UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic WINSTON A. GORDON, JR.
United States Air Force

ACM S32008

26 June 2013

Sentence adjudged 08 November 2011 by SPCM convened at Randolph Air Force Base, Texas. Military Judge: Michael Lewis (sitting alone).

Approved Sentence: Bad-conduct discharge and confinement for 55 days.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz.

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

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a special court-martial composed of a military judge, the appellant pled guilty to larceny and obtaining services by false pretenses, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. The appellant was sentenced to a bad-conduct discharge and confinement for 55 days. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts his sentence should be set aside because the military judge improperly admitted certain victim impact testimony as aggravation evidence. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Aggravation Evidence

Several months after joining the Air Force, the twenty-year-old appellant took his roommate's debit card and used it on commercial websites to order clothing, sneakers, slippers, and a gift card for himself. These items, valued at approximately $533, were all later recovered by law enforcement. He also used it to pay his $150 cellular phone bill on-line. The appellant was moved out of that airman's room after the airman reported the incidents to his chain of command and law enforcement. A few months later, he took his new roommate's debit card and used it to order pizza on two occasions, totaling approximately $36.

The appellant pled guilty to larceny for each use of the debit card to obtain goods. He also pled guilty to obtaining the cellular telephone services through false pretenses. The defense objected to the Government's plan to call the two airmen to testify in sentencing about the effect the theft of their debit cards had on them, contending the two airmen did not constitute "victims" as the specifications state the appellant stole from the various merchants. The Government responded that Rule for Courts-Martial (R.C.M.) 1001(b)(4)'s use of the word "victim" is not limited to individuals who appear in the charge sheet and this testimony constitutes "aggravating circumstances directly relating to or resulting from" the specifications.

Prior to ruling, the military judge elected to hear the testimony of both witnesses. One airman described becoming distressed when he saw the unauthorized purchases on his debit card, in part because he was in the midst of testing for school and was trying to save money. He testified that his test grades dropped and he felt betrayed by the appellant's actions. The bank reimbursed him for the unauthorized withdrawals. The second airman testified he felt angry and betrayed when he discovered what the appellant had done, was unable to focus on his studies due to stress, and the incident lowered his expectations about the trustworthiness he can expect from fellow airmen. He testified that he had not yet filed a fraud report to receive reimbursement.

The military judge ruled he would disregard the first airman's testimony that he had missed three days of training, but would consider the rest of the testimony, citing *United States v. Pearson*, 17 M.J. 149 (C.M.A. 1984), which allows him to take a wide view of what it means to be a "victim" for these purposes. He also found the airmen's testimony to be directly related to or resulting from the appellant's crimes, and, citing Mil. R. of Evid. 403, the probative value of their testimony was not substantially outweighed by the danger of unfair prejudice.

We review a military judge's decision to admit sentencing evidence, including aggravation evidence under R.C.M. 1001(b)(4), for an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009) (citation omitted). Improper argument is a question of law that we review de novo. *United States v. Marsh*, 70 M.J. 101, 104

(C.A.A.F. 2011) (citation omitted). After findings of guilty have been entered, trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. R.C.M. 1001(b)(4). Matters in aggravation must be used for an appropriate purpose, namely to inform the sentencing authority's judgment regarding the charged offense and putting that offense in context, including the facts and circumstances surrounding the offense. *United States v. Mullens*, 29 M.J. 398, 400-01 (C.M.A. 1990); *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982); *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001); *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Aggravation evidence is also subject to the balancing test of Mil. R. Evid. 403.

We find the military judge did not abuse his discretion in admitting this evidence from the two airmen. In his guilty plea inquiry to the false pretenses specification, the appellant admitted that "stealing a debit card from another Airman in the dorm has a serious negative impact on the good order and discipline of the squadron" and that his conduct likely caused that airman to not trust his new roommate. We find those statements to be correct, and we find them equally applicable to the airman whose debit card was used solely to commit larcenies. Furthermore, this information placed the offenses in context for the military judge. Lastly, we presume the military judge knows the law in this area and followed it when he sentenced the appellant, as there is no clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)).

Conclusion

The findings of guilty and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ. 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court