UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic TIMUR TIMERHANOV[1]
United States Air Force

ACM 37685

28 November 2011

Sentence adjudged 21 April 2010 by GCM convened at Andersen Air Force Base, Guam. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Captain Christopher D. Cazares; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant contrary to his pleas of one specification of attempted robbery, in violation of Article 80,

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[1] The Court notes that the military judge had a discussion with both parties regarding the inconsistent spelling of the appellant's last name. Based on this discussion and the spelling in certain key documents contained within the record, including the court-martial order, we use the above-captioned spelling.

UCMJ, 10 U.S.C. § 880, and one specification of assault with intent to commit robbery, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Additionally, the military judge found the appellant guilty in accordance with his plea of communicating a threat, in violation of Article 134, UCMJ. The court sentenced the appellant to a bad-conduct discharge, confinement for 5 months, and forfeiture of all pay and allowances. A pretrial agreement capped confinement at 6 months, and the convening authority approved the sentence adjudged. The appellant asserts as error that the evidence is insufficient to support the findings of guilty of attempted robbery and assault with intent to commit robbery because his voluntary intoxication rendered him incapable of forming the specific intent required for these two offenses.[2] We will also address the legality of the guilty findings of the two Article 134, UCMJ, offenses in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A..F. 2011).

Sufficiency of the Evidence

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). 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).

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves 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) (citing *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.

Citing his voluntary intoxication, the appellant argues that the evidence is insufficient to show beyond a reasonable doubt that he had the requisite specific intent to commit either the attempted robbery or assault with intent to commit robbery. In both the charge of attempted robbery and the charge of assault with intent to commit robbery, the Government must prove beyond a reasonable doubt that the appellant had the specific intent to commit the offense of robbery as defined in Article 122, UCMJ, 10 U.S.C. § 922, and *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 47.b (2008 ed.).

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

Where specific intent is an element of an offense, an accused may present evidence of voluntary intoxication in an effort to raise reasonable doubt as to the existence of specific intent. Rule for Courts-Martial (R.C.M.) 916(b)(l) and (2). In the present case, the appellant offered evidence of his voluntary intoxication to raise a reasonable doubt as to his specific intent to rob the victims, and the prosecution offered evidence to show that, despite the appellant's intoxication, he had the specific intent to commit robbery. Specifically, the appellant offered evidence that he had consumed a significant amount of alcohol before the charged offenses and some witnesses described him as being drunk. But other evidence shows that, despite his apparent intoxication, the appellant communicated coherently, walked without difficulty, and followed the instructions of a police officer who arrested the appellant shortly after the incident. After hearing all the evidence, the military judge found the appellant guilty of both attempted robbery and assault with intent to commit robbery.

Voluntary intoxication as a defense to a specific intent crime requires that the intoxication be so severe as to render the offender incapable of forming the requisite specific intent. *United States v. Peterson*, 47 M.J. 231, 233-34 (C.A.A.F. 1997). Evidence of an offender's conduct may be sufficiently focused and directed that it shows beyond a reasonable doubt a "particular *mens rea* or other state of mind." *Id*. at 234. Such is the case here. Neither the appellant's victims nor the police officer who arrested him describe someone incapable of forming specific intent; rather, they describe an appellant who acted deliberately, spoke clearly, and followed instructions. We have also reviewed a surveillance video admitted at trial, which shows the appellant walking steadily in the moments before the attempted robbery. Later in the evening, the appellant bragged to a friend that he had robbed someone with a fake gun. Viewing the evidence in the light most favorable to the Government, we find the evidence legally sufficient to support the findings of guilt. Further, having considered the evidence de novo, we are convinced beyond a reasonable doubt that the appellant had the specific intent to commit robbery.

Legality of the Article 134, UCMJ, Offenses

In *Fosler*, our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either clause one or two. *Fosler*, 70 M.J. at 233. While recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id*. at 230. The Court implies that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232.

Specification 1 of Charge II alleges assault with intent to commit robbery, in violation of Article 134, UCMJ. Although the specification does not expressly allege the terminal element under clause one or two, we do not find this omission fatal to the charge in this case. Unlike *Fosler*, the appellant here made no motion to dismiss at trial. He entered a plea of guilty to assault as a lesser included offense of the specification and raised no concerns about the legality of the charged offense from which the lesser offense derives. During findings argument on the greater offense of assault with intent to commit robbery, his counsel focused on the lack of specific intent and offered no argument that assaulting two civilians with an intent to rob them was not service discrediting as required by the terminal element of this greater offense. The military judge found him guilty of the greater charged offense after trial on the merits and is presumed to know the law and correctly evaluate evidence required to prove the terminal element in an Article 134, UCMJ, offense. *See United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). Under this posture of the case, we do not find the charged assault with intent to commit robbery under Article 134, UCMJ, deficient for failing to expressly allege the terminal element.

Specification 2 of Charge II alleges wrongful communication of a threat, in violation of Article 134, UCMJ, and, as with the first specification, does not allege the terminal element. Where an accused does not challenge a defective specification at trial, enters pleas of guilty to it, and acknowledges understanding all the elements after the military judge correctly explains those elements, the specification is sufficient to charge the crime. *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). Such is the case here: the appellant made no motion to dismiss the charge and entered pleas of guilty, after which the military judge thoroughly covered the elements of the offense including the terminal elements of conduct prejudicial to good order and discipline and service discrediting conduct. The appellant acknowledged his understanding of all the elements and explained to the military judge why he believed his conduct was service discrediting. Under these circumstances, we do not find the specification deficient for failing to expressly allege the terminal element.

Conclusion

The 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, 10 U.S.C. § 866(c);

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court