

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

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Scott W. SMITH  
Chief Information Systems Technician (E-7), U.S. Navy**

NMCCA 200500852

Decided 26 June 2007

Sentence adjudged 11 December 2003. Military Judge: N.H. Kelstrom. Staff Judge Advocate's Recommendation: LCDR L.A. Evans, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Reserve Forces Command, New Orleans, LA.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel  
LCDR R. W. SARDEGNA, JAGC, USN, Appellate Government Counsel  
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial with officer members of making a false official statement, rape, indecent acts with a minor, and indecent liberties with a minor, in violation of Articles 107, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920, and 934. The appellant was sentenced to a dishonorable discharge, confinement for twelve years, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. First, he asserts the convening authority abused his discretion when he approved the adjudged sentence notwithstanding that the record had been partially reconstructed and was therefore not a verbatim record. Second, the appellant avers the evidence of his guilt was factually insufficient. Finally, the appellant argues that he has been denied his right to timely post-trial review.

We have carefully examined the record of trial, the assignments of error, the Government's answer, and the appellant's reply. 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. Arts. 59(a) and 66(c), UCMJ.

### **Background**

On 18 December 2003, approximately one week after the appellant's trial concluded, the court reporter inadvertently erased the last of eighteen tapes. The erased tape contained: 1) the majority of the appellant's unsworn statement; 2) the military judge's reading of the sentencing instructions to the members; 3) counsel's sentencing arguments; 4) two questions by members regarding appropriate sentences; 5) the announcement of the appellant's sentence in open court; and 6) adjournment. Record at 1038, 1064-65.

On 16 July 2004, the military judge convened a post-trial Article 39(a), UCMJ, session to attempt to reconstruct the erased portions of the record. *Id.* at 1052. Unsuccessful attempts had been made to resurrect the contents of the erased tape using base facilities and an FBI laboratory. *Id.* at 1065. The military judge, court reporter and trial counsel subsequently used their notes, recollections, and the written sentencing instructions in an attempt to reconstruct missing portions of the record.

The trial defense counsel expressly declined to participate in the reconstruction effort asserting that to do so would violate his state bar association rules. *Id.* at 1093. The trial counsel and military judge separately reconstructed the missing portions of the record. Appellate Exhibits CXX and CXXVI. The trial defense counsel was provided a copy of the reconstructed records for review and comment and acknowledged on the record that he'd read them both.

At the post-trial Article 39(a) session, the trial defense counsel conceded the substantially verbatim nature of trial counsel's sentencing argument and the military judge's sentencing instructions. He further affirmed the accuracy of the military judge's reconstruction of a brief Article 39(a) session following counsels' sentencing arguments during which both the trial defense counsel and the trial counsel indicated that they had no objections to the arguments presented. Record at 1111-12. Beyond this, the trial defense counsel generally declined to identify any specific omissions or inaccuracies and further did not offer any additions or corrections to the reconstituted record. *Id.* at 1091-92, 1096, 1104-18; AE CXXXI at 2. The military judge concluded as a matter of law that the reconstructed record, while not verbatim, was substantially verbatim. AE CXXXI at 4. The military judge authenticated the reconstructed record of trial on 17 October 2004. Record at 1140.

### Incomplete Record of Trial

A "complete record of the proceedings and testimony" must be prepared for every general court-martial in which the adjudged sentence includes a discharge. Art. 54(c)(1)(A), UCMJ. "A 'complete record' is not necessarily a 'verbatim record.'" *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)). The Constitution does not require a literally verbatim record of a criminal trial. *Id.* The President has directed that a complete record in a general court-martial in which a bad-conduct discharge was adjudged shall include, a transcript of the trial itself, exhibits which were received in evidence and any appellate exhibits. RULE FOR COURTS-MARTIAL 1103(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Any omission from the record of trial must be evaluated to determine if it is "substantial" or "insubstantial." If the omission is substantial, it raises a presumption of prejudice that the Government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000); *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979). We find that the omissions in this record of trial are insubstantial and, therefore, do not raise a presumption of prejudice.

Following the post-trial Article 39(a) session noted above, the military judge made nine findings of fact. The appellant does not contest these findings and the record supports them. We adopt them as our own. AE CXXXI. At trial, while generally declining to participate in the reconstruction process, the defense acknowledged that the reconstruction of the military judge's sentencing instructions and the trial counsel's sentencing arguments were substantially verbatim. We agree.

The defense further asserts, however, that the reconstruction of the appellant's unsworn statement, defense counsel's sentencing arguments, two questions raised by the President of the court, and the military judge's responses are not substantially verbatim and therefore raise a presumption of prejudice which the Government must rebut. Expressly declining to identify any specific inaccuracies or omissions in the reconstructed portion of the transcript, the defense elected on appeal to rely on generalized assertions of the importance to the trial process of an appellant's unsworn statement and a trial defense counsel's argument. We agree that these are important elements at trial, but decline to adopt the appellant's flawed logic that an appellant's unsworn statement and defense counsel's sentencing arguments are of such importance to the process as to make any attempt at reconstruction, *per se*, ineffective.

The appellant builds his argument with a litany of speculative "what if's" and "may haves." For example, the appellant asserts that the record fails to reveal if the members were instructed regarding the effect of a punitive discharge on the appellant's receipt of retirement benefits. Appellant's Brief and Assignment of Errors of 3 Jul 2006 at 7. This is

somewhat disingenuous as the appellant acknowledged at trial the substantially verbatim nature of the reconstructed instructions. The reconstructed instructions do not reflect the instruction at issue nor does the record reflect that the appellant ever requested such an instruction. While such an instruction would have been appropriate, it is not required in the absence of a defense request. *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001). Consistent with our review of the reconstructed record, the appellant did not assert either at trial or on appeal that he ever made such a request.

The appellant also points to the fact that the convening authority's action purports to approve and order executed a forfeiture of pay and allowances but the record does not reveal that any forfeitures were awarded by the members. The appellant offers this as evidence that the record "could be" in error. Again, the appellant is being disingenuous as the sentencing worksheet clearly indicates that no forfeitures were awarded by the members. AE CIII. Further, the SJAR and the court-martial promulgating order each clearly state that the members' sentence did not include any forfeitures. The reference to forfeitures in the action was a scrivener's error and in no way reflects an inaccuracy in the record of trial or otherwise prejudices the appellant.

The appellant further points out that two questions posed by the President of the court and the military judge's response may be inaccurately reconstructed. The military judge recalls the first question was whether there were sentencing guidelines in the military. His answer was that there were not. The appellant does not assert on appeal either that the military judge's recollection is in error or that the military judge's response was somehow legally inaccurate. The second question asked the military judge to clarify how parole would affect the actual amount of time served by the appellant. After a brief Article 39(a), UCMJ, session with counsel, the military judge, over the appellant's objection, gave the members an additional instruction dealing with the effect of parole.<sup>1</sup> The military judge indicated that he had previously created and used the same instruction. He indicated that he read it verbatim from notes in his bench book. He was able to reproduce the instruction verbatim in the reconstructed record. While the appellant objected at trial, he does not assert on appeal that the military judge's reconstruction of the specific language used in the instruction is in any way inaccurate.

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<sup>1</sup> The military judge quoted the parole instruction as follows: "Parole is available to an accused sentenced by a military court to serve confinement, including life imprisonment. The exercise of parole, however, depends on several factors, including, but not limited to: the length of sentenced confinement; the nature of the crimes the accused is convicted of; and the conduct of the accused during his period of confinement." Record at 1050.

The essence of the appellant's argument is that the omissions from the record were both qualitatively and quantitatively substantial. He offers no specific examples in support of his contention, however. Appellant's Brief at 6. We decline to adopt the appellant's contention that reconstructions of an appellant's unsworn statement, defense counsel's sentencing arguments, and benign questions raised by members of the court are, *per se*, inadequate without any showing of specific inaccuracies or omissions.<sup>2</sup>

It is apparent from the record of trial and the post-trial Article 39(a) session dealing with reconstruction of the missing portions of the record, that the military judge went to great lengths to ensure the reconstructed record accurately detailed what occurred at trial to the greatest extent practicable. In fact, a portion of the delay between trial and the post-trial Article 39(a) session was apparently the result of good faith attempts by the Government to get computer experts to resurrect the erased data. The trial defense team expressly declined to participate in the reconstruction process.

An appellant may not decline to participate in the reconstruction of the record and thereafter ask an appellate court to give more than minimal weight to speculative assertions that error might or might not actually exist. While the appellant has the absolute right to remain silent and make the Government and the military judge reconstruct an inadvertently erased portion of the record of trial to the best of their ability, he may not thereafter use his own silence and refusal to participate as a sword to attack the adequacy of the reconstructed record with vaporous references to the mere possibility of inaccuracy.

After a careful and painstaking review of the partially-reconstructed record of trial, we are satisfied beyond a reasonable doubt that the summarization of trial proceedings in this record, as reconstructed, is "substantially verbatim," and that no presumption of prejudice or actual prejudice exists. ; *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982); *United States v. Fincher*, No. 860984, 1986 CMR LEXIS 2328, at 8-10, unpublished op. (N.M.C.M.R. 1986). We find, therefore, that the convening authority did not abuse his discretion when he approved the adjudged sentence in this case.

Even if we were to hold that the record of trial in this case was not substantially verbatim, we find that any resulting presumption of prejudice was effectively overcome by the Government beyond a reasonable doubt. The lack of any specific allegation of inaccuracy or omission by the appellant, his trial

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<sup>2</sup> See *United States v. Maxwell*, 2 M.J. 1155 (N.C.M.R. 1975), *United States v. Spring*, 15 M.J. 669 (A.F.C.M.R. 1983), *aff'd in part and reversed in part*, 17 M.J. 436 (C.M.A. 1984), and *United States v. Congram*, 9 M.J. 778 (A.F.C.M.R. 1980).

defense counsel, appellate defense counsel or our own careful review of the record supports this finding. Our finding is further supported by the military judge's firm assertion that the summarized portions of the record accurately reflect the trial proceedings.

### **Factual Sufficiency**

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ.

The appellant's argument speaks of "sexual assault" generally which we take to be a challenge to all three of the sexually-related charges. The essence of the appellant's contention is that there was sufficient evidence that the complainant was hallucinating, or otherwise lying, to raise reasonable doubt. We do not agree. Evidence need not be free from all conflict for us to be convinced of an accused's guilt beyond a reasonable doubt. *United States v. Roberts*, 55 M.J. 724, 731 (N.M.Ct.Crim.App. 2001). "Factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

The victim, AS, testified that the appellant joined her in a bathtub ostensibly to wash her hair and during the process touched her genitals with his hands, exposed his penis to her, and inserted his penis into her vagina. Record at 634-36. It was undisputed that she was approximately 12 years old at the time. While there is some evidence that the victim heard voices and imagined events on other occasions, there was no evidence that this particular encounter with her father was one of those imaginary events. In fact, the appellant acknowledged to criminal investigators that he had, in fact, been naked in the bathtub with AS during the charged timeframe, that he had an erection, that he touched her vagina, and that he had her touch his penis. Prosecution Exhibit 6. We are not convinced that having remembered accurately all the events leading up to the act of intercourse, she somehow began hallucinating at that point.

Taken together with the rest of the record, the victim's testimony, the appellant's corroboration of his presence in the bathtub, and his further corroboration of substantial portions of AS's testimony, we are convinced beyond a reasonable doubt of the appellant's factual guilt to all of the charges and specifications.

### **Post-Trial Delay**

The post-trial delay in the appellant's case does not rise to the level of a due process violation. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60

M.J. 100, 102 (C.A.A.F. 2004)). While the approximately 17-month delay between sentencing and docketing is unreasonable, we note that the appellant was convicted of raping his daughter, committing indecent acts on his daughter, taking indecent liberties with his daughter, and lying to investigators about his misconduct. The appellant raises no meritorious issues on appeal and alleges no credible prejudice as a result of post-trial delay. The appellant's assertion that he was prejudiced because the record of trial had to be reconstructed after an inadvertent erasure is unpersuasive. See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). We further find that the length of the delay in this case does not affect the findings and sentence that should be approved under Article 66(c), UCMJ. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc)(citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)).

### **Conclusion**

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOOTTO concur.

For the Court

R.H. TROIDL  
Clerk of Court