UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CHRISTOPHER T. ESTELLE
United States Air Force

ACM 34906

29 September 2003

Sentence adjudged 22 September 2001 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

VAN ORSDOL, STUCKY, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

STUCKY, Judge:

The appellant was convicted by a general court-martial consisting of a military judge sitting alone, in accordance with his pleas, of one specification of failure to go, one specification of absence without leave, one specification of attempted larceny of government property, and one specification of knowingly receiving stolen property, in violation of Articles 86, 121, 80, and 134, UCMJ, 10 U.S.C. §§ 886, 921, 880, 934, respectively. The appellant was charged with larceny of two digital cameras that were military property of a value of about $1,000.00. He pled guilty to stealing one of the cameras, but was found guilty of stealing both of the cameras, in violation of Article 121, UCMJ. Further, the appellant was charged with stealing a fuel key that was military

property of some value, in violation of Article 121, UCMJ. He pled guilty to the lesser included offense of wrongful appropriation of the fuel key, but was found guilty as charged of the larceny. Article 121, UCMJ. The appellant was acquitted of three other charged offenses. The appellant was sentenced to a bad-conduct discharge, confinement for 30 months, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged. On appeal, the appellant alleges that the evidence is legally and factually insufficient to convict him of stealing two Air Force digital cameras, in violation of Article 121, UCMJ, as alleged in Specification 2 of Charge II.

I. Background

The appellant's general court-martial was the denouement of a short but exceedingly checkered Air Force career. He entered the Air Force in March 1999 and, by the middle of 2001, he managed to amass a referral enlisted performance report and a nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, (Article 15) for underage drinking and for operating a vehicle while he was under the influence of alcohol. His punishment included a suspended reduction to E-2, forfeitures of pay, restriction to base, and extra duties. The appellant's commander imposed a second Article 15 for his failure to go to his appointed place of duty and vacated the suspended reduction to E-2. The appellant received two letters of reprimand for failure to go to his appointed place of duty and failure to obey lawful orders, respectively, before he was tried and convicted by general court-martial of wrongfully using methamphetamine on divers occasions. At his first court-martial, he was sentenced to a bad-conduct discharge, confinement for 4 months, and reduction to E-1. The misconduct on which the present charges are based occurred after that court-martial.

The appellant was assigned to the 99th Aerospace Medical Squadron at Nellis Air Force Base (AFB), Nevada. Airman First Class Benjamin McFarlane testified that the Facility Management Office had two AGFA digital cameras that were used to make identification cards for hospital personnel. One camera had a "99th Medical Group" label and a number to indicate that it was Air Force property. The other camera did not yet have a label because it was a recent purchase. The cameras were stored in a room that was secured by a cipher lock, the combination to which was officially known to approximately seven people. In July 2001, the appellant was temporarily assigned to work in the Facility Management Office. He was not authorized to enter the locked room and had not been given official access to the cipher combination.

The stipulation of fact stated that on 12 July 2001, two employees were waxing the floor outside the room where the cameras were stored. They saw the appellant unlock the door, enter the room, and remain inside for approximately one minute. Later that same day, the Las Vegas police stopped the appellant while he was driving a vehicle belonging to another airman. The police impounded the vehicle because the appellant could not produce a valid driver's license. The police took an inventory of the items

found in the vehicle, which included the camera marked with the Air Force property label. When the airman claimed her vehicle, she indicated that several items on the inventory did not belong to her. One such item was the digital camera with the Air Force property label. The other camera has not been recovered. Both cameras were reported missing on 13 July 2001.

At trial, the appellant told the court that he stole "at least one AGFA Digital Camera", on or about 12 July 2001. He agreed with the stipulation of fact that the stolen camera had an Air Force property label, that the camera had a value of about $500.00, and that he intended to wrongfully and permanently deprive the Air Force of its use. However, the appellant denied that he had stolen both cameras. Technical Sergeant (TSgt) Beaumont Hopson from security forces, testified that he investigated the disappearance of the cameras. TSgt Hopson testified that, when he spoke to the appellant in the city detention center, the appellant was knowledgeable about the mechanics of pawning items. TSgt Hopson further testified that later, as he was escorting the appellant to the latrine at the Nellis AFB confinement facility, the appellant asked if he could speak to him "off the record." TSgt Hopson said that he could. He then testified that the appellant asked "if it would be easier on him if he gave information or helped the Air Force find something that it was looking for." TSgt Hopson replied that, he could not make any deals, but that it would be better for the appellant if he gave any information that he had. The appellant now asserts there was no evidence that: (1) Both cameras were taken at the same time; and (2) He was referring to the unlabeled camera during his conversation with TSgt Hopson.

II. Discussion

We may affirm only those findings of guilty that we find are correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all of the elements of the offense, beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Reed,* 54 M.J. 37, 41 (2000). 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, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

It is quite true that there is no direct evidence that the appellant stole the second camera, but this does not end the inquiry. Larceny, like virtually every crime other than treason, may be proven by circumstantial as well as direct evidence. *Reed*, 54 M.J. at 37; *United States v. Pasha,* 24 M.J. 87 (C.M.A. 1987). Equally relevant is the long established principle that the unexplained possession of recently stolen property supports an inference that the possessor is the thief. *United States v. Johnson*, 13 C.M.R. 3

(C.M.A. 1953). Moreover, it has been held that where an accused is in possession of *part* of recently stolen property, it may be inferred that the possessor has, or had, the remainder of the property. *United States v. Sparks*, 44 C.M.R. 188 (C.M.A. 1971); *United States v. Barnard*, 49 C.M.R. 547 (C.M.A. 1975); *United States v. Irino*, 1 M.J. 513 (A.F.C.M.R. 1975) (emphasis added).

Here, the appellant was found in possession of one of the cameras on the same day it was discovered missing, and he stipulated to taking it at trial. While there was testimony that security in the room was rather lax, there was also testimony that the cameras were used on a daily basis. Thus, there is circumstantial evidence that both cameras disappeared on 12 July 2001, the date on which the appellant stipulated to stealing one of them.

A permissive inference does not shift the burden of proof to the appellant. *Pasha*, 24 M.J. at 90*; Johnson*, 13 C.M.R. at 9. When we apply the permissive inference to the timing of the cameras' disappearance and the fact that one of them was found in the appellant's possession shortly thereafter, there is ample support for the military judge's conclusion. We find the evidence to be both legally and factually sufficient to support the finding that the appellant stole both cameras—the one found in his possession and the one that is still missing.

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

AFFIRMED.

Judge ORR, V.A., participated in this decision prior to her retirement.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator