

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class DAVID B. PACKRONE
United States Air Force**

ACM 36389

19 October 2006

Sentence adjudged 29 June 2005 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Barbara E. Shestko (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Maria A. Fried, Captain John S. Fredland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jamie L. Mendelson.

Before

ORR, MATHEWS, AND THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of wrongful use of cocaine, breaking restriction, and two specifications of wrongful appropriation, in violation of Articles 112a, 134, and 121, UCMJ, 10 U.S.C. §§ 912a, 934, 921. A general court-martial comprised of a military judge sitting alone sentenced the appellant to a bad-conduct discharge, confinement for 10 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

In the specification at issue, the appellant pleaded guilty to wrongful appropriation of money from his wife, Airman (Amn) AP, by using her government travel card to withdraw money from automated teller machines. On appeal, the appellant asserts the guilty finding to that specification should be set aside because the evidence established that the money was not the property of Amn AP as alleged,

but actually was the property of Bank of America, the financial institution holding Amn AP's account. We find the assignment of error to be without merit and affirm.

Although the assignment of error is labeled as legal and factual insufficiency, we view it as a claim of variance between the pleadings and the proof adduced at trial. *United States v. Mann*, 50 M.J. 689, 699 (A.F. Ct. Crim. App. 1999). In prosecutions under Article 121, UCMJ, the person alleged to be the owner of the pilfered property must have a superior right to the accused, but need not be the true owner. *United States v. Leslie*, 13 M.J. 170, 171-72 (C.M.A. 1982). A variance between the pleadings and the proof as to ownership will not be fatal unless the accused has been prejudiced by the variance. *United States v. Finch*, No. 05-0453/MC, slip op. at 7 (C.A.A.F. 29 Sep 2006); *United States v. Craig*, 24 C.M.R. 28, 29-30 (C.M.A. 1957); *United States v. Duncan*, 30 M.J. 1284, 1289 (N.M.C.M.R. 1990). This Court, in determining prejudice, looks to see if the appellant has been misled and whether he is protected against another prosecution for the same offense. *Mann*, 50 M.J. at 699 (citing *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975)).

In the present case, the record clearly reveals the appellant knew the money he took was being held by the Bank of America. In his colloquy with the military judge at trial, the appellant agreed that, in obtaining the money, he intended to deceive both the bank and his wife and that neither the bank nor his wife consented to his taking the money. The appellant makes no claim he was misled or surprised by the variance, or that he is open to a future criminal sanction for his conduct. We find the appellant was not prejudiced and that his conviction will bar another prosecution for the same offense.

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

AFFIRMED.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court