

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

**BEFORE**

**C.L. CARVER**

**D.A. WAGNER**

**R.W. REDCLIFF**

**UNITED STATES**

**v.**

**Jeffrey R. BERG  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200001728

Decided 23 September 2004

Sentence adjudged 27 August 1999. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot, Parris Island, SC.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel  
LT ROSS WEILAND, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARVER, Senior Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members, of larceny of \$5,000.00, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to a bad-conduct discharge, confinement for 6 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant claims that the evidence supporting his conviction is legally and factually insufficient and the military judge erred in denying the challenge of a court member.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we set aside the findings and sentence. Arts. 59(a) and 66(c), UCMJ. In view of our resolution of the first assignment of error, it is unnecessary to resolve the second assignment of error.

## Legal and Factual Sufficiency

In his first assignment of error, the appellant contends that the evidence was both legally and factually insufficient to support the conviction of larceny. We agree that the evidence was factually insufficient.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999); *see also* Art. 66(c), UCMJ. Upon review, we find that the evidence was legally sufficient.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. After thoroughly reviewing the evidence presented at trial, we are not convinced beyond a reasonable doubt of the guilt of the appellant.

## Facts

The appellant was convicted of larceny by wrongfully withholding \$5,000.00 that was allegedly given to him in error when he cashed two checks at a credit union on 21 January 1999.

An insurance adjuster hand wrote two checks to the appellant as a result of an automobile accident in which the other party to the accident admitted responsibility. One check was in the amount of \$2,845.24 for damage to the appellant's vehicle. The other was in the amount of \$300.00 for a rental car. The adjuster admitted that his handwritten amount of \$2,845.24 on the check could be mistaken for \$7,845.24 since his figure "2" looked like a "7." However, he also wrote out the correct amount on the check in longhand.

The appellant endorsed the two insurance checks and presented them to a teller at the Navy Federal Credit Union (NFCU) for cash. There was no evidence that the appellant presented any document to the teller or requested a specific amount to be paid to him. The teller did not recall the transaction in question, but testified regarding what she believed occurred. The teller reviewed all the relevant documents including the original check, her computer entries and reports, and a videotape of the transaction. The video recorder rotates among 12 cameras that are located throughout the NFCU. As a result, the camera only records a still photograph about every 7 seconds from any particular camera. The camera placed directly behind the teller and aimed toward the customer afforded

the best view of the transaction. The still photos from that camera were introduced into evidence as Prosecution Exhibit 11.

The teller testified that when the checks were presented to her for cash, she wrote the appellant's NFCU account number on them. She would not have cashed the checks unless the person presenting them had an account at NFCU. Since one of the checks exceeded \$2,500.00, the teller was required to obtain the approval of her supervisor. The videotape shows that the teller left her window and returned shortly thereafter with the supervisor. The supervisor testified that she did not remember the transaction either, but after viewing the documents and the videotape, she believes that she examined the check to ensure that the amount, date, endorsements, and signatures were correct. She testified that when she reviews the amount of the check, she only looks at the amount written in Arabic numerals and does not compare it to the amount that was written out in longhand. The supervisor initialed the check and entered an override code on the teller's computer that allowed the teller to cash the check. The supervisor said that she did not look at the computer screen to see if the teller had already entered the amount to be paid. There is no evidence that the teller and supervisor discussed the amount of the check.

After the supervisor left the teller's window, the teller entered the incorrect amount of \$7,845.24 into her computer log. The teller then took out cash to pay the appellant for the two checks. She testified that if she had paid out \$8,145.24, she should have retrieved 8 bundles of cash totaling \$8,000.00 from the bottom left hand drawer and retrieved the remaining amount of cash from the top drawer. If she had paid out \$3,145.24, she should have retrieved three bundles of cash from the bottom left hand drawer and the rest from the top drawer.

The videotape shows that the teller bent down to the left to retrieve the bundles of cash, then retrieved some more cash from the top drawer, and finally placed all the money on the desk in front of her in the teller's window. The teller viewed the videotape and testified that she believed that the videotape showed that she had more than three bundles of cash in front of her on the desk when she paid the appellant. The bank manager testified that he viewed the same videotape and he believed that the tape showed at least three bundles of cash, but he could not determine the exact number of bundles.

We viewed the videotape ourselves, but did not find it helpful because there was only one still photo on the tape that showed the cash on the teller's desk and it was not very clear. But, we did find that the videotape appeared to show three or four piles of cash. We could not determine if the piles were in bundles or loose cash. We could not see more than four piles of cash on the desk.

About a month after the insurance checks was cashed, the insurance company returned one of the checks to the NFCU with a notation that the check was incorrectly encoded for \$5,000.00 over the amount of the check. As a result, the bank manager reviewed the paperwork and the videotape. He contacted Naval Criminal Investigative Service (NCIS) and asked for an investigation. NCIS special agent (S/A) M received the call from the bank manager and opened an investigation. He interviewed the teller, but did not consider her a suspect. Nor did he ever review her bank records. He did review her employee records. The teller had one of the lowest error rates and one of the highest transaction rates at the NFCU. As a result of this error, the teller was suspended without pay, received a reprimand, and was placed on probation.

When the appellant was escorted to the NCIS office for an interview, the NCIS S/A did not interview him, but instead directed him to talk to the bank manager. The NCIS S/A did not search the appellant's barracks room. During the subsequent discussion with the bank manager, the appellant said that he could not remember if he had been overpaid because he had been taking medication that affected his memory. He also said that he did not need this problem and asked how he could make it go away. The bank manager said that if he had received the extra \$5,000.00, the appellant could either return the money or get a loan for the amount.

A Navy psychiatrist testified for the Government that he had been treating the appellant for post-traumatic stress disorder and major depression and had prescribed several medications. He said that he increased one of the medications about a week before the check was cashed. He saw the appellant again a day after the check was cashed and again after the appellant had been confronted by the bank manager. The doctor said that one of the medications prescribed could have caused cognitive impairment, though the doctor did not see any evidence of it. The appellant always appeared alert and oriented during their treatment sessions. However, memory impairment and amnesia are possible side effects of two of the other medications the appellant was taking at that time. The appellant first reported blackouts in May of 1999.

The Government contends that the appellant's financial transactions show that he must have received more than \$3,100.00 from the two checks he cashed on 19 January 1999 since the Government presented evidence that he spent about \$3595.00 from 21 January 1999 until 17 February 1999. That sum is about \$450.00 more than he should have received in cash from the two insurance checks. He had accounts at both the NFCU and the Marine Corps Federal Credit Union (MCFCU). During that same time period he did not make any withdrawals from his MCFCU checking or savings accounts. But, he did withdraw \$700.00 from that account over a three-day period from 15 January to 19 January 1999. There was no evidence presented that the appellant used any of

the insurance money either to repair his vehicle or to pay for a rental car. During that time, the appellant was living in the barracks and presumably had no expenses for housing and very little expense for meals. There was no evidence presented regarding any deposits or withdrawals from his NFCU account except that it had a balance of only \$26.48 sometime after 23 February 1999.

Upon careful review of the record, we find that we are not convinced beyond a reasonable doubt that the appellant ever received the alleged \$5,000.00 overpayment.

### **Conclusion**

Accordingly, the findings of guilty and the sentence are set aside. The charge and specification are dismissed. All rights, privileges, and property of which the appellant has been deprived shall be restored.

Judge WAGNER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL  
Clerk of Court