UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DAVID J. CHARGUALAF, JR.
United States Air Force

ACM 38023

5 June 2013

Sentence adjudged 15 June 2011 by GCM convened at Joint Base Lewis-McChord, McChord Field, Washington. Military Judge: Martin T. Mitchell.

Approved sentence: Confinement for 12 months and reduction to E-1.

Appellate Counsel for the appellant: Major Daniel E. Schoeni and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ROAN, GREGORY, and HARNEY
Appellate Military Judges

HARNEY, J.

The appellant was tried by a general court-martial composed of officer members. Contrary to his pleas, the appellant was found guilty of two specifications of false official statement, one specification of larceny, one specification of forgery, and one specification of obstruction of justice, in violation of Articles 107, 121, 123, 134, UCMJ, 10 U.S.C. §§ 907, 921, 923, 934.[1] The members sentenced the appellant to confinement for 12 months and reduction to E-1. The convening authority approved the sentence as adjudged.

[1] The appellant was acquitted of a third specification of forgery.

On appeal, the appellant argues: (1) the obstruction of justice specification fails to state an offense because it does not allege the terminal element for an Article 134, UCMJ, offense; (2) the evidence is legally and factually insufficient to support his convictions for larceny and forgery; and (3) the military judge abused his discretion when he denied the appellant's motion to compel a forensic psychologist. In a supplemental assignment of error, the appellant argues that he is entitled to a new trial based upon the post-trial discovery of new evidence.

Background

By an order dated 24 October 2006, the appellant, a reservist assigned to the 446th Aircraft Maintenance Squadron, was ordered into a tour of active duty service effective 30 October 2006 and was instructed to report to McChord Air Force Base, Washington (now Joint Base Lewis-McChord (JBLM)). The appellant entered into active duty from an address in Bremerton, Washington. On 12 February 2007, the appellant moved to a different address in Tacoma, Washington. Both Bremerton and Tacoma are within the "commuting area" for JBLM. The commuting area is defined as a 50-mile radius or one-hour driving time from JBLM to the member's residence.[2]

On 2 November 2007, the appellant notified Master Sergeant (MSgt) DW from the Command Support Staff that he had moved from Tacoma, Washington, to Lake Stevens, Washington, a locale outside the 50-mile commuting area. MSgt DW told the appellant he would need to complete a worksheet changing his address to Lake Stevens. The appellant completed the change of address form on 2 November 2007 and the appellant's orders were amended on 7 November 2007 to reflect the Lake Stevens address. By moving outside the 50-mile commuting area, the appellant was entitled to per diem and lodging based on the Lake Stevens address.

The appellant then filed a Department of Defense (DD) Form 1351-2, *Travel Voucher or Subvoucher* (March 2008), with finance for reimbursement and payment of per diem and lodging expenses based on the Lake Stevens address. Finance refused to pay the amount claimed on the voucher because it reflected a change from inside to outside the commuting area but lacked supporting documentation. Senior Master Sergeant LD from the finance office spoke to MSgt DW and told him that, consistent with Air Force Reserve Command Policy 03-29, *Subject: Changes to Resident/Commuting Status*,[3] the unit needed to prepare and route a memorandum

[2] The 446 Airlift Wing Instruction, *446 AW Lodging Program Management*, ¶ 2.1.1 (29 May 2003), stated: "Headquarters Air Force Reserve Command (AFRC) will furnish guidance for designating the commute area, (currently 50-mile radius or 1 hour driving time). Mileage is calculated from McChord AFB to city of residence, by using map directions from AAA Insurance directional website . . . ."

[3] Air Force Reserve Command Policy #03-29, *Subject: Changes to Resident/Commuting Status*, stated: "The installation commander (i.e., wing commanders) may make the final decision on whether or not a member meets the

through the appellant's chain of command to justify and approve the appellant's change of residence to one outside the commuting area. On 14 December 2007, the 446 AW/CC approved the request to change the appellant's entitlements based on his change of residence.

On 5 November 2007, the appellant signed the lease renting a room in the Lake Stevens house from Mr. KS. Mr. KS testified at trial that the appellant did not live at the Lake Stevens house or move in any of his possessions, and only paid rent on two occasions. Mr. KS testified that after signing the lease, the appellant lived in the Tacoma area.[4] The appellant submitted receipts to his unit purportedly showing he continuously paid Mr. KS rent from 1 November 2007 to 1 January 2010. By May 2009, however, Mr. KS had vacated the Lake Stevens house.

Mr. BB worked in the 446th Airlift Wing Reserve Pay Office. Part of his duties involved researching whether or not a member's address or other information was valid for purposes of receiving reserve pay and allowances. If valid, Mr. BB would process a member's voucher for payment with the finance office; if not, he would pass on the information to an investigator. In the course of his duties, Mr. BB was alerted that the appellant's address in Lake Stevens might be invalid. As was his custom, Mr. BB asked the appellant for a copy of the Lake Stevens lease, which the appellant provided. Upon reviewing the lease, Mr. BB found it to be vague because it lacked, among other things, contact information for the landlord. Mr. BB then asked the appellant to provide other documents to verify his address, such as bank statements, utility bills, or rent receipts. The appellant e-mailed copies of the rent receipts to Mr. BB. The cash receipts purportedly showed that the appellant had paid Mr. KS $500 per month in rent for his Lake Stevens address from November 2007 to January 2010. Upon examining the receipts, Mr. BB noticed that each receipt listed the Lake Stevens address twice but used two different zip codes for the address; the incorrect zip code was for the appellant's Tacoma residence. Mr. BB also noticed that Mr. KS's signature looked exactly the same on each receipt.

All of these factors raised Mr. BB's suspicions. Based on his experience, Mr. BB decided he could not validate the appellant's address. After informing his chain of command of his suspicions about the appellant's address and corresponding entitlements, Mr. BB was told to notify the Air Force Office of Special Investigations. Mr. BB's suspicions were confirmed at trial when Mr. KS testified he was "shocked" when he saw

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definition of being 'in or out' of the commuting area. Wing commanders must consider all facets of the member's situation and the impact to benefits and entitlements before making a final ruling on whether a member's request for change of residence is valid, or is consider 'in' or 'out' of the commuting location."

[4] The appellant signed four month-to-month leases during that period: one dated 28 November 2007 for a residence in Tacoma; a second dated 22 February 2008 for a residence in Gig Harbor, Washington; a third dated 30 July 2008 for a residence in Tacoma; and a fourth dated 1 April 2009 for a residence in Tacoma.

the receipts with his alleged signature, stating "he hadn't signed them" and verifying that the signature on those documents did not look like his.

The appellant's initial active duty orders were set to expire on 26 April 2007. Subsequent orders and amendments extended the appellant on active duty through 22 March 2010.[5] At no point during this period was appellant released from active duty nor did a break in service of more than one day occur. The appellant filed four DD Form 1351-2 travel vouchers covering the same period, for which he was paid approximately $127,000 in per diem and lodging based on the Lake Stevens address.

Article 134, UCMJ, Specification

The Specification of Charge IV charged the appellant with obstruction of justice, in violation of Article 134, UCMJ. The Specification alleged that the appellant told Mr. KS to tell investigators that he had validly leased a house in Lake Stevens, Washington, to the appellant. He also asked Mr. KS to provide investigators with false paperwork supporting that assertion. The appellant argues that the Specification fails to state an offense because it does not -- expressly or by necessary implication -- allege the terminal element required for an Article 134, UCMJ, offense. We agree.

Whether a charged specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id*. (citations omitted); *see also* Rule for Courts-Martial (R.C.M.) 307(c)(3). In the case of a litigated Article 134, UCMJ, specification that does not allege the terminal element but which was not challenged at trial, the failure to allege the terminal element is plain and obvious error, which is forfeited rather than waived. The remedy, if any, depends on "whether the defective specification resulted in material prejudice to [the appellant's] substantial right to notice." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012). To decide if the defective specification resulted in material prejudice to a substantial right, this Court "look[s] to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is "essentially uncontroverted." *Id*. at 215-16 (citations omitted).

After reviewing the record of trial in this case, and in accordance with *Humphries*, we disapprove the finding of guilty to the obstruction of justice Specification alleged

[5] The appellant was extended on active duty pending criminal investigation by order of the 18 AF/CC, dated 23 March 2010 and 24 August 2010. By letter dated 4 February 2011, the 18 AF/CC extended the appellant on active duty pending trial by court-martial.

under Charge IV as a violation of Article 134, UCMJ. The Specification does not allege the terminal element. We find nothing in the record to satisfactorily establish notice of the need to defend against one or more of the terminal elements, and there is no indication the evidence was uncontroverted as to the terminal elements. The finding of guilty to the Specification of Charge IV is set aside and dismissed. We address sentence reassessment at the end of this opinion.

Legal and Factual Sufficiency: Larceny and Forgery

The appellant next argues that the evidence is legally and factually insufficient to support his convictions for larceny and forgery, as set forth in Charges I and III, respectively. We review issues of legal and factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *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 factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)), *as quoted in United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "In resolving legal-sufficiency questions, [we are] bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991), *as quoted in United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

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; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The evidence need not be free of all conflict for a rational fact finder to convict an appellant beyond a reasonable doubt. The members may believe "one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see also United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

1. Larceny. We find the evidence legally and factually sufficient to support the appellant's conviction for larceny by false pretenses. The military judge instructed the members that larceny had the elements of wrongfully obtaining military property (money), valued at more than $500, which belonged to the United States, done with the

intent to permanently deprive the owner of the use and benefit of the property. *Manual for Courts-Martial, United States*, (*MCM*), Part IV, ¶ 46.a.(a)(1) (2008 ed). The military judge further instructed that "obtaining" is wrongful when done by false pretenses, defining a "false pretense" as "any misrepresentation of fact by a person who knows it to be untrue, which is intended to deceive, which does in fact deceive, and which is the means by which value is obtained from another without compensation." Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-46-1 (1 January 2010); *see also MCM*, Part IV, ¶ 46.c.(1)(e).

The appellant informed MSgt DW on 2 November 2007 that he had moved outside the commuting area from Tacoma to Lake Stevens, that he was on orders until 10 April 2008, and that he had signed a four-month lease to cover that period. Based on these representations, MSgt DW prepared a memorandum for the 446 AW/CC to approve or disapprove the appellant's request to change his residence to one outside the commuting area. The 446 AW/CC approved the request, which in turn entitled the appellant to per diem based on the Lake Stevens address. The facts show that the appellant signed the lease with Mr. KS on 5 November 2007, three days after he told MSgt DW he had moved to Lake Stevens. The facts show that the appellant did not move from Tacoma to Lake Stevens, but continued to live in the immediate Tacoma area with his girlfriend and other friends, as verified by Mr. KS and the appellant's other leases. The facts show that the appellant never lived in the rented room nor moved any of his belongings to that locale. The facts also show that the appellant only paid Mr. KS rent on two occasions, once at the beginning of the lease and once in May 2009. During this period, the appellant was on orders that reflected the Lake Stevens address, and filed travel vouchers for lodging and per diem reimbursement expenses totaling approximately $127,000.

2. Forgery. Conversely, we find the evidence is not legally and factually sufficient to support the appellant's conviction for forgery. Forgery under Article 123, UCMJ, includes only those falsified documents that have legal efficacy. "Legal efficacy" means that "the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability [to] the prejudice of another." *MCM*, Part IV, ¶ 48.c.(4). We agree with the appellant that the forged rent receipts lack such legal efficacy. The phony rent receipts show purported transactions between the appellant and Mr. KS. They do not by themselves create or purport to create any right or responsibility on the part of the United States.

The Government argues that the rent receipts, when used in conjunction with the travel voucher the appellant filed via DD Form 1351-2, perfected his travel reimbursement claim. We are unconvinced. Certainly, additional documents in a particular case may constitute extrinsic facts relevant to the issue of legal efficacy when considered with the falsified document. *See United States v. Thomas*, 25 M.J. 396, 400-

02 (C.M.A. 1988). Thus, although relevant, the addition of the DD Form 1352-2, did not actually confer legal efficacy upon the rent receipts. The rent receipts were merely preliminary and necessary steps toward the perfection of his claim. As our superior court has noted, documents that are preliminary and perhaps even necessary steps towards perfection of a legal right or the imposition of legal harm cannot constitute forgeries under Article 123, UCMJ. *United States v. Hopwood*, 30 M.J. 146, 147-48 (C.M.A. 1990); *Thomas*, 25 M.J. at 400-02; *see also United States v. Jones-Marshall*, 71 M.J. 534 (Army Ct. Crim. App. 2012). Thus, the falsified rent receipts lack legal efficacy; they do not impose an apparent liability on the United States nor perfect the appellant's claim for reimbursement. As such, the rent receipts cannot constitute forgeries under Article 123, UCMJ. The finding of guilty to the Specification of Charge III is set aside and dismissed. We address sentence reassessment at the end of this opinion.

Motion to Compel Expert Witness

Prior to trial, the appellant's trial defense counsel filed a motion to compel the appointment of an expert in the field of forensic psychology, arguing that the expert was necessary "due to potential mental health issues that may be relevant and/or mitigating to the charges at issue and any sentencing portion of the trial." The military judge denied the motion because the appellant failed to show that the requested expert assistance was necessary or would result in a fundamentally unfair trial. The appellant asserts that the military judge abused his discretion. We disagree.

We review a military judge's ruling on a request for expert assistance for an abuse of discretion. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). Abuse of discretion is a strict standard that requires more than a difference of opinion but a finding that the ruling was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (quotation marks and citations omitted).

R.C.M. 703(d) permits employment of experts at government expense when their testimony would be relevant and necessary. *United States v. Ford*, 51 M.J. 445, 455 (C.A.A.F. 1999). The defense bears the burden to show (1) why the expert is necessary, (2) what the expert will do, and (3) why counsel cannot accomplish the same tasks. *United States v. Freeman*, 65 M.J. 451, 457 (C.A.A.F. 2008); *Bresnahan*, 62 M.J. at 143. To meet this burden, the accused must show more than a "mere possibility of assistance" from the expert, and show that a "reasonable probability" exists that the expert will assist the defense and that denial of the request would result in an unfair trial. *Bresnahan*, 62 M.J. at 143 (quotation marks and citations omitted).

We find the military judge did not abuse his discretion when he denied the defense motion to compel. The defense couched their request as necessary because of "potential

mental health issues that may be relevant and/or mitigating to the charges at issue and any sentencing portion of the trial." The defense further stated that the expert would "accomplish much for the defense" by conducting psychological testing on the appellant, identifying issues relevant to the court-martial and their impact on defense strategy, and serving as a potential expert witness. In our opinion, the reasons the appellant cites show no more than the mere possibility of assistance in this case. Moreover, the military judge stated that the appellant's counsel failed to show what the expert would accomplish for them or how denial of the expert would result in a fundamentally unfair trial. The military judge noted specifically that he did not see any "evidence from which to conclude that there is a reasonable probability that an expert would be able to develop a possible defense of partial mental responsibility or to develop evidence in extenuation or mitigation beyond what can produce by experienced defense counsel." After examining the record, we find no abuse of discretion in the military judge's determination that the appellant failed to show the required necessity.

Request for New Trial

On 8 February 2013, the appellant filed a petition for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873, asserting that he had new evidence regarding his home of record and place of entry into active duty came to light after his court-martial in the form of a DD Form 214, *Certificate of Release or Discharge from Active Duty* (August 2009). The appellant claims that the DD Form 214 shows that his home of record and the place from which he entered active duty was Glendale, Arizona. Because this was outside the commuting area from JBLM, he was entitled to the travel benefits he received.

The question of whether a petition meets the criteria under R.C.M. 1210(f)(2), is reviewed de novo. *United States v. Denier*, 43 M.J. 693, 699 (A.F. Ct. Crim. App. 1995). Requests for a new trial are disfavored and only granted if manifest injustice would result from denying such a petition. *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). The petitioner has the burden of demonstrating a new trial is required under R.C.M. 1210(f)(2). *Id*. at 356.

An accused may petition for a new trial at any time up to two years after approval of the findings of the convening authority, but his entitlement to a new trial is expressly contingent upon grounds of newly discovered evidence. In order to receive a new trial on these grounds, a petitioner must establish the following factors:

> (A) The evidence was discovered after trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

> (C) The newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2).

We find that a new trial is not warranted in this case. At trial, defense counsel admitted various enlistment documents and orders that listed the appellant's "home of record" at the time of his enlistment as Phoenix, Arizona, and his "place of enlistment" at the time of enlistment as Glendale, Arizona. Trial defense counsel argued that these documents established that the appellant was on continuous active duty from his initial home of record and his "'home of record' was, and should have been the entire time, Arizona." Thus, the information in the appellant's DD Form 214 was already presented to the members during findings. As such, we find that the appellant has not met his burden of showing that a new trial is required in this case and his petition is denied.

Sentence Reassessment

On consideration of the entire record, and pursuant to *Humphries*, the finding of guilty to the Specification of Charge III, and Charge III, and the Specification of Charge IV and Charge IV are set aside and dismissed. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (CM.A. 1986), we are confident the members would have imposed the same sentence of confinement for 12 months and reduction to E-1. Dismissing the obstruction of justice specification and the forgery specification do not substantially change the sentencing landscape. The appellant still stands convicted of larceny and false official statement. This Court finds that the sentence, as approved by the convening authority, is appropriate for the remaining offenses.[6]

Conclusion

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

[6] The facts and circumstances surrounding the dismissed Specification of Charge III were properly before the court as *res gestae* of the charged Article 121, UCMJ, 10 U.S.C. § 921, offense.

Accordingly, the findings and the sentence, as reassessed are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist