UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.E. VINCENT, E.C. PRICE, P.G. STRASSER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SPENCER RIVASPEREZ
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800524
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 February 2008.
Military Judge: LtCol Thomas Sanzi, USMC.
Convening Authority: Commanding General, Third Marine Aircraft Wing, MARFORPAC, San Diego, CA.
Staff Judge Advocate's Recommendation: Maj G.R. Hines, USMC; **Addendum:** LtCol T.A. Daly, USMC.
For Appellant: Maj Anthony Burgos, USMC; Maj Christian Broadston, USMC.
For Appellee: Capt Mark Balfantz, USMC; Capt Geoffrey Shows, USMC.

30 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STRASSER, Judge:

A general court-martial, with enlisted representation, convicted the appellant, consistent with his pleas, of failure to go to his appointed place of duty, willful disobedience of a superior commissioned officer, violation of a lawful general order, and wrongful use of cocaine, in violation of Articles 86, 90, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§

886, 890, 892, and 912a. He was found guilty, contrary to his pleas, of conspiracy to commit larceny, violation of a lawful general order, making a false official statement, five specifications of larceny, and two specifications of negligent vehicular homicide, in violation of Articles 81, 92, 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, 921, and 934.

The appellant was sentenced to confinement for five years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.[1] The convening authority disapproved all confinement in excess of 48 months, and, except for the dishonorable discharge, ordered the sentence executed.

On appeal, the appellant asserts that the evidence is legally and factually insufficient to sustain his conspiracy to commit larceny and the larceny convictions. We have carefully examined the record of trial and the pleadings of the parties. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

On Saturday, 11 November 2006, at approximately 1600, Lance Corporal (LCpl) Bilodeau left his Marine Corps Air Station (MCAS) Yuma barracks room to go to the movies. He did not secure the door because his roommate, Corporal (Cpl) Receuro, did not have a key. Upon his return at 1800, he noticed that certain of his electronic items (a $1,050.00 Pavilion laptop computer, a $520.00 Microsoft XBOX 360 bundle with extra controller and video games, and a $15.00 DVD movie) were missing. During that two-hour time period, many of the barracks Marines were at a barbecue at nearby Ramada Field. After the word of the theft became known, several of the Marines left the barbecue in order to help look through the barracks for the missing items. These search volunteers included Cpl Receuro,

[1] Due to an ambiguity in the convening authority's action as to whether the convening authority intended to approve or disapprove the dishonorable discharge, we returned the record of trial to the Judge Advocate General of the Navy for remand to an appropriate convening authority for clarification or issuance of a corrected action in accordance with RULE FOR COURTS-MARTIAL 1107(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *United States v. Rivasperez*, No. 200800524, unpublished op. (N.M.Ct.Crim.App. 28 May 2009). That has now been done; we are satisfied that the convening authority did indeed approve the dishonorable discharge; and so we hereby proceed with our review of this case.

LCpl Gaviria, and the appellant. LCpl Gaviria and the appellant were roommates and close friends; their room was located on the same deck as that of LCpl Bilodeau and Cpl Receuro. Cpl Receuro testified that he had accidentally left the door ajar when he left the room for the barbecue. Interestingly, none of Cpl Receuro's electronic gear had been stolen. Cpl Receuro and others testified that LCpl Gaviria did not like LCpl Bilodeau and was constantly trying to pick fights with him. At the time of the search, Cpl Receuro asked LCpl Gaviria if he had taken the items, but LCpl Gaviria denied it. Cpl Receuro and other witnesses testified that LCpl Gaviria had a reputation for untruthfulness.

A Criminal Investigation Division (CID) investigation ensued, with sworn statements taken from many of the barracks residents. On 20 November 2006, the appellant gave a sworn statement (as did LCpl Gaviria) that he knew nothing about the theft. This statement (Prosecution Exhibit 4) formed the basis for Charge V, the Article 107 violation of which the appellant was found guilty. A few days later, the CID investigator received a tip from a female friend of LCpl Gaviria's. Based on statements LCpl Gaviria had made to her, she suspected that LCpl Gaviria may have taken the items. The investigator interviewed LCpl Gaviria again. During this interview, he confessed to taking the items. A day later, LCpl Gaviria requested to meet with the investigator again. During this third session, he claimed that the appellant alone, not he, had stolen the items.

On 22 December 2006, the appellant provided a second sworn statement to CID investigators. PE 5. He affirmed that he was with LCpl Gaviria on 11 November, and that they had spent the day together. After shopping in town, they returned to base in LCpl Gaviria's car. They planned to attend the barbecue at Ramada Field, however LCpl Gaviria decided to stop at the barracks before heading to the barbeque. The appellant claimed that LCpl Gaviria entered the barracks and returned fifteen minutes later with two diddy bags, which he then put into the trunk of his car. The appellant asked him what was in the bags and LCpl Gaviria replied that it was just stuff he had to mail. They then went to the barbeque. The appellant claimed he did not then know that the diddy bag contained stolen items. The appellant also stated that in "November 2006, mid-month," LCpl Gaviria told him that he had stolen the items from LCpl Bilodeau's room, that "he had mailed off the X-Box, but needed a place to keep the laptop." In a self-described effort "to keep [LCpl Gaviria] out of trouble [the appellant] offered to help him find a safe place to keep [the laptop]." He then arranged

for the laptop's storage at a female friend's house; the appellant later identified that house for CID investigators, who then recovered the laptop.

A fourth statement was subsequently taken from LCpl Gaviria, wherein he again implicated the appellant, but this time stated that they had committed the larceny together.

Apart from the appellant's two sworn statements (PEs 4 and 5), the only trial evidence linking the appellant to the crime was the testimony of now Private (Pvt) Gaviria. Pvt Gaviria previously had been convicted on similar charges of making false official statements and larceny, and was reduced in rank to E-1. He testified for the prosecution under a grant of testimonial immunity, and was a recalcitrant witness. Pvt Gaviria testified that he and the appellant were out driving around. Prior to going to the barbecue, Pvt Gaviria needed to get something out of his room, so he parked in the barracks parking lot. He testified that he went into the barracks, noticed that LCpl Bilodeau's door was ajar, so he went into the room. When he saw the electronic gear lying in plain view, he decided to steal the items, put them into a diddy bag and then returned to his car. His testimony regarding the appellant's physical location at the time of the theft and knowledge of the theft, however, was less clear.

On direct and redirect examination, Pvt Gaviria indicated the appellant was in the barracks hallway and saw him exit LCpl Bilodeau's room with the diddy bag. Record at 376-79, 394-95. Although Pvt Gaviria did not know if the appellant saw him put the items into the bag, he stated that the appellant was "curious" as to what he was doing, and that they never discussed it any further. *Id*. at 377. On cross-examination, he indicated the appellant remained in the car when he entered the barracks, but responded four questions later that "we just got out of the car." *Id*. at 384. In an effort to clarify the appellant's physical location at the time of the theft, the military judge asked Pvt Gaviria "[w]here was the [appellant] when you went up there and stole that stuff?" and Pvt Gaviria answered "[the appellant] was coming up the hallway." *Id*. at 395-96.

Upon returning to the car, Pvt Gaviria put the diddy bag in the trunk. On cross-examination, Pvt Gaviria stated that when he returned to the car with the diddy bag, he told the appellant that the items in the bag were things he had to mail back home to Florida. They then drove off in Pvt Gaviria's car to the barbecue.

When the items were discovered missing soon thereafter, they left the barbecue, went back to the barracks, and helped look for the items. Upon hearing that CID was coming over to the barracks, Pvt Gaviria and the appellant left, once again in Pvt Gaviria's car, with all five of the stolen items still in the trunk. Pvt Gaviria did not recall where they went. The appellant, however, stated in his 20 November statement to CID that the two of them "left to go out into town." PE 4. At some point the laptop was stashed at the house of the appellant's female friend. Pvt Gaviria testified he threw the XBOX away, but he specifically recalled delivering the laptop to the appellant's female friend at her house.[2]

Pvt Gaviria testified that out of his four conflicting statements to CID, it was the second interview which is accurate and corresponds to his trial testimony, namely that he committed the crime alone without the defendant. In response to a question submitted by the members as to whether the appellant helped him with this theft, Pvt Gaviria replied, "No . . . I acted alone. He was there . . . He saw me coming out of the room. But I didn't want to tell what I had just done." Record at 396.

Legal and Factual Sufficiency

The appellant claims that the facts of this case were legally and factually insufficient to support findings of guilty to both the conspiracy and the larceny charges.[3]

We review the legal and factual sufficiency of the evidence *de novo*. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Reasonable doubt, however, does not mean that the evidence must be free of conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of both offenses beyond a reasonable doubt. We, too, are convinced beyond a reasonable

[2] The female friend, Ms. Prisma Moore, testified for the defense that she went on base to get the laptop. She claimed she was looking for a laptop for her sister, and Pvt Gaviria offered his extra laptop for sale. This testimony is contradicted by Pvt Gaviria's testimony and the appellant's second statement to CID. Record at 382; PE 5. Pvt Gaviria independently was able to point out to a CID investigator where Ms. Moore lived, thereby giving credence to the prosecution's version of events. Record at 348.

[3] This assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

doubt of his factual guilt of the two larceny related charges and the specifications thereunder.

The appellant's argument operates under the assumption that the conspiracy and the actual act of the larceny were consummated at the barracks on 11 November, sometime between 1600-1800. If that were the case, then perhaps there might be merit to the appellant's position. After all, the trial evidence strongly indicated that it was a spur of the moment decision by Pvt Gaviria to steal the electronic items. Pvt Gaviria testified that he acted alone and did not tell the appellant what he had done. Pursuant to this line of logic, the appellant could not be guilty of a larceny in which he did not knowingly participate. Of course, as a result of the appellant's subsequent actions, helping to hide the laptop and lying to CID, he clearly would be culpable as an accessory after the fact. Art. 78, UCMJ; *see also United States v. Keen*, 30 M.J. 1108, 1109 (N.M.C.M.R. 1989)(*per curiam*). The appellant, however, was not charged with that crime.

The pivotal issue concerns the asportation of the property. The crime of larceny continues as long as asportation of the property continues.[4] "Factually the original asportation continues as long as the perpetrator is not satisfied with the location of the goods and causes the flow of their movement to continue relatively uninterrupted." *United States v. Whitten*, 56 M.J. 234, 237 (C.A.A.F. 2002)(citation omitted). Because the crime of larceny continues through the asportation phase, anyone who knowingly assists in the actual and proximate act of carrying away the stolen property is a principal in the larceny. It makes no difference whether the continuation of the asportation by one other than the actual taker was prearranged or the result of decisions made on "the spur of the moment." "The formation of a conspiracy need not take any particular form or be manifested in any formal words. The agreement can be silent, ... tacit [,] or [only a] mutual understanding between the parties. It is usually manifested by the conduct of the parties themselves." *Id.* at 236 (citation and internal quotation marks omitted).

Thus, even though Pvt Gaviria may have consummated the larceny when he took the items out of LCpl Bilodeau's room, the appellant became an aider and abettor by knowingly participating

[4] The members were properly instructed that taking means "any actual or constructive moving, carrying, leading, riding, or driving away of another's personal property." Record at 713.

in the ongoing, continuous asportation of the stolen property. The record indicates that the appellant was aware of the theft when Pvt Gaviria exited LCpl Bilodeau's room with the diddy bags containing the stolen items. Assuming, without finding, the appellant did not know that the items in the diddy bag were stolen when Pvt Gaviria exited LCpl Bilodeau's room, and further, that he still did not know that the items were stolen when they drove to the barbecue, it is most certainly a reasonable, logical, permissible, if not overwhelmingly compelling inference for any finder of fact to draw that the appellant certainly so knew when they both were at the barracks "helping" to look for the stolen items. The appellant's failure to mention his presence in the barracks at the approximate time of the larceny in either of his two statements to CID, and subsequent statement that he learned of the theft approximately one week later are obvious attempts to deceive. PEs 4 and 5.

Further, removal of the vehicle and its contents from the base was an integral part of the scheme, intended from the outset by Pvt Gaviria. It is clear that Pvt Gaviria's car trunk was only a waypoint in the removal (asportation) of the property. Pvt Gaviria had to keep the property moving in order to dispose of it and to avoid predictable, eventual detection. The barbecue was a necessary, temporary stop. Had they not shown up, suspicion would have immediately focused on Pvt Gaviria (who was able to immediately deflect it when queried on the scene by Cpl Receuro). The appellant joined in mid-scheme, so to speak, and thereby became involved in the larceny itself as both a conspirator and as an aider and abettor. Crucially, both Pvt Gaviria and the appellant left the barracks once the CID investigator arrived, and they drove off in Pvt Gaviria's car with the stolen items in the trunk. The fruits of the crime would not be secure until they had safely left the base. Once they were in town, the "flow of movement" came to a close and the larceny was finally complete. *Keen*, 30 M.J. at 1109-10.

Conclusion

We have considered the evidence produced at trial in a light most favorable to the Government and find that a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specifications of which the appellant was convicted. Moreover, we have carefully considered the evidence, and making allowances for not having seen and heard the witnesses, we are convinced beyond a

reasonable doubt that the accused is guilty of the charges and specifications of which he was convicted. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Senior Judge VINCENT and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court