**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class DONALD W. JEWELL**
**United States Air Force**

**ACM 36624**

**28 December 2006**

Sentence adjudged 3 November 2005 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Timothy M. Cox, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Major Nurit Anderson.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

PER CURIAM:

The appellant, in accordance with his pleas, was convicted of two specifications of violating a lawful general regulation and one specification of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892. He was also convicted, in accordance with his pleas, of one specification of knowingly receiving and possessing child pornography on divers occasions and one specification of knowingly possessing child pornography on divers occasions in a building owned by the United States contrary to 18 U.S.C. § 2252A, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A general court-martial composed of a military judge sentenced the appellant to a bad-conduct discharge, confinement for 13 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant asserts that the staff judge

advocate's recommendation (SJAR) incorrectly advised the convening authority in regard to the maximum imposable punishment. Finding error, but no prejudice, we affirm.

The maximum imposable sentence the appellant faced for his offenses included, inter alia, confinement for 24 years and 6 months. The military judge, however, granted the appellant's request to merge Specifications 1 and 2 of Charge II for purposes of sentencing, based upon an unreasonable multiplication of charges. This reduced the maximum imposable term of confinement to 14 years and 6 months. Prior to the court-martial, the appellant entered into a pretrial agreement (PTA) with the convening authority that limited confinement to no more than 18 months.

The SJAR incorrectly advised the convening authority that the maximum imposable term of confinement the appellant faced was 24 years and 6 months. The appellant did not comment on the SJAR after it was served on him. Failure to comment on an error in the SJAR results in waiver unless it is prejudicial under a plain error analysis. Rule for Courts-Martial 1106(f)(6); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). To prevail, the appellant must show there was an error, that it was plain and obvious, and that it materially prejudiced a substantial right. *United States v. Capers*, 62 M.J. 268, 269 (C.A.A.F. 2005) (citations omitted). When errors occur in the SJAR, the prejudice prong is a relatively low threshold. *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005). Although the threshold is low, the appellant must still demonstrate a colorable showing of possible prejudice. *Id*. at 436-37.

We conclude the error in the SJAR was plain and obvious, but find that there has been no colorable showing of prejudice. *See Capers*, 62 M.J. at 270*; United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999); *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). First, although the maximum imposable sentence was misstated in the SJAR, the convening authority who acted on the findings and sentence was fully aware that the PTA limited the maximum approvable confinement to 18 months, well under the correct maximum imposable confinement of 14 years and 6 months, because he signed it, and because it was reflected in the SJAR. Second, the SJAR advised the convening authority to approve the adjudged sentence, which was less than the maximum allowable confinement under the PTA. Finally, the only relief the appellant and his counsel requested in clemency was restoration to the grade of E-2. There was no request for release from confinement or any suggestion that the adjudged confinement was excessive.

The appellant argues that because of the error in the SJAR, the convening authority did not have the "proper frame of reference" in evaluating his clemency request, and that the convening authority was "probably less sympathetic." While the threshold of demonstrating prejudice is low, we find the appellant's vague references to the convening authority's possible state of mind does not demonstrate a colorable showing of possible prejudice. The appellant's argument does not reveal any connection between the

misstatement in the SJAR and his request to be restored to the grade of E-2. We are convinced that the error in the SJAR did not materially prejudice a substantial right of the appellant.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator