IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.D. HARTY **R.G. KELLY** **W. FREDERICK**

UNITED STATES

v.

Kevin R. SANFORD
Sergeant (E-5), U. S. Marine Corps Reserve

NMCCA 200500993 Decided 6 November 2006

Sentence adjudged 3 October 2003. Military Judge: D.M. Jones. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, School of Infantry, Training Command, Camp Pendleton, CA.

LT BRIAN L. MIZER, JAGC, USNR, Appellate Defense Counsel
LT M.H. HERRINGTON, JAGC, USNR, JAGC, Appellate Government Counsel

HARTY, Judge:

Contrary to his pleas, a special court-martial, composed of officer and enlisted members, found the appellant guilty of violating a lawful order, dereliction in the performance of his duties, larceny, and impersonating a commissioned officer, in violation of Articles 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, and 934. The appellant was sentenced to confinement for six months, forfeiture of $767.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

We have reviewed the record of trial, the appellant's eight assignments of error, and the Government's response. We find merit in several assignments of error and will take corrective action in our decretal paragraph, reassess sentence, and grant sentence relief for excessive post-trial delay. Otherwise, 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was the Marine Corps Reserve liaison for the School of Infantry (SOI) at Camp Pendleton, California. In that capacity, he became associated with Private First Class (PFC) B, a Marine reservist who was sent home from SOI due to family problems in Texas. PFC B later returned to SOI to complete his training, however, he reported with a hand injury, suffered on his civilian job, and was returned home again within a few days.

The appellant was aware that PFC B was having financial problems at home and looked for ways to bring him back on active duty. The appellant could not get PFC B back into SOI right away, so he had him transferred from his reserve unit in Texas to a reserve unit at Camp Pendleton. The appellant tried to get PFC B transferred to the California reserve unit on Additional Duty for Special Work (ADSW) orders so he would receive travel reimbursement, and active duty pay and benefits for his family. The reserve unit, however, did not have any ADSW funds, so the appellant arranged for PFC B to perform all of his drills back-to-back for the new reserve unit at SOI. PFC B, however, did not have the funds to arrange travel for himself from Texas to Camp Pendleton.

PFC B told his employer that he had been recalled to active duty and asked the employer if he could help him with the cost of travel. The employer did not believe him and wanted to talk to someone in the military to confirm PFC B's story. The appellant called PFC B's employer the same day to provide that confirmation. The appellant told PFC B's employer that: (1) PFC B was being recalled to active duty to complete his training; (2) that PFC B would be in trouble if he did not report as ordered; (3) that the Marine Corps would not pay PFC B's travel because he was a reservist and travel money was being used to send active duty personnel overseas; and, (4) that if airfare was provided by the employer, the military would provide PFC B with medical care to fix his hand injury that was the employer's responsibility to fix. It turned out that PFC B's recall orders were falsely prepared by the appellant to appear like original orders in message format. Based on the appellant's false representations, PFC B's employer used his credit card to purchase airfare over the internet for PFC B's travel to Camp Pendleton.

Impartial Judge

For his first assignment of error, the appellant claims that the military judge abandoned his impartial role by reopening the hearing on the appellant's motion to suppress statements, and directing the Government to call witnesses to testify at that hearing. The appellant does not challenge the military judge's findings of fact or legal conclusions as part of this assignment of error. We find that the military judge did not abandon his neutral role in resolving the appellant's motion to suppress.

During pretrial motions, the appellant moved to suppress his multiple custodial statements to Captain (Capt) M, because (1) Capt M failed to fully and accurately advise the appellant of his Article 31(b), UCMJ, rights; (2) any waiver of his Article 31(b) rights was not knowingly and voluntarily made; (3) his request to consult with an attorney was ignored; and, (4) any statements made after these violations were derivative of the prior inadmissible statements. Appellate Exhibit IV. Capt M and the appellant testified on the motion. The next day, the military judge sent an email to the parties stating that he did not have enough evidence upon which to decide the appellant's motion to suppress and directed the Government to produce additional witnesses to testify on the motion the next day. Appellate Exhibit XL. At the next day's motion hearing, the trial defense counsel objected to the military judge receiving additional evidence on the motion, because the burden was on the Government by a preponderance of the evidence and that burden had not been met if the military judge required additional evidence in order to rule on the motion. Record at 228. The military judge then called three witnesses who had given statements to Capt M as part of the investigation that led to the appellant's charges. The military judge conducted the inquiry of each witness, and the parties were given the opportunity to ask questions of the witnesses. The military judge's questions concerned the procedure followed by Capt M to inform each witness of their rights under Article 31(b), UCMJ.

A military judge is permitted to call or recall witnesses, *sua sponte*, and has wide latitude to question witnesses. Art. 46, UCMJ; MILITARY RULE OF EVIDENCE 614, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.); RULE FOR COURTS-MARTIAL 801(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.); *see also United States v. Acosta*, 49 M.J. 14, 17-18 (C.A.A.F. 1998); *United States v. Sowders*, 53 M.J. 542, 545-46 (N.M.Ct.Crim.App. 2000). He must remain impartial, but he does not "lay aside impartiality when he asks questions in the appropriate case to clarify factual uncertainties." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987). The legal test is whether, from the viewpoint of a reasonable person and "taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's questions." *Acosta*, 49 M.J. at 18 (quoting *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995))(internal quotation marks omitted); *see also United States v. Schember*, 50 M.J. 670, 673 (N.M.Ct.Crim.App. 1999).

The military judge did not abandon his neutral role in this case. Capt M and the appellant testified differently concerning when the appellant's Article 31(b), UCMJ, warnings were given, how they were given, and the substance of those warnings as given. This issue was raised by the appellant both in his pretrial motion and in his testimony on the motion. The military judge's actions in directing that additional witnesses be called on this issue was no more than an attempt to clarify the factual matters initially raised by the appellant, and fully within the procedures available to him. The answers to his questions could just as easily have

gone in the appellant's favor. We are satisfied that a reasonable person observing the appellant's court-martial would not doubt its fairness or the impartiality of the military judge. Accordingly, we decline to grant relief.

Motion to Suppress

For his second assignment of error, the appellant claims that the evidence presented on his motion to suppress statements does not support the military judge's findings that Article 31(b), UCMJ, was complied with. We disagree.

The appellant argues that the Article 31(b), UCMJ, procedures followed by Capt M, as described by the additional witnesses called by the military judge, did not amount to "habit evidence," and, therefore, the military judge erred in relying on that testimony in making his findings of fact. The Government, however, correctly notes that the military judge is not bound by the Military Rules of Evidence, except for privileges, when resolving preliminary questions concerning the admissibility of evidence. *See* MIL. R. EVID. 104(a).

The additional witnesses testified concerning how they were advised of their Article 31(b), UCMJ, rights by Capt M during the investigation that produced statements leading to the appellant's charges. This testimonial evidence did not have to qualify as "habit evidence" in order for the military judge to give it weight in resolving disputed factual issues on the motion. We will review the military judge's findings of fact and conclusions of law under the prevailing appellate standard of review.

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(citing *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000), *overruled* on other grounds by *United States v. Inong*, 58 M.J. 460, 464 (C.A.A.F. 2003)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We conclude that the military judge's findings of fact are supported by the record and are not clearly erroneous, and his conclusions of law are not incorrect. This assignment of error is without merit.

Legal and Factual Sufficiency

For his next three assignments of error, the appellant claims that the evidence was not factually or legally sufficient to prove his guilt beyond a reasonable doubt of dereliction of duty (Charge I), larceny (Charge II), or impersonating a commissioned officer (Charge III). We disagree as to the charge of dereliction of duty, but agree with the appellant as to the charges of larceny and impersonating a commissioned officer. Corrective action will be

ordered in our decretal paragraph and we will reassess the appellant's sentence accordingly.

When testing for legal sufficiency, we look at "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. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006)(quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Legal sufficiency is a question of law that we review *de novo*. *United States v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005). For factual sufficiency, we weigh all the evidence in the record of trial, recognizing that we did not see or hear the witnesses, and determine whether we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. We will apply these standards to each challenged finding of guilt.

1. Dereliction of duty

The appellant was found guilty of being derelict in the performance of his duties by "failing to ensure proper information was [inputted] into Marine Corps Total Force System (MCTFS) Diary Retrieval System." Charge Sheet. The appellant correctly notes that a service member cannot be derelict in the performance of a duty that he or she does not have, or a duty that is voluntarily assumed.

An essential element of any dereliction in the performance of duties is that the appellant "had certain duties." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 16b(3)(a). These duties "may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." *Id.*, ¶ 16c(3)(a). A violation of a self-imposed duty, however, is not a violation of Article 92, UCMJ. *United States v. Dallman*, 34 M.J. 274, 275 (C.M.A. 1992). We must decide whether the appellant had any duty to ensure proper information was inputted into the MCTFS Diary Retrieval System, and whether that duty was anything other than self-imposed.

The record establishes that the appellant was the unit's Reserve liaison. In that position, it was his duty to provide proficiency and conduct marks to the diary clerks for Marine Reservists. The diary clerks would physically enter that information into the MCTFS Diary Retrieval System. The appellant provided proficiency and conduct marks to the diary clerks for PFC B, a Marine Reservist, on four or five occasions. These marks had never been issued by anyone authorized to evaluate PFC B, and were fraudulent. These facts convince us that the appellant had a duty to provide accurate proficiency and conduct mark information to the diary clerks, and that he was aware that the proficiency and conduct marks he provided to the diary clerks concerning PFC B were fraudulent. Considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all

the essential elements of willful dereliction of duty beyond a reasonable doubt. We, ourselves, are convinced of the appellant's guilt beyond a reasonable doubt. This assignment of error is without merit.

2. Larceny

The appellant was found guilty of larceny of U.S. currency by inducing PFC B's civilian employer to purchase an airline ticket so PFC B could report to Camp Pendleton in accordance with military orders. The entire basis for reporting to Camp Pendleton, however, was false, because the appellant created fraudulent orders recalling PFC B to active duty. PFC B's employer provided him with an airline ticket to report to Camp Pendleton based on the appellant's misrepresentations.

The appellant now asserts that this cannot be larceny because there is no property involved, only a service –- the flight to California. Therefore, according to the appellant, he should have been charged with obtaining services under false pretense, in violation of Article 134, UCMJ. The Government argues that the $240.50 the victim spent to purchase the airline ticket, based on the appellant's misrepresentations, is the property stolen from the victim by false pretense. We find that the larceny conviction cannot stand, but for reasons other than raised by the appellant.

The appellant's fact pattern can be simplified as follows: A (appellant) induced B (PFC B's employer) through false pretenses to purchase something (airline ticket) for C (PFC B). Such a scenario can fall within the strict confines of Article 121, UCMJ. *See United States v. Ragins*, 11 M.J. 42, 46 (C.M.A. 1981)("False pretenses used by A to induce B to transfer property to C . . . can probably fit within the literal language of Article 121"). Even though there may have been a larceny, we must decide whether the evidence supported a guilty finding of the larceny as charged.

The appellant was charged with, and convicted of, larceny of U.S. currency from PFC B's employer. The amount of currency pled was the same as what was charged to the employer's credit card for PFC B's airline ticket. The appellant was not charged with the larceny of the airline ticket itself. However, there cannot be a larceny of U.S. currency unless the evidence shows that currency actually transferred from the victim to another party as a result of the appellant's inducements. *Compare United States v. Albright*, 58 M.J. 570, 573 (Army Ct.Crim.App. 2003)(finding no larceny of public funds where there is no evidence that public funds were actually disbursed because of the appellant's fraudulent use of her government credit card), *with United States v. Christy*, 18 M.J. 688, 690 (N.M.C.M.R. 1984)(finding larceny of government funds where personal purchases were made with a government credit card and the government actually disbursed funds to pay the vendor).

PFC B's employer testified that he paid $240.50 for an airline ticket to send PFC B to Camp Pendleton, and that it was purchased

from Travelocity. Record at 573. Documentary evidence establishes that the purchase was made on-line with a credit card. Prosecution Exhibit 7. There is no evidence that the victim paid his credit card company for that purchase.[1] Based on this evidence, the Government has established only that the victim incurred a legal obligation to pay a debt to his credit card company for the purchase of an airline ticket induced by the appellant's misrepresentations, but not the larceny of U.S. currency. *Albright*, 58 M.J. at 573.

We conclude that the evidence is neither legally nor factually sufficient to establish larceny of U.S. currency. We are also unwilling to affirm a conviction for larceny of the airline ticket by exceptions and substitutions, because the specification makes no reference to an airline ticket. *See Dunn v. United States*, 442 U.S. 100, 106 (1979)("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."); *see also United States v. Wray*, 17 M.J. 375, 376 (C.M.A. 1984)(holding that an accused cannot be convicted by exceptions and substitutions of a larceny different from that charged). We conclude, therefore, that the finding of guilty to larceny of U.S. currency under Charge II cannot be affirmed. That conclusion, however, does not end our inquiry.

This court has the authority to set aside a finding of guilty and affirm only a finding of guilty to a lesser included offense. Art. 59(b), UCMJ. We may not, however, affirm a finding of guilty to an included offense on a theory not presented to the trier of fact. *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999)(quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980) and citing *United States v. Standifer*, 40 M.J. 440, 445 (CMA 1994)). Attempted larceny of U.S. currency is a lesser included offense of the larceny as charged. *See* MCM, Part IV, ¶ 46d(1)(b). The evidence presented is both factually and legally sufficient to support the elements of the included offense, and affirming a finding of guilty for the included offense is not based on a different theory of guilt. We, therefore, will take corrective action in our decretal paragraph and reassess the appellant's sentence accordingly.

3. Impersonating a commissioned officer

The appellant asserts that the evidence is legally and factually insufficient to support a conviction of impersonating a

[1] The parties stipulated that as part of PFC B's plea agreement with the Government, PFC B paid his employer $300.00 on 1 October 2003 for the airline ticket. Appellate Exhibit LXIII; Record at 763. This, however, does not establish that the employer transferred any funds to his credit card company.

commissioned officer, because he never wore the uniform or insignia. The appellant agrees, however, that:

> The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces.

Appellant's Brief of 22 Jun 2006 at 18 (quoting *United States v. Messenger*, 6 C.M.R. 21, 24-25 (C.M.A. 1952)). Although we agree with the appellant that most impersonation cases involve the wearing of a commissioned officer's or noncommissioned officer's uniform or insignia, or the affirmative oral representation that one holds that position, we do not find those are the only ways to wrongfully impersonate, in violation of Article 134, UCMJ. That, however, does not answer the question whether there is legally and factually sufficient evidence to support the appellant's conviction.

The appellant was charged with, and found guilty of, impersonating "a commissioned officer of the Marine Corps, by drafting up orders with the intent to defraud [PFC B's employer] by pretending to be Captain Johnson." Charge Sheet. PFC B testified that the appellant told him that he, the appellant, had written orders that PFC B could provide to his, PFC B's, employer to prove his recall to active duty. The orders were sent by facsimile machine to PFC B's father who showed the orders to PFC B. The appellant subsequently told PFC B that he, the appellant, "made these orders," Record at 463, and that they "were made off of a base copy of orders . . . and that he had changed it up and replaced the actual officer of the original orders and some other information there to mine and his information . . . ." *Id*. at 470. The recall orders bear the following language indicating the source of those orders: "16. DRAFTER OF THESE ORDERS WAS: JPS. JPS, EXTENSION: 0000 JOHNSON, CAPT, USMC, EXTENSION: 1369." PE 3 at 2. PFC B testified that he did not believe that "Capt Johnson" was a real person, because "the appellant stated that he made him up." Record at 471.

Having reviewed the record of trial and having weighed all the evidence in this case, we do not believe that a rational fact finder could be convinced of the appellant's guilt of impersonating a commissioned officer merely by typing a fictitious officer's name at the bottom of fictitious orders. We ourselves are not convinced of the appellant's guilt. While the creation of fraudulent orders to bring someone on active duty is prejudicial to good order and discipline, there is no evidence that what the appellant did rises to the level of assuming the role of a commissioned officer, masquerading as a person of high rank, falsely holding himself out as an officer, or pretending to have the authority of an officer. *See United States v. Yum*, 10 M.J. 1, 4 (C.M.A. 1980); *United States v. Demetris*, 26 C.M.R. 192, 194 (C.M.A. 1958); *Messenger*, 6 C.M.R. at 24-25. This, however, does not end our inquiry.

We have no doubt that the appellant's conduct, including falsifying military orders with the intent to defraud someone, was prejudicial to good order and discipline or service discrediting. The Specification's language -- "by drafting up orders with the intent to defraud [PFC B's employer]" – places the appellant on notice that the Government was alleging that these acts were within the prohibitions of Article 134, UCMJ. Under these circumstances, we believe the above language, contained within the greater language alleging impersonation of a commissioned officer under Article 134, UCMJ, is an included offense, as conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, under that same Article. We, therefore, affirm the finding of guilty to Charge III and its Specification by excepting the words "impersonate a commissioned officer of the Marine Corps, by," excepting "ing" from the word "drafting," and excepting "by pretending to be Captain Johnson." We disapprove the finding of guilty as to the excepted words, and affirm a finding of guilty to the Specification, as excepted. *See United States v. Fuller*, 54 M.J. 107, 112 (C.A.A.F. 2000)(evidence sufficient to affirm finding of guilty to simple disorder under Article 134, UCMJ, although not legally sufficient to support finding of guilty to maltreatment); *United States v. Sapp*, 53 M.J. 90 (2000)(the included offense of a simple disorder affirmed when the record did not support a finding of guilty for the greater offense). We will take corrective action in our decretal paragraph and reassess the appellant's sentence accordingly.

Uncharged Misconduct

For his sixth assignment of error, the appellant claims that the military judge abused his discretion by allowing evidence of the appellant's prior inappropriately familiar relations with another junior Marine. We agree; however, we find the error harmless.

The military judge admitted, pursuant to MIL. R. EVID. 404(b), and over defense objection, evidence that the appellant fraternized with Lance Corporal (LCpl) H as relevant "to show intent, lack of mistake or accident, notice or knowledge to the accused that his conduct was inappropriate" as it pertained to Charge I, Specification 1, alleging a violation U.S. Navy Regulations prohibiting unduly familiar relationships with junior service members. Record at 338; Appendix to Findings of Military Judge. The admitted evidence consisted of Staff Sergeant (SSgt) A's testimony that then PFC H: (1) was seen going out to eat with the appellant; (2) talked on the phone with the appellant; (3) would take Reservists to the appellant's office and remain there for up to 90 minutes; (4) was seen with the appellant wearing civilian attire; (5) was seen in the SOI television room with the appellant at 0430; (6) called the appellant by his first name; and, (6) exchanged non-professional emails with the appellant. SSgt A considered the relationship improper and counseled the appellant concerning the relationship. LCpl H testified that his relationship with the appellant consisted of: (1) escorting

Reservists to the appellant's office at SOI; (2) getting a ride from the appellant from SOI to Oceanside, California after work four or five times and occasionally stopping to get something to eat on the way; (3) discussing personal issues; (4) telephone conversations after SOI; (5) that he addressed the appellant as "sergeant" except in discussions with others, and then he referred to the appellant by his first name; (6) that the appellant corrected him the one time that he called him by his first name; (7) visiting the appellant once in November, 2002; and, (8) sharing a hotel room with the appellant one night in Las Vegas to save money on lodging.

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *McDonald*, 59 M.J. at 430 (citing *Tanksley*, 54 M.J. at 175)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Ayala*, 43 M.J. at 298. We apply the following three-part test set forth in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), to determine whether the above evidence should have been admitted under M.R.E. 404(b):

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

(citations omitted). The evidence admitted must fulfill all three prongs to be admissible. *Id*. "The first and second prongs address the logical relevance of the evidence." *McDonald*, 59 M.J. at 429; MIL. R. EVID. 401 and 402; *see also Huddleston v. United States*, 485 U.S. 681, 686-87, 689 (1988). "The third prong ensures that the evidence is legally, as well as logically, relevant." *McDonald*, 59 M.J. at 429; MIL. R. EVID. 403; *see also Huddleston*, 485 U.S. at 687-88.

We find that the evidence failed the second and third *Reynolds* prongs –- it did not make any fact of consequence more or less probable, and any probative value was substantially outweighed by the danger of unfair prejudice. Intent, lack of mistake or accident, and notice or knowledge that the appellant's conduct was inappropriate, was never at issue. Because there was little or no probative value to any fact of consequence, the admitted evidence's probative value was substantially outweighed by the danger that members would simply conclude that the appellant was someone who has a history of engaging in unduly familiar relationships with junior Marines, and, therefore, probably did so again. Therefore, the military judge abused his discretion in admitting the evidence.

Having determined that the military judge abused his discretion, we must now determine whether this error resulted in material prejudice to the appellant's substantial rights. Art. 59(a), UCMJ. "We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (citing *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985)). First, the Government's case was strong. The appellant told PFC B to call him by his first name, they consumed alcohol together, they lived in the appellant's recreation vehicle together, and on one occasion PFC B woke up in his own bed to find the appellant in bed with him. Second, the defense case was not compelling, consisting mostly of impeachment of PFC B, evidence of how the Reserve side of SOI operated, and the appellant's mother's testimony about hiring PFC B to help repair her roof and providing money to PFC B's family. Third, the evidence concerning the appellant and LCpl H, even if relevant, was of marginal importance. It consisted of SSgt A's personal observation of contacts between the appellant and LCpl H at SOI and LCpl H's testimony concerning those contacts. Most of these contacts were professional only. Finally, the quality of the evidence in question was simply lacking. For these reasons, we hold that the erroneous admission of SSgt A's and LCpl H's testimony concerning the appellant's prior unduly familiar relationship with LCpl H was harmless error. *See United States v. Barnett*, 63 M.J. 388, 394-97 (C.A.A.F. 2006).

Post-Trial Delay

For his seventh assignment of error, the appellant claims that he has been denied his due process right to a speedy appellate review of his case. The Government argues that there has not been a due process violation, but if there was, it was harmless.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not facially unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id*. (quoting *Toohey*, 60 M.J. at 102).

Here, there was a delay of about 555 days from the date of trial to the date the CA took his action and another 80 days elapsed before the 1,041-page record of trial was docketed with this court. This case was both tried and docketed prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), so the presumptions of unreasonable delay set

forth in that case do not apply here. Nevertheless, we find that the delay in this case was facially unreasonable, triggering a due process review.

Regarding the second factor, reasons for the delay, the record contains no explanation. Looking to the third and fourth factors, we find no assertion of the right to a timely appeal prior to filing the appellant's brief before this court, and no claim or evidence of specific prejudice. We also find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Thus, we conclude that there has been no due process violation resulting from the post-trial delay. *Jones*, 61 M.J. at 83.

We are also aware of our authority to grant relief under Article 66, UCMJ, and find that the delay in this case affects the sentence that should be approved. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We will provide relief in our decretal paragraph.[2]

Conclusion

Accordingly, the findings of guilty as to the sole Specification under Charge II (larceny) is set aside, however, a finding of guilty to the included offense of attempted larceny, a violation of Article 80, UCMJ, and to Charge II are affirmed. That Specification shall now read as follows:

> "In that Sergeant Kevin R. Sanford, U.S. Marine Corps Reserve, on active duty, did, at an unknown location, between 5 September 2002 to on or about 1 October 2002, wrongfully attempt to steal U.S. currency, of a value less than $500.00, the property of Mr. Daryl Odum."

The findings of guilty as to the language excepted from the sole Specification under Charge III is set aside and that language is dismissed. Findings of guilty as to the sole Specification under Charge III, as excepted, and as to Charge III, are affirmed. That Specification shall now read as follows:

> "In that Sergeant Kevin R. Sanford, U.S. Marine Corps Reserve, on active duty, did, at Camp Pendleton, CA, on or about 1 October 2002, wrongfully and willfully draft orders with the intent to defraud Mr. Daryl Odum."

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*,

[2] We have considered the appellant's eighth assignment of error challenging his convictions for "non-petty offenses" by a panel of only four members, and find it to be without merit. *See United States v. Wolff*, 5 M.J. 923, 925 (N.C.M.R. 1978); *see* also Art. 29, UCMJ.

29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Based on the nature and circumstances of the appellant's remaining offenses, and taking into consideration the appellant's years of credible service, we find that a court-martial would impose a sentence no higher than a bad-conduct discharge, confinement for 150 days, forfeiture of pay of $767.00 per month for five months, and reduction to pay grade E-1. *See Peoples*, 29 M.J. at 428 ("No higher sentence may be affirmed by the appellate court than would have been adjudged at trial absent the error.").

After reassessment of sentence, and taking into consideration the excessive amount of post-trial delay in this case, we affirm the findings of guilty, as modified above, and only that portion of the sentence as extends to a bad-conduct discharge, confinement for 150 days, and reduction to pay grade E-1. We direct that the supplemental court-martial order reflect this court's findings.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court