

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman ROBERT L. DIXIE JR
United States Air Force**

ACM S30917

31 October 2006

Sentence adjudged 4 March 2005 by SPCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of \$823.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Kimani R. Eason.

Before

MOODY, JOHNSON and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ZANOTTI, Judge:

Contrary to his pleas, the appellant was convicted by a special court-martial composed of officer and enlisted members of three specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921, and two specifications of unlawful entry, in violation of Article 134, UCMJ, 10 U.S.C. § 934; a lesser-included offense of the charge under Article 130, UCMJ, 10 U.S.C. § 930, housebreaking. He was acquitted of one specification of larceny. The adjudged and approved sentence included a bad-conduct discharge, confinement for 3 months, forfeitures of \$823.00 pay per month for 3 months, and reduction to the grade of E-1. On appeal, the appellant asserts that the evidence is

factually and legally insufficient to sustain his conviction.* We find appellant's assertion without merit and affirm the findings and sentence.

Background

In September 2004, the appellant became a target of investigation in a series of larcenies from his unit dorm, building 1303, located at Kunsan Air Base, Republic of Korea. During the course of the investigation, he consented to a search of his dorm room, which led to the discovery of stolen property.

Through the testimony of about a dozen witnesses, the prosecution developed a case of circumstantial evidence linking the appellant to stolen dorm keys, which provided access to the dorm rooms from which the property was stolen. Testimony was presented that appellant had access to all the keys for building 1303 because he was on bay orderly duties in July 2004, and the dorm manager during that time had not consistently safeguarded the dorm keys. The current dorm manager testified there was no record of the appellant being issued a master key or keys to other rooms in the building. Senior Airman (SrA) Haywood, who was the appellant's girlfriend, outlined how she came to possess two room keys, the mysterious disappearance of one of those keys, and the appellant's explanation that he had turned in her second key because she was not supposed to have it. However, SrA Haywood's second key and another, which opened the second floor janitor's closet, were subsequently found in the appellant's dorm room. Witnesses testified they had observed appellant enter other dorm residents' rooms with a key he claimed was a "master" key. One of those entries was into SrA Haywood's room, after being told she was not in. The two keys were the subject of one specification of larceny of military property.

The remaining two specifications of larceny were related to items of personal property found during the search of the appellant's dorm room. Testimony established that these items had been taken from dorm rooms while the owners were on temporary duty, off-station. One of those rooms belonged to SrA Yepez, who testified that he returned from temporary duty, noticed things were missing from his room, and filed a report. His testimony conclusively established the stereo found in appellant's room belonged to him, and the appellant was found guilty of larceny for stealing the stereo and unlawful entry into SrA Yepez's dorm room. Evidently, the members had some reasonable doubt as to whether a pair of football cleats found in the appellant's room was the same pair of cleats stolen from SrA Yepez. The appellant was acquitted of that specification of larceny.

The testimony also established beyond a reasonable doubt that SrA Johnson was the lawful owner of a laptop computer found in appellant's room. While most of her

* This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

personal documents had been deleted, she was able to find a photograph still present on the computer. Furthermore, the programs were consistent with those that had been on her computer, and the icon arrangement on the desktop retained its same scattered appearance. She recognized a worn spot on the bottom of the computer and the computer still utilized the marquis style screensaver she used, although the words streaming across the screen were different.

The prosecution established that a laptop computer had been stolen from SrA Irizarry's room. The computer came to be in SrA Irizarry's room when SrA Johnson loaned the computer to her boyfriend, Staff Sergeant (SSgt) Holland. SSgt Holland testified that he had been asked to watch SrA Irizarry's room during his temporary duty off-station, was given the key, and used that room for private and quiet study. He testified that he last used the laptop in SrA Irizarry's room on the morning of 16 September 2004. He locked the door and reported for duty at 0600 hours and remained there until his shift ended at 1800 hours. He testified that SrA Johnson asked him to return the laptop, but when he went to retrieve it, it was gone. The laptop and its power cord were later found in a drawer in the appellant's room. These facts support the finding of guilty for the final specification of larceny and the specification of unlawful entry into SrA Irizarry's dorm room.

The appellant did not testify, but the defense presented evidence to develop a theory of innocent purchase of stolen property. The primary piece of evidence to support this theory was appellant's statement to his roommate, following the seizure of the property, that he had purchased the property from someone "PCSing" [departing under orders directing a "Permanent Change of Station"]. The defense also established that the government failed to investigate other suspects, such as SrA Yepez's roommate who was administratively discharged during SrA Yepez's absence. SrA Yepez testified that he first suspected that his roommate had taken the property, but testimony suggests that this lead was not followed. The defense established that other items of personal property were reported stolen from building 1303 and were never recovered. The defense established that other dorm keys opened more than the single doors to which they were assigned, and that government keys could be reproduced notwithstanding a "do not copy" stamp on the key. Finally, the defense also established appellant's assignment to a static post from which he ostensibly could not leave on the date the computer was supposed to have been stolen, thereby creating a potential alibi.

The government established through cross-examination and rebuttal that other items of stolen property were found in appellant's possession. The government rebutted the appellant's alibi with the inference of opportunity to leave the post during the time the laptop was stolen and with testimony that the appellant did on at least one other occasion leave his post.

There was also a minor inconsistency in the prosecution's case as to the exact location of the laptop when it was last seen. SSgt Holland, who had borrowed it from SrA Johnson, testified that he had last used it in SrA Irizarry's room on the morning of the day it disappeared. SrA Johnson testified that she saw SSgt Holland with the laptop at about 1400 hours. Also, while it is not clear from the record, she could have last seen it in SSgt Holland's room, rather than SrA Irizarry's room.

Discussion

We may affirm only those findings of guilty that we determine are correct in law and fact and, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether a rational factfinder could have found the appellant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). We conclude that there is sufficient competent evidence in the record of trial to support the court's findings. See *Turner*, 25 M.J. at 324-25; Article 66(c), UCMJ.

The evidence and inferences therefrom reveal that the appellant was in possession of a stolen stereo, laptop, and a military-owned set of keys. He was not authorized to have the military keys, including the key to his former girlfriend's room that he had taken without her permission. The appellant claimed to have had a "master" key. Such a key would have afforded the appellant the opportunity to enter any dorm room he desired. The appellant was observed using a key to open rooms assigned to others, and the appellant had no authorization to enter those rooms. Two rooms were vacant during the charged time period, and property was reportedly stolen from those rooms during those times. The stolen property was subsequently found in the appellant's possession. It is also reasonable to infer that appellant was at building 1303, entering those rooms during his posted duty hours.

Based upon the evidence presented at trial, the military judge gave the members the following instruction:

In this case, evidence has been introduced that property that was wrongfully taken from a certain place at a certain time under certain circumstances, may have been found shortly thereafter in the exclusive possession of the accused. Based upon this evidence, you may justifiably infer that the accused wrongfully took the property from that place at that time and under those circumstances. The drawing of this inference is not required and the

weight and effect of this evidence, if any, will depend upon all the facts and circumstances as well as other evidence in the case.

It is clear to us that the members carefully examined and weighed the evidence, and were able to draw reasonable inferences from it. The members acquitting the appellant of stealing the football cleats, and finding him guilty of the lesser-included offense of unlawful entry rather than the greater offense of housebreaking, supports us in that conclusion.

Confusing testimony as to the whereabouts of the laptop on the date it was reportedly stolen does not trouble us. Such testimony was not outright contradictory and even in its best light, is wholly irrelevant to the defense theory that another was responsible for these crimes. We see no reason to disturb the finding of unlawful entry into SrA Irizarry's room.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. We further conclude that when the evidence is viewed in the light most favorable to the government, rational fact finders could have found the appellant guilty of all the offenses beyond a reasonable doubt.

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; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

Senior Judge MOODY participated in this decision prior to his retirement.
Judge JOHNSON participated in this decision prior to her reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court