UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class EFRAIN PEREZ-TOSADO JR.
United States Air Force

ACM 36485

31 October 2007

Sentence adjudged 4 May 2005 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Donald Plude.

Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Donna S. Rueppell.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one specification of assault in which grievous bodily harm is intentionally inflicted, in violation of Article 128, UCMJ, 10 U.S.C. § 928. Contrary to his pleas, the appellant was found guilty of one specification of robbery, in violation of Article 122, UCMJ, 10 U.S.C. § 922. A panel of officers and enlisted members sentenced the appellant to a bad conduct discharge, confinement for 20 months, forfeitures of all pay and allowances, and reduction to E-1. The convening authority approved the findings and, except for the forfeitures, approved the sentence as adjudged.

Before this court, the appellant avers the evidence is legally and factually insufficient to support the appellant's conviction for robbery. We find the appellant's assigned error to be without merit and affirm.

Background

The appellant's brother, Jose, opened the door to the appellant's apartment and let a man named GM enter. Jose had just met GM earlier that day. Jose immediately began punching GM, who fell on the couch and curled up in a defensive position. Even though GM was not fighting back, the appellant nonetheless joined his brother in breaking 40 ounce beer bottles on GM's head and kicking GM in the head and face.[1] After the beating, the appellant and Jose took GM, who was bleeding heavily, out the back door of the apartment and put him in the back seat of GM's car. The appellant drove GM's car a short distance from the appellant's apartment. The brothers then took GM out of the car and, after Jose took GM's wallet, identification (I.D.) card, cell phone and some cigarettes, left GM in the dark.[2] The appellant and Jose ran from this drop-off point and then walked back to the appellant's apartment. On the way back, the brothers threw GM's car keys into the woods and Jose gave the appellant $40 dollars of the approximately $180 dollars taken from GM's wallet.

The appellant's two written statements, admitted at trial, describe the brutal beating of GM, but, conflict with GM's testimony as to when GM's money and personal items were taken.[3] The appellant indicated in his statements that before the three of them departed the appellant's apartment and after GM said, "I'll do anything; just don't hurt me," Jose asked GM for his wallet. The appellant's statement goes on to say that when GM said he did not have his wallet, Jose searched GM, found his wallet and took GM's money, I.D. card, cell phone and some cigarettes.

GM testified that his personal property was taken after the brothers took him out of his car. GM testified that the appellant was about an arm's length away from Jose when Jose asked for his wallet and took his money and other personal items. GM testified that he told them, "Here you go. I have a family, you know." A court member asked GM, "[d]id they use a weapon to make you submit, to make you give them your property?" GM's response was, "[n]o, no, I simply obeyed because I feared something bigger." When trial counsel asked GM for clarification, GM said, "I was afraid that they would kill me."

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[1] Jose also struck GM with a plastic tool case and a large dog bone.
[2] The appellant contends he did not know his brother was going to rob GM.
[3] GM does not speak English and so testified through an interpreter.

Law and Discussion

This Court conducts a de novo review of the legal and factual sufficiency of the case before us. Article 66(c), UCMJ, 10 USC § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency requires us to review the evidence in the light most favorable to the government. If any rational trier of fact could have found the elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *United States v. Richards*, 56 M.J. 282, 285 (C.A.A.F. 2002) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We may affirm a conviction only if we also conclude, as a matter of factual sufficiency, that the evidence proves the appellant's guilt beyond a reasonable doubt. *Washington*, 57 M.J. at 399 (citing *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)). We must assess the evidence in the entire record and take into account the fact that the trial court saw and heard the witnesses. *Id.*

The government's theory in this case is that the appellant is liable for the robbery of GM, as a principal under Article 77, UCMJ, 10 U.S.C. § 877. To be criminally liable as a principal under Article 77, one who is not the perpetrator must "[a]ssist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense" and "[s]hare in the criminal purpose o[r] design." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 1.b.(2)(b) (2002 ed.). Article 77 has been interpreted to require an affirmative step on the part of the appellant. *United States v. Thompson*, 50 M.J. 257, 259 (C.A.A.F. 1999); *see also United States v. Shearer*, 44 M.J. 330 (C.A.A.F. 1996); *United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990); *United States v. Burroughs*, 12 M.J. 380 (C.M.A. 1982). Mere presence at the scene of a crime does not make one a principal. *MCM*, Part IV, ¶ 1.b.(3)(b); *Pritchett*, 31 M.J. at 217; *Burroughs*, 12 M.J. at 382-83; *United States v. Clark*, 60 M.J. 539, 545 (A.F. Ct. Crim. App. 2004).

The classic interpretation of the aiding and abetting rule of law is generally attributed to Judge Learned Hand, cited by, among many others, the Supreme Court of the United States and C.A.A.F. *Pritchett*, 31 M.J. at 217; *United States v. Raper*, 676 F.2d 841, 849 (D.C. Cir. 1982). In *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), Judge Hand opined that an accused must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." Justice Douglas quoted this interpretation in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

The C.A.A.F. has also emphasized that "[a]ll that is necessary is to show some affirmative participation which at least encourages the principal to commit the offense in all its elements as defined by the statute." *Pritchett*, 31 M.J. at 216 (quoting *United States v. Knudson*, 14 M.J. 13, 15 (C.M.A. 1982)). "What is required on the part of the aider is sufficient knowledge and participation to indicate that he knowingly and willfully

participated in the offense in a manner that indicated he intended to make it succeed." *Pritchett*, 31 M.J. at 217 (quoting *Raper*, 676 F.2d at 849).

The elements of the robbery charge and specification in this case are: (1) that the accused wrongfully took legal currency of a value of about $180, an identification card, a cellular phone, and some number of cigarettes; (2) that the taking was against the will of GM; (3) that the taking was by means of force and violence or putting GM in fear of immediate and future injury to his person and his property; (4) that the property belonged to GM; (5) that the property was of some value; and (6) that the taking of the property by the accused was with the intent to permanently deprive GM of the use and benefit of the property. *MCM*, Part IV, ¶¶ 47.b.(1)-(6).

Our review of the evidence in the case convinces us it is both legally and factually sufficient. Reviewing the evidence in the light most favorable to the government, we find that a rational trier of fact could find, beyond a reasonable doubt, that the appellant acted as a principal in aiding and abetting the robbery of GM. The appellant's close proximity to Jose and GM, when Jose asked for and took GM's money and other personal items, after having just beaten GM amounted to more than mere presence at the scene by the appellant. The appellant's participation in the beating of GM, his driving GM away in GM's car and his presence at the time of the robbery assisted his brother by continuing the threat of violence and ensuring complete control over GM, such that GM begged the two brothers to stop hurting him and caused GM to fear for his life. Whether the robbery occurred at the appellant's apartment or five to ten minutes later outside GM's car does not change our analysis. Further, our thorough review of the evidence, including the appellant's own admissions and making allowances for not having personally observed the witnesses, convinces us the appellant is guilty of robbery, as a principal, beyond a reasonable doubt.

Conclusion

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court