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

Before
B.L. PAYTON-O'BRIEN, E.C. PRICE, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

AARON B. MORRIS
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201100569
GENERAL COURT-MARTIAL

Sentence Adjudged: 17 June 2011.
Military Judge: Col M.B. Richardson, USMC.
Convening Authority: Commanding General, Training Command, Quantico, VA.
Staff Judge Advocate's Recommendation: LtCol J. Gruter, USMC.
For Appellant: LT Gregory M. Morison, JAGC, USN; Capt Michael Berry, USMC.
For Appellee: Maj Paul Ervasti, USMC.

30 November 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PRICE, Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of three specifications of aggravated sexual contact with a child and four specifications of indecent liberty with a child in violation of Articles 120(g) and (j), Uniform Code of Military

Justice, 10 U.S.C. §§ 920(g) and (j).[1,2] The convening authority approved the adjudged sentence of confinement for seven years and a dishonorable discharge from the United States Marine Corps.

The appellant raises seven assignments of error, including that: (1) three specifications of the original charge fail to state offenses; (2) the military judge abused his discretion by denying a defense challenge for cause; (3) the military judge committed plain error by allowing testimony regarding unsubstantiated hearsay and uncharged misconduct; (4) the military judge committed plain error by allowing the members to hear inadmissible hearsay; (5) errors in the court-martial order warrant a new convening authority's action; (6) the military judge abused his discretion in admitting the appellant's video-taped statement, and (7) he was denied a fair trial when the members saw evidence relevant to child pornography offenses, after the military judge indicated he would grant an R.C.M. 917[3] motion for most of the images but before entering findings of not guilty on all child pornography related offenses.[4]

After consideration of the pleadings of the parties and reviewing the entire record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

On 24 September 2010, the appellant and his wife, T.M., engaged in an ongoing dispute, primarily via text message, about their troubled relationship and potential divorce. The appellant returned home following a day of duty and the dispute continued. Also present in their residence were their three-year-old son, I.M., and the appellant's four-year-old daughter, G.M., his child from another relationship. After further

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[1] These statutory provisions were repealed and substantially revised in The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).

[2] The military judge merged the four specifications of indecent liberty with a child into two specifications for sentencing purposes.

[3] RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

[4] Assignments of error (6) and (7) are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

argument with T.M., the appellant left with a friend; an emotionally distraught T.M. entered a darkened second-floor hall closet in an effort to gather her thoughts outside the presence of the children.

Later the appellant returned to the residence, and unsuccessfully searched the house for his wife. Apparently believing that his wife had left the children alone, he subsequently bathed both children in their bathroom, located near the second floor closet then occupied by T.M.. After bathing G.M., he asked her "Will you have sex with me?" When G.M. said no, the appellant asked, "How about when you're 14?" He then repeated the same questions with respect to the ages of 16 and 18. G.M. then left the bathroom and returned wearing only a shirt but no bottoms, and indicated that she needed to "pee." The appellant directed her to the master bathroom.

The appellant then spanked G.M.'s bottom and uttered words to the effect of "That's a hot ass." Record at 785. The appellant and G.M. then entered the master bathroom, where his wife heard him say, "You got to hold it like this. Now move your hand up and down like this." *Id.* at 786. T.M. testified that at that point she ran out of the closet where she was hiding, entered the master bathroom, and she saw G.M. sitting on the toilet, with the appellant standing in front of her with his pants halfway down and with G.M.'s hand on his erect penis. *Id.* at 790. She testified that the appellant then exclaimed, "I'm not a pedophile. [I]t's not what it looks like. It's not what it seems." *Id.* at 792.

T.M. testified that moments later, while escorting G.M. to a neighbor's house, T.M. asked "Did Daddy touch you?" and that G.M. replied "yes." *Id.* at 802. T.M. also testified that several minutes later, while playing with the neighbor's children as they awaited arrival of the police, G.M. blurted out that "Daddy had his fingers in me." *Id.* at 817.

The appellant was apprehended soon thereafter and taken to a Naval Criminal Investigative Service (NCIS) office. After advisement and waiver of his Article 31(b), UCMJ, rights the appellant made a statement to the NCIS agents which was videotaped and admitted as evidence at trial. Prosecution Exhibit 20. The appellant initially denied any misconduct, but subsequently made admissions including asking G.M. if she would like to have sex with him then or when she was older, making sexual comments about her buttocks, grabbing her buttocks in a sexual manner, asking whether she would like to touch his penis,

and unzipping his pants with his erect penis plainly visible in his underwear. He denied removing his penis from his underwear, but stated that after some prompting G.M. touched his penis through his underwear. He also denied inserting his fingers into G.M.'s vagina. During the interview, the appellant made numerous spontaneous exclamations, including that he didn't know what was wrong with him, that he deserved "to be shot," that he was a "sex addict," "a monster," and that "I've never done this before. I never raped her. I've never done anything with her."

At trial, G.M. testified that on the night her father went to jail he touched her and that it hurt. Using a teddy bear as a demonstrative aide, she pointed to the teddy bear's pubic area to indicate where her father touched her, and also to indicate where her father made her touch him. She also testified that when T.M. saw her with the appellant that night, she ran away and screamed, and indicated that T.M. appeared mad. *Id.* at 931. The appellant did not cross-examine G.M..

Additional facts necessary to resolve the assigned errors are included herein.

Failure to State an Offense

The appellant asserts that Specifications 1, 2 and 5 of the original charge fail to state an offense because each specification is unclear as to which offense under Article 120, UCMJ, is alleged. He argues that common language employed in each specification that he "engage[d] in indecent conduct in the physical presence of [G.M.]" constitutes ambiguous language and when "combined with the ambiguous language of Article 120, UCMJ, the prosecution could have been alleging [either] indecent liberty with a child or indecent act." Appellant's Brief of 16 Feb 2012 at 14. We disagree.

Whether a charge and specification state an offense is a question of law that we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy. *Id.* (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). "A specification that is susceptible to multiple meanings is different from a specification that is facially deficient." *Id.*

The relevant offense of Indecent Liberty with a Child was defined by statute as: "engag[ing] in indecent liberty in the

physical presence of a child . . . with the intent to arouse, appeal to, or gratify the sexual desire of any person . . . ." Art. 120(j), UCMJ.

The phrase "indecent liberty" was further defined as "indecent conduct, but physical contact is not required. . . . An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. . . ." Art. 120(t)(11), UCMJ. In addition, "indecent conduct" was defined as: "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. . . ." Art. 120(t)(12), UCMJ.

The President defined the five elements of "Indecent Liberty with a Child" applicable here as:

> (a) That the accused committed a certain act or communication;
> (b) That the act or communication was indecent;
> (c) That the accused committed the act or communication in the physical presence of a certain child;
> (d) That the child was under 16 years of age; and
> (e) That the accused committed the act or communication with the intent to: arouse, appeal to, or gratify the sexual desires of any person.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶45b(10).

The specifications at issue each allege that on or about 24 September 2010 the appellant did:

> Specification 1: *engage in indecent conduct* in the physical presence of G.M., a female under 16 years of age, by communicating the words, to wit: by asking her "will you have sex with me?," "will you have sex with me when you are 7, or 12, or 14, or 16, or 18 years old?" or words to that effect, with the intent to gratify the sexual desires of the said [appellant].
>
> Specification 2: *engage in indecent conduct* in the physical presence of G.M., a female under 16 years of age, by communicating the words, to wit: by saying to her "That's a hot ass," or words to that effect, with

> the intent to gratify the sexual desires of the said [appellant].
>
> Specification 5: *engage in indecent conduct* in the physical presence of G.M., a female under 16 years of age, by communicating the words, to wit: by asking her "will you touch it?," "hold it like this," "move your hands up and down" or words to that effect, with the intent to gratify the sexual desires of the said [appellant].

(Emphasis added).

We are satisfied that each specification alleges either expressly or by implication every element of the offense of indecent liberty with a child and protects the appellant against double jeopardy.

Contrary to the appellant's assertion, we conclude that the common language from each specification ""engage[d] in indecent conduct" constitutes an unambiguous use of the term specified by statute to define "indecent liberty." Compare Articles 120(j), 120(t)(11), and 120(t)(12), UCMJ. In addition, each of these three specifications closely tracks the Manual's sample specification for the offense of Indecent Liberties with a Child. MCM, Part IV, ¶45g(10).

We note that the Court of Appeals for the Armed Forces has previously found that "'language' can be, or be part of, 'conduct' in a particular case." *United States v. King*, 71 M.J. 50, 52, n.3 (C.A.A.F. 2012) (citing *United States v. Brinson*, 49 M.J. 360, 364-65 (C.A.A.F. 1998) (concluding that use of coarse language constituted disorderly conduct); *United States v. Littlewood*, 53 M.J. 349, 352, 353-54 (C.A.A.F. 2000) (finding a variety of offenses, including indecent language, to be indecent conduct of a nature to bring discredit upon the armed forces and prejudicial to good order and discipline); and *United States v. Lofton*, 69 M.J. 386, 390 (C.A.A.F. 2011) (holding that sexual comments made by an officer to a female enlisted airman constituted conduct unbecoming an officer).

We also note that the appellant's argument that, as written, the specifications could allege either "indecent liberty with a child or indecent act" does not support his conclusion that they therefore fail to state an offense. On the contrary, as written the specifications allege the offense of

"indecent liberty with a child" and the lesser included offense of "indecent act."

Comparing the statutory elements of the two offenses reveals that as alleged here, "indecent act" in violation of Article 120(k), UCMJ, is indeed a lesser included offense of "indecent liberty with a child" in violation of Article 120(j). *See United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010).

The offense of Indecent Act was defined by statute as: "engag[ing] in indecent conduct . . . ." Art. 120(k), UCMJ. The term "indecent conduct" defined in Article 120(t)(12), UCMJ, and discussed *supra* was applicable to both offenses. The Presidentially defined elements of "indecent act" were:

(a) That the accused engaged in certain conduct; and
(b) That the conduct was indecent conduct.

MCM, Part IV, ¶45b(11).

Simply put, application of the statutory elements test discussed in *Jones* reveals that the "elements of [indecent act] are also elements of [indecent liberty with a child] and [indecent liberty with a child is] the greater offense because it contains all of the elements of [indecent act] along with one or more additional elements." *Jones*, 68 M.J. at 470. Comparing the statutory elements, it is impossible to prove the indecent liberty with a child without also proving an indecent act. Notably, the Manual for Courts-Martial also listed "Article 120 – Indecent act" as a lesser-included offense of "Indecent liberty with a child." MCM, Part IV, ¶45d(10)(a). Furthermore, the offense as charged here clearly alleges the elements of both offenses.

Accordingly, we conclude that Specifications 1, 2 and 5 of the original charge state offenses as they allege, either expressly or by implication, every element of the offense of indecent liberty with a child, "so as to give the accused notice and protection against double jeopardy." *Crafter*, 64 M.J. at 211.

Challenge for Cause

The appellant asserts that the military judge abused his discretion by denying the defense's challenge for cause of Captain (Capt) C based upon Capt C's meeting with the convening

authority on an unrelated matter approximately one month prior to trial. Record at 627-31. Following the military judge's denial of that challenge, the defense did not exercise a peremptory challenge on any member. *Id.* at 634.

"[F]ailure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the [challenge for cause] upon later review." RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); *see also United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006). Therefore, by failing to exercise a peremptory challenge against any member, the appellant waived further review of his challenge for cause of Capt C and this issue is without merit.

Unsubstantiated Hearsay and Uncharged Misconduct

The appellant argues that the military judge committed plain error by allowing T.M. to testify on redirect that G.M. said "Daddy had his penis in me," where that statement was both unsubstantiated and unrelated to any charged misconduct. The parties agree that T.M.'s testimony on direct was that G.M. blurted out, "Daddy had his fingers in me," that the appellant neither objected to T.M.s testimony on redirect nor requested a curative or limiting instruction, and that absent objection, this issue is subject to review under the plain error standard.

"When the defense fails to object to admission of specific evidence, the issue is waived, absent plain error." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citations omitted). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" *Id.* (citation omitted).

At trial the appellant objected to eliciting through the testimony of his estranged wife, what G.M. may have said shortly after the alleged misconduct. In an Article 39(a), UCMJ, session conducted after the members were excused from the courtroom, T.M. testified that G.M. said "Daddy has [sic] his fingers in me." Record at 815. T.M. also testified that G.M. "just blurted it out." *Id.* Trial defense counsel argued that G.M.'s statement was hearsay and that the "excitement hasn't been established." *Id.* at 815-17. The military judge overruled the appellant's objection, noting that he found the statement "sufficient to qualify as an excited utterance pursuant to Military Rule of Evidence 803(2) . . . [as] a statement which relates to a startling event or condition made while the

declarant was under the stress of excitement caused by the event or condition." *Id.* at 816.

The military judge overruled the defense hearsay objection. He then noted that "the magic words here were 'she just blurted this out'," that the statement was not precipitated by any sort of questioning, that the statement was made "within five minutes of the incident," and that G.M. "was subject to not only the alleged sexual offense . . . but then the ensuing melee between [T.M.] and the [appellant]." *Id.* at 815-16. He also noted that the statement followed T.M.'s question "Did Daddy touch you?" by "thirty seconds to a minute" with G.M. "blurting out, 'Yes, he put his fingers in me.'" *Id.* at 816. Based upon the foregoing, we conclude that the military judge did not abuse his discretion when he overruled the defense hearsay objection. We adopt his findings of fact and concur with his conclusions of law that the statement was admissible as an excited utterance under MILITARY RULE OF EVIDENCE 803(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

T.M. then testified before the members that after the alleged misconduct occurred, she took G.M. to a neighbor's house and that while playing with the neighbor's kids and without prompting, G.M. blurted out that "Daddy had his fingers in me." Record at 817. The assistant defense counsel's extensive cross-examination of T.M. focused primarily upon her credibility, prior instances of hearing voices and medications she had been prescribed, her potential motives to fabricate, and inconsistencies between her previous statements and in-court testimony. He did not articulate or elicit the specific words that G.M. allegedly uttered at the neighbors house, but alluded to the statement that G.M. "blurted out" or made at the neighbor's house on at least three occasions. *Id.* at 889, 890, 893.

During redirect examination, the trial counsel asked what G.M. blurted out at the neighbors house and T.M. testified that she said that "Daddy had his penis in me." *Id.* at 906. This was the one and only mention of this purported statement by G.M. in the record of trial.

Assuming that the military judge's failure to *sua sponte* address T.M.'s altered description on redirect was error, under these facts we are convinced that the statement had no substantial impact on findings or sentence and thus did not materially prejudice the appellant's substantial rights. *See United States v. Pope*, 69 M.J. 328, 333-34 (C.A.A.F. 2011).

First, the appellant was found not guilty of Specification 1 under Additional Charge III, rape of a child by "penetrating

[G.M.'s] genital opening with his hand or finger[.]" Record at 1588. This was the most serious offense alleged and the only offense that alleged the appellant penetrated G.M.'s genital opening. Thus the appellant was acquitted of the offense to which G.M.'s purported statement would be the most legally and logically relevant.

Second, the only direct reference in the entire record of trial to T.M.'s recollection of G.M.'s statement that "Daddy had his penis in me," was her testimony to that effect on redirect. This testimony materially differed from her testimony on direct[5] which tracked the specification's language. In fact, neither party mentioned the purported penile penetration in their closing arguments; instead both parties referenced the misconduct charged, the appellant's penetration of "[G.M.'s] genital opening" with "his hand or finger." The Government made explicit or direct reference to digital penetration of G.M.'s genital opening throughout closing arguments. Record at 1516, 1524, 1540-42, 1545, 1549, 1556. Defense counsel's argument on this matter was limited to pointing out discrepancies between T.M.'s testimony at the "Article 32 hearing" and at trial with respect to exactly when and who was present when G.M. blurted out "Daddy had his fingers in me." *Id.* at 1533-34.

Moreover, the military judge's instructions on findings made no explicit reference to the statement in issue. *Id.* at 1481-83. His instructions on the "rape of a child" offense explicitly repeated the language that "the accused engaged in a sexual act, to wit: penetrating her genital opening with his hand or finger." *Id.* at 1481. The only arguable and at most indirect reference to the statement in issue, was the military judge's definition of "Sexual act" as "the penetration, however slight, of the genital opening of another by a hand or finger or by *any object* . . . ." *Id.* at 1481-82 (emphasis added). However, we find this of no significance in light of the entire record and in the absence of instruction on variance with respect to exceptions and substitutions. Additionally, and without reference to the statement in issue, the military judge instructed the members that they could not consider evidence of two other incidents of uncharged misconduct "as evidence pertaining to the charged conduct." *Id.* at 1495.

Finally, the direct and circumstantial evidence supporting the appellant's guilt was overwhelming, including those portions of T.M.'s testimony corroborated by other evidence, G.M.'s testimony, and the appellant's own videotaped admissions which

[5] T.M.'s testimony on direct and at the Article 39(a) session conducted moments earlier regarding G.M.'s statement was virtually identical.

corroborated significant portions of T.M.'s testimony and all of G.M.'s testimony, and the appellant's exclamations to NCIS reflecting his consciousness of guilt. The single, uncorroborated statement attributed to G.M. by the appellant's estranged wife was a minor comment in the context of the entire trial and argument. Conversely, the appellant's theory of defense was both unclear and weak, and the members appropriately returned findings of not guilty to charges and specifications which were not supported by overwhelming evidence of guilt. *Id.* at 1587-88. Given the overwhelming evidence of the appellant's guilt, "we are convinced that the absence of a limiting instruction had no substantial effect on the verdict." *Pope*, 69 M.J. at 334.

For these reasons, we are convinced that the testimony at issue was not a factor in obtaining the appellant's conviction or sentence and thus did not materially prejudice the appellant's substantial rights. *Pope*, 69 M.J. at 333.

Recorded statements previously declared inadmissible

The appellant argues that after finding recorded statements T.M. and G.M. provided to law enforcement inadmissible hearsay, the military judge committed plain error when he allowed those recordings before the members as a part of the appellant's videotaped statement. In that videotaped statement, the appellant listens to the clearly audible recordings of T.M.'s and G.M.'s statements to law enforcement. The appellant asserts that the military judge's curative instruction was inadequate to cure the defect due to the emotionally charged nature of the audio tape recordings. We disagree.

First, in the absence of a defense objection to the limiting instructions provided by the military judge, we review for plain error. *Maynard*, 66 M.J. at 244 ("The plain error standard is met when (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.") (citation and internal quotation marks omitted).

Second, the audio tape statements were not hearsay, as they were not "offered in evidence to prove the truth of the matter asserted." MIL. R. EVID. 801(c). Statements that are offered for another purpose besides the truth of the matter asserted are not hearsay. *United States v. Baumann*, 54 M.J. 100, 103 (C.A.A.F. 2000). The military judge deemed these statements admissible for the limited purpose of explaining the appellant's reactions in his video recorded interview with NCIS investigators, and

therefore not prohibited under MIL. R. EVID. 802. This was particularly important in this case where the appellant initially denied any misconduct, but subsequently made multiple admissions, and where the defense contested the voluntariness of those admissions at trial.

Third, the military judge provided the members an appropriate instruction as to the limited purpose for which the statements could be considered. MIL. R. EVID. 105. Specifically, prior to playing the video recording of the appellant's statement to NCIS, the military judge advised the members that the statements in issue "are only offered . . . as a means of explaining the rest of the statement that the [appellant] made in response to being confronted with them. You may not consider those statements by [T.M.] or [G.M.] as evidence of the truth of the matter contained within the statements themselves." Record at 1226. The members subsequently asked the military judge to refresh their understanding of the acceptable use of these statements during deliberations. Appellate Exhibit CXXVII; Record at 1578. The military judge again comprehensively explained the limits on the members' permissible use of the two statements. Record at 1579-83. In fact, the limiting instructions provided by the military judge were not objected to by defense counsel, but were in part based upon trial defense counsel's recommendations. *Id.* at 478-79, 1227.

Fourth, "[i]n the absence of evidence to the contrary, the members are presumed to follow the military judge's instructions." *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991) (citation omitted). The validity of this presumption is reinforced by the members request that the military judge refresh their understanding of the acceptable use of these statements during deliberations, and his comprehensive explanation of the limited use of the two statements in response. AE CXXVII; Record at 1579-83. Simply put, "the members are presumed to follow the military judge's instructions," *Holt,* 33 M.J. at 408, and the appellant has presented no evidence to the rebut this presumption.

Finding no error, we also conclude that "there is no material prejudice to the appellant's substantial rights." *Maynard*, 66 M.J. at 244 (citation and internal quotation marks omitted).

Court-Martial Promulgating Order Errors

The appellant identifies two errors in the promulgating order: (1) that the promulgating order erroneously reflects that the sentence adjudged included "reduc[tion] to the pay grade of E-1," and (2) that the convening authority erroneously claimed to consider "the pretrial agreement" prior to taking action on the findings and sentence. He argues that these errors suggest that the convening authority misunderstood the procedural posture of his case and improperly reviewed the record, resulting in prejudice. Appellant's Brief at 24. He requests that "a convening authority reconsider his case and unambiguously state a correct understanding of what happened [at his court-martial] before [deciding] whether to grant any clemency." *Id.* at 24-25.

We find these errors in the promulgating order harmless. *United States v. Crumpley,* 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Although the sentence did not include reduction to pay grade E-1, the appellant was reduced to the pay grade of E-1 by operation of law when the convening authority approved the sentence including a dishonorable discharge and confinement for seven years.[6] Art. 58a, UCMJ. Similarly, we find no prejudice as a result of the convening authority's erroneous indication that he considered a non-existent "pretrial agreement" before taking action. The appellant has failed to "make some colorable showing of possible prejudice." *United States v. Wheelus,* 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman,* 46 M.J. 321, 323-24 (C.A.A.F. 1997)). The appellant is nonetheless entitled to a record that correctly reflects the results of his court-martial. *Crumpley*, 49 M.J. at 539. We will order appropriate action in the decretal paragraph.

Although not raised by the appellant, the court-martial promulgating order includes two additional errors. First, Specification 2 of the Third Additional Charge erroneously reflects that the appellant "engaged in a sexual *act* with a

[6] This error first appears in the Report of Results of Trial signed by trial counsel. Results of Trial) of 17 Jun 2011 at page 4, ¶4. This error is repeated in the staff judge advocate's recommendation (SJAR) through the staff judge advocate's attestation that: "I have reviewed the results of trial, enclosure (1), and it accurately reflects the charges, findings and sentence adjudged[.]" SJAR of 30 Sep 2011 at ¶2. The appellant did not raise this error in his post-trial submission or on appeal, and "we find that this error did not affect appellant's substantial rights, since no prejudice was alleged or is apparent." *Crumpley*, 49 M.J. at 539; *see also* R.C.M. 1106(f)(6).

child" and should read "engaged in sexual *contact* with a child."[7] (emphasis added). Second, the convening authority's action in the court-martial promulgating order states: "Pursuant to Article 71, UCMJ, the punitive discharge *will be executed* after final judgment." (emphasis added). To the extent that the convening authority purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543, 544 (N.M.Ct.Crim.App. 2011). The appellant has not asserted, nor have we found any prejudice to the appellant from these errors. However, the appellant is entitled to have the promulgating order correctly reflect the results of his proceeding. We shall order corrective action in our decretal paragraph. *Crumpley,* 49 M.J. at 539.

Conclusion

The supplemental court-martial promulgating order shall correctly reflect the findings and sentence including: (1) Specification 2 of the Third Additional Charge, except the word "act" and substitute the word "contact;" (2) except the words "the pretrial agreement" from "Matters Considered," and (3) sentence adjudged shall be reflected as "Dishonorable discharge and confinement for seven (7) years."

We affirm the findings and sentence as approved by the convening authority.

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court

[7] This error also first appears in the "Results of Trial," and is repeated in the SJAR when the staff judge advocate attests to the accuracy of those "Results of Trial." Results of Trial at page 4; SJAR at ¶2. The appellant did not raise this error in his post-trial submission or on appeal, and "we find that this error did not affect appellant's substantial rights, since no prejudice was alleged or is apparent." *Crumpley*, 49 M.J. at 539; *see also* R.C.M. 1106(f)(6).