UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DETARIO S. MELTON
United States Air Force

ACM 37558

31 January 2011

Sentence adjudged 22 March 2009 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Jennifer L. Cline (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, Major Bryan A. Bonner, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Major Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

The appellant was arraigned before a general court-martial composed of a military judge sitting alone on one charge and its specification of wrongful use of marijuana, and one charge with two specifications of robbery in violation of Articles 112a and 122, UCMJ, 10 U.S.C. §§ 912a, 922. The military judge accepted his plea of guilty to the wrongful use of marijuana and convicted him contrary to his pleas of the two robbery

offenses by exceptions and substitutions.[1] She sentenced the appellant to a bad-conduct discharge, confinement for one year and eight months, total forfeitures, and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge, total forfeitures and reduction to E-1, but reduced confinement by two months to compensate for delay in post-trial processing. The appellant assigns three errors: (1) the sufficiency of the evidence to support conviction of robbery, (2) the admission of certain uncharged misconduct to show motive, and (3) the delay in post-trial processing.

Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), 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, 324 (C.M.A. 1987)). In 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 in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the [appellant's] guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). With these standards in mind we turn to the evidence in this case.

Shortly after midnight on 19 October 2008, Senior Airman (SrA) SR and her German friend, Mr. DR, were robbed as they walked to a parking lot in Landstuhl, Germany. A black man wearing a black bandana, a black watch cap, and black bulky clothing approached them with what they believed to be a gun. Speaking in English with a southern accent, the man demanded that SrA SR give him her purse and that Mr. DR give him his money. SrA SR tossed her purse to the man, but Mr. DR replied that he did not understand. The robber repeated his demand for money and eventually Mr. DR gave him some money from his pocket. SrA SR noticed another man across the street about 15 feet away wearing similar clothing, and she saw a car at the end of the street with the lights on. The two men ran to the car and drove away. SrA SR and Mr. DR noted most

[1] The military judge excepted out the aggravating language of robbery with a firearm in both specifications as well as certain items of property listed in Specification 1.

of the numbers and letters on the license plate of the car and provided German police with this information as well as a description of both the vehicle and the robber.

Using the information provided by the victims, German police quickly identified the car as belonging to Hertz Rental Car and discovered that on the night of the robbery it was rented to the appellant. The appellant was apprehended on the evening of 19 October 2008 as he entered Spangdahlem Air Base in the rental vehicle in the company of a civilian friend, DL. Inside the vehicle police found a black jacket, black watch cap, black bandana, and a pellet gun magazine. Police found SrA SR's stolen purse and other items belonging to her at a residence identified by the appellant as where he was on the night of the robbery, and her wallet was found in a trash bin a short distance away from this address.

The appellant told police that at the time of the robbery he was at a party at the residence of a friend, Ms. CM, and told them that Ms. CM did not like talking to the authorities. The appellant acknowledged renting the car identified as the getaway vehicle, but denied any involvement in the robbery and claimed that he was the only person at Ms. CM's party who could drive the car because it had a manual transmission. The appellant did not provide full names or contact information for any of the eight to ten people at the party other than Ms. CM and Mr. DL, the person who was with the appellant when he was apprehended. The police ultimately found Ms. CM, but she provided no information relevant to the investigation. More damaging to the appellant's case than his failure to provide specific information on potential alibi witnesses was his failure to identify for investigators another individual at the party: his good friend Mr. JG.

Mr. JG testified during a deposition played at trial that he, Mr. DL, and the appellant were good friends who spent a lot of time together. He stated that the three of them were together at the residence of Ms. CM on the night of the robbery until about 2300 hours when they left to go to a club but did not have any money. According to Mr. JG, the appellant brought up the idea of robbing someone. They parked near a bank and a pub in Landstuhl. The appellant wore black clothes, covered the lower part of his face with a cloth, and carried an Airsoft pellet gun. When a man and woman approached the car, the appellant and Mr. DL got out. The appellant walked up to the couple while Mr. DL stood across the street. Soon thereafter both returned to the car, and the appellant had a purse with him. Mr. JG admitted that he had previously made statements inconsistent with his testimony at the deposition, but explained that Mr. DL had asked him to lie about the robbery after Mr. DL was arrested by German police.

The appellant testified at trial that he did not commit the robbery. To explain why his rental car was at the scene of the robbery, he testified that he loaned the car to Mr. JG, Mr. DL, and two other people at the party – the same car that the appellant earlier told investigators only he could drive. The appellant admitted lying to investigators when he

told them that no one else drove his rental car on the night of the robbery but said that he lied to investigators because he thought that his friend Mr. DL "might have had something to do with it."

Viewed in the light most favorable for the prosecution, the evidence is clearly legally sufficient to support the findings of guilt. The victims' description of both the robber and the getaway car are entirely consistent with the appellant being the perpetrator and are corroborative of the testimony of Mr. JG who identified the appellant as the assailant. Drawing every reasonable inference from the evidence of record in favor of the prosecution, we find the evidence legally sufficient to support the findings of guilt.

Turning next to factual sufficiency, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. Notwithstanding the prior inconsistent statements of Mr. JG, his positive identification of the appellant as the perpetrator is strongly corroborated by the other evidence in the case to include the descriptions provided by the victims, the appellant's possession of the car identified as the getaway car, and the appellant's own deceptive statements to investigators concerning his involvement in the crime. Having viewed the deposed testimony of Mr. JG and evaluated that testimony in light of the cautions on accomplice testimony, we find no reason to discount his testimony. Taken as a whole, the direct and circumstantial evidence convinces us beyond a reasonable doubt of the appellant's guilt.

Uncharged Misconduct

The prosecution offered evidence of the appellant's purchase and use of marijuana between June and October 2008, coupled with evidence of other financial difficulties, to show a financial motive for committing the charged robbery. In detailed findings of fact and conclusions of law the military judge specifically found that the evidence was admissible for that limited purpose under Military Rule of Evidence (M.R.E.) 404(b). The appellant argues that military judge abused her discretion by admitting this evidence. We disagree.

A military judge's decision on the admissibility of evidence under M.R.E. 404(b) is reviewed for an abuse of discretion. *United States v. Acton*, 38 M.J. 330, 332 (C.M.A. 1993). This involves more than a difference of opinion: the challenged decision must be arbitrary, fanciful, clearly erroneous, or clearly unreasonable. *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995). A military judge abuses her discretion when the findings of fact upon which she bases her ruling are not supported by the record, she applies incorrect legal principles, or her application of the correct legal principles to the facts is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

We first note that the military judge applied the correct legal standard in evaluating the admissibility of this uncharged misconduct. Admissibility of uncharged misconduct is tested under at least three standards:

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value substantially . . . outweighed by the danger of unfair prejudice"?

United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted).

Applying these factors to the evidence offered at trial, the military judge first found that the evidence reasonably supports a finding that the appellant committed the uncharged misconduct. Citing the testimony of Mr. JG along with the other evidence in the case, the military judge determined that the evidence sufficiently showed the appellant had a marijuana habit that created financial difficulties. The record supports this finding.

Next, the military judge determined that this evidence was relevant to establish motive for the charged robberies. Evidence of financial difficulty is generally probative of a motive to commit a monetary crime. *United States v. Smith*, 52 M.J. 337, 343 (C.A.A.F. 2000) (evidence of financial need is probative of motive to commit larceny). The military judge noted that evidence of drug use does not by itself equate to financial need, but evidence of a significant drug habit coupled with an inability to pay for it can show financial difficulty that becomes relevant to motive to commit a monetary crime. Making such drug use and financial difficulty particularly relevant in this case is evidence of the appellant's desire to purchase marijuana on the night of the robbery and his lack of funds. The evidence supports the military judge's conclusion that the uncharged misconduct was relevant to show motive for the charged robberies.

Finally, the military judge conducted the proper balancing test under M.R.E. 403. Finding that the proffered evidence shows "an immediate pressure for money far beyond simple insolvency," the military judge concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. She applied the correct factors in making her determination, to include the strength of proof of the prior acts, their probative weight, less prejudicial alternatives, potential distraction to the factfinder, the time needed to prove the prior conduct, the temporal proximity and frequency of the prior conduct, the existence of any intervening circumstances, and the relationship between the parties. *See United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F.

2005) (citing *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000). Further, the military judge stated that she would provide an appropriate limiting instruction to the members. The appellant later changed his forum election to military judge alone, and the military judge is presumed to have considered the evidence only for the permissible limited purpose for which it was offered. *United States v. Hill*, 62 M.J. 271, 276 (C.A.A.F. 2006).

Post-Trial Processing Delay

The appellant argues that violation of his due process right to timely post-trial processing entitles him to additional relief.[2] Two hundred and five days elapsed between the end of the appellant's trial and the convening authority's action. The staff judge advocate provided a chronology attached to his recommendation to the convening authority that detailed the processing of the appellant's case. In his addendum to the recommendation, he recommended that the convening authority reduce the adjudged confinement by two months based on the post-trial processing delay, and the convening authority agreed. The appellant now seeks additional relief.

We review de novo whether an appellant's due process right to a speedy post-trial review has been violated. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). A presumption of unreasonable delay applies if a convening authority does not take action within 120 days of trial completion. *Id.* at 142. When the presumption is triggered, four factors apply to determine whether a due process violation has occurred: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.* at 135. The appellate government counsel concedes that the reasons offered for the delay are insufficient, but maintains that the appellant has failed to show prejudice. We agree.

In evaluating prejudice, we focus on three primary factors: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern; and (3) limitation on the ability to present a defense at a retrial following a successful appeal. *Id*. at 138. The 205 day delay in the appellant's case is significantly less than that in *Moreno* which was 490 days from the end of trial to the action, but, more importantly for the analysis of prejudice, the appellant articulates no prejudicial impact of the delay in is case. Rather, citing *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006), he argues that he is nevertheless entitled to relief. In *Toohey*, 644 days passed between the end of trial and action, 805 days passed before it was docketed at the respective service court of appeal, and over six *years* passed before a decision on appeal. *Id*. at 357. Our superior court held that such an "egregious delay" justifies relief even absent specific prejudice. *Id*. at 363. We do not find the delay in this case of such an egregious character.

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Applying the *Moreno* factors to the appellant's case, we find that the relief already afforded by the convening authority is sufficient.

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; *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
Clerk of the Court