UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAMES N. BARRENTINE, III
United States Air Force

ACM 36721

24 September 2007

Sentence adjudged 25 February 2006 by GCM convened at Dyess Air Force Base, Texas. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, forfeiture of $849.00 pay for one month, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

WISE, BRAND, and HEIMANN

Appellate Military Judges

OPINION OF THE COURT

WISE, Chief Judge:

The appellant in a mixed plea case at a general court-martial composed of officer members was found guilty of making a false official statement and larceny of military property valued at more than $500 in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. The appellant pled guilty and was found guilty of stealing the following military property: (1) an M68 red dot sight valued at $347; (2) a complete rail system for an M4 rifle valued at $328; (3) a front grip assembly for an M4 rifle of some value; (4) 7 30-round magazine clips for an M16 rifle valued at $51.17; (5) 19 15-round magazine clips for an M9 pistol valued at $138.32; and (6) gun cleaning kits of some value. He also pled guilty and was found guilty of making a false official statement. The false

official statement came as a result of the appellant reporting the M68 red dot sight missing. An investigation was opened and the appellant made a sworn written statement to a law enforcement agent investigating the case that he (appellant) did not know what happened to the sight. This was false as the appellant had actually stolen the sight. The appellant also pled guilty to wrongful appropriation of an asp (a tactical baton) valued at $41.53 but was found guilty of larceny of the asp.

Contrary to his pleas, the appellant was convicted of stealing the following military property: (1) 20 20-round magazines for an M16 rifle valued at $146.20; (2) binoculars valued at $319; (3) 2 pepper spray cases—used to hold individual pepper spray cans—of some value; and (4) empty ammunition cans of some value. The appellant was acquitted of stealing: (1) an M4 rifle; (2) a sling for an M16 rifle; (3) an instruction book for an M4 rifle; and (4) an A1 duty bag.

The court-martial sentenced the appellant to a bad-conduct discharge, forfeiture of $1000 of his pay for 1 month, hard labor without confinement for 30 days, and reduction to E-1. The convening authority approved only a bad-conduct discharge, forfeiture of $849 of his pay for 1 month, and reduction to E-1.

The appellant raises four allegations of error: (1) the evidence is legally and factually insufficient to support his conviction of larceny of the ammunition cans and the 20 20-round magazines for an M16 rifle because his confession to stealing those items was uncorroborated; (2) the evidence is legally and factually insufficient to support his conviction of larceny of the two pepper spray cases and the binoculars; (3) prejudicial error was committed by the military judge by admitting, without objection, hearsay testimony that items seized from the appellant's residence were property of the United States Air Force; and (4) prejudicial error was committed by the military judge during sentencing proceedings by improperly instructing the members as to how they could use witness testimony and portions of three character letters expressing a desire to continue serving with the appellant. Finding no material prejudice to the substantial rights of the appellant, we affirm the findings and sentence.

Legal and Factual Sufficiency

We review the appellant's claim of legal and factual sufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In resolving legal sufficiency questions, the court is bound to draw every reasonable inference from the record in favor of the prosecution.

United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991). 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. *Turner*, 25 M.J. at 325.

Corroboration of the Appellant's Confession to Stealing Ammunition Cans and 20 20-Round Magazines for an M16 Rifle

The appellant was assigned to the 7th Security Forces Squadron, Dyess Air Force Base (AFB), Texas and worked in the security forces armory. On 27 February 2005, the appellant informed his supervisor that an M68 red dot sight was missing. The NCOIC reported the item as stolen to the 7th Security Forces Squadron and an investigation was opened. Mr. Danny Gil, Jr., a civilian detective working for the 7th Security Forces Squadron, investigated the suspected theft and learned that other items from the armory were missing. Detective Gil elevated the case to Detachment 222, Air Force Office of Special Investigations (AFOSI), Dyess AFB, Texas.

The appellant was interviewed by AFOSI agents on 23 March 2005. The appellant waived both his *Miranda* rights and his rights under Article 31, UCMJ, 10 U.S.C. §831, and confessed to stealing a number of items from the armory. The appellant prepared and signed a sworn statement in which he wrote, amongst other things, "I took six or so M16/M4 magazines as well" and "I took empty ammo cans from the armory to use at my house to store things." He concluded his written statement by writing, "I took these things with the intention to keep them." The appellant later consented to a search of his off-station residence and the ammunition cans and 20 20-round magazines were lawfully seized.

The equipment custodian for the armory, when shown the 20 round M16 magazines that had been entered into evidence, testified that 20 round M16 magazines are used by security forces personnel "for training and other purposes" and "wouldn't be issued items for anybody to take home and keep in the [sic] personal equipment." He recognized the markings on one of the magazines, "Colt AR-15 mags," and identified the magazine as the type of 20 round M16 magazines the security forces would order. He testified that one of the ammunition cans that had been introduced into evidence is of the type normally used by the military. He explained how ammunition cans are acquired and used, and added that some of the empty cans would be retained and used for storage purposes. He testified that those cans not used for storage would be returned to "munitions," that they would not be thrown away, and an ammunition can is not an item that is generally given or taken home by a member of the security forces.

Mil. R. Evid. 304(g) states, "[a]n admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that

corroborates the essential facts admitted to justify sufficiently an inference of their truth." Our superior court articulated what is required to be corroborated in *United States v. Cottrill*, 45 MJ 485, 489 (C.A.A.F. 1997); *United States v. Baldwin*, 54 M.J. 464, 465 (C.A.A.F. 2001). "The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted." *Cottrill*, 45 M.J. at 489 (internal citations omitted). The quantum of evidence necessary to raise that inference of truth has been described as "slight," *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987), and "very slight." *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988).

The appellant was assigned to the 7th Security Forces Squadron, Dyess AFB, Texas and worked in the armory. The appellant had the opportunity to steal the ammunition cans and the 20-round magazines. The appellant confessed to stealing a number of items of military property including the ammunition cans and the 20-round magazines. The appellant pled guilty and was found guilty of stealing a number of the items he confessed to stealing not including the ammunition cans and the 20-round magazines. The items were seized from his residence incident to a lawful search. The ammunition cans and the 20-round magazines are of the type generally used by the 7th Security Forces Squadron. Military members are not permitted to take the items home. This evidence is sufficient to justify "an inference of truth" as to the appellant's confession. *See* Mil. R. Evid. 304(g). This evidence of record, considered in the light most favorable to the prosecution and drawing every reasonable inference from the record in favor of the prosecution, is sufficient for a reasonable trier of fact to find beyond a reasonable doubt all essential elements of larceny of the ammunition cans and 20-round magazines. Further, we are ourselves convinced beyond a reasonable doubt that the appellant is guilty of the larcenies.

Legal and Factual Sufficiency of the Conviction for Larceny of Two Pepper Spray Cases and the Binoculars

The appellant confessed to stealing numerous items from the armory. The appellant consented to the search of his off-base residence. Five law enforcement personnel from both the AFOSI Detachment and the security forces squadron at Dyess AFB converged on the appellant's home and conducted or participated in the search for and seizure of stolen items. The appellant cooperated in the search by walking through the residence with law enforcement agents identifying items that he had stolen from the Air Force. As the appellant identified the items, they were set aside and later secured by Detective Gil. The binoculars and the pepper spray cases were secured by Detective Gil.

The former NCOIC of the armory testified that pepper spray cases were items stored in the armory. He was shown the two pepper spray cases that had been seized from the appellant's residence and noted that the markings on each case—the number "1"

on one case and the number "15" on the other case—were the type of markings used by the armory to account for the items. Another witness, the equipment custodian for the armory, also identified the markings on the pepper spray cases and further testified that the binoculars seized from the appellant's residence had markings—the number "3" and Roman Numeral "III"—that were the type of markings used by the armory to account for binoculars. The equipment custodian testified to the value of the items.

This evidence of record, considered in the light most favorable to the prosecution and drawing every reasonable inference from the record in favor of the prosecution, is sufficient for a reasonable trier of fact to find beyond a reasonable doubt all essential elements of larceny of the pepper spray cases and larceny of the binoculars. Further, we are ourselves convinced beyond a reasonable doubt that the appellant is guilty of the larcenies.

Admission of Hearsay Testimony that the Stolen Property was the Property of the United States Air Force

The appellant alleges the military judge erred to the substantial prejudice of the appellant by admitting, without objection from trial defense counsel, hearsay evidence during the testimony of detective Danny Gil. Detective Gil testified that retired Air Force Master Sergeant (MSgt) Cook told Detective Gil the items—ammunition cans, 20-round magazines, pepper spray cases, and binoculars—seized from the appellant's residence were property of the United States Air Force and were military property. MSgt Cook did not testify.

Plain error occurs when there is error, the error is plain or obvious, and the error results in material prejudice to a substantial right. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). Any error committed in admitting the hearsay of MSgt Cook contained in the testimony of Detective Gil did not materially prejudice appellant's substantial rights. As discussed above, there was ample evidence admitted at trial beyond that provided by the testimony of Detective Gil to prove that the property stolen was the property of the United States Air Force and military property. Thus we find no plain error in the admission of the hearsay testimony.

Instruction on the Use of Defense Mitigation Evidence

During pre-sentencing, trial defense counsel offered three character letters indicating, in part, that the appellant should be returned to duty. After the character letters had been admitted into evidence but before they were published to the members, trial counsel objected to the character letters because they contained "unauthorized sentence arguments." The military judge ruled that he would permit the letters to be published to the members but would give the members a limiting instruction as to how

they could use the information contained therein. The character letters were published to the members.

The first letter at issue was written by a Technical Sergeant who had known the appellant "since 2003" and who had supervised the appellant for the previous eight months. His character letter stated:

> I thoroughly understand a violation of this nature requires harsh punishment however, I also feel I would not be doing my job as a leader and a mentor given the opportunity to rehabilitate an Airman that is deserving of remaining in the best career field in the United States Air Force. I ask you offer your most generous consideration in the punishment you bestow on this matter.

The next letter at issue was written by a Staff Sergeant and stated:

> I have known and worked with SrA James Barrentine since April 2001. . . . He's a sharp troop and is very knowledgeable in the Security Forces career field, I would hate to see the U.S. Air Force lose someone like him.

The third letter at issue was written by a Master Sergeant and stated:

> Considering James's continuation of military service, I feel James's continuation in the Air Force along with his enormous growth potential would continue to be a tremendous asset to this organization or any other Air Force organization. Once again I believe James's [sic] can benefit the Air Force by continuing to serve and fulfilling his duties within our organization.

The Technical Sergeant who wrote the first letter referenced above was called as a witness by the defense during pre-sentencing proceedings and the following exchange occurred:

> Question by trial defense counsel: If you had to place a value on his help to you, how would you describe that?
> A. It was very invaluable to me. He worked very hard for me. If I was taking a team forward I would take Barrentine with me, I sure would. He is a hard worker and he has been invaluable to me.

After the close of pre-sentencing proceedings, the military judge gave the following limiting instruction:

> Mr. President, and panel members, just a quick instruction to you. In some of the character letters provided to you by the defense and also in the testimony from one of the NCOs and testified earlier this morning, Sergeant [D], but in their testimony and in their written letters of character that were given to you, there are statements in there that you may read it and may infer that there is a recommendation concerning retainability and retention of Airman Barrentine. I would ask that you not read those letters in that respect basically where it may make a recommendation as to whether Airman Barrentine should be retained or not, I am sorry, not retained or not but punitively separated discharge or retained. You should ignore that in that the only ones that can make that decision are you. No outside individuals can come in and say this is what you need to do and then therefore you need to follow that advice, that would be improper. So, for any inference that you may draw from that to that effect, simply ignore that and you are to make your decision on your own as a totally independent decision. Does that make sense to the members? An affirmative response.

Trial defense counsel did not object to this instruction.

We review this issue under a plain error analysis. Plain error occurs when there is error, the error is plain or obvious, and the error results in material prejudice to a substantial right. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *See Powell*, 49 M.J. 460. Our superior court, in *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005), ruled that "retention evidence" such as that introduced in this case is "expressly permitted to be presented by the defense" pursuant to Rule for Courts-Martial 1001(c).[1] However, a witness cannot proffer an opinion that the accused should not receive a punitive discharge as that opinion would invade the province of the court-martial to make that decision. The Court placed the responsibility on the military judge to give tailored instructions distinguishing between "a punitive discharge, which is for the members to decide, and the willingness of a servicemember to serve with an accused again, which may mitigate the range of punishments available at courts-martial." *Griggs*, 61 M.J. at 409-10.

The appellant complains that the military judge's instruction focused solely on what the evidence could not be used for—whether to impose a punitive discharge—and was silent on what the evidence could be used for—to mitigate the appellant's sentence. We need not determine whether the instruction was erroneous or, if erroneous, whether the error was plain or obvious as we have determined that the appellant did not suffer material prejudice to a substantial right.

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[1] Unlike *Griggs*, the court members in this case were provided the character statements containing the recommendations for retention and did hear similar testimony from the witness.

The appellant was a 26-year-old married airman with a one-month old son. He had just over six years of service at the time of his court-martial. During this period of service he compiled an Article 15[2] (for dereliction of duty by operating a motorcycle without proper protective safety gear and failure to obey a lawful order from his superior commissioned officer not to operate the motorcycle until he attended mandatory safety classes and safety briefing), two Letters of Counseling, four Letters of Reprimand, and four EPRs, two with overall ratings of "4" and two with overall ratings of "3"—one was a referral EPR covering the time frame of and directly related to the Article 15 he received. One Letter of Counseling and the four Letters of Reprimand were received after the appellant was first interviewed by OSI agents regarding the crimes for which he was convicted at this court-martial.

The overwhelming focus of the appellant's sentencing case was placed on avoiding confinement. The appellant's oral unsworn statement before the members primarily dealt with the impact confinement would have on him, his wife, and newborn son; particularly as to the devastation he would feel if he could not be with his family during the early months of his infant son's life. The appellant's wife testified about the appellant's relationship with his newborn son, the fact that the appellant was the sole support for the family, and the pain all would feel if the appellant was confined and missed the early months of his son's life. Trial defense counsel concentrated his sentencing argument on the impact confinement would have on the appellant and his family. Indeed, trial defense counsel did not even mention a punitive discharge in his sentencing argument.

The appellant's efforts and those of his counsel were extraordinarily successful. Facing the possibility of a punitive discharge, confinement for 15 years, reduction to E-1, and forfeitures for the crimes for which he was convicted, and having compiled a questionable record of service, the appellant was sentenced only to a bad-conduct discharge, reduction to E-1, forfeitures, and hard labor without confinement for 30 days (the convening authority disapproved the hard labor without confinement). Any error associated with the military judge's limiting instruction did not materially prejudice the appellant's substantive rights.

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;

[2] Article 15, UCMJ, 10 USC § 815.

United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly the approved findings and sentence are

AFFIRMED

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court