UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JEFFREY M.B. STRICKLAND
United States Air Force

ACM S31728

26 July 2010

Sentence adjudged 20 August 2009 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Michael S. Kerr.

Appellate Counsel for the United States: Major Roberto Ramírez and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and GREGORY
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of aggravated assault with a dangerous weapon, one specification of communicating a threat, and one specification of carrying a concealed weapon, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934. The adjudged and approved sentence consists of a bad-conduct discharge, eight months of confinement, and reduction to the grade of E-1.

On appeal, the appellant asks this Court to set aside his findings of guilty on the charges and specifications of aggravated assault and communicating a threat and to set

aside his sentence. As the basis for his request, he asserts that the evidence is legally and factually insufficient to support those convictions because the evidence failed to show beyond a reasonable doubt that: (1) he pointed a gun at Mr. EZ; (2) he did not act in self-defense; and (3) he made the statement "I'm going to kill you."[*] We find the appellant's assignment of error to be without merit and accordingly affirm the findings and the sentence.

Background

On 22 March 2009, the appellant and a friend were at a local bar in Tucson, Arizona. When the appellant began smoking an electronic cigarette near the entrance of the bar, Mr. EZ, a bouncer at the bar, asked the appellant to stop smoking in that area and told him that he needed to either smoke in the designated smoking area or leave. The appellant shrugged off Mr. EZ's commands and proceeded farther into the bar with the lit cigarette. Mr. EZ approached the appellant and told him that he had to leave the bar. The appellant became angry, began shouting racial epithets, and told Mr. EZ and Mr. MM, another bouncer, that he would kill them. Mr. EZ escorted the appellant out of the bar and into the parking lot. The appellant left, only to return a short time later when he pulled a hand gun from his waist band and pointed it at Mr. EZ. Mr. EZ asked Mr. MM to call the police and the appellant departed the area. Shortly thereafter, officers with the Tucson Police Department arrested the appellant at another local bar and escorted him to the police station for questioning. After a proper rights advisement, the appellant waived his rights, admitted brandishing a hand gun but denied pointing it at anyone.

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, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). "[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). 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). We have considered the evidence produced at trial in a light most favorable to the government and find that a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specifications in question.

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

With respect to the aggravated assault conviction we note that: (1) Mr. EZ's testimony that the appellant "pointed [the gun] directly at me" and that all Mr. EZ "could see was the circle barrel of the gun. And, I was just praying a round . . . didn't come out. I thought . . . if he pulled the trigger, I was done," and (2) Mr. MM's testimony that he was standing next to Mr. EZ and the appellant approached, produced a hand gun, and pointed it in Mr. MM's direction, are legally sufficient to support the conviction.

Moreover, the government was not obliged to prove that the appellant was not acting in self-defense because the defense of self-defense was not raised by the evidence. The record makes clear that the appellant retreated and departed the area. By returning to the area with the hand gun, the appellant became the aggressor and lost whatever self-defense rights he might have had. Rule for Courts-Martial 916(e)(4). Concerning the conviction for communicating a threat, both Mr. EZ's and Mr. MM's testimony that the appellant told them that he was going to kill them legally supports the appellant's conviction.

Lastly, 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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of the specifications in question.

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.

JACKSON, Senior Judge participated in the decision of this Court prior to his reassignment on 15 July 2010.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court