UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RUDY A. BERTOLLI
United States Air Force

ACM S31875

15 May 2012

Sentence adjudged 16 September 2010 by SPCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of $100.00 pay per month for 1 month, and reduction to E-3.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A special court-martial composed of military judge alone convicted the appellant contrary to his pleas of wrongful distribution of marijuana and obstruction of justice, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The court sentenced the appellant to a bad-conduct discharge, confinement for 30 days, forfeiture of $100.00 pay per month for one month, and reduction to the grade of E-3. The convening authority approved the sentence adjudged. The appellant assigns two errors regarding the Article 134, UCMJ, charge: (1) the specification fails to state an offense by not alleging either terminal element, and (2) the evidence is legally and factually insufficient to support conviction.

Article 134, UCMJ

The Specification of Charge II alleges that the appellant wrongfully endeavored to impede an investigation by making certain statements to a potential witness against him, in violation of Article 134, UCMJ. The elements of that offense, entitled Obstructing Justice, are:

> (1) That the accused wrongfully did a certain act;
> (2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;
> (3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States, Part IV, ¶ 96.b (2008 ed.). The fourth element is commonly referred to as the terminal element. The specification here does not allege the terminal element either expressly or by necessary implication.

In *United States v. Hunt*, NMCCA 201100398, slip op. at 1-2 (N.M. Ct. Crim. App. 30 April 2012), our sister court addressed the issue of an Article 134, UCMJ, specification which failed to expressly allege the terminal element in the context of a litigated trial. Finding that the specification at issue did not necessarily imply the terminal element, the court tested for prejudice. *Id*. at 3 (citing *United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012)). In finding no prejudice to the appellant, the court noted:

> There was no request for a bill of particulars, no argument as to whether the elements were supported, no surprise stated or objection raised when the elements were provided to the members in instructions before counsel arguments, no confusion or indication that the defense was misled by the pleadings, and no claim, prior to the pleadings before this court, that the specification was in any way defective.

Id. Here, the record compels a similar conclusion.

The appellant litigated his case before a military judge who is presumed to know the law and apply it correctly. *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (citing *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000)). The appellant made no request for a bill of particulars, made no motion to dismiss for failure to state an offense, made no objection during trial counsel's argument on the terminal element, and made no claim prior to pleadings before this Court that the specification was in any way defective. Defense counsel argued briefly that the appellant's statements alleged in the

specification were not wrongful but did not dispute trial counsel's argument that the statements, if wrongful, were prejudicial to good order and discipline and service discrediting. Nor did defense counsel respond by either objection or argument to questions posed by the military judge to trial counsel concerning proof of the terminal element—a colloquy that conclusively shows that the parties properly considered the terminal element an essential element of the offense. In short, the record contains nothing to show that the appellant was confused or misled by the pleadings. Under these circumstances, we find no prejudice to the appellant by the failure of the specification to allege the terminal element.

Sufficiency of the Evidence

The appellant argues that the evidence is legally and factually insufficient to show that the conduct alleged as obstructing justice was either service discrediting or prejudicial to good order and discipline. 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." *Turner*, 25 M.J. at 325, *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). 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.

The proof shows that the appellant asked another military member to whom he had distributed marijuana to destroy and/or hide evidence of their communications that would implicate him in the transaction. Senior Airman EC testified that the appellant told her that the Air Force Office of Special Investigations had questioned him and asked if she had been questioned. When she replied that she had not yet been contacted, he told her to deny contact with him, to erase all text messages from her phone, to hide her phone, and to not say anything.

Contrary to the appellant's argument, the Government is not required to prove that someone witnessed the conduct to show that it was service discrediting; rather, the question is whether the activity "would have tended to bring discredit upon the service had the public known of it." *Phillips*, 70 M.J. at 166. In this judge alone trial, the military judge is presumed to know the definitions of the elements and apply those definitions correctly. *Id.* Indeed, the military judge asked trial counsel during argument to describe the proof that supported the terminal element, and the trial counsel articulated how the appellant's conduct satisfied both Clause 1 and 2 of Article 134, UCMJ. Viewing the evidence in the light most favorable to the Government, we find the evidence legally sufficient for the military judge, as trier of fact, to find the appellant guilty beyond a reasonable doubt. Having weighed the evidence ourselves and making allowances for not having observed the witnesses, we are convinced that the evidence is 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, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court