UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ZACHARY A. ZOLNOSKY
United States Air Force

ACM 38103

13 August 2013

Sentence adjudged 26 January 2012 by GCM convened at F. E. Warren Air Force Base, Wyoming. Military Judge: Scott E. Harding (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowance, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Major Erika L. Sleger and Gerald R. Bruce, Esquire.

Before

HARNEY, MITCHELL, and SOYBEL
Appellate Military Judges

PER CURIAM:

At a general court-martial composed of a military judge, the appellant was arraigned on one specification of desertion, four specifications of absence without leave (AWOL), two specifications of failure to obey a lawful regulation, and one specification of divers uses of marijuana, in violation of Articles 85, 86, 92, and 112a, UCMJ, 10 U.S.C. §§ 885, 886, 892, 912a. He pled guilty to all charges and specifications except the charge of desertion, to which he pled not guilty, but guilty to the lesser included offense of AWOL. He was found guilty of all charges and specifications as charged.

On appeal, the appellant asserts two errors: (1) His conviction for desertion under Article 85, UCMJ, is factually insufficient; and (2) The military judge abused his discretion by not admitting, under Mil. R. Evid. 803(3), a statement the appellant made

after his apprehension regarding his understanding he would be placed in deserter status if he were absent more than 30 days.

Mil. R. Evid. 803(3)

Before ruling on the sufficiency of the evidence question, we must first decide whether the judge abused his discretion by excluding certain evidence. At trial, the defense sought to admit three statements the appellant made to his military escorts on the trip back to base after his apprehension. The military judge admitted two of the statements: (1) that he "didn't really feel comfortable in the military;" and (2) that he "wanted to get discharged." The defense also wanted to admit, under Mil. R. Evid. 803(3), the appellant's statement: "I was planning on coming back prior to the 30 days because I do understand that if I'm gone longer than 30 days I am automatically in deserter status." This statement would be used to show his intent to return. Responding to trial counsel's objection, trial defense counsel argued that this statement went to the appellant's "state of mind and what he was planning on doing – what his plans were." However, after the military judge developed the evidence further through more precise questioning of the escort, trial defense counsel agreed the phrase "I was planning on coming back" referred to a past thought process, and was not a "then existing" state of mind or a future plan. Consequently, the military judge sustained the objection and did not admit the statement.

Mil. R. Evid. 803(3) provides the hearsay exception for statements of "[t]hen existing mental, emotional, or physical condition." It states: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." This Rule generally allows evidence of one's present state of mind and future intent or plans. "It generally does not permit evidence of present memory or belief to prove the existence of a past condition or fact. It thus follows the traditional distinction between statements of present status, including forward-looking statements that do not present memory problems, and backwards-looking statements that do." Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* § 803.02[4][a], at 8-72 (6th ed. 2006).

The standard of review for a military judge's ruling on the admissibility of evidence is abuse of discretion. *United States v. Mott*, 72 M.J. 319 No. 12-0604/NA, slip op. at 25 (C.A.A.F. 8 July 2013) (citing *United States v. Freeman*, 65 M.J. 451, 452 (C.A.A.F. 2008)).

While another judge may have ruled differently, we find the military judge did not abuse his discretion. The appellant had already been arrested by the civilian authorities and was in military custody when he made the statement. He certainly had time to think

of things to say to improve his predicament. Preventing the admission of such after-the-fact statements is one of the purposes of the Rule, and here the military judge could have seen the appellant's statement as self-serving and backwards-looking. Considering the purpose and limitations of Mil. R. Evid. 803(3), such a ruling is not an abuse of discretion. *See, e.g.*, *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983).

Sufficiency of the Evidence

The appellant claims his conviction for desertion under Article 85, UCMJ, is factually insufficient. The facts showed he departed for a three-day leave and was supposed to return to duty on a Monday. Rather than returning to his duty station, he returned to his hometown and remained away for 22 days until his absence was terminated by apprehension. The appellant left some possessions in his on-base quarters when he departed on leave. There was a laptop computer, a DVD player, a few DVDs, some clothing, food, and toiletries. His closet and dresser drawers were described as "practically empty." A few uniform items, such as a belt and service dress hat, were found.

Also in the room was a note written on a piece of paper, listing "Pros" and "Cons." Listed under "Pros" were the words: "Home," "Civilian," "Spare time," "Work alone," "No More Bitch Work," "Treated like a person," and "Family." Listed under "Cons" were the words: "No Friends," "No Job," and "Reputation."

Other evidence presented to the military judge included testimony that, prior to his departure, the appellant told a supervisor he felt he had "been forced" to join the military due to "family expectations," and that he did not know if he was ready to be in the military. The appellant also asked a supervisor why it was taking so long for him to be discharged, and told a friend that he wanted to be discharged. When the appellant's room was searched, there was almost no civilian clothing remaining. The appellant's absence was terminated by apprehension and he had made no effort to turn himself in.

The appellant asserts his conviction for desertion is factually insufficient because the evidence (primarily the items left behind) showed his intention to return to base, and his fiancée and mother testified that he intended to "go back." Although not specifically raised by the appellant, we will consider legal sufficiency as well. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c). 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)). "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

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) (quoting *Turner*, 25 M.J. at 325). Applying these standards to the evidence as summarized above, we find the evidence legally and factually sufficient to prove the appellant's guilt beyond a reasonable doubt.

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. Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[*] The Court notes a typographical error in the Court-Martial Order (CMO), dated 15 March 2012. Specification 1 of Charge III incorrectly lists "said botanical increase" instead of "said botanical incense." Accordingly, the Court orders the promulgation of a corrected CMO.