**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**First Lieutenant MICHAEL O. CLARK**
**United States Air Force**

**ACM 37494**

**15 August 2011**

Sentence adjudged 9 June 2009 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Dismissal and confinement for 5 months.

Appellate Counsel for the Appellant: Major Reggie D. Yager (argued); Colonel Eric N. Eklund (on brief); Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Anthony D. Ortiz; and Captain Robert D. Stuart.

Appellate Counsel for the United States: Captain Joseph Kubler (argued); Colonel Don M. Christensen (on brief); Lieutenant Colonel Jeremy S. Weber; Major Scott G. Jansen; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT



GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant contrary to his pleas of two specifications of larceny in violation of Article 121, UCMJ, 10 U.S.C. § 921, and acquitted him of an unrelated specification of making a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907. The court-martial sentenced him to a dismissal and confinement for 5 months, and the convening authority

approved the sentence adjudged. The appellant challenges the admission of secondary evidence in the form of testimony concerning the contents of a destroyed video surveillance recording. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

*Background*

Home Depot store detectives caught the appellant leaving a Home Depot in Egg Harbor Township, New Jersey, with unpaid merchandise on 7 March 2008. They observed the appellant put four Craftsman windows, some faucets, and a case of caulk on a cart. Leaving the cart with the windows behind in the store, the appellant paid for the caulk and exited to the parking lot. He drove his van to the contractor exit, parked, and re-entered the store where he retrieved the cart with the windows and pushed it through the contractor exit without paying. The contractor exit is intended to facilitate pickup of items that have been prepaid. When confronted by store detectives, the appellant stated that he "forgot" to pay. The appellant further stated that he was "fixing up a house."

Store Detective KH checked the store's transaction records using the appellant's credit card number and discovered that he had charged items at the same store three days earlier on 4 March 2008. He reviewed the store's surveillance video for that date, around the time shown on the transaction record, and identified the appellant pushing a cart loaded with two large cabinets toward the contractor exit of the store. He identified the appellant in the video based on the appellant's age, build, hair color, and clothing, to include the same dark blue jacket with beige collar that the appellant wore when KH stopped him three days later. KH identified the two cabinets by comparing their appearance in the video with the store's inventory. The store's transaction records for the day show some credit card transactions by the appellant but no payments for any cabinets.

The appellant contacted his unit the day following his arrest to request an extension of his leave in New Jersey. He explained that he had been arrested for shoplifting at a Home Depot where he went to purchase items for a rental property he owned in New Jersey. The appellant had made several trips to New Jersey on weekends to work on a duplex that he was remodeling. During the phone call to his unit, the appellant expressed concern about his financial situation because the property had been empty for the past seven months. In April 2009, Detective AG of the Pleasantville, New Jersey, police department searched a two-story residential duplex owned by the appellant. He found what appeared to be relatively new cabinets similar to those identified as stolen by the appellant.[1]

[1] The military judge excluded the witness's opinion that the cabinets were made by the same manufacturer but otherwise admitted his lay opinion testimony as to physical similarities between the cabinets found in the appellant's rental property and those identified as taken by him from Home Depot on 4 March 2008.

*Secondary Evidence of Destroyed Recordings*

KH testified that he was unable to preserve the video surveillance recordings concerning the appellant because the digital video recorder system server that permitted copying digital video to hard media was not working, and that the digital recordings are deleted automatically after 30 days. He testified that he requested repair of the system, but the repairs were not made within the 30-day period that would have enabled him to copy the digital recordings before automatic deletion. He was, however, able to print a still photograph from the 4 March 2008 recording which shows an individual that he identified as the appellant pushing a cart with two large boxes.

The appellant moved to exclude testimony identifying the appellant in the video surveillance recordings that had been destroyed. In his written motion submitted prior to trial, the appellant argued that opinion testimony identifying the appellant in the video recordings was not relevant, was improper opinion, and was unfairly prejudicial because the trier of fact alone should determine identity from still photographs derived from the recordings. Trial defense counsel orally expanded the bases of the motion to include the loss or destruction of the video recordings, citing Military Rule of Evidence (M.R.E.) 1004 that prohibits secondary evidence of a recording's contents if the recording has been lost or destroyed in bad faith. The military judge found no bad faith on the part of Home Depot employees in the loss of the video surveillance recordings and permitted secondary evidence in the form of testimony and still photographs as relevant, admissible, but non-conclusive evidence of the recordings' contents under M.R.E. 1004.

We review a military judge's ruling on the admission of evidence for an abuse of discretion. *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001) (citations omitted). An abuse of discretion occurs where the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *Id*. In this case, we find neither.

Secondary evidence of the contents of a recording is admissible when the original has been destroyed unless the destruction was the result of bad faith. M.R.E. 1004. The testimony of the Home Depot store detectives confirms the military judge's finding that the destruction of the video recordings was due to mechanical malfunction rather than bad faith: the recording capability was not functioning and, despite requests for repair, it was not repaired within the 30-day window that would have permitted making a hard copy of the digital surveillance video pertaining to the appellant. M.R.E. 1004 makes no distinction in the types of secondary evidence which might be admissible to prove the contents of a lost or destroyed recording, and the military judge did not abuse her discretion in permitting testimony and still photographs as secondary evidence of the recordings' contents.

In *Harris*, a case involving a similar use of video surveillance recordings to investigate past activities of a suspect, the Court upheld admission of still photographs derived from video surveillance recordings that had been destroyed. In that case, a bank fraud examiner used date and time information on forged checks to locate relevant portions of surveillance recordings which showed the suspect using a drive-up teller window. The relevant recordings were destroyed because the recording device automatically recorded over them after six months, but the bank fraud investigator had printed out freeze frame photographs of the suspect at the teller window.

Upholding admission of the photographs derived from the destroyed video recording, the court found that the video recording process from which the photographs were derived was properly authenticated under the silent witness theory. This was based on testimony of the investigator who described the process of creating the recording without the need to call a human witness to the events shown on the recording. *Harris*, 55 M.J. at 438-39. As in *Harris*, the record amply supports a reasonable foundation for admission of the photograph: the detective here described in detail the video recording process, the reliability of that process, and how he made still photographs from that process. This foundation likewise supports the military judge's admission of the detective's testimony as relevant and admissible secondary evidence of the contents of the destroyed video recording under M.R.E. 1004. *See United States v. Gill*, 40 M.J. 835 (A.F.C.M.R. 1994) (testimony concerning contents of destroyed letter admissible under M.R.E. 1004 where recipient testified that letter was not destroyed in bad faith and reliably recalled letter's contents).

The appellant now argues that the military judge erred by not addressing the admissibility of secondary evidence under the pretrial discovery provisions in Rule for Courts-Martial (R.C.M.) 703 which require appropriate relief when evidence of "central importance" is lost or destroyed and there is no "adequate substitute." R.C.M. 703(f)(2). Because R.C.M. 703 does not require a showing of bad faith to trigger appropriate relief such as exclusion of secondary evidence, the appellant argues that it conflicts with and imposes a stricter requirement for admissibility than M.R.E. 1004 which permits secondary evidence unless bad faith is shown. He argues that application of this stricter requirement should have resulted in the exclusion of secondary evidence of the 4 March 2008 video recording because (1) the recording is of central importance, (2) testimony is not an adequate substitute, and (3) it is the only evidence of the theft on 4 March 2008. This trail of assumptions, however, does not lead to error.

Because R.C.M. 703 was not even mentioned at trial as a basis for exclusion of evidence, the military judge made no findings expressly concerning R.C.M. 703. We reject the appellant's claim that the issue was "squarely before the military judge" and will evaluate the appellant's newly minted argument under the plain error standard in which the appellant must show that plain or obvious error occurred that materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460

(C.A.A.F. 1998) Although the record contains no express findings concerning an R.C.M. 703(f)(2) objection since none was made at trial, the evidence is more than sufficient to evaluate the claimed error. Here, we find no error, plain or otherwise.

First, the record does not show that the missing video was of such central importance as to require the drastic relief of dismissal requested by the appellant. Other evidence of the 4 March 2008 theft was presented: (1) credit card transaction records put the appellant in the store on the day of theft, (2) a still photograph taken from the video and authenticated by the store detective shows, according to his testimony, the appellant pushing a cart loaded with cabinets, (3) comparison of the cabinets in the photo with store inventory records shows the type of cabinets on the cart, (4) store transaction records show no purchases of such cabinets, (5) a search of rental property owned by the appellant found newly installed cabinets similar to those on the cart, and (6) the appellant admitted that he was in the process of refurbishing some rental property and was having financial difficulties. Absence of the video does not negate this other evidence but does, as the military judge expressly stated, go to its weight. She had no sua sponte duty to either exclude this evidence under R.C.M. 703(f)(2) or dismiss the specification.

Second, assuming arguendo that the video surveillance recording is of such central importance as required to trigger relief under R.C.M. 703(f)(2), the military judge's finding that the testimony concerning the contents of the lost video—as well as the still photograph taken from the video—was both relevant and admissible necessarily shows that she found such testimony an adequate substitute. Applying normal principles of statutory construction to the alleged conflict between R.C.M. 703(f)(2) and M.R.E. 1004, we will construe these provisions to produce "the greatest harmony and least inconsistency." *United States v. Johnson*, 3 M.J. 361, 362 (C.M.A. 1977) A determination of the adequacy of substitute evidence under R.C.M. 703(f)(2) is a matter within the discretion of the military judge just as a determination of relevance and admissibility of secondary evidence is under M.R.E. 1004, and we do not find the two provisions to conflict in this case.

Here, the military judge, in effect, made a determination of adequacy by ruling on the relevance and admissibility of the secondary evidence. She could have easily excluded the secondary evidence had she found its probative value substantially outweighed by the danger of unfair prejudice, confusion, or misleading, but she did not. Again, she emphasized that absence of the video goes to the weight of the secondary evidence but does not render it inadmissible. In this, the military judge properly delineated her role of deciding whether the condition precedent for admissibility of the secondary evidence had been satisfied, then leaving for the trier of fact to determine whether the secondary evidence accurately described the contents. M.R.E. 1008.

We find unpersuasive the appellant's reliance on a New York lower court decision that excluded testimony of a laundromat owner concerning an assault that he observed on

a video surveillance recording which had since been destroyed. *People v. Jimenez*, 796 N.Y.S. 2d. 232 (N.Y. Sup. Ct. 2005). While acknowledging the general admissibility of secondary evidence of lost originals, the court concluded that the laundromat owner's testimony "would be no more than a summary of his interpretation of what he had seen on the tape and not a reliable and accurate portrayal of the original." *Id*. at 234. Unlike the dynamics of an assault recorded on video which the New York court found could not be adequately conveyed by a witness' summary description, the video here simply showed the appellant pushing a cart through a store. Based on his personal observations of the appellant on the same day that he viewed the video as well as his familiarity with Home Depot products, the store detective testified that he identified the appellant in the video and the merchandise on the cart.

We find no plain error in the military judge's decision to admit secondary evidence of the contents of the video surveillance recording in light of R.C.M. 703(f)(2) nor do we find a conflict between that rule and M.R.E. 1004 as applied to the facts of this case. The assumptions upon which the appellant relies to argue error are neither plain nor substantiated by the record. To find for the appellant, we would have to conclude that the military judge had a sua sponte duty to: (1) apply a rule of pretrial access to evidence that neither party even mentioned at trial, (2) use that rule to override the evidentiary rule which was argued at trial and which directly concerns admissibility of secondary evidence in the absence of originals, (3) find that the missing video was of central importance to the case, (4) find that no adequate substitute for the missing evidence existed, and (5) conclude that the only appropriate relief was dismissal of the affected specification. The record does not support following such a faint trail of assumptions.

In yet another shift of focus and theory, a few days before oral argument, the appellant submitted a motion to cite supplemental authority which emphasizes the personal knowledge requirement of M.R.E. 602 and argued that the military judge had insufficient evidence to find that the store detective had personal knowledge of who was in the lost video and the photograph derived from it. As with his previous theories, we find the appellant's argument unpersuasive.

A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. M.R.E. 602. Here, the record shows that the store detectives had sufficient personal knowledge to testify concerning the appellant's identity in the video and photograph. KH testified that he personally interacted with the appellant when he stopped him for shoplifting on 7 March 2008, describing in detail his appearance. That same day he reviewed the 4 March 2008 video surveillance recording in which he identified the appellant based on his personal knowledge of the appellant's dress and appearance:

> When I reviewed the video of March 4th from register 15, I observed [the appellant] wearing the same jacket, the dark blue jacket with the beige. The

> build was the same, slender, same type of hair. So, that's how I identified him from the March 7th to the March 4th incident.

He added that in his experience as a store detective he had reviewed video surveillance recordings to identify a suspect "[a]bout 150, 200 times." Store Detective EB also identified the appellant in the 4 March 2008 video based on comparison with his personal appearance as observed by EB on 7 March 2008. He further testified that he had two other previous personal interactions with the appellant at another Home Depot store which lasted about one-half hour that helped inform his personal knowledge of the appellant:

> Q: During that 30-minute timeframe, did you have a good opportunity to get a description and kind of make a mental note of his appearance and stature?
>
> A: Absolutely. I talked to him and everything.

The evidence plainly shows sufficient personal knowledge for the witnesses to testify concerning the identity of the individual in the subject video and photograph, and, as the military judge correctly stated, questions about the quality of the video, the photograph, and other matters go to weight rather than admissibility.

*Appellate Processing*

We note that the overall delay of 24 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The appellant's term of confinement ended within a few months of action, the post-trial record shows no evidence that the delay has had any negative impact on the appellant, and that he concurred in his counsel's request for extensions of time beyond one year. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

*Conclusion*

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

AFFIRMED.

OFFICIAL


STEVEN LUCAS
Clerk of the Court