UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class LAWRENCE L. THOMAS
United States Air Force

ACM 35437

4 January 2005

Sentence adjudged 25 October 2002 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Sharon A. Shaffer.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Shannon J. Kennedy.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, including those raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and the government's reply thereto. In Charge II, Specification 5, the appellant was convicted of stealing "two compact disc holders, approximately three personal computer games, approximately three personal computer programs, a compact disc stand and approximately 139 compact discs" from then SrA S. However, the record contains no evidence of theft of any of these items except one compact disc holder and 139 compact discs. Therefore, we hold that the record is legally and factually insufficient to sustain a conviction as to the other items allegedly taken. *See United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We further hold that we can correct this error as follows: the finding of guilty as to Charge

II, Specification 5, is affirmed, except the words "two compact disc holders," substituting therefor the words "one compact disc holder" and except the words "approximately three personal computer games, approximately three personal computer programs, a compact disc stand."

Because we have modified a finding of guilty, we must perform sentence reassessment. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

The appellant was sentenced by a panel of officer members to a bad-conduct discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to E-1. We have considered all the matters properly before the panel. We conclude that, even without the words excepted from Charge II, Specification 5, the panel would have adjudged a sentence no less than a bad-conduct discharge, confinement for 33 months, forfeiture of all pay and allowances, and reduction to E-1. Because the action of the convening authority reduced the sentence to confinement to 24 months, no adjustment to the approved sentence is required.

We have considered each of the other assignments of error raised pursuant to *Grostefon*, and resolve them adversely to the appellant.

We conclude 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 was committed. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. On the basis of the entire record, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court