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

Before
J.R. PERLAK, R.Q. WARD, J. R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ETHAN S. SHORT
ELECTRONICS TECHNICIAN SEAMAN (E-3), U.S. NAVY

NMCCA 201200483
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 August 2012.
Military Judge: CAPT John Waits, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR M.C. Holifield, JAGC, USN.
For Appellant: LT Carrie Theis, JAGC, USN.
For Appellee: Maj Crista Kraics, USMC.

30 July 2013

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 found the appellant guilty, pursuant to his pleas, of one specification of of unauthorized absence terminated by apprehension and one specification of wrongful use of marijuana in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. A panel of members with enlisted representation found the appellant not guilty of aggravated sexual assault of a child and aggravated sexual abuse

of a child. The members sentenced the appellant to seven 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 and, except for the punitive discharge, ordered it executed.

The appellant submitted three assignments of error, alleging that: 1) appellate review was impossible because the Government failed to provide a verbatim record of trial; 2) the trial counsel's sentencing argument was improper; and 3) the Staff Judge Advocate's (SJA) failure to comment on the appellant's allegation of legal error was plain error. After consideration of the pleadings and the record of trial, we find no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

On 12 January 2012, the appellant left his command, the USS HALYBURTON (FFG 40), without permission and returned to his hometown in Michigan. Prosecution Exhibit 1. The appellant remained unlawfully absent until he was apprehended by the Michigan State Police in a traffic stop on 26 February 2012, and subsequently returned to military control. *Id*. While being processed into the military brig, the appellant underwent a urinalysis exam that tested positive for marijuana. *Id.* When confronted with this result, the appellant admitted to using marijuana while absent. Further facts relevant to disposition of this case are developed below.

Verbatim Transcript and Playing of the Providence Inquiry

The appellant was initially charged with a single specification of desertion under Article 85; however, he pled guilty to the lesser included offense of unauthorized absence. During the providence inquiry on this specification, the military judge informed the appellant that unauthorized absence is a lesser included offense of the original charge of desertion. Record at 41-42. An audio recording of this providence inquiry was played for the members during the sentencing proceeding. *Id*. at 702-04. The authenticated record of trial does not contain a verbatim transcript of the providence inquiry as it was played for the members. Rather, the record merely marks the playing with "Providence inquiry begins being played for the members" and "Providence inquiry continues playing for the members." *Id.* at 703-04. The appellant claims this omission results in the Government's

failure to provide a verbatim transcript as required under RULE FOR COURTS-MARTIAL 1103(b)(2)(B) MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) and impedes our ability to render review. In response to the appellant's pleading, the Government moved to attach a transcript of the providence inquiry as heard by the members, a sworn affidavit from the court reporter, and the audio recording of the trial. Government Motion to Attach of 31 May 2013. Although the appellant took issue with the accuracy of the transcript,[1] the appellant did consent to the court's consideration of the audio recordings. Appellant's Answer to the Government's Motion to Attach of 6 June 2013. Our decision to grant the motion to attach renders that portion of the appellant's assigned error moot.

Turning now to the substantive allegations, we find no error materially prejudicial to the substantial rights of the appellant. First, our review of record indicates that, contrary to the appellant's assertion in his clemency petition, the members were never told that he pled guilty pursuant to a pretrial agreement. Clemency Request of 21 Aug 2012. The members did hear that the appellant had originally been charged with desertion; however, immediately after that portion of the providence inquiry was played for the members the military judge stopped the recording and provided a curative instruction. Record at 704. The members acknowledged this instruction and agreed to abide by it. *Id.* The record of trial yields no evidence that appellant was prejudiced by the playing of the providence inquiry and we presume that the members followed the military judge's instructions. *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000). Accordingly, we find no prejudice and deny the request for relief.

Trial Counsel's Sentencing Argument

During his argument on sentencing, the trial counsel urged the members to award the appellant a punitive discharge instead of allowing him to leave the Navy by way of an administrative

[1] We agree with the appellant's assertion that the transcript contained in the Government Motion to Attach is still incomplete. After reviewing the transcript and audio recording concurrently, we note that the transcript attached by the Government's motion does not include three lines heard by the members wherein the military judge inquired whether "counsel request any further inquiry on that specification" and both trial counsel and trial defense counsel declined further inquiry. Record at 58. We find this is an insubstantial omission and does not impact our ability to review the case. *United States v. Valentin,* No. 201000683, 2012 CCA LEXIS 180 at *10-11 (N.M.Ct.Crim.App. (17 May 2012), *aff'd in part and rev'd in part*, 71 M.J. 400 (C.A.A.F. 2012) (C.A.A.F. 2012) (summary disposition).

separation process.[2] The appellant claims this was an improper sentencing argument and urges disapproval or modification of the sentence.

As the appellant failed to object to the trial counsel's sentencing argument, we review the argument for plain error. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009). Plain error is established upon a showing that an error occurred, the error was plain or obvious, and the error resulted in material prejudice to the appellant's substantial rights. *Id.* Assuming without deciding that trial counsel's argument was improper, we find that the appellant fails to demonstrate the required prejudice.

In assessing prejudice, we look to "the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). In our prejudice determination, we balance three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id*. (quoting *Fletcher*, 62 M.J. at 184). In applying these factors to an improper sentencing argument, we consider whether "'trial counsel's comments, taken as a whole, were so damaging that we cannot be confident' that [the appellant] was sentenced 'on the basis of the evidence alone.'" *Id*. (quoting *Fletcher*, 62 M.J. at 184). Here, the appellant was sentenced to a bad-conduct discharge for a forty-six day unauthorized absence terminated by apprehension during which he knowingly smoked marijuana. After reviewing the argument and the evidence against the appellant, we are confident that the appellant was sentenced on the basis of the evidence alone and find no prejudice.

Failure to Comment on Allegation of Legal Error

In his clemency request, the appellant alleged that the members heard that he "was originally charged with desertion and was only pleading guilty to Unauthorized Absence pursuant to an agreement he reached with the convening authority." Clemency Request of 21 Aug 2012. Now, in his third assignment of error, he argues that this was an assertion of legal error, and that the SJA failed to properly comment on the alleged error in his

[2] "But don't – members, don't let him go out on his own terms, you know, at the end of his EAOS with an honorable discharge or through some nonpunitive administrative-separation process." Record at 749.

recommendation (SJAR) in accordance with R.C.M. 1106(d)(4). After reviewing the SJAR, we find that the appellant was not materially prejudiced by the omission.

The appellant's "failure to comment on any matter in the post-trial recommendation in a timely manner waives any later claim of error, unless it rises to the level of plain error." *United States v. Kho,* 54 M.J. 63, 65 (C.A.A.F. 2000). To demonstrate plain error, the appellant must show that (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id*. We conduct the plain error analysis of an SJAR omission *de novo,* and "[b]ecause of the highly discretionary nature of the convening authority's action on the sentence, we will grant relief if an appellant presents 'some colorable showing of possible prejudice.'" *Id.* (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

Our review of the SJAR shows that although it summarizes the appellant's claim of legal error, it fails to state whether the SJA agreed or disagreed with the appellant's assertion. This failure constitutes error. *United States v. Welker*, 44 M.J. 85, 88 (C.A.A.F. 1996). However, our review of the record indicates that, contrary to the appellant's assertion, the members were never told he was pleading pursuant to a pretrial agreement. Where there is no error at trial, we will find no prejudice toward the appellant from the SJA's failure to opine on the same. *Id.* at 89. Thus the only remaining issue is the fact that the members learned that the appellant was originally charged with desertion, but pled guilty to the lesser included offense of unauthorized absence. As noted above, the military judge provided a curative instruction to the members, and we presume that members follow the military judge's instructions. *Jenkins*, 54 M.J. at 20. Accordingly, even under the "some colorable showing of possible prejudice" standard, we find no prejudice in this case and deny the request for relief. *Kho,* 54 M.J. at 65.

Conclusion

Accordingly, the findings of guilty and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Chief Judge PERLAK participated in the decision of this case prior to detaching from the court.