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

Before
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI
Appellate Military Judges

UNITED STATES OF AMERICA

v.

EDWARD J. FIELDS
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201100455
SPECIAL COURT-MARTIAL

Sentence Adjudged: 11 May 2011.
Military Judge: LtCol Stephen F. Keane, USMC.
Convening Authority: Commanding Officer, 2d Battalion, 11th Marines, 1st Marine Division, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.
For Appellant: LT Gregory M. Morison, JAGC, USN.
For Appellee: Capt David N. Roberts, USMC.

12 April 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

WARD, Judge:

At a special court-martial, members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of larceny under Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The panel sentenced him to confinement for six months, forfeiture of $100.00 pay per month for five months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. The

appellant submits two assignments of errors: first that a fatal variance occurred between the pleadings, proof and findings; and second, that the court-martial order incorrectly states the pleas and findings. After reviewing the record of trial and the parties' pleadings, we resolve the former assignment of error against the appellant and the latter in his favor. We conclude that the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The charge and sole specification[1] stem from the appellant's actions in wrongfully using Private First Class C's (PFC C) Navy Federal Credit Union (NFCU) Visa check card to make unauthorized payments for his own personal bills.[2] Prior to trial, the appellant unsuccessfully moved to suppress several incriminating statements he made to staff noncommissioned officers (SNCO) in his unit. At trial, the Government presented witness testimony and documentary evidence to substantiate four unauthorized charges to PFC C's NFCU VISA check card, all occurring between 1 and 5 November 2010. Among the Government witnesses were PFC C, who testified that the appellant admitted to making all four unauthorized charges on PFC C's check card, and two of the appellant's SNCOs plus his company first sergeant, all of whom testified that the appellant confessed to the same. The Government then rested its case-in-chief and the defense rested without presenting any evidence.[3] The military judge then instructed counsel to brief the issue of whether the Government had established sufficient evidence of ownership of the stolen property pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Record at 245.

Following briefs on the issue raised by the military judge, both sides declined oral argument and the military judge ruled that the Government provided sufficient evidence to establish NFCU as the owner of the stolen property. *Id*. at 245-46. Next,

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[1] The specification reads "In that [the appellant] did, at an unknown location, between on or about 1 November 2010 and 5 November 2010, steal U.S. Currency, of a value of less than $500.00, the property of Navy Federal Credit Union."

[2] The unauthorized charges were payments to T-Mobile, Pacific Marine Credit Union, and EZ-Rims-4-Rent. Record at 176-80.

[3] Prior to resting its case, trial defense counsel requested a brief recess "just to consider any 917 issues." Record at 243. However, following the recess the Defense made no such motion and rested. *Id*. at 244.

the Government made a motion under R.C.M. 603 to make a minor change to the specification by adding the words "on divers occasions," or, in the alternative, to tailor the findings worksheet to allow the panel to select any of the four different unauthorized charges in support of a guilty finding. Appellate Exhibit XXII at 3. The trial defense counsel objected, arguing that such a change would increase the criminality of the offense as only a single larceny was alleged and the Government had offered four different acts to prove a single theory of larceny. Record at 248. Trial defense counsel also objected to a tailored worksheet as it "would permit the members to find [the appellant] guilty of four separate larcenies . . . despite the fact that he has been charged with a single larceny. The defense proposes an alternative findings worksheet *that would subject [the appellant] to criminal liability only for a single act of misconduct, as charged in the sole specification*." AE XXIII at 2 (emphasis added).

In denying the Government's motion, the military judge stated:

> [Y]ou've presented four theories,[4] you've alleged that there was one larceny that took place, and so you're stuck with the way that you charged this offense. And while the case law is unsettled, I'm not going to allow a minor change . . . .
>
> But the defense clearly was put on notice by discovery and never asked for a bill of particulars or anything along those lines. . . . [A]nd they didn't object when the government presented four different theories to establish the larceny . . . .
>
> However, since four specific theories were presented by the government, I'm going to require that if the members do find beyond a reasonable doubt that any one of those theories was proven beyond a reasonable doubt, that they specifically identify which theory that was so that there are no ambiguous findings in this case . . . . [W]e're going to have to craft a findings worksheet and findings instructions that will

[4] Although described as "theories", in actuality the Government presented evidence of four different occasions where the appellant misused PFC C's VISA check card, and each occasion met the elements of larceny as pled in the specification. The applicable theory for each occasion was the same -- wrongful obtaining by false pretense.

> make it clear to the members that they must—if they convict him of anything, they must select one and identify which one that is.

Id. at 248-49. Following a brief recess, the military judge reviewed with counsel Appellate Exhibits XXV and XXVI, the findings worksheet and findings instructions respectively. Neither side objected to either the worksheet or the instructions.[5] *Id*. at 249-50.

In its closing argument, the Government focused on all four unauthorized charges and the evidence adduced during the trial. *Id.* at 250-58. Trial defense counsel raised no objection to the Government's argument. Instead, he attacked PFC C's credibility and argued that PFC C had authorized the appellant to use his card on these four occasions. *Id*. at 259-61. After the members closed for deliberations, the president submitted a question concerning the findings worksheet, specifically what vote was necessary on each subparagraph under a guilty finding.[6] During the ensuing Article 39(a) session, the military judge advised counsel that he would instruct the panel that the appellant could only be found guilty of one of the subparagraphs and the remainder should be lined out. Both sides concurred with his proposed instruction. *Id*. at 278.

Once the members returned, the military judge explained to the president of the panel:

> MJ: All right. So you're going to go in order down the findings worksheet. If you vote on – you just go on one. (b)(1), if you find two-thirds vote that (b)(1) has been met, for instance – it's not a suggestion. I'm just giving you an example. If six members found that he was guilty of the offense of larceny of using the Navy Federal Credit Union Visa check card of PFC [C] to steal $212 in order to make a payment at Pacific Marine Federal Credit Union, you would just announce that as your sentence (sic) and you can cross out everything underneath that. If you didn't have two-thirds for that, you'd go to the next one.

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[5] AE XXV, the findings worksheet, provides under the header for Guilty, four subparagraphs each listing one of the four unauthorized charges described during the Government's case-in-chief.

[6] AE XXXIII.

> Once you've got your two-thirds, you cross out everything – if you got two-thirds for any of [the subparagraphs], you cross out everything that didn't apply. So in other words, you can only pick one of these or one of these[7] or zero or none of the above.
>
> Do you understand?
>
> PRES: It's either one or none; it's not all four, sir?
>
> MJ: Right.
>
> PRES: Yes, sir.
>
> MJ: Because they only – the government only charged one larceny.
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> PRES: Aye, sir.
>
> MJ: Just presented four theories.
>
> Both sides satisfied with my explanation?
>
> TC: Yes, sir.
>
> DC: Yes, sir.

Id. at 279-80. Shortly thereafter, the panel returned their guilty verdict, finding the appellant guilty of the first subparagraph on the worksheet and lining out the remainder. *Id*. at 281; AE XXV.

Fatal Variance

The appellant contends that the Government's actions in charging one larceny but presenting evidence on four separate thefts amounts to a fatal variance since it "substantially changes the offense alleged from a single act of larceny into four." Appellant's Brief of 7 Nov 2011 at 8. The prejudice, he argues, arises from the possibility of re-prosecution for the remaining three thefts on which findings were not entered, the inability to know which theft to defend against at trial, and the inability of this court to review the ambiguous findings. The Government counters with a threefold argument: first, that

[7] This second reference is to the lesser included offense of wrongful appropriation, which contained the same four paragraphs. AE XXV.

any error regarding variance cannot lie since the appellant himself invited the error by objecting to a major change; second, that the findings are unambiguous as the appellant was convicted of only one larceny as charged; and third, that the appellant is protected from re-prosecution on the remaining three thefts.

a. Substantial Change

A variance occurs where the evidence at trial "establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." *United States v. Lubasky*, 68 M.J. 260, 264 (C.A.A.F. 2010) (citation and internal quotation marks omitted). Although the military judge gave special instructions to the panel and modified the findings worksheet accordingly, his advice did not change the nature or identity of the offense. Nor is this a case where findings by exceptions and substitutions were made that changed the nature of the offense pled. *See United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003). The time, date and manner in which the appellant was alleged to have committed the offense remained the same. Even though the Government presented evidence of four separate thefts, each of these thefts conformed to the elements of the offense alleged. Consequently, the nature of the offense was not substantially changed by the Government's charging or proof offered at trial.

b. Lack of Notice on What to Defend Against

We reject the appellant's contention that he lacked notice on what he needed to defend against. As the military judge noted, notice was readily apparent throughout pretrial discovery and motions litigation. Record at 249. The appellant never requested a bill of particulars nor raised any objection during or after the Government's case. In addition, he failed to object to the findings instructions and worksheet crafted by the military judge. To the contrary, he advocated its use.[8]

c. Possibility of Re-Prosecution

[8] We also note that the appellant did not object to the military judge's solution in requiring the members to select only one of the four thefts submitted by the Government. Since we find no error, it is unnecessary for us to determine the extent to which the appellant himself invited any error as the Government urges us to do. However, the fact that the appellant urged the military judge to use a findings worksheet "that would subject [the appellant] to criminal liability *only for a single act of misconduct, as charged in the specification,*" AE XXIII at 2 (emphasis added), the exact solution the military judge chose, is a factor that leads us to conclude that no prejudice resulted. Record at 248-49.

We likewise are not persuaded by the appellant's argument that he remains exposed to potential criminal liability for the remaining three thefts. We look to the entire record to determine double jeopardy protection, *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994), and the allegation of time and date in the specification is generally sufficient to protect against re-prosecution. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). In this case, the factual recitations in the specification combined with the record of trial offer ample protection for any subsequent re-prosecution for any of the four thefts submitted to the members.

d. Findings Ambiguity

We review *de novo* the question of whether there is any ambiguity in the findings that prevents us from conducting our factual sufficiency review under Article 66(c), UCMJ. *See United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008); *United States v. Brown*, 65 M.J. 356, 358-59 (C.A.A.F. 2007). We find no ambiguity in the findings.

First, we note that unlike *United States v. Walters,* 58 M.J. 391 (C.A.A.F. 2003), the case relied upon by the appellant, the military judge in this case took prophylactic steps to ensure that any guilty finding identified the specific underlying conduct, thereby removing any potential for ambiguity. Thus, we find *Walters* inapposite.[9]

Additionally, even if the military judge had not taken these prophylactic steps and the members came back with a general verdict of guilty, we would find no error. "The longstanding common law rule is that when the factfinder returns a guilty verdict on an indictment charging several acts, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Rodriguez*, 66 M.J. at 204 (citing *Griffin v. United States*, 502 U.S. 46, 49 (1991)). This presumption in favor of general verdicts is also true when the Government presents multiple or alternate theories of liability as a general guilty verdict attaches to them all. *Id*. (citing *Turner v. United States*, 396 U.S. 398, 420 (1970)); *see also United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987) ("It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is

[9] *Walters* applies "only in those narrow circumstances involving the conversion of a divers occasions specification to a one occasion specification through exceptions and substitutions by the members." *Walters*, 58 M.J. at 396.

that there is evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members").

In this case, a general guilty verdict would have attached equally to all four acts of theft submitted to the members and we could affirm the finding provided at least one of the four acts withstood our factual and legal sufficiency analysis. Measures such as those taken by the military judge in this case only become necessary when the members except some language from the specification and establish a need to specify which underlying act supports the guilty verdict. This is the principal distinction between the case at bar and those involving modified findings where a *Walters*-type solution is necessary. In the latter category, the modified findings "implicitly mean that the factfinder had found that the accused was not guilty of some of the acts alleged at trial" and therefore greater specificity in the findings is necessary to determine which act survives the verdict for appellate review. *Rodriguez*, 66 M.J. at 205.

Error in the Court-Martial Order

The parties both agree that the appellant's second assignment of error warrants relief. We also agree. The appellant is entitled to have all his official records reflect the results of his court-martial. *United States v. Crumpley,* 49 M.J. 538-39 (N.M.Ct.Crim.App. 1998). We will order corrective action in our decretal paragraph.

Conclusion

We affirm the findings and the sentence as approved by the CA. The supplemental court-martial order will reflect that the appellant was arraigned on two charges, and that Charge I and its sole specification alleging a violation of Article 107, UCMJ, were dismissed by the military judge prior to the entry of pleas.

Senior Judge CARBERRY and Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court