

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

**Before
J.R. PERLAK, J.K. CARBERRY, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHADD A. ROBERTS
HOSPITAL CORPSMAN SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201100437
GENERAL COURT-MARTIAL**

Sentence Adjudged: 17 May 2011.

Military Judge: CAPT Tierney M. Carlos, JAGC, USN.

Convening Authority: Commander, U.S. Naval Activities,
Rota, Spain.

Staff Judge Advocate's Recommendation: LT Paul H. Thompson,
JAGC, USN.

For Appellant: CDR R.D. Evans, Jr., JAGC, USN.

For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

20 March 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.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of wrongful and knowing possession of child pornography in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for three years and a bad-conduct discharge. The convening authority approved the

sentence as adjudged but pursuant to a pretrial agreement, suspended all confinement in excess of 24 months.

The appellant's sole assigned error is that the record of trial is incomplete and requests that we remand the case for a post-trial Article 39(a), UCMJ, session and direct the military judge to address a number of perceived omissions and inconsistencies in the record. We have carefully considered the record of trial, the appellant's sole assigned error, and the Government's response. We find the record to be substantially complete and that no error materially prejudiced the substantial rights of the accused has occurred. Arts. 59(a) and 66(c), UCMJ.

Specifically, the appellant argues that the following errors and omissions in the record of trial render it an incomplete transcript: (1) the original charge sheet was not included in the record of trial; (2) the military judge failed to identify the court reporter for the 17 May 2011 session of court; (3) the time annotations made by the court reporter are inconsistent with the military judge's statements made on the record; and, (4) the sealing order to Prosecution Exhibit 2 was not signed by the military judge until 15 July 2011, one day after the military judge authenticated the record of trial. Appellant's Brief of 25 Oct 2011.

In its response, the Government argues that the original charge sheet was included in the record, but was erroneously labeled as Appellate Exhibit III. As to the other errors or admissions, the Government concurs, but argues the omissions and errors are insubstantial, and the record is complete and substantially verbatim. Government's Brief of 21 Dec 2011. We agree.

Discussion

Because the appellant's sentence at a general court-martial includes a bad-conduct discharge, the Government is required to prepare a complete record of trial which includes a substantially verbatim transcript. Art 54(a), UCMJ; *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982); RULE FOR COURTS-MARTIAL 1103(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The requirement for a complete record of trial and substantially verbatim transcript is one of jurisdictional proportion that cannot be waived. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A record with insubstantial omissions satisfies the verbatim requirement but a record with substantial

omissions gives rise to a presumption of prejudice. *Lashley*, 14 M.J. at 9. Whether or not omissions are substantial may be determined by the nature of the omission or by the number of omissions. *Id.* Appellate courts determine whether an omission is substantial on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). While the record for this case is imperfect, we find it substantially complete and verbatim.

Charge Sheet

Although the charge sheet was not included in the verbatim transcript where it is normally found, it was included in the record as AE III. Although there was no reference made to AE III during the proceedings, the context of the record and examination of the exhibit itself makes us confident that it is the original charge sheet, particularly since it includes pen changes addressed on the record by the military judge and counsel during the providence inquiry when the military judge asked if the appellant agreed to a major modification to the charge after he had been arraigned. Record at 27-31.

Court Reporter

Both parties concede that neither the military judge nor the trial counsel identified the court reporter or indicated her status as to oath for the 17 May 2011 session of court. R.C.M. 901(c) requires the trial counsel to announce the reporter's status as to oath and unsworn reporters shall be sworn. We regard the omission of this step from the transcript be insubstantial; we note that the defense was provided an opportunity to examine the record prior to authentication by the military judge and did not raise this error as a substantial omission. Record at 107; Clemency Request of 8 Aug 2011. Furthermore, authentication of the record by the military judge confirmed the court reporter did faithfully perform his or her duties as reporter for this court-martial. R.C.M. 807(b), Discussion.

Time Notations

The appellant also notes that on various stages of the trial, inconsistencies between the military judge's announcements of the time with the time recorded by the court reporter. We find none of these alleged errors amount to a substantial omission. The inconsistencies are not omissions at all, simply inconsistencies. The appellant does not

demonstrate, nor do we find, any possible prejudice associated with this inconsistency.

Sealing Order

During the presentencing case the military judge admitted Prosecution Exhibit 2, a compact disc upon which two video (mpg) files are stored. Record at 87-88. Each file records the sexual abuse of a young boy. The military judge authenticated the record of trial on 14 July 2011; both the appellant and the Government agree that the military judge signed a sealing order for Prosecution Exhibit 2 on 15 July 2011.¹ Although the appellant concedes that it was appropriate to place PE 2 under seal, he argues that the record lacks any discussion or reference to the military judge's issuance of such an order. The appellant argues the lack of reference to the sealing order constitutes an omission that renders the record incomplete. Furthermore, the appellant argues the military judge lacked authority to include a sealing order after he authenticated the record of trial. We are not persuaded that the lack or late submission of a sealing order constitutes a substantial omission. While the lack of a sealing order may indicate a failure of the trial counsel or the military judge to comply with the requirements of R.C.M. 1103A, it does not amount to an omission from the verbatim transcript. The appellant does not demonstrate, nor do we find, any prejudice to the appellant's substantial rights arising from this error.²

Conclusion

Prosecution Exhibit 2 is ordered sealed. The findings and the sentence as approved by the convening authority are affirmed

For the Court

R.H. TROIDL
Clerk of Court

¹ The sealing order is not present in the record of trial.

² We will take appropriate action in our decretal paragraph to safeguard the contraband images contained within PE 2.