UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CLAYTON P. PAYNE
United States Air Force

ACM 37793

19 December 2012

Sentence adjudged 29 September 2010 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: W. Shane Cohen (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 36 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Anthony D. Ortiz; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant pled guilty before a general court-martial composed of military judge alone to one specification of aggravated sexual assault of a child, one specification of sodomy with a child, one specification of adultery, one specification of incest, one specification of possession of child pornography, and one specification of soliciting the production and distribution of child pornography, in violation of Articles 120, 125, and 134 UCMJ, 10 U.S.C. §§ 920, 925, 934. The military judge convicted him in accordance with his pleas, and sentenced him to a dishonorable discharge, confinement for 45 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The

convening authority approved the dishonorable discharge, confinement for 36 months, and reduction to the grade of E-1.[1] The appellant assigns three errors: (1) whether the record of trial is substantially verbatim, (2) whether the specification of adultery states an offense, and (3) whether the specification of soliciting the production and distribution of child pornography states an offense.

The Record

The stipulation of fact admitted during the guilty plea inquiry lists the first attachment as a compact disc containing images of child pornography which were specifically identified in the stipulation and discussed on the record, but the record of trial forwarded for review did not contain the disc. The Government obtained a duplicate of the missing disc and submitted it along with affidavits from the trial counsel and chief of military justice stating that the disc contained the same files that were on the original disc. Nevertheless, the appellant persists in his argument that the record is not substantially verbatim.

We review de novo whether a record of trial is complete. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *Id*. at 111. Whether an omission is substantial is reviewed on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). In this case, we find the omission of the disc insubstantial, even had the Government not provided a duplicate.

During the plea inquiry the appellant specifically described the types of child pornography that he viewed, agreed that the disc attached to the stipulation of fact contained the images he viewed, and that the contents of the disc are as described in the stipulation:

> Nine images depict children engaged in sexual acts or children with a lascivious display of the genitals. Attachment 1, Exhibits 8, 15, 17, 19, 20, 21, 22, 25, 27. Of those images, Exhibit 8 was confirmed by the National Center for Missing and Exploited Children (NCMEC), a nonprofit agency that keeps track of known images of child pornography, to contain a victim under the age of 18. The remaining images contain children whose ages are readily identifiable as under the age of 18.

In light of the stipulated written discriptions of the child pornography already present in the record, separate from the accompanying photographs, we find that the Government has overcome the presumption of prejudice by providing a copy of the missing exhibit certified as containing the same files as the original. *United States v. Lashley*, 14 M.J. 7,

[1] A pretrial agreement capped confinement at 36 months. The convening authority granted the appellant's request for disapproval of adjudged forfeitures and waiver of automatic forfeitures for the benefit of the appellant's wife.

9 (C.M.A. 1982) (Omitted material may be "sufficiently retrievable" as to make the record substantially verbatim.). Even without the copy, the presumption is overcome in this guilty plea case by the detailed description of the missing images in the record. *United States v. Henthorn*, 58 M.J. 556, 559-60 (N.M. Ct. Crim. App. 2003) (Omission of child pornography photographs attached to stipulation of fact as part of a guilty plea but not included in the record did not result in prejudice where the guilty plea is not questioned and the general nature of the photographs is described in the record.).

Sufficiency of the Article 134, UCMJ, Specifications

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) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial 307(c)(3). While failure to allege the terminal element of an Article 134, UCMJ, offense is error, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 34-36 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.).

The appellant argues that the adultery specification fails to state on offense because it fails to expressly allege the terminal. The appellant pled guilty to the adultery specification. During the guilty plea inquiry, the military judge explained the elements of the offense, to include the terminal element. The appellant acknowledged understanding the elements and explained how his conduct was service discrediting. Under these circumstances the appellant suffered no prejudice from the adultery specification's omission of the terminal element. *See Ballan*.

Concerning the specification alleging the appellant's wrongful solicitation of the production and distribution of child pornography, the appellant argues that this is not an offense, because the record "only indicated that SWP [a minor] voluntarily photographed herself and sent it to [the a]ppellant." But that is not what the specification alleges. As summarized by the military judge while confirming with counsel their understanding of the specification, "it did not indicate that a particular person was solicited nor did it allege a specific offense . . . had been solicited." As correctly described by the military judge, the elements of the offense charged are: (1) "that within the United States, on divers occasions, between on or about 1 January [20]09 and on or about 14 October [20]09, [the appellant] knowingly solicited the production and distribution of visual depictions of a minor engaged in sexually explicit conduct"; (2) "that [the appellant's] solicitation was wrongful"; and (3) "that under the circumstances, [the appellant's] conduct was of a nature to bring discredit upon the armed forces." The specification contains sufficient

words of criminality to state a general article offense under Article 134, UCMJ. *See United States v. Vaughan*, 58 M.J. 29, 35 (C.A.A.F. 2003).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] 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

STEVEN LUCAS
Clerk of the Court

[2] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.