UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEPHEN C. SHARP
United States Air Force

ACM 35839

19 June 2006

Sentence adjudged 18 December 2003 by GCM convened at Beale Air Force Base, California. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Clayton O'Connor (legal intern).

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's reply thereto. The appellant avers his plea to accessory after the fact to larceny, in violation of Article 78, UCMJ, 10 U.S.C. § 878, is improvident because the military judge failed to establish the appellant knew the principal had committed the offense of larceny. To be guilty of accessory after the fact, the appellant must have known that "Jake" committed larceny of a model car *and* must have assisted "Jake" in order to prevent "Jake's" apprehension. *See United States v. Foushee*, 13 M.J. 833, 835 (A.C.M.R. 1982). Although the stipulation of fact reflected the appellant knew "Jake" had stolen the car and lied to the true owner to protect "Jake," the appellant's answers to the military judge's questions in the providency inquiry were inconsistent with the stipulated facts. The military judge did not reconcile the inconsistency and therefore

should not have accepted the appellant's guilty plea to this charge. *See United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004); *United States v. Clark*, 28 M.J. 401, 405 (C.M.A. 1989); Article 45(a), UCMJ, 10 U.S.C. § 845(a). We therefore set aside Charge I and its Specification.

Having found error, we must now determine whether we can reassess the sentence or must return the case for a rehearing. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We are confident we can reliably determine a sentence no higher than what would have been imposed at the trial level, absent the prejudicial error. *See id.* at 308. *See also United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We are convinced beyond a reasonable doubt that absent the prejudicial error the sentence would have been the same, that is: A bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to E-1.

Accordingly, Charge I and its Specification is set aside. The findings, as modified, and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator