

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

**BEFORE**

**J.W. ROLPH**

**J.D. HARTY**

**R.G. KELLY**

**UNITED STATES**

**v.**

**Chad L. KLUEMPER  
Sergeant (E-5), U.S. Marine Corps**

NMCCA 200602366

Decided 30 August 2007

Sentence adjudged 18 August 2005. Military Judge: D.S. Oliver. Staff Judge Advocate's Recommendation: Col W.D. Durrett, Jr., USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Air Bases Western Area, San Diego, CA.

Maj J.S. STEPHENS, USMC, Appellate Defense Counsel  
Capt GEOFFREY SHOWS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A general court-martial, composed of officer members, convicted the appellant, contrary to his pleas, of wrongful use of cocaine, two specifications of assault consummated by a battery, and aggravated assault, in violation of Articles 112a and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, and 928. The appellant was sentenced to confinement for nine months, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

We have reviewed the record of trial, the appellant's five assignments of error,<sup>1</sup> the Government's response, the appellant's

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<sup>1</sup> I. THE EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY TO AGGRAVATED ASSAULT OF LCPL [W]ALKER.

II. THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY TO ASSAULT CONSUMMATED BY A BATTERY UPON LCPL [W]ALKER AND CPL [R]ENO.

III. THE MILITARY JUDGE ERRED BY LIMITING THE CROSS-EXAMINATION OF THE URINALYSIS OBSERVER, PVT BALL, INTO THE WITNESS'S POSSIBLE BIAS FROM HIS PENDING SPECIAL COURT-MARTIAL.

reply, and all related appellate pleadings. We find merit in the appellant's fifth assignment of error that the record of trial is substantially incomplete. We will set aside the CA's action and return the record to the Judge Advocate General for resubmission to the CA. In light of our disposition of this issue, we need not address the remaining assignments of error.

### Record of Trial

In his fifth assignment of error, the appellant contends that the missing portion of the transcript of Staff Sergeant (SSgt) Termaine Jackson's testimony is a substantial omission from the record of trial and thereby renders the record incomplete. Appellant's Brief of 29 Jan 2007 at 18. Based on the circumstances presented, we agree, and find that the omission is substantial, and the record of trial is incomplete. Moreover, we find that the Government has not carried its burden of rebutting the presumption of prejudice resulting from that omission.

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). Article 54(c)(1)(A), UCMJ, requires that a "complete record of the proceedings and testimony" be prepared for every general court-martial in which the adjudged sentence includes a bad-conduct discharge. Our superior court has consistently interpreted Article 54, UCMJ, to require such proceedings to be substantially verbatim. *United States v. Santoro*, 46 M.J. 344 (C.A.A.F. 1997); *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982)(quoting *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979)). Records of trial that are not substantially verbatim or that are incomplete cannot support a sentence that includes a punitive discharge or confinement in excess of 6 months. RULE FOR COURTS-MARTIAL 1103(b)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

To determine whether a record is "substantially verbatim" we assess whether the omitted portion was "'substantial,' either qualitatively or quantitatively." *Lashley*, 14 M.J. at 9. Such a record need not be a "word for word" account of the entire trial. *Lashley*, 14 M.J. at 8. The question of what constitutes a substantial omission is determined on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). Where an omission

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IV. THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO GIVE A CURATIVE INSTRUCTION IMMEDIATELY AFTER A GOVERNMENT WITNESS TESTIFIED TO AN UNCORROBORATED ADMISSION OF UNCHARGED MISCONDUCT BY APPELLANT TO HAVING USED COCAINE DURING THE SUMMER OF 2003.

V. APPELLANT'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE AND THUS INCAPABLE OF REVIEW UNDER ART. 66, UCMJ, BECAUSE OF RECORDER FAILURE.

from the record of trial is substantial, it raises a presumption of prejudice that the Government must rebut. *Santoro*, 46 M.J. at 346; *Gray*, 7 M.J. at 298. We note that our sister court has held that "a condition precedent to applying this [substantial/insubstantial] test is the availability in the record of a sufficient description of the content of whatever matter has been omitted so as to enable this Court, or any other reviewing authority, to determine whether such matter could have materially prejudiced the substantial rights of the accused at trial." *United States v. Williams*, 14 M.J. 796, 798 (A.F.C.M.R. 1982). Moreover, our superior court has held that "without knowing the details of the evidence which has been omitted from the record of trial, an appellate court usually is unable to decide that the omission was not prejudicial to an appellant." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981). 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).

During presentation of its case on the merits, the Government called as a witness, Staff Sergeant (SSgt) Jackson, an investigator for the Criminal Investigative Division (CID) who investigated the allegations against the appellant and who participated in the interrogation of the appellant. However, none of SSgt Jackson's testimony, prior to the submission of questions by the members, is transcribed and contained in the record of trial. Lost and missing from the record is SSgt Jackson's being called to the stand, his swearing in, direct and cross-examination, any objections and exchanges between the parties, any legal rulings by the military judge and the submission of any documentary evidence.<sup>2</sup> Moreover, the Results of Interrogation of the appellant on 27 July 2004, in which SSgt Jackson participated, is attached to the record of trial as Defense Exhibit E, however there is no record of it being marked, offered, admitted or how it was utilized in the record of trial.<sup>3</sup> In total, it appears that at least 46 minutes of SSgt Jackson's testimony went unrecorded.

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<sup>2</sup> In pertinent part, the record indicates that Corporal P.A.R. was excused as a witness and that the court-martial was recessed at 1017 on 18 August 2005. Record at 536. The next notation is that the court was called to order at 1103 on 18 August 2005, and then the members were excused for an Article 39(a), UCMJ, session during which the parties discussed the members' questions for SSgt Jackson. *Id.* The transcription of SSgt Jackson's testimony begins with the military judge asking SSgt Jackson the questions from the members. Record at 537.

<sup>3</sup> As evidenced by Defense Exhibit E, during his interrogation, the appellant was questioned about the allegations of indecent assault. Defense Exhibit E also contains the appellant's admissions concerning his heavy consumption of alcohol during the evening, and his passing out in the bathroom at some point during that night. During the examination by the court, SSgt Jackson testified that during the interrogation, he let the appellant tell his version of events of the weekend in narrative form, and then the other investigator

The omission of SSgt Jackson's testimony was not discovered until the appellant's case was pending at this court.<sup>4</sup> Upon motion from the appellate defense counsel, we ordered the Government to produce the missing testimony of SSgt Jackson. The Government was unable to provide the transcript, but instead produced an affidavit of a Marine Corps Air Station (MCAS) Miramar, California, court reporter, erroneously stating that no testimony was missing from the record of trial, and that the record of trial was complete. Thus, it is apparent that the full testimony of SSgt Jackson was not recorded.

Following a chambers conference, we ordered the Government to produce either the verbatim transcript of SSgt Jackson's testimony, or an authorized substitute. In response, the Government contacted the military judge, trial counsel, defense counsel, and SSgt Jackson; however, none of them could recall the content of the missing testimony. Thus, the Government was unable to provide either the missing testimony or an authorized substitute. Since the Government cannot reconstruct the missing testimony, it is evident that the witness' testimony is irretrievably lost.

The Government admits that there is an "obvious void" in the testimony of SSgt Jackson, but argues that the record is substantially complete and that there was no prejudice to the appellant because "the record establishes that testimony given by SSgt Jackson during the court-martial focused on Charge III and the violation of Article 134, . . . , and the five specifications thereunder", of which the appellant was acquitted. Government Response to Court Order of 27 Mar 2007 at 2-5. We disagree, as this conclusion is not apparent on the face of the record, and there is no affidavit or other evidence from the military judge, either counsel, or even the witness himself, reconstructing, summarizing, or even describing the substance of the missing testimony. As such, we cannot speculate regarding the substance of the testimony, and to what charges it related. Moreover, in the absence of an authorized substitute for the missing testimony, we cannot determine the impact of the testimony on the appellant's court-martial, nor can we determine whether the matter could have materially prejudiced the substantial rights of the appellant at trial.

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went back and asked the appellant specific questions concerning the allegations. Record at 538.

<sup>4</sup> We fail to comprehend how the military judge authenticated this record of trial as accurately reporting the proceedings given the lengthy recording gap which included the testimony of a key witness on the merits. The need to uphold the absolute verity of the record is a paramount duty. See *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976). In the words of Senior Judge Ferguson, "If we cannot be sure the records before us are authentic, our review is meaningless. . ." *United States v. Harris*, 44 C.M.R. 177, 184 (C.M.A. 1971).

Thus, we conclude that the omission is substantial, and the record of trial is incomplete.

Because the Government has been unable to reconstruct, or describe the substance of SSgt Jackson's missing testimony during the Government's case on the merits, we hold that the record of proceedings is not complete, and therefore not "substantially verbatim." Thus, we find that the Government has not rebutted the presumption of prejudice rising from the defective record. Moreover, since we cannot determine with any certainty from the record how the missing testimony related to each of the charges and specifications, or its effect on the triers of fact, we conclude that the omission is inextricably intertwined with the entire trial and taints all findings of guilt. See *McCullah*, 11 M.J. at 237.

Our remaining issue, then, is to determine the appropriate remedy to cure the possible prejudice resulting from the omission. In R.C.M. 1103(f), the President has provided for cases such as this, where a verbatim record cannot be prepared because recordings or notes have been lost, or for other reasons. In those instances, a summarized report of the proceedings must be prepared, and the CA may: "(1) Approve only so much of the sentence [as] could be adjudged by a special court-martial, except that a bad-conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months, may not be approved; or (2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the convening authority may not approve any sentence imposed at such a rehearing more severe than or in excess of that adjudged by the earlier court-martial." R.C.M. 1103(f)(1) and (2). R.C.M. 1103(f) is based on paragraph 82i, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Revised ed.), and also in reliance upon *Lashley*, 14 M.J. at 7 and *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973). MCM, Appendix 21, at A21-82. In *Lashley*, our Superior Court held that "[s]ometimes, the omissions are so substantial that the only remedy is a new trial." *Lashley*, 14 M.J. at 9 (citing *Boxdale*, 47 C.M.R. at 352, *United States v. Schilling*, 22 C.M.R. 272 (C.M.A. 1957) and ¶ 82i, MCM, 1969 (Revised ed.)).

In this case, we conclude we cannot cure the prejudice caused by the missing testimony by dismissing certain charges and affirming a lesser sentence. Rather, given the unknown nature of the missing testimony and its unknown impact on the court-martial, we believe the decision on how

to proceed is best left to the CA. Thus, we will return the case to the CA for rehearing consideration or action modifying the sentence in accordance with R.C.M. 1103(f).

### **Conclusion**

The CA's action is set aside. The record is returned to the Judge Advocate General for resubmission to the CA, who may, in his or her discretion, order a rehearing, or approve a sentence that does not include a bad-conduct discharge and otherwise complies with the limitations of R.C.M. 1103(f)(1). Upon completion of the CA's subsequent action, the case shall be returned to this court for completion of appellate review. *United States v. Johnston*, 45 M.J. 88, 89 (C.A.A.F. 1996).

Senior Judge ROLPH and Senior Judge HARTY concur.

For the Court

R.H. TROIDL  
Clerk of Court