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

BEFORE

CHARLES WM. DORMAN **W.L. RITTER** **E.E. GEISER**

UNITED STATES

v.

Teon E. JACKSON
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200001671 Decided 30 November 2005

Sentence adjudged 29 July 1999. Military Judge: P.J. McLaughlin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LT ELYSIA NG, JAGC, USNR, Appellate Defense Counsel
LT JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel
Maj RAYMOND E. BEALL II, USMC, Appellate Government Counsel

GEISER, Judge:

The appellant was convicted *in absentia*, contrary to his pleas, by a general court-martial with officer members, of four specifications of larceny from the Marine Corps Exchange of various amounts greater than $100.00 and two specifications of making and uttering insufficient fund checks, in violation of Articles 121 and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 923a. The appellant was sentenced to a bad-conduct discharge, confinement for one-year, total forfeiture of all pay and allowances and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged.

We previously affirmed the approved findings and sentence in an unpublished decision issued on 31 March 2003. On 30 September 2004 our superior court set aside our decision because the text of our previous opinion included verbatim replication of substantial portions of the Government's brief. The case was remanded to this court for a new Article 66(c), UCMJ, review before a panel comprised of judges who have not previously

participated in this case. *United States v. Jackson,* 60 M.J. 346 (C.A.A.F Order 2004).

The appellant asserts two assignments of error. He first alleges that Specifications 3 and 4 of Charge II and the specifications under Charge III reflect an unreasonable multiplication of charges under RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed). Secondly, the appellant alleges that the staff judge advocate's recommendation (SJAR) and the CA's action reflect incorrect findings to Specification 1 of Charge II.

We have examined the record of trial, the two assignments of error, and the Government's response. We find that the approved findings and sentence are correct in law and in fact and that no error materially prejudicial to a substantial right of the appellant was committed.

Unreasonable Multiplication of Charges

In his first assignment of error, appellant contends that the members' findings of guilt to Specifications 3 and 4 of Charge III (larceny) and the findings of guilt to Specifications 1 and 2 of Charge II (uttering bad checks) constitute an unreasonable multiplication of charges. Appellant's Brief of 29 Jul 2002 at 3. We disagree.

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *See United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). While multiplicity is based on the constitutional and statutory prohibitions against double jeopardy, the doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.*

This Court applies five factors in evaluating a claim of unreasonable multiplication of charges:

> 1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
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> 2) Is each charge and specification aimed at distinctly separate criminal acts?
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> 3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> 4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?

> 5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

See United States v. Quiroz, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd,* 58 M.J. 183 (C.A.A.F. 2003)(summary disposition); *accord Quiroz*, 55 M.J. at 339 ("this approach is well within the discretion of [this court] to determine how it will exercise its Article 66(c) powers."). Applying these factors to the appellant's case, we find that there has not been an unreasonable multiplication of charges.

We note that the appellant did not object at trial, which significantly weakens his argument on appeal. *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000)(en banc), *reversed on other grounds*, 55 M.J. 334 (C.A.A.F. 2002). We disagree, however, with the Government's claim that the appellant's failure to raise the issue of unreasonable multiplication of charges at trial means that the issue is forfeited absent plain error. As correctly noted by the appellant, this court has a statutory obligation to affirm only such findings of guilty as should be approved based on the entire record. Art. 66(c), UCMJ.

We find that the contested specifications reflect separate and distinct criminal acts with separate victims. The obvious victim of the charged larcenies was the Marine Corps Exchange (MCX). By choosing to use bad checks as the means of victimizing the MCX, however, the appellant also victimized the bank the checks were purportedly drawn on and the banking system generally. Thus, the Article 121 and 123a offenses reflect different societal interests and do not constitute the kind of overreaching or "piling on" that the doctrine of unreasonable multiplication of charges is intended to remedy. *Quiroz,* 57 M.J. at 585.

By charging the accused separately for the larceny and bad check offenses, the Government did not exaggerate the criminality of the appellant's conduct or unreasonably increase the appellant's punitive exposure. The appellant committed larcenies using a means that extended the effects of the appellant's criminality to additional victims. We do not believe the Government's decision to charge it both ways was overreaching.

Incorrect Findings

The appellant's second assignment of error notes that the SJAR and the order promulgating the CA's action reflect incorrect findings for Specification 1 under Charge II. The cited documents reflect a finding of guilty to larceny in an amount of $1,252.82. The finding reflected in the record of trial by exceptions and substitutions is to larceny of an amount in excess of $100.00. Record at 265. We agree with the appellant's assertion but find no prejudice to the appellant from these errors. We nonetheless recognize that the appellant is "entitled to have [his] official records correctly reflect the results of his court-martial." *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will therefore direct in our decretal paragraph that the supplemental court-martial order correctly reflect the findings.

Incomplete Record of Trial

This Court also notes that Prosecution Exhibit 7 is missing from the record. This exhibit consisted of a black and white VHS video surveillance tape made by the MCX. On 11 February 2003, this Court ordered the Government to produce the missing tape on or before 10 March 2003. On that date, the Government advised that, after "pursuing all possible options," the Government was unable to locate the missing exhibit. Government's Response to Court's Order of 10 Mar 2003. We further note that the record is missing the Article 33, UCMJ, letter forwarding the charges to the general court-martial convening authority as well as the Article 34, UCMJ, advice letter.

A "complete record of the proceedings and testimony" must be prepared for every general court-martial in which the adjudged sentence includes a bad-conduct discharge. Art. 54(c)(1)(A), UCMJ. "A 'complete record' is not necessarily a 'verbatim record.'" *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)). The Constitution does not require a verbatim record of a criminal trial. *Id.* The President has directed that a complete record in a general court-martial in which a bad-conduct discharge was adjudged shall include, in addition to a transcript of the trial itself, exhibits which were received in evidence and any appellate exhibits. R.C.M. 1103(c)(1). Where an omission from the record of trial is substantial, it raises a presumption of prejudice that the Government must rebut. *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979). We find that the absence of prosecution exhibit 7 is substantial and raises a presumption of prejudice.

We note that a witness from MCX security described the missing exhibit in detail during her testimony. Record at 104-08. We further note that the Government's case against the

appellant was substantial, to include receipts, bank records, and Prosecution Exhibit 11, a sworn confession by the appellant. Taken together, the detailed description of the missing evidence, the overwhelming Government case against the appellant, and the lack of any claim of prejudice by the appellant adequately rebuts the presumption of prejudice in this case.

Regarding the missing Article 33, UCMJ, letter forwarding the charges to the general court-martial convening authority and the missing Article 34, UCMJ, advice letter, we find that the appellant affirmatively waived his right to an Article 32 investigation in this case. Appellate Exhibit III. We therefore find no material prejudice to the substantial rights of the appellant resulted from the omission of the cited letters from the record of trial.

Conclusion

We direct that the supplemental court-martial order indicate that, in Specification 1 of Charge II, the appellant was convicted of larceny of an amount in excess of $100.00 rather than in the amount $1,252.82. The approved findings and sentence are affirmed.

Chief Judge DORMAN and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court