UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant CHRISTOPHER B. ARMSTRONG
United States Air Force

ACM 34397

20 June 2003

Sentence adjudged 19 May 2000 by GCM convened at Pope Air Force Base, North Carolina. Military Judges: Barbara Brand and William E. Orr.

Approved sentence: Dismissal, confinement for 1 year, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Frank Spinner (argued), Colonel Beverly B. Knott, Major Jeffrey A. Vires, Major Terry L. McElyea, and Major Maria A. Fried (on brief).

Appellate Counsel for the United States: Major Eric Placke (argued), Lieutenant Colonel Lance B. Sigmon and Major Jennifer R. Rider (on brief).

Before

VAN ORSDOL, BRESLIN, and STONE
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

In accordance with his pleas, the appellant was convicted of unlawfully entering the dwelling of Ms. Z, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and making a false official statement denying the unlawful entry, in violation of Article 107, UCMJ, 10 U.S.C. § 907. Contrary to his pleas, the appellant was found guilty of indecently assaulting Senior Airman (SrA) W by touching and squeezing her breasts and rubbing her thigh, in violation of Article 134, UCMJ, larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921, and making a false official statement denying the indecent assault of SrA

W, in violation of Article 107, UCMJ. The appellant was acquitted of a separate assault upon SrA W, and of attempting to unlawfully enter the dwelling of Ms. G. The general court-martial sentenced the appellant to a dismissal, total forfeitures, and confinement for 1 year. The convening authority approved the sentence adjudged.

The appellant now contends that the evidence is factually insufficient to sustain the convictions for indecent assault, larceny, and the false official statement to which the appellant pled not guilty.[1] The appellant also contends the trial counsel erred in bringing before the members the fact that the appellant asserted his right to counsel during an interview, and that the military judge erred in denying the defense request to call an expert witness. We also considered two issues not raised at trial or on appeal. After taking corrective action, we affirm.

Background

The appellant was passed over for promotion to captain, and went to the Military Personnel Center at Randolph Air Force Base (AFB), San Antonio, Texas, for several days to review his records. While in San Antonio, he stayed with an acquaintance, Captain Steve Brand, in an apartment off base. When he arrived, the appellant told Captain Brand that he was interested in meeting women, and asked if there were any attractive women in the apartment complex. Captain Brand mentioned a woman who lived upstairs from him (Ms. Z), and later they discussed a young lady who lived in another apartment (Ms. G). During his visit to San Antonio, the appellant went his own way during the day and met Captain Brand in the evenings for dinner and drinks downtown.

On Friday, 16 July 1999, Captain Brand met the appellant at his apartment after work. The appellant mentioned that he had gone upstairs that day and introduced himself to Ms. Z. The two men went out for the evening in San Antonio, and returned to the apartment early the following morning. After Captain Brand went to bed, the appellant climbed from Captain Brand's second floor balcony to the balcony above, and entered Ms. Z's apartment, uninvited, through the sliding glass door. He went into the bedroom where Ms. Z was sleeping, and woke her. After a brief conversation, she ushered him out the front door.

On Saturday, 17 July 1999, Captain Brand and the appellant went to a piano bar on the Riverwalk in San Antonio called "Howl at the Moon," popular for audience participation in songs and bawdy antics. The appellant and Captain Brand met a friend, Captain Clay Robertson, as planned, and the three found tables at the front, near the stage. When additional seats became available, Captain Brand invited three young

[1] We heard oral argument on this issue at Southwestern Illinois College, as part of our Project Outreach.

women nearby to join their group. The three women were SrA W, SrA R, and SrA B. Two of the women introduced themselves and said they were airmen. SrA W later testified that she "jokingly" said she was a pilot, "then rolled [her] eyes and laughed." The group had drinks and socialized for sometime, although conversation was difficult in the crowded and noisy bar. The appellant engaged SrA W in conversation. The group took snapshots of each other together.

After some time, SrA W got up to get another drink. While at the bar, the appellant approached and told her he would like to pull her into the men's bathroom nearby. SrA W thought the appellant was joking. After she got her drink and stepped back from the bar, the appellant grabbed her arm and pulled her a few steps toward the men's bathroom. SrA W told him to let go, pulled her arm away, and returned to the table.

SrA W later got up to dance with SrA B in a small area near the stage, where some chairs had been pushed aside. It was very crowded. SrA B was behind SrA W, facing SrA W's back. The appellant approached both from behind. SrA W felt SrA B lean against her, then felt hands touching and squeezing her breasts. She grabbed the hands, turned around, and saw it was the appellant who had touched her. SrA W said, "Stop touching me," and went back to the table. The appellant came and sat next to her, and started rubbing her upper leg. SrA W got up and moved. She took her purse, which was hanging across the back of a chair, but forgot her wallet, which was lying on the table. The wallet contained her and SrA R's military identification cards, her credit cards, her driver's license, and about $60.00 in cash.

At a later point, SrA W wanted to buy another drink, but could not find her wallet. She reported the loss to the group and the bouncer, and they searched the area without success. They found the appellant coming into the bar from the Riverwalk, but he denied any knowledge of the wallet.

At about 2330 that night, Captain Brand, Captain Robertson, and the appellant left the piano bar to go to a dance club called "Polyesters." They stayed at the dance club until 0200 or 0300, and then drove to a "Denny's" restaurant to eat. Captain Brand recalled the appellant had bought a yellow disposable camera earlier in the week, and saw the appellant carrying one or more similar cameras, plus a silver Canon camera. The appellant told Captain Brand that he took the cameras, cash, and a ruler/calculator. The appellant gave the Canon camera to Captain Robertson as a gift. As they drove to "Denny's," the appellant started cursing SrA W, and repeatedly said he took her identification card and threw it in the river to teach her a lesson.

Captain Brand and the appellant arrived back at the apartment at about 0430. They knew the appellant's flight left at 0630, so Captain Brand set his alarm and got an hour's sleep.

The appellant left the apartment, and went to the apartment of Ms. G, in the same complex. He knocked on the door, tried the doorknob, and peered into the apartment through a gap between the shade and the window jamb for about 15 minutes. Ms. G was frightened because she did not know the appellant, and did not open the door.

When Captain Brand awoke, the appellant was back in the apartment. He told Captain Brand that he had been trying to find the cute girl who lived in the apartment complex. Captain Brand drove the appellant to the airport, and then returned home to sleep.

On his way to work the next morning, Captain Brand found a disposable camera and a ruler/calculator on the floor of his car. On the advice of his deputy staff judge advocate, Captain Brand reported the incidents to the Air Force Office of Special Investigations (AFOSI). Captain Brand also recovered the Canon camera from Captain Robertson, and gave it to the AFOSI.

The AFOSI questioned the appellant after advising him of his rights. He denied entering Ms. Z's apartment, touching SrA W's breasts or trying to drag her into the bathroom, or being involved in a confrontation involving a stolen wallet while at "Howl at the Moon."

Factual Sufficiency of the Evidence

The appellant contends that the evidence is not factually sufficient to sustain the findings of guilt on the contested charges. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Reed*, 54 M.J. 37, 41 (2000). The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," the court is "convinced of the accused's guilt beyond a reasonable doubt." *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). After carefully reviewing the evidence in the record of trial, and considering the arguments of counsel, we find the evidence was legally and factually sufficient to support the convictions.

A. Indecent Assault.

SrA W testified that the appellant grabbed and squeezed her breasts, and rubbed her thigh. Considering all the circumstances surrounding the event, including the appellant's apparent interest in SrA W, his offer (even if joking) to drag her into the bathroom, and the manner in which the touchings occurred, we are convinced the acts were intentional and were committed with the intent to gratify the appellant's sexual

desires. While no one else saw the actual touchings, other witnesses recalled SrA W's immediate report of the incidents, and observed a change in her reaction to the appellant. The appellant was also markedly hostile toward SrA W later that night.

The appellant's attack on SrA W's credibility is unpersuasive. The appellant contends that she "admitted that she falsely led the men to believe that she was an officer and a pilot." However, SrA W actually testified that she said it in a joking manner, and later explained that she was an airman. Whether others heard her is not determinative–even the civilian defense counsel acknowledged that the bar was very crowded and noisy, and that people would often nod in agreement even though they had not heard what someone else was saying. In any event, in the context of a social gathering at a bar on a Saturday night, such comments are of little moment.

The appellant also contends SrA W "testified that she could not remember any sexually provocative behavior on the stage at the club." However, that is not completely accurate. SrA W testified that she "did see some things that were–you could say were sexually provocative," but when pressed could not recall details of events because they occurred so long before trial. We are convinced SrA W accurately remembered the significant events of the evening in question; her inability to recall certain specific details does not impeach her credibility.

The appellant also asserts that SrA W made inconsistent statements about the incident, noting that some statements contain details that others do not. We recognize, however, that witnesses make different statements with varying degrees of detail, and the fact that a statement she prepared on her own was not as detailed as one resulting from close questioning by investigators or lawyers does not mean the witness is untruthful.

B. Larceny.

The court-martial found the appellant guilty of stealing SrA W's wallet, cash, and her identification card, as well as a Canon camera and a calculator. SrA W testified that her identification card and cash were in her wallet, and she inadvertently left them on the table when she walked away after the appellant's unwelcome touching of her thigh. When she discovered the wallet missing and began to search for it, they found the appellant coming back into the bar from the Riverwalk. Later, the appellant told Captain Brand that he was angry at SrA W, and that he threw her identification card into the river. The appellant also admitted that he took some cash that evening. Given the appellant's opportunity, his motive, and his admissions, we find the evidence legally and factually sufficient to support the findings of guilt.

The appellant contends both Captain Brand and Captain Robertson were motivated to implicate the appellant because each feared disciplinary action for fraternization or drunken driving. He argues that both had reasons to minimize their own conduct and

make the appellant appear culpable. We see no merit in this argument. It must be noted that Captain Brand initiated the investigation, and there was no evidence that anyone else intended to do so. Normally a person does not report to the AFOSI matters one wishes to conceal. It is also apparent that all the members of the group were in civilian clothes that night, and did not know each other beforehand. There is no substantial evidence that any of the officers–other than the appellant–conducted themselves inappropriately after that time. We find no reasonable basis to conclude that the witnesses fabricated or slanted their testimony to implicate the appellant.

C. False Official Statement.

As noted above, the appellant was charged with making several false official statements to the AFOSI. He pled guilty to lying to the AFOSI about not entering Ms. Z's apartment through the sliding glass door to the balcony, and to being in her apartment. The court members found him guilty of making a false official statement that he never touched a female's breasts while at "Howl at the Moon," but acquitted him of lying about whether he was involved in a confrontation regarding a stolen wallet at "Howl at the Moon." The appellant contends, as he did at trial, that the evidence is insufficient to show the appellant committed the acts alleged. He also maintains that he experienced a "blackout" due to intoxication and could not remember the events, so that he later believed his statements were true. We reject this argument.

At trial, the defense called Dr. William Renn, an expert witness, to testify that the appellant was an alcoholic who sometimes experienced "blackouts" due to extreme intoxication. Significantly, there was no testimony that the appellant actually experienced a "blackout" on the evening in question. To the contrary, the evidence indicated his speech was not slurred, he was able to walk without difficulty, he interacted with others, and he recalled events from that evening. We find the appellant was not so intoxicated as to be incapable of forming specific intent or remembering what he did.

Comment on Exercise of Rights

The appellant contends the trial counsel improperly brought to the attention of the members the fact that the appellant asserted his right to counsel, and that the instruction by the military judge to disregard the comment was insufficient to cure the error. We do not agree.

At trial, the prosecution called Special Agent Richard Watson, AFOSI, to testify about the statements the appellant made to the AFOSI, which were alleged to be false. At the conclusion of the agent's testimony, the assistant trial counsel asked, "and how did the conversation end that day?" The agent replied, "After Agent Carney asked him about the incident where he was knocking on a female's door, Lieutenant Armstrong made one more comment and then asked for a lawyer." The civilian defense counsel immediately

objected, and the military judge excused the members. The defense moved for a mistrial, but it was denied. The military judge subsequently recalled the members and provided the following instruction:

> MJ: Mr. President, members of the court, the witness referred to a–that the accused may have asked for a lawyer in this particular case. I'm directing you to disregard that statement. A military member has an absolute right to request a lawyer at any time and the fact that the accused may have asked for a lawyer must be disregarded by you. Can each of you follow that instruction?
>
> MEM [Maj Miller]: Just that statement, sir? Not all the other statements.
>
> MJ: Yes. Just that particular statement.
>
> Bailiff, please call the witness back.

When the witness returned, civilian defense counsel commenced his cross-examination.

It is error to introduce evidence that an accused invoked his constitutional rights to silence or counsel. The rule arose from the concern expressed by the Supreme Court that "too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann v. United States*, 350 U.S. 422, 426 (1956). In *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978), the Court quoted with apparent approval Professor Wigmore's observation that "'[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.' 8 J. Wigmore, Evidence § 2272, p. 426 (J. McNaughton rev. 1961)."[2]

This prohibition is firmly entrenched in military law. *United States v. Sidwell*, 51 M.J. 262, 265 (1999); *United States v. Garrett*, 24 M.J. 413, 418 (C.M.A. 1987), *vacated on other grounds by Garrett v. Lowe*, 39. M.J. 293 (C.M.A. 1994); *United States v. Moore*, 1 M.J. 390, 391 (C.M.A. 1976); *United States v. Nees*, 39 C.M.R. 29, 34 (C.M.A. 1968). As the error violates an accused's constitutional rights, this Court may only find

[2] The public today may be more willing to accept an accused's assertion of his rights as a neutral fact. As the Supreme Court observed in *Mitchell v. United States*, 526 U.S. 314, 330 (1999):

> It is far from clear that citizens, and jurors, remain today so skeptical of the principle or are often willing to ignore the prohibition against adverse inferences from silence. Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition.

the error harmless if we are convinced the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Hall*, 58 M.J. 90, 94 (2003); *Sidwell*, 51 M.J. at 265.

In this case, the parties and the military judge agreed that it was improper to inform the members that the appellant invoked his right to counsel. We concur. We must next determine whether the appellant was prejudiced by this constitutional error.

We note that the error was an "isolated reference to a singular invocation of rights" by the appellant. *Sidwell*, 51 M.J. at 265; *Garrett*, 24 M.J. at 416-17. It was very brief, and did not indicate the offense or offenses for which the right to counsel was invoked. *Sidwell*, 51 M.J. at 265. Civilian defense counsel immediately objected, and the military judge called for a session under Article 39(a), UCMJ, 10 U.S.C. § 839(a), to consider corrective action. Shortly thereafter, the military judge instructed the members in clear and forceful terms that they must disregard the fact that the appellant asked for a lawyer. *Id.* Lastly, trial counsel did not attempt to use the evidence against the appellant in any way. *Id.* Considering all these circumstances, we are convinced the error was harmless beyond a reasonable doubt.

The appellant does not take issue with the substance of the military judge's curative instruction, but contends it was insufficient because the military judge did not individually voir dire the members to determine whether they could follow the instruction. We note that in similar circumstances, other military judges have conducted voir dire of the court members, and that practice is cited with approval by our superior court. *Sidwell*, 51 M.J. at 265; *Garrett*, 24 M.J. at 418. However, absent clear and convincing evidence to the contrary, members are presumed to follow the instructions given them. *United States v. Jenkins*, 54 M.J. 12, 20 (2000); *Garrett*, 24 M.J. at 418; *United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975). While individually questioning the members is a good way to help assure they appreciate the seriousness of a special instruction, it is not mandatory in all cases. Indeed, military judges commonly instruct court members on critical constitutional matters, including the presumption of innocence and the burden of proof, without conducting individual voir dire. Considering the military judge's prompt corrective action, coupled with the strong, directive language of the curative instruction, we are satisfied that the court members understood their duty under the law.

Denial of Expert Witness

The appellant contends the military judge erred in denying the defense request to present the testimony of an expert witness, Major DeLeon, to offer his opinion that Dr. Renn's assessment was reliable after Dr. Renn was cross-examined. We find no error.

The civilian defense counsel arranged for the appellant to be evaluated by Dr. William Renn, an expert in alcoholism and alcohol abuse treatment. At trial, the defense attempted to use Dr. Renn to testify about the appellant's version of events on the night in question. However, the military judge granted the government's pretrial motion requesting that Dr. Renn be prevented from including otherwise inadmissible hearsay evidence in his testimony.

During the defense's case, Dr. Renn opined that the appellant was an alcoholic, explained the effects of intoxication, and testified that the appellant sometimes experienced "blackouts" brought on by over-indulgence in alcohol. The trial counsel cross-examined Dr. Renn about the basis for his opinion and its limitations, including the fact that he made his original assessment after speaking only to the appellant. He also cross-examined Dr. Renn about his prior personal dealings with the defense counsel. At the conclusion of the examination of the witness, a court member asked whether the defense had obtained a second opinion. Dr. Renn indicated that he did not know.

The defense counsel then sought to call Major Richard DeLeon, a clinical social worker and nationally certified substance abuse counselor, as a witness for the defense to offer an opinion on the reliability of Dr. Renn's assessment. Trial counsel objected, arguing that such testimony would improperly bolster the testimony of another witness. The military judge ruled that Major DeLeon could testify about what he would do if presented with a patient such as the appellant and what the standard of care is for such assessments, but that he could not express an opinion of the reliability of Dr. Renn's assessment. As the military judge succinctly stated, "you can't use one witness to say another witness was right." The defense counsel elected not to call Major DeLeon as a witness. The appellant now contends the military judge erred by not allowing the defense to call Major DeLeon to rehabilitate Dr. Renn's testimony after it was attacked.

Mil. R. Evid. 702 allows a party to present the testimony of a qualified expert if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Simply put, the expert testimony must be helpful to the factfinders. Scientific evidence from an expert about a matter in issue may be helpful, but an opinion about the truthfulness, accuracy, or reliability of another witness's testimony invades the province of the factfinder, and is not helpful. In *United States v. Cameron*, 21 M.J. 59, 63 (C.M.A. 1985), the (then) Court of Military Appeals reiterated the rule, as expressed by the court below, "The rule remains that, absent unusual circumstances, opinion testimony on whether or not to believe a particular witness' testimony simply is not deemed helpful to the factfinder, for the factfinders are perfectly capable of observing and assessing a witness' credibility." *See Jenkins*, 54 M.J. at 16 ("This Court has consistently held that a witness may not opine that another witness is lying or telling the truth."); *United States v. Birdsall*, 47 M.J. 404, 410 (1998) ("An expert's opinion evaluating the truthfulness of a witness' story also usurps the jury's exclusive function to weigh evidence and determine credibility");

United States v. Hill-Dunning, 26 M.J. 260, 262 (C.M.A. 1988) ("We have consistently held that the opinions of one witness concerning the credibility or believability of another witness are inadmissible. We do not permit witnesses to pit themselves against one another"); *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988) ("expert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony"); *United States v. Samara*, 643 F.2d 701, 705 (10th Cir. 1981) (An expert should not "go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility") (quoting *United States v. Ward*, 169 F.2d 460, 462 (3d Cir. 1948)).

In this case, the defense wanted Major DeLeon to express his opinion about the reliability of Dr. Renn's assessment, in other words, to say that Dr. Renn's testimony was truthful or believable. However, such opinion evidence is simply not helpful to the factfinders, and was therefore inadmissible. We hold the military judge did not err in excluding such testimony.

Of course, Major Deleon could properly have testified about the manner in which psychological assessments are prepared, because it was a scientific fact in issue that may have been helpful to the factfinder. *See United States v. Wright*, 53 M.J. 476, 485 (2000) (citing *United States v. Halford*, 50 M.J. 402, 404 (1999)). From this, the members could have determined for themselves whether Dr. Renn's assessment was properly completed. The military judge's ruling permitted the defense to present such testimony, however the defense declined to do so.[3]

Larceny–Maximum Punishment

Although not raised at trial or on appeal, we note two related issues involving the manner in which the larceny offenses were charged. We find error and take corrective action.

As noted above, the evidence proved that, while at "Howl at the Moon," the appellant stole SrA W's wallet, which contained cash, credit cards, her driver's license, and her military identification card. The appellant also stole a Canon camera and a ruler/calculator at some point during the evening. The government charged these larcenies in two specifications, each of which included an aggravating element warranting increased punishment.

[3] That was a wise choice. The permissible scope of Major DeLeon's testimony concerning the approved protocol for performing alcohol abuse assessments was subject to the same cross-examination, exposing the limitations of the process. It would have been risky to let the members hear the cross-examination twice. Moreover, Major DeLeon's testimony could not have helped remove the suggestion of bias relating to the existing relationship between the civilian defense counsel and Dr. Renn.

The first specification alleged the theft of the wallet, cash, the Canon camera, and the calculator as theft of property worth more than $100.00. The evidence indicated the wallet was worth about $30.00, and the victim had about $60.00 in cash. The wallet also contained credit cards and a driver's license, but no particular monetary value was assigned to these items. The parties also stipulated that the Canon camera was worth $75.00 and the ruler/calculator was worth $10.00. The second specification alleged the theft of two identification cards that were military property of the United States.

A. Aggregate Value.

The first issue is whether the prosecution properly aggregated the value of the various stolen items, so as to provide a basis for increased punishment for a theft of property worth more than $100.00. Under Article 56, UCMJ, 10 U.S.C. § 856, Congress delegated to the President the power to prescribe the maximum punishment limits for offenses under the UCMJ. At the time of trial, the *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 46e(1)(b) (2000 ed.), provided that the maximum punishment for larceny of non-military property worth less than $100.00 was a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. Under that same provision, the maximum punishment for larceny of non-military property worth more than $100.00 included a dishonorable discharge, forfeiture of all pay and allowance, and confinement for 5 years.[4]

In this case, no single item was valued at more than $100.00; rather, it was the aggregate value of several items that made the appellant vulnerable to the higher maximum punishment. The long-standing rule in military practice is that where the government attempts to aggregate the value of property to support a greater maximum punishment, it must produce evidence to negate the possibility that the larcenies were separate. *United States v. Taylor*, 20 C.M.R. 5 (C.M.A. 1955); *United States v. Florence*, 5 C.M.R. 48 (C.M.A. 1952). The rule is included in the *Manual for Courts-Martial*, Part IV, ¶ 46c(h)(ii) (2000 ed.): "When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons." As the (then) Court of Military Appeals observed, "it need only be demanded that the prosecutor, in his allegations of larceny, recognize fair and distinct interruptions in the current of the accused's criminality, and acknowledge them alone, resolving doubts, of course, in favor of the latter's penal interest." *United States v. Hall*, 20 C.M.R. 278, 280 (C.M.A. 1955). If the prosecution's efforts are fair, tenable, and reasonably uniform, the court "shall not at all require a micrometer caliper for use in the disposition of cases of this ilk." *Id*. at 281.

[4] Since the date of the trial, the cut-off for increased punishment for larceny was increased to $500.00. *MCM*, Part IV, ¶46e(1) (2002 ed.).

The theft of SrA W's wallet and cash were clearly a single act, but the value of these items totaled only $90.00. It is unknown when the appellant stole the Canon camera and the ruler/calculator. There is no evidence showing it occurred while the appellant was at "Howl at the Moon." Thus, the government has failed to show that these thefts occurred at substantially the same time and place, so that they could be aggregated as a single theft. We find the evidence factually insufficient to support the finding of larceny of property of a value more than $100.00. We will take corrective action in our decretal paragraph.

Having found error in the findings, we must reassess the sentence. We are satisfied that the appellant would have received the same sentence at trial had the error not occurred. Court members determine an appropriate sentence based, in part, upon the underlying facts of the offenses–not the title of the crime–and those facts remain the same. The members were incorrectly advised that the maximum punishment included 16 years and 6 months' confinement, rather than 12 years' confinement. However, in view of the substantially lesser sentence imposed, we are confident it would have made no difference. Finally, we are ourselves convinced the appellant's sentence is appropriate.

B. Single Theft.

What is one theft may not be divided into separate specifications. Here, the appellant's act of stealing SrA W's wallet, including her cash and military identification card, was one theft. The items taken in this single theft were included in two separate specifications, no doubt in recognition of the enhanced punishment for theft of military property. This was error. However, in the unique circumstances of this case, we find no prejudice. The appellant was properly liable for the increased punishment authorized for the theft of the identification card because it was military property. Although the wallet and cash were included in a separate specification, that specification also included other stolen items, so it did not operate to increase the appellant's maximum punishment, or to substantially exaggerate the appellant's culpability.

Conclusion

The finding of guilt to Specification 1 of Charge III is affirmed, excepting the word "greater" and substituting the word, "less." The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and the sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court