UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL W. GLEISER
United States Air Force

ACM 38155

26 November 2013

Sentence adjudged 18 April 2012 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: W. Shane Cohen (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 27 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brett D. Burton; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Consistent with his pleas, a general court-martial composed of a military judge found the appellant guilty of one specification of conspiracy to commit larceny; one specification of theft of military property; five specifications of theft of non-military property; and one specification of unlawful entry, in violation of Articles 81, 121, and 134, UCMJ, 10 U.S.C. §§ 881, 921, 934.[1] Contrary to his pleas, he was also found guilty

[1] The appellant was acquitted of one specification each of conspiracy to commit burglary, damaging non-military property, theft of non-military property, and burglary, respectively alleged in violation of Articles 81, 109, 121, and

of two additional specifications of theft of non-military property and one additional specification of unlawful entry, in violation of Articles 121 and 134, UCMJ. He was sentenced to a bad-conduct discharge, confinement for 27 months, reduction to E-1, and a reprimand. The convening authority approved the sentence as adjudged. The appellant now asks this Court to dismiss his conviction of one of the theft specifications (Specification 10 of Charge III) as factually and legally insufficient.[2] Finding no basis for doing so, we affirm the findings and sentence as adjudged and approved.

Background

Between 1 May 2010 and 30 June 2011, the appellant and Airman First Class (A1C) Joshua Newsom stole items from various car dealerships and private citizens. One such occasion was charged in Specification 10 of Charge III. That Specification alleged that the appellant did "steal one truck-mounted toolbox, of a value of less than $500.00, the property of [BM]" in December 2010.

Sometime in December 2010, the appellant, A1C Newsom, and SrA DC were in a "little back alley" behind SrA DC's house. The alley was between the back of SrA DC's shed and BM's property a few feet away. While there, they saw a white truck-mounted toolbox behind BM's residence but on BM's property. The toolbox was rusted and broken in some places, and had been placed in a pile surrounded by weeds, tire parts, old bicycle rims, and other old rusted metal. The appellant and A1C Newsom asked SrA DC if they could "take it." SrA DC told them they could not because it was not his, it was on his neighbor BM's property, and he didn't want to wreck his relationship with BM. On a subsequent night and without SrA DC's knowledge, the appellant and A1C Newsom took the toolbox. Security Forces investigators later recovered it, along with other stolen items, in A1C Newsom's basement. Security Forces notified the local police of the theft and reported the appellant and A1C Newsom as suspects. A detective responded and interviewed both suspects. Under rights advisement, the appellant and A1C Newsom admitted to the detective that at dusk sometime in December 2010 they took the toolbox from "a field" behind SrA DC's house. They both said it appeared abandoned. The detective's investigation ultimately led him to BM who confirmed the toolbox was on his property and it was missing. BM had never reported the toolbox as stolen or missing.

The appellant now argues that his conviction for the theft of the toolbox is legally and factually insufficient because there was no evidence presented at trial establishing BM's ownership of the toolbox. He further argues that the Government failed to satisfy the element of specific intent to permanently deprive BM of the toolbox. He avers that the evidence instead showed he honestly believed the toolbox was abandoned property as it was broken, useless, and in a junk pile.

129, UCMJ, 10 U.S.C. §§ 881, 909, 921, 929. Another charged specification of theft of non-military property was withdrawn after arraignment.

[2] This issue was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Discussion

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 factfinder 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)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). "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] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The applicable elements of the offense of larceny are:

(1) That the accused wrongfully took certain property from the possession of the owner or of any other person;

(2) That the property belonged to a certain person;

(3) That the property was of a certain value, or of some value; and

(4) That the taking by the accused was with the intent permanently to deprive another person of the use and benefit of the property.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 46.b.(1) (2008 ed.). The appellant's appeal concerns the second and fourth elements.

Regarding the second element, the appellant avers that there was no evidence that BM owned the toolbox because BM never testified that he owned it or that he had not thrown it away. We disagree.

Under Article 121, UCMJ, an "owner" is a "person who, at the time of the taking . . . had the superior right to possession of the property in the light of all conflicting interests . . . ." *MCM*, Part IV, ¶ 46.c(1)(c)(ii). "[O]wnership may describe one who has dominion or control over a thing, though title may be in another." *United States v. Jett*, 14 M.J. 941, 944 (A.C.M.R. 1982) (citations and internal quotation marks omitted). The Government sufficiently demonstrated that the property belonged to BM. First, SrA DC testified that when the appellant and A1C Newsom asked if they could take the toolbox, he himself believed BM owned the toolbox since it was on BM's property and he adamantly told the appellant and A1C Newsom that they could not take the toolbox because it belonged to BM. Second, the detective confirmed the toolbox belonged to BM. Third, the toolbox was located on BM's property; thus, BM had rights to the toolbox superior to the appellant. We find that a reasonable factfinder could have found this evidence established beyond a reasonable doubt that BM owned the toolbox. Being convinced ourselves that the facts established BM as the owner, we also find the evidence factually sufficient to meet the second element.

Regarding the fourth element, the appellant argues that the evidence failed to establish the requisite specific intent to permanently deprive BM of the toolbox since it was abandoned property. We disagree.

"Abandoned property is property that the owner has thrown away. The former owner has relinquished all right or title to, and possession of, the property with no intent to reclaim them." *United States v. Meeks*, 32 M.J. 1033, 1035 (A.F.C.M.R. 1991) (citations omitted). Thus having no owner, abandoned property cannot be stolen and one who finds it becomes its new owner and not a thief. *Id*. (citations omitted). *See also United States v. Wiederkehr*, 33 M.J. 539, 541 (A.F.C.M.R. 1991) (citations omitted); *United States v. Swords*, 35 C.M.R. 889, 894 (A.F.B.R. 1965); Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-46-1 (1 January 2010) ("One who finds, takes, and keeps abandoned property becomes the new owner and does not commit larceny.") Additionally, because a larceny conviction requires proof beyond a reasonable doubt of a specific intent to steal, *MCM*, Part IV, ¶ 46.c.(1)(f)(1), if the appellant had an honest belief that the property was abandoned, he has a complete defense. *United States v. Turner*, 27 M.J. 217, 220 (C.M.A. 1988) (internal quotation marks and citations omitted); Rule for Courts-Martial 916(j). "[I]ntent to steal may be proved by circumstantial evidence." *MCM*, Part IV, ¶ 46.c.(1)(f)(ii).

Notwithstanding BM's treatment of the toolbox, he did not abandon it. That the toolbox was rusted, broken in places, and situated in a junk pile is not dispositive. The toolbox retained value, and it was located on BM's property; thus, it remained in his possession. Although BM did not testify, other evidence showed he did not intend to relinquish all right or title to the toolbox. On cross-examination, when asked about BM's attitude regarding his toolbox being missing, SrA DC testified that:

> [BM] told me that *he kind of wished that if [the appellant] would have just asked*, he could have taken it, *because it was [BM's] junk pile*, there wasn't a whole lot of use to anything back there, and he kind of laughed about it. I asked if he [ ] want[ed] to press charges, or if there were any hard feelings there, and he said, no, because it was broken and useless.

(Emphasis added.) Despite BM's apparent assessment of the toolbox as useless, considering the fact that he would have given it to the appellant had he asked for it, that BM still wished that the appellant would have asked him for it, and that he referred to it as his junk pile, indicate BM retained some possessory interest in the toolbox.

The evidence additionally indicated that the appellant did not believe the toolbox was abandoned and free to anyone who wanted to take it. If he did, he would not have believed it necessary to ask SrA DC if he could take it, and would not have waited until a later date when SrA DC was not around to do so. Moreover, SrA DC told the appellant he was not free to take it. A reasonable factfinder could have found this evidence established beyond a reasonable doubt that the toolbox was not abandoned and that the appellant did not honestly believe it to be so. Being convinced ourselves that the facts established the toolbox was not abandoned property, we also find the evidence factually sufficient to meet the fourth element.

Having reviewed the record of trial under the applicable standards, we find the evidence was legally and factually sufficient to support the appellant's conviction on Specification 10 of Charge III.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court