UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman RYAN B. PERRINE
United States Air Force

ACM S31972

18 March 2013

Sentence adjudged 12 July 2011 by SPCM convened at MacDill Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Megan E. Middleton; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER

PER CURIAM:

A special court-martial composed of a military judge convicted the appellant, contrary to his pleas, of larceny and wrongful appropriation, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The adjudged sentence consisted of a bad-conduct discharge, confinement for 3 months, and reduction to E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant contends the evidence is factually and legally insufficient to sustain his convictions for larceny and wrongful appropriation. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

On 22 April 2011, an Army and Air Force Exchange Service (AAFES) loss prevention employee at MacDill Air Force Base, watching over surveillance cameras observed the appellant acting in a suspicious manner. The appellant removed the price tag from a $7.95 DVD and placed it on a more expensive video game worth $39.99, and then removed the sticker from a $2.79 dog collar and placed it on a more expensive dog harness worth $12.00. After using an electronic price scanning machine in the store to see how the prices would scan, he proceeded to the checkout counter, bought the video game and dog harness for the lower amount and left the store, where he was detained by the AAFES employee. He pled guilty to wrongfully appropriating these two items, but pled not guilty to wrongfully appropriating nine other items at earlier times. During his guilty plea inquiry, he admitted to wrongfully obtaining the video game and dog harness from AAFES through false pretenses, by misrepresenting the price of the items, which enabled him to receive the property for less than their proper value.

Based on this incident, the AAFES employee reviewed the store's records for other transactions made by appellant in the preceding year, using his name and debit/credit card information. This research discovered certain problematic transactions that served as the basis for the larceny charge, as well as the additional items listed in the wrongful appropriation charge.

The appellant frequently returned items to AAFES without a receipt. When a receipt is not provided, AAFES will issue the refund in the form of a store credit placed on a gift card, which the customer can then use to pay for items from the store. The AAFES employee found many of the appellant's returns to be legitimate, but others were suspicious and served as the basis for the charges in this case.

Cash register receipts from a 15 April 2011 transaction by the appellant indicated he purchased a DVD and a Playstation remote control (which cost $14.95), but the video footage of that transaction revealed that he actually purchased a DVD and a set of headphones. Video footage also showed the appellant returning to the store 40 minutes later and returning the same type of headphones without providing a receipt, receiving a store credit for the full price of the headphones ($179.95).

A review of AAFES records found similar transactions were found on other occasions, although AAFES did not maintain video footage from those time periods:

- On 11 November 2010, the appellant returned a $149.95 set of golf clubs 43 minutes after the cash register records indicate he purchased a $31.99 golf putter. (AAFES records for 2010 showed two sets of these golf clubs were sold by the exchange on 16 October and 7 November by individuals who did not appear to be the appellant, based on the signed credit receipts.)

- On 21 November 2010, he returned a $289.99 set of golf clubs without a receipt one hour after the cash register records indicate he bought a $31.99 golf putter. (AAFES records for 2010 showed one set of these golf clubs was purchased on a credit card and then returned by an individual who did not appear to be the appellant.)

- On 27 November 2010, the appellant returned a paintball kit worth $169.99 without a receipt 38 minutes after he bought what the register showed as a $24.99 golf putter. (AAFES records for 2010 showed two prior kits had been purchased on a credit card by two individuals who did not appear to be the appellant, one of whom subsequently returned the item.)

- On 8 December 2010, the appellant returned a DVD series worth $59.95 six minutes after someone paid cash for that same item at a price that scanned as $9.97. (AAFES records for 2010 showed two prior purchases of this item several months prior to this time, one purchased on a credit card by a customer who did not appear to be the appellant, and one by someone who paid cash.)

- On 19 December 2010, the appellant returned a set of golf clubs for $229.95 without a receipt. (AAFES records for 2010 show two prior purchases of these clubs on credit cards by individuals who did not appear to be the appellant).

- On 28 December 2010, the appellant returned a DVD set worth $74.95 the same day someone purchased the same item for $14.95 using a gift card. (AAFES records for 2010 show only one prior purchase of this DVD set, on a credit card by someone who did not appear to the appellant.)

- On 6 January 2011, the appellant returned a set of golf clubs for $499.99 without a receipt less than one hour after the appellant bought a youth baseball bat for $49.99. (The day before, someone attempted to purchase these same golf clubs but the cashier voided the transaction for unknown reasons. AAFES records for 2010 reflect no one had previously purchased these clubs.)

- On 8 January 2011, the appellant returned a "mummy [sleeping] bag" worth $49.99 without a receipt, after having purchased a cheaper "mummy bag" for $19.99 the day before. (AAFES records reflected numerous prior purchases of the more expensive item.)

The Government also offered video footage of the appellant purchasing a $179.95 suitcase, on 16 March 2011, with the cash register scanning the item as a $9.95 shaving kit. After conducting a balancing test under Mil. R. Evid. 403, the military judge

admitted this evidence under Mil. R. Evid. 404(b), as proof of the appellant's plan, intent, and/or lack of mistake.

The AAFES records reflect that the appellant received store credit for the above transactions in the amounts listed. These amounts were placed on various gift cards, which the appellant then used at AAFES to purchase other items which cost over $500.

For this series of events, the appellant was charged with wrongful appropriation of 11 items of a value of $1,758.72, which was calculated by adding up the legitimate prices of all the items he purchased. He was also charged with larceny of "AAFES store credit, of a value of $1,430.16," which is the total amount of store credit the appellant received from his "no receipt" returns minus the amounts he paid AAFES during his fraudulent purchase of those items. After hearing the evidence, the military judge found the appellant guilty of wrongfully appropriating 11 items "of a value of more than $500" and committing larceny of AAFES store credit "of a value of more than $500."

Conviction for Wrongful Appropriation and Larceny

The appellant argues the evidence is factually and legally insufficient to prove beyond a reasonable doubt that the appellant committed larceny of "store credit" as "store credit" is intangible and cannot be stolen. He further argues his conviction for both larceny and wrongful appropriation are factually and legally insufficient, because the Government did not present enough evidence to meet the elements of those offenses.

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 factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *as quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"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 *Turner*, 25 M.J. at 324). "[I]n 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) (citations omitted). 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) (citations omitted).

The appellant contends "a record of returned items and a video allegedly showing [him] switching a price tag is factually insufficient to prove [he] was engaged in an ongoing scheme to switch tags and then return the items for their whole value." He concedes the Government had sufficient proof that he engaged in a "scheme" to improperly take one item—the headphones he is seen on video buying for a low price and shortly thereafter returning for a higher price. But he argues this did not prove he committed the same offense on the other occasions. Having weighed the evidence and made allowances for not having observed the witness, we are convinced of the appellant's guilt beyond a reasonable doubt, and we also conclude a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

He also argues that AAFES "store credit" cannot be stolen because it is "intangible" and not "capable of being possessed," citing to *United States v. Mervine*, 26 M.J. 482, 483 (C.M.A. 1988). In that case, our superior court held that extinguishing a debt through fraud did not constitute larceny because a debt (in the form of an agreement to make payments under a deferred payment plan for an item the debtor had taken possession of) is not the proper subject for a larceny. In reaching its decision, the Court noted "[P]ossession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of" and a debt is "simply not the equivalent of money for purposes of Article 121," UCMJ. *Id.* at 483- 84 (quotation marks and citation omitted). That logic is not applicable here.

The offense of larceny requires the appellant to have wrongfully taken or obtained "money, personal property, or [an] article of value of any kind," from its owner with the requisite intent. Article 121(a), UCMJ. Additionally, "[w]rongfully engaging in credit, debit, or electronic transaction to obtain goods … is usually a larceny of those goods from the merchant offering them." *Id.* at *Manual for Courts-Martial, United States*, Part IV, ¶ 46.c.(1)(h)(vi).

Here, the appellant did "take possession" of "tangible property" that had "value." He walked away from the AAFES customer service counter carrying a gift card that had been credited with the value of the item he had just fraudulently returned to AAFES by representing he had purchased it for its legitimate price. In addition to its literal value as a piece of plastic, that card had a further tangible and actual value—the dollar amount contained on it. The appellant took that tangible value (which was equivalent to money) and converted it to the goods he received from AAFES by using those gift cards to buy additional items valued at over $500. Under these circumstances, the appellant can be and properly was convicted of larceny of over $500 from AAFES.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[1] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[1] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).