or about 3 December 2009, with intent to deceive, sign an official document, to wit: a Valdosta Police Department Witness Statement, where the said [appellant] claimed that he never used the debit card of Staff Sergeant [TA], which document was totally false and was then known by the said [appellant] to be false." We find the evidence legally and factually sufficient to uphold the appellant's conviction for signing a false official statement, as stated in the Specification of Charge I. The evidence shows that the appellant did, on or about 3 December 2009, sign an official document, the Valdosta Police Department Witness Statement. The evidence also shows that the statement was false and that the appellant had the intent to deceive. In that statement, the appellant denied using TA's debit card or having any knowledge about the transactions charged to TA's account even though, at his court-martial, the appellant stated he had permission to use TA's debit card. Additionally, the record contains ample testimony establishing the appellant's reputation for untruthfulness, TA's reputation for truthfulness, and the appellant's statement to a co-worker that he had used TA's debit card information. Once again, we find the military judge was in the best position to weigh and evaluate the credibility of witnesses. *Peterson*, 48 M.J. at 83; *see also Jackson*, 443 U.S. at 319.

We have considered the evidence produced at trial with particular attention to the matters raised by the appellant. Considering the evidence in the light most favorable to the prosecution and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant is guilty of the false official statement in the Specification of Charge I.

Legality of the Article 134, UCMJ, Offenses

The appellant was convicted of three specifications of obtaining services under false pretenses, in violation of Article 134, UCMJ.[4] Article 134, UCMJ, criminalizes three categories of offenses not covered by other articles of the UCMJ: Clause 1 offenses require proof that the alleged conduct be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital crimes that violate federal law, including law made applicable by the Assimilative Crimes Act, 18 U.S.C. § 13. Because the specifications at issue do not reference federal law or the Assimilative Crimes Act, they necessarily involve Clause 1 or 2. The language of each specification complies with the model specification in effect at the time but does not expressly allege the terminal element that such conduct was either prejudicial to good order and discipline or service discrediting. Because the specifications do not expressly allege the terminal element, we will review de novo whether the specifications that allege obtaining services under false pretenses under Article 134, UCMJ, survive in light of *Fosler*. *See United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994).

In *Fosler*, our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either Clause 1 or 2. Although recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt

[4] The specifications in Charge III read as follows:

> Specification 1: Did, at or near Valdosta, Georgia, on or about 24 August 2009, with intent to defraud, falsely pretend to the city of Valdosta that the debit card number used to provide payment belonged to the aforementioned SENIOR AIRMAN CHADRICK L CAPEL as opposed to Staff Sergeant [TA], then knowing that the pretenses were false, and by means thereof did wrongfully obtain from the city of Valdosta services, of a value of about $147.41, to wit: water service.
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> Specification 2: Did, at or near Valdosta, Georgia, on or about 24 August 2009, with intent to defraud, falsely pretend to Mediacom Communications Corporation that the debit card number used to provide payment belonged to the aforementioned SENIOR AIRMAN CHADRICK L. CAPEL as opposed to Staff Sergeant [TA], then knowing the pretenses were false, and by means thereof did wrongfully obtain from Mediacom Communications Corporation services, of a value of about $306.16, to wit: cable service.
>
> Specification 3: Did, at or near Valdosta, Georgia, on or about 25 August 2009, with intent to defraud, falsely pretend to Verizon Wireless that the debit card number used to provide payment belonged to the aforementioned SENIOR AIRMAN CHADRICK L. CAPEL as opposed to Staff Sergeant [TA], then knowing that the pretenses were false, and by means thereof did wrongfully obtain from Verizon Wireless services, of a value of about $176.97, to wit: cellular telephone service.

interpretations that hew closely to the plain text." *Fosler*, 70 M.J. at 230. The Court implies that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232.

While narrowly construing the specification in the posture of the case, the Court reiterated that the military is a notice-pleading jurisdiction: "A charge and specification will be found sufficient if they, 'first, contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id*. at 229 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974) (brackets in original)). Failure to object to the legal sufficiency of a specification does not constitute waiver, but "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990). *See also United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

Here, the appellant did not at any stage of the proceedings object to the specifications alleged under Article 134, UCMJ. As such, where the sufficiency of a specification is challenged for the first time on appeal, it will be liberally construed in favor of validity. *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) ("A flawed specification first challenged after trial, however, is viewed with greater tolerance than one which was attacked before findings and sentence."). We find that specifications that allege obtaining services under false pretenses provide sufficient notice of criminality. Indeed, consistent with the language of *Fosler*, these specifications contain language "the ordinary understanding of which could be interpreted to mean or necessarily include the concepts of prejudice to 'good order and discipline' or 'conduct of a nature to bring discredit upon the armed forces.'" *Fosler*, 70 M.J. at 229. In our view, specifications charging an Airman with (1) wrongfully obtaining services under false pretenses from off-base service providers, (2) falsely pretending to the off-base service provider that the debit card he used to obtain those services belonged to him rather than another Airman, and (3) acting with the intent to defraud, put him on notice that such conduct is prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. When the appellant used the debit card of TA, his co-worker and supervisor, without TA's permission or knowledge, and for the appellant's own benefit, he acted to the prejudice of good order and discipline. Moreover, the appellant's actions affected off-base service providers, who specifically catered to military members, and may fairly be characterized as conduct that brings discredit upon the armed forces. As the Court stated in *Watkins*, we are confident that the appellant "was not misled." *Watkins*, 21 M.J. at 210. We therefore conclude that the specifications that alleged obtaining services under false pretenses for which the appellant was convicted are legally sufficient under

Fosler: each specification fairly informed the appellant of the charge against him, enabled him to prepare a defense, and protected him against double jeopardy.

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

STEVEN LUCAS
Clerk of the Court