

**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.

**Derek R. UNDERHILL
Seaman (E-3), U.S. Navy**

NMCCA 200700144

Decided 9 August 2007

Sentence adjudged 19 October 2006. Military Judge: D.G. Bengtson. Staff Judge Advocate's Recommendation: LT A.S. Hoyt, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan.

LT HEATHER CASSIDY, JAGC, USN, Appellate Defense Counsel
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel
LT FRANK L. GATTO, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of carnal knowledge and sodomy with a child more than 12 years but less than 16 years of age, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. His sentence included a bad-conduct discharge, confinement for six months, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged.

We have reviewed the record of trial, the appellant's two assignments of error claiming that the record of trial is not verbatim and that the staff judge advocate (SJA) erred by not addressing legal errors raised by the appellant.¹ We have also

¹ The appellant asserts the SJA erred by not addressing the legal errors raised by the appellant after service of the SJA's recommendation (SJAR). We disagree. The SJA is supposed to use the record of trial in making his recommendation even though he is not required to review the record for legal error. RULE FOR COURTS-MARTIAL 1106(d)(1) and (4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). If the record is reviewed for legal error, the SJA need

considered 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

The appellant, a 20-year-old Sailor from a small town in Florida, was assigned to a ship home ported in Yokosuka, Japan. A 15-year-old Navy dependent, RW, initiated contact with the appellant through a website on MySpace.com. The appellant and RW agreed to meet and struck up a friendship. Two weeks into that friendship, they began to engage in sexual activity including oral, anal, and vaginal sex. When RW thought she might become pregnant from one incident of sexual activity, the appellant took her to the base hospital so she could get a "morning after" pill. Law enforcement was notified while the appellant and RW were at the hospital, statements were taken, and the appellant was charged with criminal acts against RW.

After trial but before the record was authenticated, the court reporter discovered that one of the audio tapes from the trial had been erased. That tape contained all or part of the testimony given by four defense witnesses during the presentence hearing. Those four witnesses included the appellant's mother, sister, and an expert witness, all of whom testified in person; and the appellant's high school teacher, who testified by telephone.

The military judge ordered a post-trial Article 39(a), UCMJ, session in order to conduct an RULE FOR COURTS-MARTIAL 1102, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) hearing to recreate the lost testimony. During that hearing, the appellant's mother recreated her testimony by telephone and the expert witness testified in person. The remaining two witnesses were not available, according to the trial defense counsel, and their testimony was

only state in summary fashion whether any legal error requires corrective action. R.C.M. 1106(d)(4). The SJAR contains the SJA's conclusion that there are no legal errors within the record that require corrective action. SJAR of 25 Jan 2007. Although the SJA was obligated to comment on the submitted allegations of legal error, we do not find prejudice to the appellant from the SJA's failure. First, all legal issues subsequently raised by the appellant deal with issues that were fully litigated on the record; therefore, each alleged legal error was previously reviewed by the SJA. We do not see how the appellant is prejudiced by the SJA's failure to repeat his conclusion in an SJAR addendum. Second, the appellant did not suffer prejudice because since the legal issues raised are without merit, they would neither result in a favorable SJA recommendation for corrective action, nor result in corrective action by the CA. *See United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996)(an appellate court may determine if the accused has been prejudiced by the SJA's failure to comment on submitted legal error by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority)(citing *United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988)).

summarized by the trial counsel and trial defense counsel. Appellate Exhibits LXX and LXXI.

Incomplete Record of Trial

For his first assignment of error, the appellant claims that the record of trial is not verbatim and that the missing verbatim testimony, objections, and court rulings, are substantial omissions creating an un rebutted presumption of prejudice. Appellant's Brief of 13 Apr 2007 at 8. We disagree.

1. The law

Whether a record of trial is incomplete, is a question of law which we review *de novo*. The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)(citing *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979)); see R.C.M. 1103(b)(2)(B)).

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). Substantial omissions render a record of trial incomplete, raising a presumption of prejudice.² *Id.* at 8 (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as a complete one.³ *Henry*, 53 M.J. at 111.

² See, e.g., *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000)(three defense sentencing exhibits not otherwise described in the record); *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981)(a letter of dishonor in a worthless check case used to show *mens rea*); *Gray*, 7 M.J. at 298 (unrecorded sidebar conferences involving the admission of evidence); *United States v. Sturdivant*, 1 M.J. 256, 257 (C.M.A. 1976)(argument concerning court member challenges); *United States v. Seal*, 38 M.J. 659 (A.C.M.R. 1993)(videotapes showing the accused flying during Desert Shield/Storm, which was admitted during the sentencing portion of trial).

³ See, e.g., *United States v. Barnes*, 12 M.J. 614, 615 (N.M.C.M.R. 1981)(appellate exhibits consisting of questionnaires completed by the court members when those exhibits were not offered and no ruling was based on the content of those questionnaires); *United States v. Burns*, 46 C.M.R. 492, 498 (N.C.M.R. 1972)(a topographical chart depicting the location of a victim's body when that location was clearly established by testimony and other exhibits); *United States v. White*, 52 M.J. 713, 715 (Army Ct.Crim.App. 2000) (a defense exhibit consisting of a videotape used as demonstrative evidence of the interior configuration of the appellant's car when that information was presented by other means and was not in dispute); *United States v. Johnson*, 33 M.J. 1017, 1019 (A.C.M.R. 1991)(an appellate exhibit consisting of a flier given to the members even though there is no description of its content); *United States v. Harper*, 25 M.J. 895, 898 (A.C.M.R. 1988)(an appellate exhibit consisting of the accused's personnel record when the contents are described on the record); *United States v. Baker*, 21 M.J. 618, 620 (A.C.M.R. 1985)(an appellate exhibit consisting of a court member's written question when the answer to that question is in the record); *United States v. Carmans*, 9 M.J.

When there is a substantial omission from a record, the initial 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)). A substantial omission from a general court-martial transcript will result in a violation of Article 54, UCMJ, which requires the preparation of a separate and complete record of trial when the adjudged sentence includes a punitive discharge. The same omission will violate the President's requirement that the record in such a case include a "verbatim" written transcript. R.C.M. 1103(b)(2)(B). Verbatim, however, does not mean word-for-word. *Lashley*, 14 M.J. at 8. Our superior court has consistently held that "verbatim" means "substantially verbatim." *Gray*, 7 M.J. at 297 (citations omitted).

A. Prejudice

Even if we find a substantial omission, it creates no more than a presumption of prejudice that the Government may rebut. In order for the Government to rebut the presumed prejudice, however, it must first identify the prejudice flowing from the omission. We see two primary points in the post-trial process during which prejudice could result from a record of trial that has substantial omissions: (1) the CA's action, and (2) appellate review.

First, an accused could certainly be prejudiced at the CA's action stage by an incomplete record of trial. Although the CA is not required to review the record of trial, R.C.M. 1107(b)(3), the staff judge advocate or the legal officer, as the case may be, is required to use the record of trial in determining how to advise the CA on what action to take on the findings and sentence. R.C.M. 1106(d)(1). If an accused claims that legal error occurred during trial, the staff judge advocate must address that allegation at least with a summary statement of agreement or disagreement. R.C.M. 1106(d)(4). If the record of trial is not "substantially verbatim," the SJAR or legal officer recommendation could be an uninformed recommendation, thereby denying an appellant his or her full opportunity for corrective action or clemency from the CA. *See United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958) ("It is while the case is at the convening authority level that the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence.").

616, 620 (A.C.M.R. 1980)(photographs of stolen property ordered substituted for the actual exhibits when that property is fully described on the record), *aff'd* 10 M.J. 50 (C.M.A. 1980).

Second, if a court-martial results in a punitive discharge or one year or more of confinement, the accused is entitled to full appellate review of that court-martial. Art. 66(b), UCMJ. This right to automatic appellate review must be read in conjunction with the statutory requirement for verbatim records of trial when the sentence triggers the automatic review. Our superior court has held that Article 19, UCMJ, dealing with special courts-martial, "was intended to have 'provided that if there is a discharge for bad conduct a complete record must be made so that it can be reviewed' and Article 66 to have provided for the review of such cases in a manner similar to general courts-martial." *United States v. Whitney*, 48 C.M.R. 519, 520-21 (C.M.A. 1974)(quoting Hearings on HR 2498 Before a Subcomm of the House Comm on Armed Services, 81st Cong, 1st Sess 963 (1949)).

Therefore, if the record is not "substantially verbatim," the appellant is prejudiced because he or she cannot receive the appellate review he or she is statutorily entitled to receive. However, if the record is "substantially verbatim," the appellant can receive the appellate review he or she is entitled to receive, thereby removing any prejudice flowing from the omissions. See *United States v. Burns*, 46 C.M.R. 492, 498 (N.C.M.R. 1972)(citing *United States v. Nelson*, 13 C.M.R. 38 (C.M.A. 1953)).

B. Appellate options

A service court of criminal appeals has options other than disapproving all findings when there is a substantial omission. In *United States v. Santoro*, 46 M.J. 344, 346-47 (C.A.A.F. 1997), our superior court affirmed this court's setting aside the guilty finding on a contested charge affected by omitted exhibits consisting of 14 Government exhibits and all of the 18 defense exhibits, where we also approved the guilty finding on a guilty plea that was not affected by the omitted exhibits, and we approved a sentence of no punishment.⁴ In *United States v. Stoffer*, 53 M.J. 26, 27-28 (C.A.A.F. 2000), our superior court again affirmed this court's conclusion that the Government had rebutted the presumption of prejudice as to findings but not sentence, where we approved the findings and a non-verbatim transcript sentence.

C. Record reconstruction

The use of R.C.M. 1102 during a post-trial Article 39(a), UCMJ, session is the appropriate procedure for reconstructing lost testimony prior to authentication. See *United States v. Crowell*, 21 M.J. 760, 761 (N.M.C.M.R. 1985). In *Crowell*, we

⁴ The military judge sentenced Santoro to a bad-conduct discharge, confinement for 90 days, forfeiture of \$440.00 pay per month for 3 months, and reduction to the lowest enlisted grade. The record was received at this court eight years after trial. We were "unable to assess the appropriateness of the sentence in view of the missing exhibits and deficiencies in the record. As a result, [we] affirmed a sentence of 'no punishment' in lieu of the sentence adjudged at trial." *Santoro*, 46 M.J. at 345.

specifically approved R.C.M. 1102 pre-authentication hearings "to resolve any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence." *Id.* Because a substantially verbatim transcript is required to support a punitive discharge, we determined that the loss of testimony is an issue affecting "legal sufficiency." We also noted that the rule specifically enumerates matters which are not subject to post-trial sessions, and repetition of proceedings to recapture lost testimony is not listed.

2. Analysis

An entire audio tape was mistakenly erased in the case *sub judice*, resulting in the total loss of two defense witnesses' sentencing testimony and the partial loss of two other defense witnesses' sentencing testimony. Three of the four witnesses originally testified in the courtroom and the fourth testified by telephone. There were several counsel objections and court rulings on those objections, and some defense exhibits were discussed during the period covered by the erased audio tape. These omissions are substantial, and if not reconstructed, create a presumption of prejudice that the Government must rebut. We conclude that the record, as reconstructed, is substantially verbatim, and that the appellant has not been denied his right to appellate review.

Prior to authentication, the military judge held an Article 39(a), UCMJ, session to reconstruct the missing testimony. During this process, the appellant's expert witness, whose original testimony was partially lost, testified again in the courtroom; and, the appellant's mother, whose original testimony was partially lost, testified by telephone. Objections raised by counsel during the original testimony and the military judge's rulings were noted for the record. The appellant's sister and the appellant's high school teacher were not available to assist in the reconstruction of their prior testimony. Their lost testimony and any objections and rulings were summarized by both counsel and by the military judge from their notes and the court reporter's notes. AE LXX, LXXI, LXXII. The admission of all defense exhibits, one of which was redacted over defense objection,⁵ was confirmed. None of those exhibits are missing from the record of trial. The defense request to call a witness during sentencing in violation of the military judge's earlier R.C.M. 615 order sequestering witnesses was reconstructed as well as the military judge's denial of that request.⁶

⁵ Defense Exhibit CC.

⁶ We note that the appellant chose to call a different witness, Legalman First Class A, to present the same information that the denied witness was going to present.

Based on our review of the entire record, as reconstructed, we conclude that the appellant is not entitled to relief. As reconstructed, there are no substantial omissions in the record of trial. The military judge's quick action in calling the post-trial session allowed those involved to create a "substantially verbatim" transcript of the proceedings. Therefore, there is no presumption of prejudice. Even if there was a presumption of prejudice, it has been rebutted. From the undisturbed record plus the reconstructed testimony, objections, argument, and rulings, we can provide the appellant his statutory right to a full appellate review of his findings and sentence guaranteed to him by Article 66(b), UCMJ. Therefore, the appellant has not suffered material prejudice to a substantial right. Art. 59(a), UCMJ.

Conclusion

Accordingly, we affirm the findings and sentence as approved below.

Chief Judge ROLPH and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court