

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.F. FELTHAM, D.E. O'TOOLE, F.D. MITCHELL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MATTHEW P. TOUPS  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200600752  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 16 September 2004.  
**Military Judge:** LtCol Daniel Daugherty, USMC.  
**Convening Authority:** Commander, 3d Marine Division, Okinawa, Japan.  
**Staff Judge Advocate's Recommendation:** LtCol D.J. Bligh, USMC.  
**For Appellant:** Mary T. Hall; LT Anthony Yim, JAGC, USN.  
**For Appellee:** Capt James Weirick, USMC.

**6 November 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

MITCHELL, Judge:

A general court-martial composed of members with enlisted representation, convicted the appellant, contrary to his pleas, of attempted murder, assault consummated by a battery, two specifications of violating a lawful order, impersonating an officer, carrying a concealed weapon, and possession of child pornography, in violation of Articles 80, 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, 928, and 934.<sup>1</sup> The appellant was sentenced to confinement for 18 years

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<sup>1</sup> The members found the appellant guilty of, *inter alia*, violating Article 134, which alleged a violation of 18 U.S.C. 2252A (Charge II, Specification 2). The convening authority approved a finding of guilty to the lesser included

and a dishonorable discharge. The convening authority approved the findings, and the sentence.<sup>2</sup>

The appellant raises eight assignments of error: (1) the military judge erred in denying the defense's motion to suppress evidence obtained from a search of his computer; (2) the evidence was legally and factually insufficient to establish that the appellant attempted to commit murder; (3) the evidence was legally and factually insufficient to establish that the appellant possessed material containing images of child pornography; (4) the convening authority erred by reassessing the appellant's sentence; (5) the convening authority abused his discretion when he failed to grant clemency to the appellant as a result of the appellant's conditions of confinement; (6) the appellant was prejudiced by unreasonable post-trial delay; (7) the appellant's sentence of eighteen years confinement is inappropriately severe; and (8) the appellant did not receive effective assistance of counsel.<sup>3</sup>

We have carefully considered the record of trial, the appellant's eight assignments of error, and the Government's response thereto. We conclude that the findings of guilty pertaining to Charge II, Specification 2 (possession of child pornography) are factually insufficient. We will take corrective action in our decretal paragraph. Otherwise, we conclude the remaining findings and the sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. See Arts. 59(a) and 66(c), UCMJ.

### Facts

The appellant had been romantically involved with a female Marine, Lance Corporal (LCpl) C, whom he had met at the Navy-Marine Corps Intelligence School in November 2002. Upon completion of this school, the appellant received orders and transferred to Okinawa. LCpl C was dismissed from the school and was reassigned to Supply School in April 2003. The two remained in contact with each other, and LCpl C eventually received orders and joined the appellant in Okinawa. They resumed a dating relationship, and, in August 2003, planned to get married. Record at 343.

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offense of a violation of Article 134, UCMJ, wrongful possession of child pornography.

<sup>2</sup> After the convening authority approved the lesser included offense of possession of child pornography, he reassessed the sentence and determined it to be appropriate for the appellant and his offenses. Accordingly, the convening authority approved the sentence awarded by the court-martial.

<sup>3</sup> This assignment of error was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

On or about 9 December 2003, the appellant came to LCpl C's barracks room to speak with her concerning a romantic relationship she had with another man during a period in which she and the appellant had broken up. The appellant asked LCpl C if "anything happened between [them]," at which time she responded that it was none of his business because they had been broken up at that time. Record at 346-47. While the two of them lay on her bed, the appellant pinned LCpl C down and slapped her three times. *Id.* at 347. The following day, via phone, LCpl C told the appellant their relationship was over.

After she ended the relationship, LCpl C contacted the appellant's barracks duty officer at Camp Hansen over concerns for appellant's well-being because he had threatened suicide. The barracks duty officer met with the appellant on 17 December 2003 and made arrangements for him to be evaluated. The appellant managed to elude the personnel who were charged with escorting him to be evaluated, jumped out of his barracks room window (ground floor), and took a cab to LCpl C's barracks room. When the appellant arrived, LCpl C was watching a movie with a friend, Private (Pvt) W. At the behest of the appellant, LCpl C asked Pvt W to leave the room while they talked. Pvt W complied. During their conversation, LCpl C again told the appellant their relationship was over. The appellant then pulled a knife from his pocket and slit LCpl C's throat. The knife also pierced the victim's left hand during the attack. The appellant then covered the victim's mouth to prevent her from screaming and would not allow her to leave the room. He shortly thereafter jumped from her third-deck barracks window, severely injuring himself. While being transported by ambulance to the hospital, the appellant stated that he had attempted to kill himself and LCpl C because she had broken up with him. Record at 466.

While hospitalized, the appellant underwent surgery and was placed on pain medications. On 29 December 2003, NCIS Special Agent (SA) James contacted LCDR Russo, the appellant's attending physician, to determine whether there were any medical reasons that would preclude NCIS from speaking with the appellant. LCDR Russo advised SA James that the appellant was taking a low dose of pain medication<sup>4</sup> but it would not interfere with his being interviewed. *Id.* at 153-54. SA James testified that the appellant appeared to be in good spirits and communicated effectively during the interview. *Id.* at 154.

When he met with the appellant, SA James identified himself as an NCIS agent and displayed his credentials. *Id.* SA James read the appellant his Article 31(b), UCMJ, rights. The appellant indicated his willingness to speak with the agent, made a verbal statement to him, but requested to speak with an attorney before providing a written statement. *Id.* at 155.

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<sup>4</sup> During the recovery period, the appellant was prescribed Oxycontin and Percocet.

The following day, SA James contacted the local defense counsel's office and requested that a defense counsel contact the accused. *Id.* at 156. SA James then returned to the hospital in furtherance of his investigation and requested a permissive authorization for the search and seizure of appellant's laptop computer and other external storage devices. These items had already been seized by NCIS as part of the investigation. The accused consented to the search of his computer. Appellate Exhibit XXIII; and Record at 157. A subsequent examination of the computer's hard drive revealed that it contained child pornography.

### **Legal and Factual Sufficiency of the Evidence**

We start with the appellant's second and third assignments of error where he alleges, respectively, that the evidence was factually and legally insufficient to establish that the appellant attempted to commit murder and that he wrongfully possessed child pornography. We disagree with appellant's contentions as to his conviction for attempted murder, but we concur with the appellant that the finding of guilty as to the charge of wrongfully possessing child pornography is factually insufficient.<sup>5</sup>

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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *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 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. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

### **Attempted Murder**

The elements of attempted murder are: 1) the accused did a certain overt act; 2) the act was done with the specific intent to commit a certain offense under the code (to wit: murder, in violation of Article 118, UCMJ); 3) the act amounted to more than mere preparation; and 4) the act apparently tended to effect the commission of the intended offense. The evidence at trial established that the accused entered LCpl C's barracks room armed with several knives. When the victim told appellant that their

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<sup>5</sup> The appellant's first assignment of error avers that the military judge erred when he denied the defense's motion to suppress evidence obtained from a search of his computer. The child pornography images seized off the appellant's computer served as the impetus for Charge II, Specification 2. This court's finding that the aforementioned specification was factually insufficient makes this assignment of error moot.

relationship was over, the appellant swung one of the knives at the victim and slashed her throat. Record at 353. After the appellant jumped out of the victim's barracks room window, severely injuring himself, he disclosed to the EMT that he "tried to kill [LCpl C] and then tried to kill [himself]." *Id.* at 466. The appellant additionally told the EMT that he tried to kill LCpl C because she had broken up with him. *Id.* After reviewing the evidence in a light most favorable to the Government, we are convinced that a rational trier of fact could have found the appellant guilty of attempted murder, and we are convinced of the appellant's guilt beyond a reasonable doubt. Accordingly, we find this assignment of error to be without merit.

### **Possession of Child Pornography**

The elements of possession of child pornography under Article 134, UCMJ, are that the accused knowingly possessed child pornography and that, under the circumstances, the conduct of the accused was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. The appellant contends that the evidence presented at trial was factually insufficient to prove the appellant's guilt beyond a reasonable doubt. We agree.

The evidence adduced at trial clearly establishes that at least three other people had access to the appellant's computer and used it, with the appellant's permission, to "surf" the Internet for pornography. He avers, and we concur, that this casts doubt as to whether the evidence established beyond a reasonable doubt that the appellant knowingly possessed child pornography. After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is not convinced of the appellant's guilt on this charge and specification beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c). Accordingly, we disapprove the finding of guilty as to Specification 2 under Charge II referred on 23 August 2004.<sup>6</sup>

In view of our corrective action, we will now reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment, we note that even if the appellant had not been convicted of the aforementioned specification, he still would have faced a maximum punishment of

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<sup>6</sup> In his eighth and final assignment of error, raised through *United States v. Grostefon*, the appellant avers that he received ineffective assistance of counsel. Specifically, the appellant avers that his military trial defense counsel failed to investigate and obtain a log book that allegedly contained exculpatory information relating to the child-pornography offense. This court's action with regards to the child pornography specification renders this assignment of error moot.

confinement without possibility of parole, a dishonorable discharge, reduction to pay grade to E-1, and total forfeitures. We find that, given that the charges for which the appellant was convicted included the brutal assault and attempted murder of his ex-girlfriend, the members would not have adjudged any lesser sentence, even if the appellant had not been convicted of possessing child pornography. We independently find the sentence is appropriate for this offender and his offenses.<sup>7</sup> *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

### **Post-Trial Delay**

In his sixth assignment of error, the appellant avers that his right to a speedy post-trial review was materially prejudiced by unreasonable delay in post-trial processing. In this case, a delay of approximately 20 months occurred from the date of sentencing to the date of docketing with this court.

In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. We conclude, however, that any error in that regard was harmless beyond a reasonable doubt. We additionally find the delay does not affect the findings and sentence that should be approved in this case. *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005) (*en banc*).

We find the appellant's remaining assignments of error to be without merit.

### **Conclusion**

We disapprove the findings of guilty to Charge II, Specification 2. The remaining findings and the sentence are correct in law and in fact and no error materially prejudicial to the substantial rights of the appellant remains. See Arts. 59(a)

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<sup>7</sup> The appellant alleges in assignment of error seven that his sentence was too severe. We disagree and find that assignment of error to be without merit.

and 66(c); UCMJ. The modified findings and the sentence are affirmed.

Senior Judge FELTHAM and Judge O'TOOLE concur.

For the Court

R.H. TROIDL  
Clerk of Court