

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

**Before  
E.E. GEISER, R.G. KELLY, J.L. FALVEY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOSEPH O. DALTON  
AVIATION MAINTENANCE ADMINISTRATIONMAN THIRD CLASS (E-4),  
U.S. NAVY**

**NMCCA 200700766  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 4 May 2007.  
**Military Judge:** CDR Tammy P. Tideswell, JAGC, USN.  
**Convening Authority:** Commander, Navy Region Northwest,  
Silverdale, WA.  
**Staff Judge Advocate's Recommendation:** CDR S.L. Hladon,  
JAGC, USN.  
**For Appellant:** Capt Anthony W. Burgos, USMC.  
**For Appellee:** Maj Tai D. Le, USMC.

**22 January 2008**

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

FALVEY, Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of sodomy of a child under the age of 12 on divers occasions, indecent acts with a female under the age of 16 on divers occasions, indecent liberties with a female under the age of 16, receipt and possession of child pornography on divers occasions, and distribution of child pornography on divers occasions in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The appellant was sentenced to confinement for ten years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge.

In a single assignment of error, the appellant alleges that the military judge committed plain error by admitting prosecution exhibits 2 and 3 in aggravation.<sup>1</sup> PE 2 describes all known images of four identified victims of sexual misconduct. PE 3 describes the psychological effects on one of the four identified victims. While the appellant was found guilty of possessing some pornographic images of all four children, he was not found guilty of possessing *all* of the known images described in the exhibits. Further, the appellant notes that the acts described were committed by persons under circumstances wholly unrelated to his misconduct. The appellant argues, therefore, that at least part of PE 2 and PE 3 did not directly relate to or result from the offenses the appellant was found guilty of and was unduly prejudicial. RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

We have carefully considered the record of trial, the appellant's sole assignment 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.

### Facts

The appellant pled guilty pursuant to a pretrial agreement. The agreement contained a "specially negotiated provision" in which the appellant agreed "not to object to . . . Defense Computer Forensics Laboratory lab reports, National Center for Missing and Exploited Children reports including known victim reports as well as victim impact statements . . . being offered into evidence in sentencing on the basis of hearsay, authenticity, or foundation." Appellate Exhibit XXVII at 4-5; Record at 248. During presentencing, the trial counsel offered two exhibits covered by the above mentioned provision, prosecution exhibits PE 2 and PE 3. These exhibits were admitted without objection. Record at 258.

PE 2 contains a Child Identification Report from the National Center for Missing and Exploited Children. This report identifies four individual children whose photographs were retrieved from the appellant's computer hard-drive. The report included a summary description of all known images depicting the four child victims. The summary described, *inter alia*, acts of defecation, urination, whipping, and bondage. No images portraying these specific acts were found among images of the four victims retrieved from the appellant's computer.

PE 3 contains a victim impact letter written by the mother of the one of the four identified child victims. The letter describes numerous sex acts the child was subjected to including

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<sup>1</sup> We have considered the appellant's motion for oral argument and his motion is hereby denied.

the use of defecation, urination, and bondage. The letter also details the psychological trauma suffered by this victim from both the actual abuse and from her knowledge of the permanent record of the abuse contained in images circulating on the Internet. As noted above, some of the acts described by the girl's mother were not depicted on images the appellant pled guilty to possessing. The trial counsel quoted from this letter during her argument on sentencing. Record at 384.

Although the appellant did not object at trial, the appellant now argues that PE 2 and PE 3 were inadmissible and their admission constituted plain error.

### **Analysis**

R.C.M. 1001(b)(4) permits the Government "to present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Such evidence "includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused." *Id.* A balancing test under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) must also be conducted. Where, as here, the military judge did not articulate her MIL. R. EVID. 403 balancing, we must examine the record ourselves and perform the test. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

The appellant contends that the summaries contained in PE 2 include descriptions of acts of sexual deviancy that were not reflected on the images the appellant was convicted of receiving, possessing, and distributing. The appellant fears that this may have misled the military judge and exaggerated the appellant's level of culpability. We note, however, that the military judge examined all of the photographs recovered from the appellant's computer hard-drive and was able to compare those photographs with the summary descriptions contained in PE 2. There is no indication the military judge mistakenly associated those summary descriptions with any of the child pornography found on appellant's computer or that she believed the appellant was somehow involved in all of the described sexual acts.

The appellant argues that it was error to admit PE 3 because the described psychological effects on the victim was not limited to those effects directly resulting from the acts depicted in the images recovered from the appellant's computer or from the invasion of the victim's privacy, but rather stemmed from actual sexual abuse committed by someone other than the appellant. Although the actual sexual abuse certainly contributed to the psychological effects described by the victim's mother, PE 3 clearly indicates that the invasion of the victim's privacy resulting from the distribution of degrading images of her on the Internet was also a contributing factor.

As noted above, the trial counsel quoted from PE 3, and in so doing, noted the nexus between the appellant's offenses and the psychological harm to the victim arising from the appellant's viewing and redistribution of the pornographic images. As the trial counsel observed, such viewing "perpetuates the victimization" of the child. Record at 385. Such harm directly relates to the appellant's receipt, possession, and distribution of child pornography and consideration of the effects of such invasion of privacy is appropriate. See *United States v. Anderson*, 60 M.J. 548, 555-57 (A.F.Ct.Crim.App. 2004).

Experienced and professional military lawyers appointed as trial judges are "assumed to be able to appropriately consider only relevant material in assessing sentencing." *United States v. Hardison*, 64 M.J. 279, 283-84 (C.A.A.F. 2007)(citing *United States v. McNutt*, 62 M.J. 16, 26 (C.A.A.F. 2005)(quoting *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)). Although the exhibits were potentially susceptible to misuse, we trust that the military judge knows the law and considered these exhibits only for their relevant purposes. The appellant offers nothing but speculation to the contrary.

We have examined the record and performed the requisite balancing test. *Manns*, 54 M.J. at 166. PE 2 has at least some probative value and under the circumstances of this case, we find little or no risk of unfair prejudice. Regarding PE 3, we find the probative value of the victim impact evidence to be relatively high and the risk of unfair prejudice to be low. Although some of the psychological damage described resulted from the actual abuse, we are confident that much of the psychological effects described have and will continue to result from the invasion of privacy arising from circulation of the images on the Internet. Accordingly, we find the probative value of the contested evidence is not substantially outweighed by the risk of prejudice. We are not persuaded that the admission of these exhibits was error, let alone plain error.<sup>2</sup>

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<sup>2</sup> Assuming, arguendo, that there was error, we find no prejudice to the appellant. There is nothing in the record to indicate that the military judge was unduly influenced by the admission of PE 2 and PE 3, or by the trial counsel's sentencing argument. Further, the sentence adjudged was reasonable in light of the appellant's offenses.

**Conclusion**

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL  
Clerk of Court