

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

**Before
R.E. VINCENT, E.C. PRICE, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOEL K. PINKLER
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200700804
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 May 2007.

Military Judge: Maj Charles Hale, USMC.

Convening Authority: Commanding General, III Marine Expeditionary Force, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol D.J. Bligh, USMC.

For Appellant: Maj Christian Broadston, USMC.

For Appellee: Capt Roger Mattioli, USMC.

28 October 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of two specifications of violating a lawful general order, housebreaking, indecent assault, indecent acts, obstructing justice, and unlawful harassment in violation of Articles 92, 130, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 930, and 934. The appellant was sentenced to six months confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in an act of clemency, suspended all confinement in excess of four months.

The appellant asserts two assignments of error: (1) the military judge abused his discretion in denying the defense motion to sever the orders violation related to pornography from the indecent assault and indecent acts specifications; and (2) the appellant's convictions for housebreaking, unlawful harassment, indecent acts, indecent assault, and violating a lawful general order by possessing pornography on a government computer, were factually and legally insufficient. After considering the record of trial, the appellant's assignments of error, and the Government's answer, we conclude that the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant's charges encompass three unrelated incidents: the possession of homosexual pornography found on the appellant's government computer, the appellant's indecent assault of Corporal (Cpl) B committed at night in the victim's barracks room, and the appellant's unlawful harassment of Lance Corporal (LCpl) G.

1. Homosexual pornography found on the appellant's government computer

In June of 2004, Private First Class (PFC) Killroy arrived in Okinawa, and the appellant, then a lance corporal, was his supervisor.¹ Shortly after his arrival on the island, PFC Killroy used the appellant's government computer before he was provided an account of his own. The first time PFC Killroy used the appellant's computer he noticed a suspicious email in the appellant's Microsoft Outlook email account. The appellant, operating the computer with PFC Killroy, quickly deleted the email and closed his email account. Later, after the appellant left, PFC Killroy re-opened the appellant's email account and found the suspicious email in the "deleted items" folder. The email was a subscription to "young skater," and it contained pornography. Record at 330; Prosecution Exhibit 2 at 5-9.

In the spring of 2005, now LCpl Killroy again found pornography on the appellant's government computer. Record at 332. While LCpl Killroy attempted to download a file to the appellant's computer, a window appeared containing a list of approximately 100 graphic files. After clicking on the files, LCpl Killroy saw homosexual pornography. The appellant stipulated to the expected testimony of Sergeant (Sgt) Rivas, an information security officer in his unit. In March or April of

¹ Since rank is relevant in our analysis, each Marine will be referred to according to his rank during the time period discussed. The appellant, at all times, outranked both LCpl G and PFC Killroy, although each promoted during the pertinent time period. Record at 233, 327.

2006, Sgt Rivas was working on the appellant's government computer when he noticed "at least 100 image files" with sexually explicit names of a male homosexual nature. *Id.* at 350-51. A later search of the appellant's government email account by the Naval Criminal Investigative Service (NCIS) revealed pornography similar to what LCpl Killroy had viewed.² *Id.* at 330, 356; PE 2.

2. The charges related to Cpl B

On 16 April 2006, the appellant ran into Cpl B at a bar in Okinawa near their barracks. After drinking together, they returned to the barracks to watch television in Cpl B's room. After watching television for some time, Cpl B asked the appellant to leave because it was late and he had physical training early the next morning. The appellant left and Cpl B went to sleep, alone in his room with the door shut, on top of his rack, wearing only cutoff shorts. *Id.* at 390-91.

Cpl B awoke to find the appellant sitting on his bed, looking at him, while the appellant held his own erect penis in his hand. *Id.* at 393-94. Cpl B then realized his cutoff shorts were unbuttoned and unzipped, and that his penis was exposed to view by the appellant. *Id.* at 394-95. Cpl B reacted by physically assaulting the appellant, and reporting the incident to the assistant staff duty officer that night.

3. The unlawful harassment of LCpl G

In early 2004, LCpl G arrived in Okinawa as a new private first class, and was assigned to the same unit as the appellant, who at the time was a lance corporal. The appellant was LCpl G's supervisor, and they were friends. However, their relationship changed after their unit deployed to South Korea in 2004. The appellant began constantly hanging around LCpl G to the extent he made arrangements so he would sleep next to LCpl G while in the field. On one occasion, the appellant took photographs of LCpl G while he was asleep on top of his rack and wearing only his underwear. *Id.* at 235, 274. As a result of the appellant's conduct, LCpl G began feeling uncomfortable with the appellant's behavior and reported his concerns to other leaders in his unit.

In early 2005, the appellant and LCpl G deployed with their unit to Thailand in support of tsunami relief operations. LCpl G told the appellant he did not want to sleep next to him after the appellant demanded that LCpl G sleep in his hotel room, and the appellant altered the room roster so he could be in the same hotel room as LCpl G. *Id.* at 235-36. The appellant's actions continued to make LCpl G uncomfortable. *Id.* at 238.

² The appellant's government computer was also searched by NCIS, and no pornography was discovered. Record at 355-56. A computer program had been installed, which made the computer appear as if it had "[n]ever touched the network." *Id.* at 361. This resulted in the appellant's obstructing justice charge, which is not at issue on appeal.

In August of 2005, during another deployment to South Korea, the appellant again demanded that LCpl G sleep next to him and used his rank as a Corporal to make things stressful for LCpl G. The appellant kept LCpl G up at odd hours at night, even after Gunnery Sergeant (GySgt) Libby told him to stop. *Id.* at 239. The appellant would wait around to accompany LCpl G to the shower facilities, which further made LCpl G uncomfortable. *Id.* at 239-40.

While in Okinawa, the appellant visited LCpl G's barracks room regularly, and LCpl G often refused to answer his door when the appellant knocked. On one occasion, the appellant refused to leave LCpl G's room, which resulted in a physical altercation between them. *Id.* at 245. The appellant also hid his own personal items in LCpl G's barracks room, and reported the items as stolen. *Id.* at 246. The appellant later admitted planting the items in LCpl G's room and was disciplined by the unit. PE 1.

The appellant's conduct had an emotional affect on LCpl G, whereby he felt "uneasy" and "embarrassed," and subject to ridicule by other Marines in the unit. *Id.* at 256. LCpl G eventually told GySgt Libby that if the appellant didn't stay away from him, he would stab the appellant with his knife. *Id.* at 280. LCpl G began to think he may have a psychiatric disorder, but later realized that he only exhibited symptoms when he was around the appellant. *Id.* at 463.

Severance of Offenses

We review the military judge's decision whether to grant a motion to sever for an abuse of discretion. *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999)(citing *United States v. Foster*, 40 M.J. 140, 148 (C.M.A. 1994)). "In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial . . . regardless whether related." RULE FOR COURTS-MARTIAL 601(e)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The military judge, however, can sever offenses "to prevent manifest injustice." R.C.M. 906(b)(10).

We analyze three factors to determine if the military judge committed an abuse of discretion in finding no "manifest injustice": (1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover. *Southworth*, 50 M.J. at 76.

The appellant's possession of homosexual pornography on his government computer would have been admissible proof related to his indecent assault and indecent acts charges, under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.);

see *United States v. Whitner*, 51 M.J. 457 (C.A.A.F. 1999) (homosexual videotape and magazine evidence admissible in a male-on-male sodomy case as evidence of the accused's state of mind and motive); *United States v. Mann*, 26 M.J. 1 (C.A.A.F. 1988) (heterosexual pornography depicting children and adults was admissible under MIL. R. EVID. 404(b) to prove the specific intent required for the charge of indecent acts with a minor); *United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R. 1983), (homosexual pornography admissible in a male-on-male sodomy case to show the accused's intent under MIL. R. EVID. 404(b)).

The military judge gave a proper limiting instruction to the members. The military judge specifically instructed the members:

Spillover. An accused may be convicted based only on the evidence before the court and not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming or proving that he committed any other offense.

. . . .

I just instructed you that you may not infer that the accused is guilty of one offense because of the guilt may [sic] have been proven by another offense and that you must keep the evidence with respect to each offense [s]eparate. However, if you find beyond a reasonable doubt that the accused had homosexual pornography on his computer, you may only consider this evidence for the accused's intent or state of mind at the time of the alleged offenses involving Lance Corporal [G] and Lance Corporal [B].

Record at 517-18.

The United States Court of Appeals for the Armed Forces has noted that "[t]he ability of a jury to follow instructions is instrumental to our theory of trial." *United States v. Duncan*, 53 M.J. 494, 498 (C.A.A.F. 2000)(quoting *United States v. Dixon*, 184 F.3d 643, 646 (7th Cir. 1999)). The court found a military judge's limiting instructions, alone, are sufficient to prevent "manifest injustice" despite failing the first factor of the *Southworth* severance analysis. *Id.*

Finally, the findings do not reflect an impermissible crossover. "Instead of a strongly supported allegation joined with a weakly supported one, the Government presented strong and

independent factual cases with respect to each [specification]." *Southworth*, 50 M.J. at 77-78; cf. *United States v. Giles*, 59 M.J. 374 (C.A.A.F. 2004) (noting the irrelevance and highly prejudicial nature of perjury charges combined with drug related charges and finding an impermissible crossover).

Based upon these *Southworth* factors, we conclude that the military judge did not abuse his discretion in denying the appellant's motion to sever charges. The appellant is unable to show that the denial of the severance motion prevented him from receiving a fair trial, and "it is not enough that separate trials may have afforded him with a better opportunity for an acquittal." *Duncan*, 53 M.J. at 497-98 (quoting *United States v. Alexander*, 135 F.3d 470, 477 (7th Cir. 1994)).

Factual and Legal Sufficiency

In his second assignment of error, the appellant asserts that the evidence was factually and legally insufficient to support his convictions for housebreaking, unlawful harassment, indecent assault, indecent acts, and violating a lawful general order by having pornography on his government computer. We review the legal and factual sufficiency of evidence *de novo*.

The test for legal sufficiency is whether, considering the evidence in a light most favorable to the Government, any rational trier of fact could have found the elements of the offenses 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), UCMJ.

The appellant asserts that his charges for housebreaking, indecent assault, and indecent acts were legally and factually insufficient because the events, as described by Cpl B, were unbelievable. Appellant's Brief of 11 Feb 2008 at 20. We disagree. Both the assistant duty officer and Cpl B's suite-mate corroborated much of Cpl B's testimony regarding the charges stemming from 16 April 2006. Record 426-28, 438-39. The appellant's suite-mate awoke that night to arguing, and fighting, and he remembered hearing the words "butt ass naked." *Id.* at 438. The assistant duty officer saw the appellant that night, bloody and bruised, and remembered Cpl B reporting the sexual assault. *Id.* at 427-28. This is consistent with Cpl B's testimony, and the members apparently found Cpl B to be credible.

We also disagree with the appellant's assertion that the unlawful harassment charge was factually and legally insufficient because the "substantial emotional distress" element was lacking.

LCpl G testified that the appellant made him "extremely uncomfortable." *Id.* at 246. LCpl G also testified that his problems with the appellant affected him emotionally; he felt trapped, stressed out, embarrassed, and uneasy around the appellant. *Id.* at 234, 248, 256. LCpl G, while venting his frustration to GySgt Libby, even threatened to stab the appellant with his knife. *Id.* at 280. The appellant's harassment of LCpl G led him to believe he had a psychiatric disorder because of the way he felt when the appellant was around him. *Id.* at 463. We find the evidence clearly supports the appellant's conviction for unlawful harassment of LCpl G. *See United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003).

Finally, we disagree with the appellant's assertion of factual and legal insufficiency of his conviction for violating a lawful general order because no pornographic photos were found on his government computer. Appellant's Brief at 23. The fact that no pornography was located on the appellant's computer is not without explanation. GySgt Shakir testified that on 8 May 2006, the computer user "PiniklerJK" installed a program that made the appellant's computer seem "as if it were brand new." Record at 361-63. Prior to that time, both Cpl Killroy and Sgt Rivas viewed evidence of pornography on the appellant's computer. *Id.* at 330, 351. Moreover, a later search of the appellant's government email account found pornography within the appellant's Outlook files. *Id.* at 356.

Considering the evidence in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of the above offenses beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. Further, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses' testimony, this court is convinced of the appellant's guilt for each of these offenses beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

Post-Trial Processing Errors

Although not raised by the appellant, we note that the trial counsel's report of the results of trial, the staff judge advocate's recommendation (SJAR), and the court-martial order (CMO), all incorrectly state that the appellant was convicted of Additional Charge I. Report of Results of Trial of 24 May 2007 at 1; CMO and Convening Authority's Action of 19 Sep 2007 at 3-4; SJAR of 25 Aug 2007 at 3-4. The trial defense counsel's clemency petition, likewise, incorrectly indicated that the appellant was found guilty of Additional Charge I. Clemency Request of 27 Jul 2007 at 1. In fact, the military judge had dismissed Additional Charge I for failure to state an offense.³ Record at 498.

³ The source of the confusion was the military judge's reference to the cleansed charge sheet, rather than the actual charge sheet. Record at 498;

Trial defense counsel's failure to object to the error in the SJAR, results in waiver, absent plain error. R.C.M. 1106(f)(6); see *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Under a plain error analysis, the appellant must show: (1) an error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right. *Scalo*, 60 M.J. at 436 (citing *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998)). We find that the error did not materially prejudice a substantial right of the appellant's because no "colorable showing of possible prejudice" exists. *Scalo*, 60 M.J. at 437 (citing *Kho*, 54 M.J. at 65). No prejudice exists because the convening authority granted the two month confinement reduction that the appellant sought in his clemency petition. See *United States v. Ruiz*, 30 M.J. 867 (N.M.C.M.R. 1990)(SJAR error in findings did not constitute a plain error because, absent the error in findings, the convening authority still would not have disapproved or suspended any part of the sentence); Clemency Request at 3; CMO and Convening Authority's Action at 5.

The appellant is, however, entitled to "have his official records correctly reflect the results of his court-martial." *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998)(citing *United States v. Diaz*, 40 M.J. 335, 345 (C.M.A. 1994); *United States v. Graf*, 35 M.J. 450, 467 (C.M.A. 1992); and *United States v. Moseley*, 35 M.J. 481, 485 (C.M.A. 1992)).

Conclusion

Accordingly, we affirm the findings and sentence as approved on by the convening authority. However, we direct that the supplemental court-martial order accurately reflect that Additional Charge I was dismissed.

Senior Judge VINCENT and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court

Appellate Exhibit XIV at 1. The findings worksheet, however, correctly reflects that Additional Charge I was not before the members. AE XXXIX at 2.