UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CODI R. COWARD
United States Air Force

ACM 35925

20 April 2006

Sentence adjudged 21 February 2004 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Anne L. Burman and Jack L. Anderson.

Approved sentence: Dishonorable discharge, confinement for 9 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Andrew S. Williams, Major Sandra K. Whittington, Major L. Martin Powell, Major Teresa L. Davis.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Alisa W. James, Lieutenant Colonel Gary F. Spencer, and Major John C. Johnson.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was tried by officer and enlisted members sitting as a general court-martial at Elmendorf Air Force Base (AFB), Alaska. Contrary to his pleas, he was found guilty of attempted unpremeditated murder of KE, Senior Airman (SrA) D, and Airman

Basic (AB) J,[1] by intentionally discharging a firearm at them,[2] and conspiring with Airman First Class (A1C) Y to commit aggravated assault with a dangerous weapon by firing several rounds from a firearm at the aforementioned victims,[3] in violation of Articles 80 and 81, UCMJ, 10 U.S.C. §§ 880, 881. The appellant was sentenced to a dishonorable discharge, confinement for 9 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted two assignments of error: (1) Whether the evidence is legally and factually insufficient to support his convictions of attempted unpremeditated murder; and (2) Whether the appellant's conviction of conspiracy to commit aggravated assault with a dangerous weapon is legally and factually insufficient. He asks this Court to set aside and dismiss the charges and specifications and set aside his sentence.

We have examined the record of trial, the assignments of error, and the government's response thereto. Finding no error, we affirm.

Background

During the early morning hours of 31 August 2003, the appellant, A1C Y, and A1C H, visited an apartment in the Government Hill area in Anchorage, Alaska. The three victims in this case, KE, SrA D, and AB J, were at the apartment when they arrived. There were bad feelings between the two groups due to a fight that had occurred the previous night at the Elmendorf AFB Noncommissioned Officer Club between SrA D and a friend of the appellant's who was not present at the apartment. Shortly after the appellant, A1C Y, and A1C H arrived, the victims decided to leave and words were exchanged between the groups, which A1C H referred to as "trash talking."

The victims got into two vehicles with SrA D driving one with AB J as his passenger and KE following in the other. The appellant said to A1C H and A1C Y, "let's go get these guys," and showed them his gun, a .40 caliber Ruger PT94 semiautomatic pistol. Then A1C H got into one vehicle and A1C Y drove another vehicle with the appellant as the passenger.

The appellant, A1C Y, and A1C H followed the victims with their lights off. When the appellant's vehicle passed by KE the appellant pulled out his pistol and pointed it at him, then the appellant and A1C Y drove off. KE decided to try to run the appellant and A1C Y off the road in front of the Elmendorf AFB guard shack before something

[1] The charge sheet and promulgating order referred to SrA D as Airman First Class (A1C) D and AB J as Airman (Amn) J, however, at the time of trial, when they testified their ranks were SrA and AB, respectfully.
[2] The appellant was found not guilty of attempted premeditated murder of KE, SrA D, and AB J.
[3] The appellant was found not guilty of conspiring with A1C Y to commit the premeditated murders of KE, SrA D, and AB J.

happened. He then planned to report what the appellant had done but was unsuccessful in his efforts. The appellant and A1C Y turned around and proceeded back towards the Government Hill area. KE stopped at a gas station to talk with SrA D and AB J about what had just happened. During the discussion, the appellant and A1C Y came back and the appellant waived his pistol in KE's direction.

KE again became upset with the appellant's actions and decided to follow him. As KE followed, the appellant's vehicle slowed down, and KE testified that he believed they were trying to entice him to pass their vehicle. A1C H testified that when he pulled up to the appellant he asked what was going on and the appellant told him, "it's about to go down." The vehicles stopped for a light and KE received a call from either SrA D or AB J urging him to stop following the appellant and A1C Y. KE agreed and turned onto a three-lane street. This left KE in the middle lane and the appellant and A1C Y in the left lane. The other vehicle driven by A1C H changed lanes and was in the right lane and SrA D and AB J were behind KE. All were stopped at a light and when the light changed the appellant's vehicle and A1C H's vehicle did not move. KE proceeded through the light and there was testimony that it appeared as if KE was rolling his window down to say something when the appellant started shooting at him. When KE pulled off, the appellant began shooting at the other car that SrA D and AB J were riding in. KE called 911 and met his friends at a gas station. Once at the gas station the victims discovered approximately ten bullet holes between the two vehicles, including one fired through the rear left stereo speaker at ear height. In addition, there was a bullet hole in the jacket KE was wearing.

After the incident, the appellant made statements to various Airmen that he had shot at the cars during the altercation. When questioned by Air Force Office of Special Investigations' Agent Randy Adair, the appellant admitted that he shot his weapon nine times at the two vehicles. He also claimed that while he never saw any of the victims with a weapon, he had heard they carried weapons, but when asked, was unable to provide additional information. Agent Adair described the shot placement as methodical, not wild. The appellant also told Agent Adair that he thought KE was reaching for something before the appellant fired his weapon. When the appellant was asked why he thought KE was reaching for something he could not explain why he thought that. Finally, none of the victims were in possession of a firearm during the early morning hours of 31 August 2003.

Attempted Unpremeditated Murder

As noted above, the appellant contends the evidence is legally and factually insufficient to support his convictions for attempted unpremeditated murder. At trial, the appellant raised the defense of self-defense to the charge and specifications of attempted murder. The military judge properly instructed the court members that this defense had been raised by the evidence and that they must be convinced beyond a reasonable doubt

that the appellant was not acting in self-defense when he shot at the three victims in order to find him guilty of attempted unpremeditated murder. Rule for Courts-Martial (R.C.M.) 916(e) provides in pertinent part as follows:

> *Self-Defense*
>
> (1) *Homicide* . . . It is a defense to a homicide . . . that the accused:
>
> (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and
>
> (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

The Discussion to R.C.M. 916(e) explains in pertinent part:

> The test for the first element of self-defense is objective. Thus, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. . . . The test for the second element is entirely subjective. The accused is not objectively limited to the use of reasonable force.

The test for legal sufficiency of a conviction 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 crime 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); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). 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. *Turner*, 25 M.J. at 325.

We conclude there is overwhelming evidence in the record of trial to support the court-martial's findings of guilty of the attempted unpremeditated murders of KE, SrA D, and AB J. Like the court members, we are also convinced of the appellant's guilt beyond a reasonable doubt, and find that the appellant did not act in self-defense when he fired his weapon at the victims. *See Id.*; Article 66(c), UCMJ, 10 U.S.C. § 866(c); R.C.M. 916(e).

Conspiracy

The appellant also contends his conviction for conspiracy to commit aggravated assault with a dangerous weapon is legally and factually insufficient. He maintains the

government failed to show the appellant and A1C Y entered into an agreement to commit aggravated assault. We disagree.

> The agreement in a conspiracy need not be in any particular form or manifested in any formal words. In fact, the meeting of the minds "can be silent" or simply a "mutual understanding among the parties." It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. To sustain a finding of guilty to a charge of conspiracy, the agreement need only be implied.

United States v. Phanphil, 54 M.J. 911, 916 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 6 (C.A.A.F. 2002) (internal citations omitted). *See also United States v. Cobb*, 45 M.J. 82, 84-85 (C.A.A.F. 1996); *United States v. Barnes*, 38 M.J. 72, 75 (C.M.A. 1993); *United States v. Layne*, 29 M.J. 48, 51 (C.M.A. 1989).

In this case, the appellant and A1C Y *clearly* demonstrated they had agreed to commit aggravated assault with a dangerous weapon by their conduct. First, the appellant said to A1C H and AlC Y, "let's go get these guys" and showed them his gun. Second, by his actions of driving his vehicle with the appellant as his passenger following KE, A1C Y acquiesced in the appellant's plans to "get these guys." Third, A1C Y operated his vehicle in a way that facilitated the appellant shooting his gun at the victims. Finally, there was evidence presented which indicated A1C Y shot at the victims as well.

There was an *abundance* of evidence to support the court-martial's finding of guilty of conspiracy to commit aggravated assault with a dangerous weapon. We, like the court members, are also convinced that the appellant is guilty of conspiracy to commit aggravated assault with a dangerous weapon. *See Turner*, 25 M.J. at 324-25; Article 66(c), UCMJ.

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

ANGELA M. BRICE
Clerk of Court