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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

NATHAN G. SYMANSKY
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201300123
GENERAL COURT-MARTIAL

Sentence Adjudged: 1 February 2013.
Military Judge: Col G. W. Riggs, USMC.
Convening Authority: Commanding General, 2d Marine Air Wing, Cherry Point, NC.
Staff Judge Advocate's Recommendation: LtCol J.J. Murphy, USMC.
For Appellant: CAPT Bree Ermentrout, JAGC, USN.
For Appellee: LCDR Keith Lofland, JAGC, USN.

26 November 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 convicted the appellant, pursuant to his pleas, of abusive sexual contact in violation of Article 120(d), Uniform Code of Military Justice, 10 U.S.C. § 920(d) (2012). The military judge sentenced the appellant to 14 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. A pretrial agreement had no effect; the convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

On appeal, the appellant first argues that his guilty pleas are improvident due to a misunderstanding of the maximum punishment applicable at trial. Next, he argues that the military judge's failure to rule on the trial defense counsel's objection to a Government expert witness's testimony renders the record of trial substantially incomplete.

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

Factual Background

At trial, the military judge advised the appellant that the maximum punishment for the offense to which he pleaded guilty was seven years confinement, total forfeitures of pay and allowances, reduction to the pay grade E-1, and a dishonorable discharge. Record at 21. The appellant indicated he understood, and both the trial and defense counsel agreed with the military judge's advice. *Id*.

During sentencing, the assistant trial counsel called Ms. Patrice Goldstein, a licensed clinical social worker, who was a treating therapist for the victim, Corporal (Cpl) H. After explaining her background, training and experience, the assistant trial counsel then offered Ms. Goldstein as an expert in the area of "licensed clinical social work" but without any further explanation of her relevant area of expertise. *Id*. at 73. Trial defense counsel then objected, citing a lack of notice from the Government. *Id*. The assistant trial counsel conceded that no formal notice had been provided other than providing to the defense a copy of Ms. Goldstein's resume (Prosecution Exhibit 8). *Id*. at 74. The military judge recessed the court and, after reconvening the court seven minutes later, proceeded to take Ms. Goldstein's testimony without further comment or objection from either party. *Id.* Ms. Goldstein then described to the court her treatment of Cpl H, Cpl H's progress, and the overall goals of Cpl H's treatment plan. She concluded her direct testimony by describing how Cpl H was suffering from sleeplessness, fear and a lack of sense of safety, and how these effects were in her experience consistent with those suffering from trauma. *Id*. at 74-75.

On cross-examination, trial defense counsel limited his questions to the availability of Cpl H's treatment and

confirming that she had an effective support system in place. *Id*. at 75-76. The military judge asked no questions.

Maximum Punishment Applicable Under Article 120(d), UCMJ

The appellant first argues that the lack of any statutory or presidentially assigned of a maximum punishment at the time of his offense and trial created an ambiguity, which under the Rule of Lenity renders the maximum punishment for his offense no greater than that applicable at a summary court-martial. In support, he attaches to his brief a military judge's ruling on a similar issue in an unrelated court-martial.[1] We disagree.

We recently reviewed this issue in *United States v. Booker*, *Military Judge, Respondent,* 72 M.J. 787 (N.M.Ct.Crim.App. 2013), *appeal denied sub nom. United States v. Schaleger,* __ M.J. __, 2013 CAAF LEXIS 1323 (C.A.A.F. Oct. 31, 2013) (summary disposition) (*"Booker I"*). In *Booker I*, the same military judge ruled that the maximum punishment for offenses under the recently amended Articles 120(b)(2) and 120(b)(3)(A)[2] occurring prior to 15 May 2013[3] was the jurisdictional maximum available at a summary court-martial. The Government then filed a petition for extraordinary relief seeking an order reversing the trial judge's ruling.

In reviewing the Government's petition, we initially concluded that, prior to 15 May 2013, the charged offenses of sexual assault were not "listed in Part IV" of the Manual for purposes of determining limits on maximum punishment under RULE FOR COURTS-MARTIAL 1003(c)(1)(B)(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). After applying each of the criteria under

[1] *See* Appellant's Brief of 3 Jun 2013, Appendix I, Order in *United States v. Shade*, dtd 21 Feb 2013.

[2] The Fiscal Year 2012 National Defense Authorization Act (NDAA) amended Article 120, UCMJ, and added the offense of sexual assault for offenses committed on or after 28 June 2012. *See* NDAA for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1404-07 (2011) (codified as amended at 10 U.S.C. § 920).

[3] The aforementioned amendments to Article 120 did not specify any maximum punishments, instead only authorized punishment "as a court-martial may direct." On 15 May 2013, the President amended Paragraph 45 of Part IV of the Manual for Courts-Martial, establishing maximum punishments for offenses under Article 120, UCMJ. Executive Order 13643 of 15 May 2013. For Abusive Sexual Contact under Article 120(d), E.O. 13643 limits the maximum punishment to seven years confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge.

R.C.M. 1003(c)(1)(B)(i) -(ii),[4] we concluded that the Eight Amendment's *Ex Post Facto* clause did not prohibit retroactively applying the presidentially proscribed maximum punishment limits for sexual assault offenses occurring after 27 June 2012 but prior to 15 May 2013. *Booker I*, at 798.

We subsequently reviewed another Government petition for extraordinary relief from a similar ruling by the same military judge in a different case. *United States v. Booker*, *Military Judge, Respondent,* No. 201300325, 2013 CCA LEXIS 914, unpublished op. (N.M.Ct.Crim.App. 31 Oct 2013) (*"Booker II"*). There the military judge ruled that the maximum punishment limitation for an offense under Article 120(d), Abusive Sexual Contact, 10 U.S.C. § 920(d) (2012), occurring after 27 June 2012 but prior to 15 May 2013, was again the maximum available at a summary court-martial. We granted the Government's petition for extraordinary relief after concluding that the 2012 version of Abusive Sexual Contact under Article 120(d) was "closely related" to either the 2007 version of Abusive Sexual Contact under Article 120(h), or the longstanding offense of Assault Consummated by Battery under Article 128, UCMJ. However, we could not determine from the state of the record which offense was more closely related to the charged offense of Article 120(d).

Turning now to the case at hand, we begin our analysis by comparing the statutory elements, the definitions, and the presidentially proscribed limit on maximum punishment for both versions of Abusive Sexual Contact under Article 120, UCMJ. *Compare* 10 U.S.C. § 920(d) (2012) and 10 U.S.C. § 920(h) (2006). As we noted in *Booker II*:

> the alleged offense [of Article 120(d)] is closely related to "abusive sexual contact" punishable under Article 120(h) of the 2007 version of the law, because the statutory text of the two versions of the offense is similar. . . [and] [t]he analysis in the Manual indicates that "[a]busive sexual contact remains significantly unchanged . . . except to substitute "commits" for "engages in[.]'"

[4] "For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed[.]" R.C.M. 1003(c)(1)(B)(i). An offense neither "included in [n]nor closely related to an offense listed [in Part IV or the Manual] is punishable as authorized by the United States Code, or as authorized by custom of the service." R.C.M. 1003(c)(1)(B)(ii).

2013 CCA LEXIS 914 at *13 (quoting MCM (2012 ed.), App. 23, Analysis of Punitive Articles, ¶ 45 at A23-15 (Sexual Contact Offenses)) (footnote omitted).

However, we also noted in *Booker II* that in 2012 Congress expanded the definition of "sexual contact." Previously, "sexual contact" required an intentional touching (or intentionally causing another to touch) of specified body parts[5] with intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.[6] In 2012, Congress bifurcated the definition of sexual contact into two categories: a touching of the same specified body parts as listed in the 2007 definition but with an abusive intent; or a touching of any body part with a sexual intent. 10 U.S.C. § 920(g)(2)(A)-(B) (2012).

Due to the limited nature of the record in *Booker II*, we were unable to conclude whether the charged offense under Article 120(d) implicated the statutory definition of "sexual contact" under the predecessor offense.[7] This case, however, presents a different posture because the specification here alleges an intentional touching that satisfies the definition under both versions of the statute;[8] sexual contact by an intentional touching of "the genitalia, anus, groin, breast, inner thigh, or buttocks of another person".

By comparing the statutory elements, definitions and presidentially proscribed limitations on punishment, we conclude

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[5] The specified body parts are the genitalia, anus, groin, breast, inner thigh, or buttocks of any person. Article 120(t)(2), UCMJ, 10 U.S.C. § 920(t)(2) (2006) (hereinafter referred to as "specified body parts.").

[6] For ease of reference, we will refer to the intent to arouse or gratify the sexual desire of any person as "sexual intent" and the intent to abuse, humiliate, or degrade any person as "abusive intent."

[7] *Booker II*, at *17-18 ("Determination of the extent of the relationship between [the Article 120(d) specification] and those closely related offenses is dependent, at least in part, on whether the body part allegedly touched was a specified body part in the 2007 version of abusive sexual contact, or not.").

[8] Specification 4 of the Charge reads in pertinent part as follows: "In that [the appellant]. . .did. . . commit sexual contact upon [Cpl H] to wit: grabbing her buttocks with his hands, rubbing his penis on her thighs and buttocks, and masturbating his penis to the point of ejaculating on her thighs and buttocks, when the said [Cpl H] was incapable of consenting to the sexual contact due to impairment by alcohol, and that condition was known or reasonably should have been known by the accused." Charge Sheet.

that specification 4 of the Charge is "closely related" to the predecessor offense of Abusive Sexual Contact under Article 120(h), UCMJ, 10 U.S.C. § 920(h) (2006). R.C.M. 1003(c)(1)(B)(i). As the President established the same limitation on punishment for the revised offense, the *Ex Post Facto* Clause is not implicated. Consequently, we find no error in the military judge's advice to the appellant that his guilty plea to Specification 4 of the Charge carried a maximum confinement penalty of seven years.

Incomplete Record of Trial

In the appellant's second assignment of error, he argues that the military judge's failure to rule on the defense objection to the court's recognition of Ms. Goldstein as an expert constitutes a substantial omission[9] that renders the verbatim record incomplete. Appellant's Brief at 9-10. We disagree.

We review completeness of a record trial *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). An incomplete record of trial is one with substantial omissions, thus raising a presumption of prejudice that the Government must rebut. *United States v. Lashley,* 14 M.J. 7, 9 (C.M.A. 1982). Conversely, insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as complete. *Henry*, 53 M.J. at 111. What constitutes a "substantial omission" from a verbatim record is determined on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

Here, the military judge recessed the court following the defense's objection. Once court reconvened minutes later, the assistant trial counsel proceeded with Ms. Goldstein's anticipated testimony without further objection. Even assuming that the military judge overruled the defense objection during the interim recess,[10] we conclude that the absence of any explanation by military judge on the record is insubstantial in that it did not "affect[] [the] rights of the [appellant] at

[9] *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979) (finding that a substantial omission from a verbatim record of trial raises a presumption of prejudice).

[10] Judging from the uninterrupted flow of the witness's testimony following the recess, we can safely assume that during the recess the military judge either overruled the defense objection, or the trial defense counsel withdrew the objection.

trial." *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979) (internal quotation marks and citations omitted).

Trial defense counsel objected solely on procedural grounds vice any substantive complaint concerning Ms. Goldstein's qualifications, expertise, or relevance of her testimony. Consequently, any objection other than lack of notice was forfeited.[11] Our review of Ms. Goldstein's testimony reveals no error, plain or otherwise, with the substance of her testimony as elicited by the assistant trial counsel. We also note that the trial defense counsel did not challenge during cross-examination Ms. Goldstein's credentials, training, or her limited opinion that the issues related by Cpl H were consistent in her experience with those who have experienced similar trauma. Record at 75-76. Moreover, even if we were to assume that this omission was substantial, we find no prejudice to the appellant. *Henry*, 53 M.J. at 111.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court

[11] Failure to object at trial forfeits appellate review absent plain error. MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); *see also United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009).