

**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.M. FREDERICK**

**UNITED STATES**

**v.**

**Rene HERNANDEZ  
Staff Sergeant (E-6), U.S. Marine Corps**

NMCCA 200501599

Decided 12 June 2007

Sentence adjudged 22 November 2004. Military Judge: A.C. Williams. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Aircraft Wing, Okinawa, Japan.

Maj JEFFREY STEPHENS, USMC, Appellate Defense Counsel  
Capt BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to her pleas, of two specifications of false official statement, larceny, and fraud against the United States, in violation of Articles 107, 121, and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 921, and 932. The appellant was sentenced to confinement for 4 months, reduction to pay grade E-1, a fine of \$2000.00, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and except for the bad-conduct discharge, ordered it executed.

We have examined the record of trial, the appellant's brief and five assignments of error out-of-time,<sup>1</sup> and one supplemental

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<sup>1</sup> I. THE MILITARY JUDGE ERRED BY FAILING TO DISMISS SPECIFICATION 2 OF CHARGE I DUE TO THE GOVERNMENT'S NEGLIGENT LOSS OF THE TAPE RECORDING OF THE CONVERSATION IN WHICH APPELLANT'S FALSE OFFICIAL STATEMENT WAS ALLEGEDLY UTTERED.

assignment of error,<sup>2</sup> and the Government's responses. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

### **Background**

This case involves travel claim fraud in conjunction with the appellant's permanent change of station (PCS) orders from Texas to Okinawa, Japan, and her subsequent tour conversion on those orders. In 2003, the appellant served as the Processing Non-Commissioned Officer-in-Charge (NCOIC) and Travel Specialist at the Amarillo, Texas, Military Entrance Processing Station (MEPS). Defense Exhibit G at 57. She was also a single parent with one dependent, a 10-year-old son, JG. In June 2003, the appellant received 12-month unaccompanied orders to the First Marine Aircraft Wing, Okinawa, Japan, from her duty station in Amarillo, Texas. As part of the unaccompanied orders, the appellant was authorized to relocate her son stateside. Prosecution Exhibit 7 at 5. The appellant did so and the "designated place" for her dependent was El Cajon, California.

Sometime after the 4th of July weekend in 2003, the appellant and her son visited with Gunnery Sergeant (GySgt) Mark Rabbitt, U.S. Marine Corps, at his residence in San Diego, California. The appellant went to GySgt Rabbitt's house so that JG could visit with GySgt Rabbitt's son prior to the appellant's leaving for Okinawa. While there, the appellant informed GySgt Rabbitt that while she was deployed in Okinawa, she was going to leave JG with her brother, Lucio Hernandez, who also lived in San Diego. The appellant asked GySgt Rabbitt if she could borrow his cell phone. She wanted to give it to her brother so she could call her son while she was deployed. GySgt Rabbitt loaned her the cell phone, and the appellant made approximately 46 calls to that phone between July and September 2003. GySgt Rabbitt terminated service on the cell phone in September 2003.

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II. THE EVIDENCE WAS NOT LEGALLY OR FACTUALLY SUFFICIENT TO PROVE APPELLANT'S GUILT TO SPECIFICATION 2 OF CHARGE I, AND THE SOLE SPECIFICATION OF CHARGE III.

III. THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING PROSECUTION EXHIBIT 23, THAT CONTAINED UNRELIABLE HEARSAY INFORMATION OBTAINED FROM INTERNET WEBSITES.

IV. THE MILITARY JUDGE ERRED WHEN HE ELICITED IMPROPER ARGUMENT FROM THE TRIAL COUNSEL BY REPEATEDLY ASKING THE TRIAL COUNSEL QUESTIONS ABOUT THE EVIDENCE PRESENTED DURING THE GOVERNMENT'S CLOSING ARGUMENT TO "HELP" HIM IN HIS "RECOLLECTION OF WHAT TRANSPIRED," RESULTING IN COUNSEL'S ARGUMENT BEING USED AS A SUBSTITUTE FOR EVIDENCE.

V. APPELLANT WAS DENIED A FAIR COURT-MARTIAL WHEN THE MILITARY JUDGE ABANDONED HIS IMPARTIAL ROLE AND INSTEAD BECAME A PARTISAN ADVOCATE FOR THE GOVERNMENT.

<sup>2</sup> I. APPELLANT'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE AND THUS INCAPABLE OF A FULL REVIEW UNDER ART. 66, UCMJ.

On 15 July 2003, the appellant submitted two travel claims. In her first travel claim, she indicated that she detached from her command in Amarillo, Texas, on 3 July 2003, and stayed in Amarillo until 6 July 2003, when she departed by private automobile for El Cajon, California, en route to Okinawa. According to the claim, she arrived in El Cajon, California, on 9 July 2003, and departed Los Angeles International Airport en route to Japan, on 10 July 2003. She reached her new duty station on 12 July 2003, without her dependent.

In her second travel claim filed the same day, for the relocation of JG, the appellant indicated that JG left her duty station at Amarillo, Texas, on 3 July 2003, and stayed in Amarillo until he departed on 6 July 2003 by private automobile. He arrived at the designated place of El Cajon, California, on 10 July 2003. On the travel claim, the appellant marked JG's arrival in El Cajon, California as "Mission Complete."

On 6 August 2003, the appellant filed a Do-It-Yourself (DITY) Move Checklist and Certification of Expenses indicating that she used a borrowed vehicle and spent \$112.29 moving her household goods from Amarillo, Texas,<sup>3</sup> to El Cajon, California. Prosecution Exhibit 6 at 4.

Sometime after her arrival in Okinawa, Japan, the appellant applied for a tour conversion to change her tour from an "unaccompanied" status to an "accompanied" status. On 30 September 2003, the appellant's tour conversion request was approved, entitling her to bring her son to Okinawa, Japan, at Government expense. On 23 October 2003, the appellant's dependent son arrived in Okinawa, Japan.

On 3 November 2003, the appellant filed another travel claim indicating JG's "Address on Receipt of (her 16 June 2003) Orders" was Hereford, Texas, and that JG had traveled to Naha, Japan, from Hereford, Texas, vice the designated place of El Cajon, California, on 22 October 2003. For the period prior to JG's arrival in Japan, the appellant claimed the Basic Allowance for Housing (BAH) for his residence in El Cajon, California. BAH for the El Cajon, California, zip code was \$1,552.00 per month versus the BAH of \$750.00 per month for Hereford, Texas.<sup>4</sup>

Chief Warrant Officer Two (CWO2) B, the travel Officer-In-Charge from the Integrated Personnel Administration Center became aware of the discrepancy in JG's place of departure when the disbursing office returned the travel claims and sought clarification from the appellant. On 18 November 2003, the

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<sup>3</sup> The appellant's address on receipt of PCS Orders was in Amarillo, Texas. PE 7 at 2-3; PE 8 at 3.

<sup>4</sup> Hereford, Texas is where the appellant's mother lived, and was the address that the appellant listed on her travel claim of 3 November 2003, as JG's residence upon receipt of her 16 June 2003 travel orders and stating that JG had departed for Okinawa from Hereford, Texas. PE 7 at 3-4; PE 10 at 3.

appellant submitted a revised travel claim for JG indicating that the "Dependents' Address on Receipt of Orders" was El Cajon, California, and alleged that JG departed from El Cajon, California on 18 October 2003 for Texas and then traveled to Okinawa. Instead of sending the claim back again, CWO2 B contacted the appellant to clarify the location from where the child departed. The appellant informed CWO2 B that JG had resided in El Cajon, California, and that once the tour conversion went through, he left El Cajon to go to Texas so that he could fly to Okinawa with his grandmother, Mrs. Odilia Hernandez. CWO2 B then requested written proof that JG had lived in California, and suggested that she submit JG's school transcripts from California. The appellant informed CWO2 B that she did not have her son enrolled in school because she knew that she was going to seek a tour conversion and would eventually pull him out of school to bring him to Okinawa. CWO2 B asked the appellant to explain the situation in writing. In response, the appellant provided CWO2 B with a typed and signed statement, indicating that her son had remained in El Cajon, California, from 10 July 2003 until 18 October 2003, when he was escorted to Hereford, Texas, for travel to Okinawa. The statement did not address her son's school situation. PE 16.

During the command investigation into the discrepancies in the appellant's travel claims, then-Second Lieutenant (2ndLt) W interviewed the appellant. The appellant informed 2ndLt W that when she deployed to Okinawa, she had left her son with her brother in California, and that she did not enroll her son in California because she intended to apply for a tour conversion. The appellant maintained that she was not aware that her mother and brother had moved JG back to Texas and enrolled him in school there. The appellant provided 2ndLt W with a copy of her DITY move claim.

School enrollment records from Texas showed that JG was enrolled in school in Texas on 1 August 2003 by the appellant's mother. Moreover, the records showed that the appellant's mother had listed her home address as JG's address. The school records showed that JG attended school in Texas from 18 August 2003 until 22 October 2003, when he left for Okinawa. In order to enroll JG in the Department of Defense Dependents School (DoDDS) in Okinawa, the appellant signed a DoDDS parental consent form permitting the release of JG's school records from Hereford, Texas to his new school in Okinawa. PE 2.

During the defense case on the merits, the appellant's mother, Mrs. Odilia Hernandez testified that she drove JG's belongings out to El Cajon, California during the weekend of 4 July 2003. She recalled that one month later, between 3 and 6 August 2003, she visited JG at Lucio Hernandez's apartment in El Cajon. When she arrived, she found the conditions unsuitable. Lucio was on terminal leave from the Marine Corps; he was unemployed; he was not going to enroll JG in school; he had no daycare plan; he was going through a divorce; and the Traffic

Management Office (TMO) had already moved most of his furniture back to Texas. Mrs. Hernandez testified she took it upon herself to move JG back to Texas without the appellant's knowledge. Mrs. Hernandez further testified that from August 2003 until October 2003, she never told the appellant that she had moved JG back to Texas to live with her, vice living with Lucio in El Cajon, California. In addition, she never told the appellant that she had enrolled JG in school in Texas, and that he was attending school there. Mrs. Hernandez testified that she only told the appellant of JG's return to Texas on 27 October 2003, when the appellant was signing the school records release form to enroll JG in school in Okinawa. Mrs. Hernandez insisted that she did not mention JG's move to the appellant despite the fact that she spoke on the telephone with the appellant on a nearly daily basis from August to October. Mrs. Hernandez could not remember if the appellant spoke to JG during any of the 60-plus phone calls that she had with the appellant between August and October. Mrs. Hernandez maintained that during that three month period, she never informed the appellant of JG's activities or his visit to the emergency room, and that the appellant never asked her about JG's activities. Mrs. Hernandez admitted that when she registered JG in school in Texas, she listed her sister's address as JG's residence in order for him to attend a better school with better teachers.

During the merits, the Government introduced evidence establishing that Lucio Hernandez was on terminal leave awaiting separation from the Marine Corps from 6 July 2003 until 8 August 2003. Moreover, Lucio Hernandez' travel voucher was introduced revealing that on 6 July 2006, which was four days before the appellant claims to have arrived in El Cajon, California, with JG, Lucio departed California by his private automobile, and traveled to his home in Amarillo, Texas, arriving on 8 July 2003. PE 3. In addition, the Government introduced Lucio Hernandez' employment records which established that he commenced employment in Amarillo, Texas, on 1 August 2003. PE 28. Mrs. Hernandez testified that sometime after his return to Texas, Lucio lived in the appellant's house in Amarillo, Texas.

#### **Military Judge's Ruling on Lost Evidence**

In her first assignment of error, the appellant contends that the military judge erred in not dismissing Specification 2 of Charge I based on the Government's violating her due process rights to a fair trial by negligently losing the tape recorded conversation between the command investigating officer and the appellant. Appellant's Brief of 6 Jul 2006 at 7-9. Specifically, the appellant contends that the audiotape recording was "of central importance to the charged offense" and had "possible exculpatory value." *Id.* at 7. We disagree.

We will examine the military judge's decision denying the motion to dismiss for an abuse of discretion. *See United States v. Manuel*, 43 M.J. 282, 288-89 (C.A.A.F. 1995); *see also United*

*States v. Kern*, 22 M.J. 49, 52 (C.M.A. 1986). "To reverse for 'an abuse of discretion involves far more than a difference in . . . opinion . . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal." *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)(citations ommitted).

The evidence presented at trial established that during the course of his investigation into the travel claim discrepancies, 2ndLt W interviewed the appellant, and contemporaneously took notes and audiotaped the interview. Upon completion of the interview, 2ndLt W also wrote a summary of the interview which he attached to his report of investigation. 2ndLt W testified that he used the tape of this interview in writing his investigation report. During his interview of the appellant, she told him "My son was not enrolled in school, because I would be bringing him out to Okinawa, soon after." That statement is the basis for Specification 2 under Charge I alleging a false official statement.

Prior to the Article 32, UCMJ, investigation into the charged offenses, 2ndLt W provided the tape recording to the trial defense counsel. The trial defense counsel then turned the tape recording over to the trial counsel at the Article 32, UCMJ, hearing. Upon completion of the Article 32, UCMJ, Report, the trial counsel once again transferred the audiotape recording to the trial defense counsel. The trial defense counsel later returned it to the trial counsel, and the trial counsel then provided the tape to the Naval Criminal Investigative Service (NCIS) for duplication. The tape was misplaced by an NCIS agent and never recovered.

During the motion phase of the appellant's court-martial, the defense orally moved to dismiss the specification due to the Government's loss of the audiotape recording. The military judge denied the motion, finding as fact that the audiotape had no apparent exculpatory value, that the statement recorded on the audiotape was related in court by an eyewitness who was an officer that had listened to the tape pursuant to his official duties, and that the tape was not destroyed in bad faith. Appellate Exhibit XV.

Article 46, UCMJ, grants the trial counsel, the trial defense counsel, and the court-martial equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may proscribe. Because Article 46, UCMJ, "makes no distinction as to types of evidence, an accused is entitled to have access to both inculpatory and exculpatory evidence." *Kern*, 22 M.J. at 51. The President, through the Manual for Courts-Martial, has specifically addressed an accused's right to access unavailable evidence. RULE FOR COURTS-MARTIAL 703(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.)

provides that "Each party is entitled to the production of evidence which is necessary and relevant." R.C.M. 703(f)(2) governs unavailable evidence, stating:

Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

In *Kern*, our superior court adopted the rule announced by the Supreme Court in *California v. Trombetta*, 467 U.S. 479, 489 (1984), concerning preservation of evidence. In applying the *Trombetta* test, the accused bears the burden to show: (1) that the evidence possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed; and (2) that he is unable to obtain comparable evidence by other reasonably available means. *Kern*, 22 M.J. at 51-52. The Supreme Court added an additional requirement in *Arizona v. Youngblood*, 488 U.S. 51 (1988), stating, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58.

Here, the appellant failed to carry his burden of proof. First, as in *Trombetta* and *Kern*, there was no indication that the audiotape was "apparently exculpatory." To the contrary, the military judge found it to have no apparent exculpatory value. Second, the appellant had comparable evidence by other reasonably available means. The individual to whom the false official statement was made, 2ndLt W, testified and was available for cross-examination. The defense twice had possession of the recording, knew what was on that tape, and was, therefore, fully prepared to cross-examine 2ndLt W on its contents. In addition, 2ndLt W's contemporaneous notes of the interview and summary of the interview were available to the defense. Third, there was no hint in the record of bad faith by the Government.

Under the circumstances, we find that the military judge's findings of fact are supported by the record, are not clearly erroneous, and we adopt them as our own. His legal conclusions are based on the correct application of pertinent case law, and are not influenced by an erroneous view of the law. We find that the military judge did not abuse his discretion by denying the appellant's motion.

## Legal and Factual Sufficiency

In her second assignment of error, the appellant contends that the evidence at trial was not legally and factually sufficient to prove her guilt of Specification 2 of Charge I (false official statement) and the sole specification of Charge III (fraudulent claim). We disagree.

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. See *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.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ.

The test for factual sufficiency is whether after weighing 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. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562. Furthermore, this court, in its factfinding role, "may believe one part of a witness' testimony and disbelieve another." *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999) (quoting *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979)).

### 1. False Official Statement

The appellant contends that there was no evidence offered by the Government to prove that she made a false official statement, arguing that the evidence established she made a factually correct statement to 2ndLt W, "that she did not enroll [her son] in school in California because--at the time she left for Okinawa--she expected that [her son] would be coming to Okinawa shortly thereafter." Appellant's Brief at 11.

There are four elements to false official statement:

- (1) that the accused made a certain official statement;
- (2) the statement was false;
- (3) the accused knew the statement was false at the time the statement was made; and
- (4) the false statement was made with the intent to deceive.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 31b.

Having reviewed the record of trial for factual and legal sufficiency under the standards set forth above, we find that the evidence was both factually and legally sufficient to sustain a finding of guilty to the appellant's having made a false official statement to 2ndLt W that her son, JG, "was not enrolled in school (in California), because (she) would be bringing him out to Okinawa, soon after" her deployment. The evidence conclusively established that JG never resided in California. First, the appellant told 2ndLt W that her dependent son, JG, "was not enrolled in school (in California), because (she) would be bringing him out to Okinawa, soon after" her deployment. Second, Lucio Hernandez, who was supposedly JG's guardian during the appellant's deployment, had terminated his residence in California prior to the date that the appellant claimed she dropped her son off with him in California. Thus, there was no residence established for JG in California, and therefore no California school in which he could be enrolled. Third, the appellant's mother enrolled JG in school in Texas in the days prior to her alleged trip to California to visit JG, whereupon she claims to have disapproved of his living conditions and taken it upon herself to move him back to Texas. Fourth, Mrs. Hernandez admitted that she falsified school enrollment forms in order to get JG into a better school in Texas. Her testimony, therefore, was suspect and lacked credibility. Fifth, the appellant's inconsistent travel claims for the relocation of JG to Okinawa, established her knowledge of her son's true residence in Texas during the period in question. Finally, JG's not being enrolled in school in California had nothing to do with the appellant's intent to seek a tour conversion and bring him to Okinawa. Rather, it is clear that the appellant made the statement with the intent to deceive 2ndLt W about her son's true residence, to conceal the fact that she had lied about the place of her son's residence in order to obtain higher allowances than she was entitled.

Considering this evidence in the light most favorable to the Government, we conclude that any rational trier of fact could have found the elements of false official statement beyond a reasonable doubt. After weighing 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 of false official statement beyond a reasonable doubt.

## **2. Fraud Against the United States**

The appellant contends that the evidence is insufficient to establish her guilt of making a false writing in connection with a claim against the United States because "there was substantial evidence offered by the defense to show that [the appellant] legitimately moved her son to California in conjunction with her PCS move to Okinawa." Appellant's Brief at 12. We disagree.

In the sole specification under Charge III, the appellant was charged with making a false writing in connection with a claim against the United States, by making and using a DD Form 1351-2 (JUL 2002), dated 15 July 2003, containing the false statement that her dependent traveled from Amarillo, Texas, to El Cajon, California. The elements of the offense of making a false writing in connection with a claim are:

(a) That the appellant made or used a certain writing or other paper;

(b) That certain material statements in the writing or other paper were false or fraudulent;

(c) That the accused knew that the statements were false and fraudulent; and

(d) That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

MCM, Part IV, ¶ 58b(1).

First, the appellant filed a written document establishing her dependent son's location as California. Second, the appellant's dependent son did not move to California in conjunction with her PCS move to Okinawa, but rather, resided in Texas the entire time. Third, the appellant knew her statement that her dependent son traveled from Texas to California in connection with her PCS move was false and fraudulent. Finally, she intentionally falsified the documentation in order to collect increased BAH to which she was not entitled.

Considering the evidence in the light most favorable to the Government, we conclude that any rational trier of fact could have found the elements of making a false and fraudulent claim beyond a reasonable doubt. After weighing 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 of making a false and fraudulent claim beyond a reasonable doubt.

#### **Admission of Summary of Phone Calls**

In her third assignment of error, the appellant avers that the military judge committed plain error by admitting Prosecution Exhibit 23, because it contained unreliable hearsay information obtained from internet websites. Appellant's Brief at 12-15. The Government argues that the exhibit was properly admissible under MILITARY RULE OF EVIDENCE 1006, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), or in the alternative, assuming it was error to admit the evidence, the error was harmless beyond a reasonable doubt. Government's Answer of 5 Oct 2006 at 18.

Failure to make a timely objection at trial to the admissibility of evidence constitutes waiver, in the absence of plain error. MIL. R. EVID. 103(a)(1) and (d); see *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005). The appellant bears the burden of demonstrating that there was an error, that the error was plain or obvious, and that it materially prejudiced the appellant's substantial rights. *United States v. Hays*, 62 M.J. 158, 166 (C.A.A.F. 2005)(citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). Our superior court has noted that:

When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence. As a result, plain error before a military judge sitting alone is rare indeed.

*United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000) (citations omitted). We find that the appellant waived this issue by not objecting to the exhibit, but even if not waived, we do not find plain error.

During its case on the merits, the Government called Chief Warrant Officer (CWO) S, the base telephone operator, to testify at trial concerning telephone calls made by the appellant from on base in Okinawa to the United States. CWO S gathered raw data from his technicians containing the appellant's outgoing calls from 15 July 2003 until 23 October 2003. The raw data was admitted at trial as Prosecution Exhibit 21. CWO S analyzed the data and created a spreadsheet which was admitted at trial as PE 23. The spreadsheet listed the phone numbers called, the times the calls were placed, the date of the calls, the length of the calls, and the name and geographic location of the subscriber and recipient of the calls. To prepare the spreadsheet, CWO S entered the phone numbers into databases available on the internet to determine the time zones called and a subscriber's name. Unable to get all the names needed, CWO S received assistance from NCIS for the additional information, which he added to the spreadsheet. Trial defense counsel did not object to Prosecution Exhibit 23.

MIL. R. EVID. 1006 states that summaries of information are permissible in courts-martial, when "[t]he contents of voluminous writings, recordings, or photographs . . . cannot conveniently be examined in court" and when the "[t]he originals, or duplicates" of the evidence upon which the summary is based are "made available for examination or copying, or both, by other parties at reasonable time and place." The Drafter's Analysis of MIL. R. EVID. 1006 explains that "Rule 1006 is taken from the

Federal Rule without change . . . ." MCM, App. 22, at A22-60.<sup>5</sup> STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL, § 1006.02 (6th ed. 2006) provides further explanation of MIL. R. EVID. 1006, stating:

Numerous or bulky originals often represent an inconvenient form of evidence. Rule 1006 represents a time-honored exception to the Best Evidence Rule and permits admission of evidence in the form of summaries, charts, or calculations when the originals cannot be conveniently examined in court.

As a precondition to admissibility of this secondary evidence, the proponent must provide a reasonable opportunity for the opponent to examine or copy the originals that serve as the foundation for the summary.

. . . .

**Before authenticating the secondary evidence the proponent must establish that the underlying originals are otherwise admissible;** a summary, chart, or calculation based on inadmissible evidence will itself be inadmissible.

*Id.* (emphasis added).

Similarly, federal circuits have concluded that FEDERAL RULE OF EVIDENCE 1006 requires the proponent of the summary to establish that the underlying materials are admissible in evidence. In *United States v. Samaniego*, 187 F.3d 1222 (10th Cir. 1999), the Court of Appeals for Tenth Circuit reversed the appellant's conviction where the Government failed to establish a foundation for the underlying telephone records from which summaries were drawn. The Court therein declined to review the harmlessness of the erroneously admitted summaries based upon the length and complexity of the proceedings, the apparent prominence of the erroneously admitted summaries, and the Government's failure to address the issue and provide the Court with an adequate record. *Id.* at 1225. In *United States v. Johnson*, 594 F.2d 1253 (9th Cir. 1979), the Court of Appeals for the Ninth Circuit reversed the appellants' convictions based on the failure of the Government to establish that the underlying materials upon which a summary was based fell within an exception to the hearsay rule. In *United States v. Malol*, 476 F.3d 1283 (11th Cir. 2007), the Court of Appeals for the Eleventh Circuit affirmed the appellant's convictions by assuming without deciding that the admission of a summary chart was error, and determined the error was harmless in light of the overwhelming evidence presented at trial, and

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<sup>5</sup> For a brief history of Rule 1006 of the Federal Rules of Evidence and its application in federal courts, see Stephen J. Murphy, III, *Demystifying the Complex Criminal Case at Trial: Lessons for the Courtroom Advocate*, 81 U.Det.Mercy.L.Rev. 289 (Spring 2004).

because the chart merely repeated the same evidence already presented.

We find that it was error to admit that portion of PE 23 (the summary chart) that contained information from internet data bases and information obtained from NCIS, because the Government failed to establish that the underlying original sources of information were otherwise admissible.<sup>6</sup> The telephone records from internet sites, from which PE 23 was partially created, was categorically hearsay, and the Government failed to establish any foundation bringing that source within any hearsay exception. The same applies to the information obtained from NCIS. Thus, the admission of that portion of PE 23 was erroneous. Although the admission of a portion of PE 23 was error, we do not find prejudice to the appellant.

This was a military judge alone trial. The Government presented conclusive evidence that the appellant did not move her son to California, but rather that he remained in Texas. As evidenced by the testimony of the appellant's mother, the appellant had almost daily telephone contact with her family in Texas during the period in question. Thus, the erroneous portion of the summary chart detailing who resided at the locations the appellant called added little to the Government's case. Consequently, we find that the erroneously admitted portion of PE 23 did not influence the findings. See *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996) ("We must presume that the military judge disregarded any improper [evidence] that was not objected to by appellant."). We therefore conclude that the error did not materially prejudice the appellant's substantial rights. *Hays*, 62 M.J. at 166; see Art. 59(a), UCMJ.

#### **Military Judge's Questioning of Trial Counsel During Closing Argument**

In her fourth assignment of error, the appellant contends that the military judge erred when he elicited "improper argument," "frequently erroneous testimony" and "inadmissible evidence" from the trial counsel by repeatedly asking her questions about the evidence during her closing argument. Appellant's Brief at 15-18. The appellant further contends she was prejudiced by the military judge's consideration of the trial counsel's answers as substantive evidence in determining his findings. *Id.* We disagree.

During closing argument on findings, the military judge asked questions of both the trial counsel and the trial defense counsel. Record at 285-320. The trial defense counsel repeatedly objected to the questioning of the trial counsel by

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<sup>6</sup> That portion of PE 23 that repeats the information contained in PE 21, telephone data retrieved from the base telephone system, was properly admitted for consideration.

the military judge during the Government's closing argument. *Id.* In pertinent part, the following exchange ensued:

DC: Sir, is (trial) counsel testifying or making a closing argument, sir?

MJ: She's making a closing argument.

DC: The defense is -

MJ: -- and I'm asking her to help me in my recollection of what transpired. You will also have the chance to -

DC: Sir, the defense is concerned by the interrogatories from the bench to the government, expecting the government to provide the answers for the evidence of its case. It's improper argument, sir.

MJ: This is not evidence. It's argument.

DC: Yes, sir, but you're asking questions as fact as if she was a witness.

MJ: Right. And my memory and my notes and the evidence in front (sic) me seated on the bench is what's going to guide my deliberation. I will ask you also for your comment on the evidence -

DC: Sir -

MJ: -- and it will be given equal weight to that of (trial counsel).

DC: (Trial counsel) is not commenting on the evidence, sir. She has given you facts when she's answering your questions.

I'm concerned for the appearance that it is giving to the court.

MJ: The objection is overruled.

Record at 291-92.

It is beyond cavil that the arguments of counsel in a court-martial are not evidence. *See, e.g., United States v. Robles-Ramos*, 47 M.J. 474, 477 (C.A.A.F. 1998); *United States v. Loving*, 41 M.J. 213, 238 (C.A.A.F. 1994); *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983). As our superior court stated in *Clifton*, "[t]he reasons are obvious: arguments are not given under oath, are not subject to objection based on the rules of

evidence, and are not subject to the testing process of cross-examination." 15 M.J. at 29. It is undisputed that military judges are presumed to know the law and to follow it, absent clear evidence to the contrary. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994)(citing *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990)).

Examining the military judge's questions in the context of the entire record, the clear import of that questioning is not to seek additional evidence, but to clarify and better understand the underlying rationale of the Government's argument and theory of the case. We conclude that the comments of trial counsel were argument and not evidence, and were so viewed by the military judge. However, even assuming that the trial counsel's comments were erroneous, this was a trial before a military judge alone, and we are confident that the judge placed the comments of trial counsel in the proper perspective. *Prevate*, 40 M.J. at 398; see *Vangelisti*, 30 M.J. at 240.

### **Impartiality of the Military Judge**

In her fifth assignment of error, the appellant avers that she was denied a fair court-martial when the military judge abandoned his impartial role and became a partisan advocate for the Government. Appellant's Brief at 18-21. Specifically, the appellant contends that the military judge became a partisan advocate when he "ask[ed] clearly incredulous impeaching questions" of the appellant's mother, Mrs. Hernandez, who was a defense witness, and then questioned the trial counsel during argument on findings. *Id.* at 19-20. We disagree.

Public confidence in the military justice system mandates that judges must maintain an impartial and neutral role while presiding over a court-martial. *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987). A military judge "may not abandon" his "impartial" role and "assist" the prosecution. *Id.* On the other hand, a military judge is not a "mere figure-head" or "simply an umpire in a contest between the Government and accused." *United States v. Kimble*, 49 C.M.R. 384, 386 (C.M.A. 1974). R.C.M. 801(c) permits the court-martial "to obtain evidence in addition to that presented by the parties." MIL. R. EVID. 614(b) provides that "the military judge . . . may interrogate witnesses . . . ." A military judge has wide latitude to ask questions of witnesses. *United States v. Acosta*, 49 M.J. 14, 17. (C.A.A.F. 1998). However, "a military judge must not become an advocate for a party but must vigilantly remain impartial during the trial." *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995).

"There is a strong presumption that a military judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). Failure

of the defense to challenge the impartiality of a military judge at trial may permit an inference that the defense believed the military judge remained impartial. *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000).

When a military judge's impartiality is attacked on appeal, the test is whether, in the context of the whole trial, the legality, fairness, or impartiality of the court-martial was put into doubt by the military judge's conduct. *Quintanilla*, 56 M.J. at 78 (citing *Burton*, 52 M.J. at 226). "This test is applied from the viewpoint of the reasonable person." *Ramos*, 42 M.J. at 396.

Here, trial defense counsel did not object to the military judge's questioning of Mrs. Hernandez. Nor did he question the military judge's impartiality or move to disqualify the military judge under R.C.M. 902. Moreover, during the trial defense counsel's argument on findings, the military judge also extensively questioned the trial defense counsel on the evidence. Having viewed this record as a whole, we conclude that a reasonable person observing the appellant's court-martial would not have doubted the military judge's impartiality or the legality or fairness of the trial.

### **Incomplete Record of Trial**

In her supplemental assignment of error, the appellant contends that her record of trial is substantially incomplete because Defense Exhibit D, which was offered but not admitted at trial, is missing from the record, thus making the record of trial incapable of a full review under Article 66, UCMJ. Appellant's Motion to File Supplemental Assignment of Error of 30 August 2006 at 2 (Supplemental Brief). The appellant further avers that the contents of the exhibit are vital to show possible error by the military judge in failing to admit the exhibit, and to show that the appellant suffered prejudice due to the ineffective assistance of trial defense counsel in failing to properly authenticate the documents. Supplemental Brief at 3-4. The appellant also argues in the alternative, that if this court determines that the omission of DE D is not a substantial omission, then the trial defense counsel was ineffective in failing to authenticate the documents. *Id.* We disagree, and will address the issues seriatim.

#### **A. Substantial Omission from the Record of Trial**

A complete record of the proceedings and testimony shall be prepared in each general court-martial case in which the sentence adjudged includes death, dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial. Art. 54(c)(1)(A), UCMJ. Our superior court has consistently interpreted Article 54, UCMJ, to require such proceedings to be substantially verbatim. *United States v.*

*Gray*, 7 M.J. 296, 297 (C.M.A. 1979). However, "insubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript. [citations omitted]." *Id.* at 297 (quoting *United States v. Boxdale*, 47 C.M.R. 351, 352 (C.M.A. 1973)).

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). As a threshold question, a reviewing court must first determine whether an omission from the record of trial is "substantial." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981). Whether an omission is substantial can be a question of quality as well as quantity. *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982). The question of what constitutes a substantial omission is analyzed on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). A substantial omission from the record of trial raises a presumption of prejudice that the Government must rebut. *McCullah*, 11 M.J. at 237.

When there is an omission in a record of trial, the concern is not with the sufficiency of the record for purpose of review, but with the statutory mandate regarding the type of record that must be made of courts-martial proceedings. *Gray*, 7 M.J. at 298 (citing *United States v. Sturdivant*, 1 M.J. 256, 257 (C.M.A. 1976)). Thus, the question is not whether there is sufficient information otherwise in the record to support appellate review, but rather whether the omission from the record contains substantial matters.

Substantial omissions have included unrecorded sidebar conferences that involved the admission of evidence . . . argument concerning court member challenges . . . the letter of dishonor in a worthless check case which was used to show mens rea . . . a videotape showing the accused flying during Desert Shield/Storm, which was admitted during the sentencing portion of trial . . . three defense exhibits . . . .

Insubstantial omissions include the absence of photographic exhibits of stolen property . . . a flier given to the members . . . a court member's written question . . . and an accused's personnel record. . . .

*Henry*, 53 M.J. at 111 (internal citations omitted).

The President, through R.C.M. 1103(b)(2)(D), has stated that "a complete record shall include," in addition to a transcript of the trial itself:

- (i) The original charge sheet or a duplicate;

(ii) A copy of the convening order and any amending order(s);

(iii) The request, if any, for trial by military judge alone, or that the membership of the court-martial include enlisted persons, . . . ;

(iv) The original dated, signed action by the convening authority; and

(v) **Exhibits**, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits **which were received in evidence and any appellate exhibits.**

(Emphasis added). Here, we are dealing with an exhibit that was not received in evidence.

At trial, the appellant contended that Defense Exhibit D was the "complete DITY travel claim," including the appellant's receipts that were attached to the DITY move claim. The trial defense counsel averred that the receipts supporting the DITY travel claim were not provided to the defense by the Government, and that they were obtained directly from the appellant. Record at 249-52. The defense offered the documents, under MIL. R. EVID 106, the rule of completeness, to prove that the appellant legitimately moved her son and household goods to California. *Id.* The Government objected to DE D on the basis of hearsay, foundation and authentication. Record at 252. The military judge reviewed the documents and sustained the objection. In doing so, the military judge provided the trial defense counsel the opportunity to call witnesses to establish a foundation for the exhibit. The trial defense counsel declined the offer, citing the unavailability of the witnesses. Record at 253-54. The record of trial that reached this court contains only an insert that states "Defense Exhibit D Not Offered."

In response to this court's order to the Government to produce the missing defense exhibit, the Government submitted the affidavit of trial defense counsel. Government Motion to Attach of 5 Oct 2006. In his affidavit, trial defense counsel detailed the contents of the missing exhibit, stating:

Defense Exhibit D was a package of documents that [appellant] had submitted when completing her DITY (Do-It-Yourself) move for permanent change of station orders from Texas to her final duty station in Okinawa. In these forms, she claimed a move of household goods from her home in Texas to California. Items in Defense Exhibit D included a weight ticket, receipts for gas purchased during the trip, and the DITY Government forms. Defense Exhibit D did not include any documents

specifically mentioning [appellant's] son or any persons who may also have been present for the journey.

. . . .

The package only established a move of household goods had taken place from Texas to California documenting this move only with receipts for gasoline and a weight ticket. It did not specifically establish that [appellant's] son made the move.

Affidavit of Brent W. Stricker of 20 Sep 2006 at 1-2.

We are convinced that the missing exhibit which was not admitted into evidence at trial, containing the appellant's receipts, does not constitute a substantial omission in the record of trial. There is, therefore, no rebuttable presumption of prejudice. Even if the missing exhibit is considered a substantial omission, thereby creating a rebuttable presumption of prejudice, we find the record of trial rebuts that presumption. The contents of the missing exhibit can be reasonably determined from the trial defense counsel's summary of the contents at trial and in his affidavit. We are not left to speculate as to its contents, and can confidently conclude that it did not provide evidence that the appellant had in fact moved her son to California during the course of the DITY move. Several defense witnesses testified as to their understanding that her son moved to California in conjunction with the DITY move. Thus, we can conclude that the missing exhibit added nothing of value to the evidentiary record that was not already provided by the defense's witnesses. Accordingly, we find that even if the omission of DE D is a substantial omission, the record rebuts any presumption of prejudice.

**B. Military Judge Properly Ruled on DE D**

A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion. His ruling will not be overturned on appeal "'absent a clear abuse of discretion.'" *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)(quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). A military judge's ruling on admissibility of evidence will only be overturned if it is "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *Travers*, 25 M.J. at 62. In conducting our review, we are required to consider the evidence in the light most favorable to the prevailing party. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

After the Government had rested its case in chief, the trial defense counsel provided the Government copies of receipts that it claimed were attached to the original DITY move and a copy of

the appellant's Visa check card statement. The trial defense counsel argued under the rule of completeness the receipts contained in DE D for identification should be included as part of the DITY move claim which was already in evidence. Record at 249, 253-54. The trial counsel objected to these documents under hearsay, foundation, and authenticity grounds. The military judge ruled that the completeness argument would have been "apropos" at the time the original DITY move documents were offered by the Government, but there was no objection at that time. He sustained the Government's objection, with the caveat that he would allow the trial defense counsel the opportunity to call a foundation witness should he so desire.<sup>7</sup> *Id.* at 253-54.

The military judge's ruling on the admissibility of DE D for identification was clearly justified under the Military Rules of Evidence. The appellant has cited no authority supporting the exhibit's admissibility, nor has she shown the military judge's ruling to be arbitrary, fanciful, or clearly unreasonable. We find that the military judge did not abuse his discretion when he failed to find DE D for identification admissible under the rule of completeness.

### **C. Effective Assistance of Counsel**

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his trial defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his trial defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

Trial defense counsel conceived of two methods for authenticating DE D: (1) the appellant would testify and lay the foundation for the exhibit; and (2) the defense would make the exhibit self-authenticating pursuant to MIL. R. EVID. 902. Affidavit of Brent W. Stricker at 1. When trial defense counsel's attempts to make the documents self-authenticating failed, he relied on the first option of having the appellant testify. When the appellant subsequently chose not to testify,

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<sup>7</sup> The appellant's claim that the military judge erred by not allowing the documents into evidence through self-authentication is without merit. See MIL. R. EVID. 902.

the trial defense counsel considered the relative importance of DE D, the testimony of the other witnesses offered to establish the fact that her DITY move was made along with the move of her son, and chose to proceed without admitting the exhibit. *Id.* at 2. On this record, we conclude that the trial defense counsel's performance was not deficient, and that his representation was within the wide range of reasonably competent professional assistance required under *Strickland*.

### **Conclusion**

Accordingly, the findings of guilty, and the sentence as approved by the convening authority, are affirmed.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL  
Clerk of Court