UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER B. REED
United States Air Force

ACM 37632

22 May 2013

Sentence adjudged 15 January 2010 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Naomi N. Porterfield; Major Reggie D. Yager; and Captain Luke D. Wilson.

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

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial comprised of officer members of one specification of knowingly and wrongfully attempting to receive visual depictions of minors engaging in sexually explicit conduct and one specification of knowingly and wrongfully possessing visual depictions of minors engaging in sexually explicit conduct, in violation of Articles 80 and 134, 10 U.S.C. §§ 880, 934. The adjudged sentence consisted of a dishonorable discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction

to the grade of E-1. The convening authority approved a bad-conduct discharge, 12 months of confinement, and reduction to E-1.

The appellant raises six issues for our consideration: (1) Whether the military judge erred by providing incomplete instructions on the affirmative defense of voluntary abandonment and by refusing to provide curative instructions; (2) Whether suggestive file names, absent any evidence the files actually contained sexually explicit images of real children, are legally and factually sufficient to support a conviction for attempted receipt of child pornography; (3) Whether the military judge erred by allowing a Government computer expert to testify that two images on the appellant's computer were National Center for Missing and Exploited Children (NCMEC) hits for "known victims"; (4) Whether the military judge erred by not suppressing the appellant's statement[1]; (5) Whether the appellant received ineffective assistance of counsel; and (6) Whether the staff judge advocate (SJA) violated Rule for Courts-Martial (R.C.M.) 1106(d)(4) by addressing only one of the three errors alleged in clemency.

Background

The appellant shared an on-base residence with Senior Airman (SrA) WTH, one of his co-workers. During the summer of 2008, the appellant purchased a new computer which SrA WTH was free to use. The appellant used a peer-to-peer file sharing program called Frost Wire to download music and videos onto this computer. This software allows a user to connect to other users' computers and share their files by typing a search term into the program, receiving a list of responsive files and then selecting files for downloading to his own computer.

On 2 December 2008, SrA WTH logged on to the appellant's computer in order to download a music file. When he was unable to find that file using his typical program, he opened the appellant's Frost Wire program to see if that program had the music. While the program was executing his search for the music, SrA WTH clicked through the appellant's Frost Wire library and folders and saw about seven files in the "incomplete file" folder whose titles led him to believe they contained child pornography (most had the word "pedo" or "pedophile" in the file name, as well as sexual terms and ages of children). He opened one of the files entitled "7 yo bj" and it briefly showed a young girl in bed with covers pulled up to her chin while an adult male walked towards her. Because he was suspicious that it was child pornography, SrA WTH exited the video file and went to his work station to confront the appellant about his discovery. When he could not find the appellant, SrA WTH told his supervisor who referred him to the Air Force Office of Special Investigations (OSI). Later that evening, he was interviewed by agents from the OSI.

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

After interviewing SrA WTH, OSI agents called the appellant in for an interview. After being read his rights under Article 31, UCMJ, 10 U.S.C. § 831, the appellant denied ever viewing child pornography on his computer and consented to a search of his residence. He also provided a written statement.

After the OSI agents seized his computer and a computer disc, they returned and again interviewed the appellant, sternly telling him he needed to be honest and provide them with any information he had failed to tell them earlier. Looking "defeated" and with his eyes watering, the appellant then admitted he had viewed child pornography on his computer and that he had been looking at both adult and child pornography since he was 13 years old (he was 22 at the time of the interview). He told the OSI agents that he looked at child pornography about "a dozen or so" times. He additionally told them that, at various times, he searched for and viewed adult pornography on a near daily basis.

The appellant said he would periodically have urges to look at child pornography and would use Frost Wire to download it. To do this, the appellant said he would type specific search words into the program on his computer. After he downloaded the files onto his computer, he would view them over an unspecified period, admitting to the OSI agents that he saw images of 3- to 17-year-old girls engaging in sexual acts with older males, including sodomy and sexual intercourse. After he was done viewing them, he would delete the files from his computer. He claimed that the last time he viewed child pornography on his computer was in July or August 2008. In his second written statement, he admitted knowing it was wrong, that he could not help himself at times, and that he needed some help with this problem.

The appellant's computer was analyzed at the Defense Computer Forensics Laboratory (DCFL). Running a search using digital fingerprints (hash values) of "known victims" found in NCMEC's database, a forensic analyst found two "hits." One was a thumbnail (small) picture file in three different locations within the unallocated space of the computer, meaning it was probably removed, by either the operating system or the computer's user, through a deletion and subsequent emptying of the recycle bin. The DCFL analyst was unable to determine how or when the picture file ended up on the computer or where it originated. The image was blurry but showed a young girl wearing underwear and reclining on a bed near the bottom half of another young child wearing underwear. The other "hit" was a brief (a fraction of a second) part of a video file that could not be viewed using any program found on the appellant's computer. The analyst used another program to create a screen shot of that video excerpt and it showed a young, naked girl holding the erect penis of an adult male. For the partial video file, its location in the "incomplete file" for the Frost Wire program indicated it was an incomplete download from Frost Wire that was placed on the computer on 21 November 2008.

The DCFL analyst also conducted key word searches of the appellant's computer's hard drive, using terms commonly associated with child pornography. This

search found seven files whose names were indicative of child pornography. All the files were found in the Frost Wire "incomplete" folder. The words in the file names were consistent with the types of terms the appellant admitted using during his Frost Wire searches. One of the suggestive file names was "Education-Daphne (9 yo) Demon[s]trating Child Pedo Outercourse." This file contained the partial video file of the naked girl. Through questioning by the defense, the expert also testified about a General Accounting Office study that found that 56% of images having file names consistent with child pornography in fact contained only adult pornography.

The defense also called a forensic expert to testify about his own analysis of the appellant's computer. This expert looked at all the photographic images found within the "allocated space" of the computer (meaning an area a computer user could see).[2] Through this review, he found 386 photographs and 35 video recordings that contained some form of nudity but, in his opinion, the people in each image were obviously adult. Like the Government expert, the defense expert was unable to open the partial video file using any programs loaded on the appellant's computer and thus it was not one of the 35 videos he initially categorized, nor was the video seen by SrA WTH as neither the child nor adult male was nude. The expert also searched for information on which search terms the appellant used to find pornography on Frost Wire, but he was unable to find any record of those searches.

The defense expert demonstrated for the panel how a Frost Wire user could type innocuous terms into the program and receive a list of file names that are indicative of child pornography. Noting that Frost Wire does not automatically cancel the downloading of a file, the defense expert demonstrated how the computer user could cancel the downloading of a file through several methods and how the partial download would remain in the "incomplete" folder until the computer user deleted it. He also testified that the forensic evidence on the appellant's computer indicated the downloading of the files in the "incomplete" folder had been cancelled.

Under cross examination, the defense expert agreed that a file would not show up in the "incomplete" folder unless the user affirmatively took an action to select and download it (or a group of files) by clicking on the file name(s) or right clicking on the file name(s) and selecting "download." If the file does not completely download but remains in the "incomplete" folder, the user can view the part of the file that did actually download. He also agreed that the presence of certain terms in the file names (i.e. pedo, underage) may indicate that the file is child pornography.

For the attempt specification, the Government contended that the appellant attempted to receive child pornography by searching Frost Wire using terms indicative of

[2] The expert found hundreds of thousands of photographs in the "unallocated" file area. Due to the large number, the expert reviewed a large sample of the images and found many pornographic images, all of which he believed depicted adults.

child pornography and then selecting for download 6-7 files whose titles contained terms that were suggestive of child pornography. For the possession specification, the Government contended that the appellant confessed to searching for, downloading, and viewing images of child pornography, and that the several images actually found on his computer sufficiently corroborated that confession.

Instructions on Voluntary Abandonment

Regarding the specification that alleged the appellant attempted to receive visual depictions of minors engaging in sexually explicit conduct, the trial defense counsel argued that the appellant voluntarily abandoned any effort he had undertaken to receive the child pornography by cancelling the downloads of the image. On appeal, the appellant asserts that the military judge erred by providing incomplete instructions on this affirmative defense and by refusing to provide curative instructions when the trial counsel misstated the law on that defense.

Voluntary abandonment is an affirmative defense to a completed attempt offense. *United States v. Schoof*, 37 M.J. 96, 103 (C.A.A.F. 1993); *United States v. Byrd*, 24 M.J. 286, 290-95 (C.M.A. 1987). "It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime." *Manual for Courts-Martial, United States*, Part IV, ¶ 4.c.(4) (2008 ed.). The defense is raised when the accused abandons his effort to commit a crime "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." *Schoof*, 37 M.J. at 104 (citation omitted); *United States v. Rios*, 33 M.J. 438, 440-41 (C.M.A. 1991). The existence of abandonment as a defense "necessarily implies that a punishable attempt precedes it." *United States v. Collier*, 36 M.J. 501, 510 (A.F.C.M.R. 1992). "A person who has performed an act which is beyond the stage of preparation and within the zone of attempt may nevertheless avoid liability for the attempt by voluntarily abandoning the criminal effort." *Byrd*, 24 M.J. at 290 (citation omitted). Given that it is an affirmative defense, the burden rests on the prosecution, once it is put into controversy, to rebut the defense beyond a reasonable doubt. R.C.M. 916(b)(1).

We review de novo the propriety of the military judge's instructions to the members. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). The military judge bears the primary responsibility for ensuring that the jury is properly instructed on the elements of the offense as well as potential defenses, and his duty is to provide an accurate, complete, and intelligible statement of the law. *Id.*; *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006); *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). A defense counsel's failure to object does not constitute waiver as waiver does not apply to required instructions such as affirmative defenses. *United States v. Stanley*, 71 M.J. 60, 63 (C.A.A.F. 2012) (citations omitted). When instructional errors have constitutional implications, as in instructions involving affirmative defenses, then the

error is tested for prejudice under a "harmless beyond a reasonable doubt" standard. *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012) (citing *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)). We must be convinced beyond a reasonable doubt that the error did not contribute to the appellant's conviction in order to find such a constitutional error harmless. *Id.*

Without objection from the parties and using the Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 5-15 (1 January 2010), as tailored for this case, the military judge instructed the members, inter alia, that even if they found each of the elements for attempted receipt of child pornography beyond a reasonable doubt, they could not find the appellant guilty of that offense if "prior to the completion of receipt of" these images, the appellant "abandoned his effort to commit that offense under circumstances manifesting a complete and voluntary renunciation of [his] criminal purpose." Apparently unnoticed by the military judge and the parties, the military judge failed to include the *Benchbook*'s instruction that:

> The burden is on the prosecution to establish the [appellant's] guilt beyond a reasonable doubt. Consequently, unless you are satisfied beyond a reasonable doubt that the [appellant] did not completely and voluntarily abandon [his] criminal purpose, you may not find the accused guilty of attempted [receipt of visual depictions of minors engaging in sexually explicit conduct].

Id.

After the defense argued in findings that the appellant's intentional cancellation of the file downloads meant he should not be convicted of attempted receipt, the trial counsel argued that any voluntary abandonment by the appellant had to occur before he clicked on the suggestive file names, as that act completed the crime of "attempting to receive" the material. In front of the members, the military judge overruled a defense objection that trial counsel was misstating the law and, in a subsequent session under Article 39(a), UCMJ, 10 U.S.C. § 839(a), refused to provide further instruction on this issue. In his clemency matters, the appellant submitted memoranda from five of the seven court-members. Each member stated that, when the military judge overruled the defense objection during the trial counsel's rebuttal argument, he or she then believed the trial counsel had stated the law correctly regarding voluntary abandonment and was a "clarification" of the law in this regard.[3]

Here, when considering all the evidence presented at trial and the totality of the findings instructions and arguments, we are not convinced beyond a reasonable doubt

[3] Due to the restrictions of Mil. R. Evid. 606(b), the members did not discuss the effect, if any, of this exchange on their deliberations or findings. Each member also recommended that the appellant's dishonorable discharge be mitigated to a bad-conduct discharge.

that the error did not contribute to the appellant's conviction. The trial counsel's findings argument could easily have led the panel to incorrectly believe that voluntary abandonment was not applicable once the crime of attempted receipt had been completed. We recognize that the military judge's instructions provided the members with the correct state of the law—that they could find all elements of attempt were met beyond a reasonable doubt and yet still acquit the appellant of that offense if they found he voluntarily abandoned his criminal purpose before he received the visual depictions—but the military judge's overruling of the defense objection and refusal to belatedly provide a curative or clarifying instruction further confused the situation, as revealed by the members' memoranda.

This problem was compounded by the failure to inform the members about the burden of proof regarding the affirmative defense of voluntary abandonment. Although the members *were* provided this instruction relative to the affirmative defense of accident for the possession charge, they were not told that the same burden applied to the defense of voluntary abandonment relative to the attempt charge. There is a reasonable possibility that this led the members to incorrectly believe they did not need to apply the same high level of proof to voluntary abandonment as to accident or the elements of the offense. Neither findings argument referenced the burden of proof for the defense of voluntary abandonment and, in fact, the defense counsel's argument implied that the defense carried the burden ("We have shown you that these were cancelled downloads.").

After considering the evidence, instructions, and arguments, we are not convinced beyond a reasonable doubt that the errors did not contribute to the appellant's conviction for attempted receipt. We therefore set aside Charge II and its Specification.[4]

Expert Testimony

In his third assignment of error, the appellant asserts the military judge erroneously permitted the Government expert to testify that two images found on the appellant's computer were of "known victims" because they matched images found in the NCMEC database of such victims. As he did at trial, the appellant contends this testimony was inadmissible hearsay since the expert had no personal knowledge of the NCMEC database and its accuracy. We review a military judge's decision to admit or exclude expert testimony over a defense objection for an abuse of discretion. *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005) (citations omitted).

During the presentation of the Government's case, the trial defense counsel asked the military judge to limit the computer expert's testimony in this area by preventing him from testifying that the appellant possessed images of "known victims" on his computer.

[4] In light of this decision, we do not address the appellant's claim that the evidence is factually and legally insufficient to support his conviction for this offense.

The defense argued that his testimony should be limited to explaining how he connected the digital fingerprints (hash values) in that database to those of the images on the appellant's computer, and that this match indicates the appellant's computer *may* potentially contain child pornography. In the defense's view, having the expert also testify that the images are of actual children based on the NCMEC database would constitute an improper intrusion into the member's decision on the "ultimate issue" of whether the appellant possessed child pornography.

The military judge overruled the defense objection, noting, with defense concurrence, that experts can rely on inadmissible hearsay in forming their opinions. He also noted that the defense can cross examine the expert on his lack of knowledge about the database and that he would provide a tailored instruction about the expert's testimony in order to ensure the panel understood their responsibility for determining the ultimate issue in the case.

Before the panel, the Government expert testified that NCMEC has a database of what they entitled as "Known Victims" and that two of the images on the appellant's computer matched images in that database. He did not testify that the two images were, in fact, of real children/victims. During findings instruction, the panel was advised "no expert witness, or any other witness, can testify that an individual knowingly and wrongfully possessed or attempted to receive 'visual depictions of minors engaging in sexually explicit conduct' as that is a matter for your consideration alone."

After reviewing the expert's testimony in the context of the trial proceedings, we find the military judge did not abuse his discretion in admitting the testimony. The expert's testimony did not improperly usurp the role of the panel in determining beyond a reasonable doubt that the appellant knowingly and wrongfully possessed images of minors engaging in sexually explicit conduct. As a result, we find that this asserted error is without merit.

Suppression of the Appellant's Statement

In his fourth assignment of error, the appellant asserts that the military judge erred by not suppressing his statements to OSI because they did not properly advise him of his rights. Specifically, he contends that the military judge erred when he concluded by a preponderance of the evidence that the OSI agents had advised the appellant that he was suspected of possessing child pornography. The crux of the appellant's argument is that the written rights advisement was not specific enough to reasonably place him on notice of the offense they suspected him of committing.

We disagree. Both OSI agents who interviewed the appellant on 2 December 2008 testified that, although the Air Force Form 1168, *Statement of Suspect/Witness/Complainant* (1 April 1998), stated the appellant was suspected of

violating "Article 134, UCMJ," the appellant was specifically advised that he was suspected of possessing child pornography. The appellant gave an oral and written statement admitting to that very crime, thus corroborating their testimony. We find the military judge's finding of fact was not clearly erroneous.

Ineffective Assistance of Counsel

Next, the appellant argues that his trial defense counsel's performance during the suppression hearing amounted to ineffective assistance. Specifically, the appellant claims that his counsel were ineffective for failing to (1) advise him of his right to testify for the limited purpose of his hearing, (2) call him to testify during the suppression hearing, and (3) move to suppress the appellant's consent to search his residence. After reviewing the record of trial, we find that trial defense counsel effectively represented the appellant throughout his court-martial.

We review claims of ineffective assistance of counsel de novo, *United States v. Wiley*, 47 M.J. 158 (C.A.A.F. 1997), under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687; *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In evaluating counsel's performance under *Strickland's* first prong, appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id*. at 688-89. We start with the proposition that defense counsel are presumed to be competent. *United States v. Anderson*, 55 M.J. 198 (C.A.A.F. 2001). The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). The appellant must establish that the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). Applying the *Strickland* test, we find the appellant has not met his burden of establishing that his trial defense counsel were ineffective.

The appellant faults his trial defense counsel for not advising him that he could testify at the motions hearing regarding the circumstances of his interview with OSI. In post-trial affidavits submitted pursuant to this Court's order, the trial defense counsel stated that they told the appellant verbally and in writing that he could testify at the motions hearing for a limited purpose relating to his OSI interview, and that this was a separate decision from whether he wanted to testify at trial. We have considered the conflict between the appellant's claim that he was never advised as to his right to testify at the hearing and the attestations of his counsel. When there is a dispute about a factual matter material to an appellate issue, we only need to resort to a post-trial fact-finding

hearing if, inter alia, the alleged errors would not warrant relief even if the factual dispute were resolved in the appellant's favor. *United States v. Ginn*, 47 M.J. 236, 243, 248 (C.A.A.F. 1997). Such is the case at hand. After reviewing the Government's evidence presented during the hearing and the appellant's declaration, we believe the military judge would still have denied the defense motion to suppress even if the appellant had testified.

The appellant also complains that his trial defense counsel were ineffective for failing to call him as a witness during the suppression hearing. In his affidavit, the defense counsel responsible for handling the suppression motion recalls the appellant being adamant that he did not want to be subject to cross-examination even for the motions hearing, but would do so if the counsel thought it was necessary. In the counsel's opinion, that testimony was not necessary and he advised the appellant accordingly. That defense counsel's affidavit also explains why he believed it was not in the appellant's interest to testify at the motions hearing. In light of this information, we find that the appellant has not met his burden of establishing that his trial defense counsel were ineffective in this regard. Appellate courts give great deference to trial defense counsel's judgments, and "presume counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993) (citations omitted); *Mazza*, 67 M.J. at 475 (stating that the Court "will not second-guess the strategic or tactical decisions made at trial by defense counsel." (quotation marks and citations omitted)).

Lastly, the appellant complains about his trial defense counsel's decision to refrain from challenging the validity of his consent to search his residence, which resulted in OSI's possession of his computer. The trial defense counsel's affidavit provides information about the strategic and tactical decisions the defense made regarding this issue. These decisions were not unreasonable under the facts of this case. The fact that his overall plan was not ultimately successful does not invalidate the defense strategy, and we give great deference to trial defense counsel's judgments in this area. *Morgan*, 37 M.J. at 409, 411; *Mazza*, 67 M.J. at 474-75.

Staff Judge Advocate Recommendation

In her post-trial Staff Judge Advocate's Recommendation (SJAR), the SJA recommended that the convening authority approve the adjudged sentence. In the appellant's subsequent clemency submissions, the trial defense counsel argued in response that the military judge erred by (1) failing to give a curative instruction to the panel about when voluntary abandonment applied in the case, (2) not suppressing the appellant's statement to OSI, and (3) departing from his neutral role by assisting trial counsel during the suppression hearing. He also submitted memoranda from five members of the court-martial panel, all of whom recommended clemency through the reduction of the dishonorable discharge to a bad-conduct discharge.

In her Addendum to the SJAR, the SJA addressed only the first error raised in the defense clemency submission, advising the convening authority that the military judge's actions were not plain error. She also amended her recommendation on the sentence and advised the convening authority to modify the appellant's sentence by approving a bad-conduct discharge in lieu of the adjudged dishonorable discharge, as well as recommending that the mandatory forfeitures be waived for the benefit of the appellant's dependents.

In his final assignment of error, the appellant avers that the SJA failed to address the other two errors raised in his clemency submission, and he asks us to set aside the convening authority's Action and return the case to the convening authority for new post-trial processing. We review alleged errors in post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004).

When the post-trial recommendation to the convening authority is prepared by an SJA:

> [T]he [SJA] shall state whether, in the [SJA]'s opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the [SJA]. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the [SJA]'s statement, if any, concerning legal errors is not required.

R.C.M. 1106(d)(4).

Unlike his role in clemency, the convening authority's role relative to defense claims of legal error "is less pivotal to an accused's ultimate interests." *United States v. Hamilton*, 47 M.J. 32, 35 (C.A.A.F. 1997). Although a convening authority has the power to remedy an accused's claim of legal error (and is encouraged to act in the interest of fairness to the accused and efficiency of the system), he is not required to do so. *Id.* Defective advice by an SJA about a claim of legal error that leads a convening authority to not provide relief can be corrected through appellate litigation of the claimed error. *Id.* Accordingly, it is appropriate for an appellate court to look for any prejudice that may have flowed from misadvice about a defense claim of legal error. *United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996). An appellate finding that those alleged errors have no merit precludes a finding that the SJA's advice prejudiced the appellant. *Hamilton*, 47 M.J. at 35; *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) ("[I]n the context of a post-trial recommendation error, whether that error is preserved or is otherwise considered under the plain error doctrine, an appellant must make 'some

colorable showing of possible prejudice.'" (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000))).

Even though two of the asserted legal errors are not referenced in the Addendum to the SJAR, we do not find error. As discussed above, there was no merit to the appellant's claim of legal error relative to the military judge's failure to suppress the appellant's statement to OSI. We also find no error in how the military judge comported himself within the context of that hearing. Thus, the SJA's failure to specifically address these two asserted legal errors did not result in any possible prejudice to the appellant.[5]

"[A] Court of Military Review is free to affirm when a defense allegation of legal error would not foreseeably have led to a favorable recommendation by the [SJA] or to corrective action by the convening authority." *United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988). The appellant must make some colorable showing of possible prejudice. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). As evidenced by his indorsement to the Addendum to the SJAR, we are confident the convening authority was made aware of the legal issues through the appellant's R.C.M. 1105 submissions. Based on the facts of this case, we will not assume the convening authority would have been inclined to approve a different sentence had the SJA commented on all of the claims of legal error in her Addendum. Additionally, the appellant has failed to make a colorable showing of possible prejudice. Further, to the extent the clemency submission does constitute a claim of legal error, we have evaluated those same claims as part of his appeal and found them to be non-meritorious. Given that, the SJA's omissions did not prejudice the appellant. *Welker*, 44 M.J. at 85.

Sentence Reassessment

Having set aside the appellant's conviction of an offense, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. To validly reassess a sentence to purge the effect of error, we must be able to (1) discern the extent of the error's effect on the sentence and (2) conclude with confidence that, absent the error, the panel would have imposed a sentence of at least a certain magnitude. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citing *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999)); *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002); *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999). We must also determine that the sentence we propose to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

[5] Regarding the issue that the staff judge advocate *did* address regarding voluntary abandonment, we recognize that we have concluded the military judge did err in how he instructed the panel on that affirmative defense. However, our holding in that regard was also based on an instructional error not raised by the defense in clemency, namely that the burden of proof instruction was not given to the panel.

In this case, our action reduces the maximum permissible sentence that the appellant faced from 20 years to 10 years of confinement. We recognize that a "dramatic change in the penalty landscape" gravitates away from the ability to reassess; however, on the basis of the error noted, considering the evidence of record, and applying the principles set forth above, we determine that we can discern the effect of the errors and will reassess the sentence. *Buber*, 62 M.J. at 479.

Even if the appellant was not charged with attempted receipt, evidence that suggestive file names were found on his computer would have been admissible either in findings as part and parcel of the possession offense, or in sentencing as aggravation evidence such that it is "interwoven" in the res gestae of the crime. *United States v. Metz*, 34 M.J. 349, 351-52 (C.M.A. 1992). On the basis of the error noted, considering the evidence of record, and applying the principles set forth above, we determine that we can discern the effect of the errors and will reassess the sentence. Under the circumstances of this case, we are confident that the panel would have imposed the same sentence even if the appellant was not convicted of the attempt offense. We also find, after considering the appellant's character, the nature and seriousness of the offenses, and the entire record, that this reassessed sentence is appropriate.

Conclusion

The findings of guilty to Charge II and its Specification are set aside and dismissed. The remaining findings and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains.[6] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the modified findings and sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[6] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).