UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOHNNY A. ESCOBAR
United States Air Force

ACM 38721

24 March 2016

Sentence adjudged 11 July 2014 by GCM convened at Ramstein Air Base, Germany. Military Judge: Christopher F. Leavey (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 4 years, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Captain Michael A. Schrama.

Appellate Counsel for the United States: Major Mary Ellen Payne; Captain Tyler B. Musselman; and Gerald R. Bruce, Esquire.

Before

ALLRED, TELLER, and ZIMMERMAN
Appellate Military Judges

OPINION OF THE COURT

ALLRED, Chief Judge:

Appellant was tried at a general court-martial composed of military judge alone. In accordance with his pleas, he was found guilty of 2 specifications of distributing child pornography, 2 specifications of viewing child pornography, 1 specification of possessing child pornography, 12 specifications of communicating indecent language, and 1 specification of behavior of a nature to bring discredit upon the armed forces in violation of Article 134, UCMJ, 10 U.S.C. § 934. Appellant was found not guilty of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence was a

dishonorable discharge, confinement for four years, and forfeiture of all pay and allowances.[1]

On appeal, Appellant contends: (1) the military judge erred by failing to dismiss a specification that was multiplicious with offenses for which he was convicted at a previous court-martial; (2) two specifications of which he stands convicted in his present court-martial are multiplicious; (3) the military judged abused his discretion by failing to merge thirteen specifications for sentencing purposes; (4) his conviction of one specification is legally insufficient;[2] (5) sentencing argument of Government trial counsel was improper; (6) a delay in post-trial processing warrants sentence relief; and (7) the Staff Judge Advocate's Recommendation (SJAR) and the action of the convening authority relied upon an incomplete record and were thus defective. We disagree and affirm the findings and sentence.[3]

Background

The case now before us is Appellant's second trial by general court-martial. At his first trial, Appellant was convicted, pursuant to his pleas, of a number of offenses involving child sex abuse and child pornography;[4] and his approved sentence included a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1.[5] Other facts pertinent to this case are discussed below.

I. Multiplicity and Unreasonable Multiplication of Charges

Appellant's first three assignments of error involve multiplicity and unreasonable multiplication of charges.

We review claims of multiplicity de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). We review claims of unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012). In the

[1] As noted by Government counsel, Appellate Exhibits XX and XXI pertaining to evidence offered under Mil. R. Evid. 412 were ordered sealed by the military judge, but were not sealed in the original record of trial. We have ordered them sealed and hereby order any copies of such exhibits to be destroyed. We order the convening authority, or his representative, to ensure the return and/or destruction of any copies of such exhibits that were provided to the Appellant or any victim.

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

[3] The military judge failed to announce that the court was assembled. *See* Rule for Courts-Martial (R.C.M.) 911 ("The military judge shall announce the assembly of the court-martial."). Assembly of the court-martial is significant for a variety of reasons. S*ee* R.C.M. 911, Discussion. In the present case, however, we find that the military judge's omission had no substantive effect upon the proceedings and was thus harmless.

[4] Specifically, Appellant was convicted of two specifications of aggravated sexual contact with a child under 12 years of age, two specifications of indecent liberties with a child, one specification of indecent conduct with a child, one specification of producing child pornography, and one specification of possessing child pornography, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934.

[5] This court's review of Appellant's first court-martial conviction is reported at *United States v. Escobar*, 73 M.J. 871 (A.F. Ct. Crim. App. 2014), *pet. denied*, 74 M.J. 260 (C.A.A.F. 2015).

context of multiplicity and unreasonable multiplication of charges, three concepts may arise: multiplicity for purposes of double jeopardy, unreasonable multiplication of charges as applied to findings, and unreasonable multiplication of charges as applied to sentencing.

Multiplicity in violation of the Double Jeopardy Clause of the Constitution[6] occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Anderson*, 68 M.J. 378, 385 (emphasis omitted) (quoting *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). The Supreme Court has laid out a separate elements test for analyzing multiplicity issues: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). "Accordingly, multiple convictions and punishments are permitted . . . if the two charges each have at least one separate statutory element from each other." *United States v. Morita*, 73 M.J. 548, 564 (A.F. Ct. Crim. App. 2014).

Even if charged offenses are not multiplicious, courts may apply the doctrine of unreasonable multiplication of charges to dismiss certain charges and specifications. Rule for Courts-Martial (R.C.M.) 307(c)(4) summarizes this principle as follows: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The principle provides that the Government may not needlessly "pile on" charges against an accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994). Our superior court has endorsed the following non-exhaustive list of factors in determining whether unreasonable multiplication of charges has occurred:

> (1) Did the [appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

[6] U.S. CONST. amend. V.

United States v. Quiroz, 55 M.J. 334, 338–39 (C.A.A.F. 2001) (citation and internal quotation marks omitted). "[U]nlike multiplicity—where an offense found multiplicious for findings is necessarily multiplicious for sentencing—the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). In a case where the *Quiroz* factors indicate the unreasonable multiplication of charges principles affect sentencing more than findings, "the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings." *Quiroz*, 55 M.J. at 339.

A. Multiplicity—Convictions from Prior Court-Martial

In his first assignment of error (AOE), Appellant alleges that Specification 1 of Charge II (distribution of child pornography) is multiplicious with offenses for which he was convicted at his first court-martial. Appellant, however, entered an unconditional plea and failed to raise this matter at trial.[7] Accordingly, Appellant has forfeited this issue, and we test for plain error.[8] In a plain error analysis, Appellant has the burden of persuading us that there was error, that the error was plain or obvious, and that the error materially prejudiced a substantial right of the appellant. *United States v. Akbar*, 74 M.J. 364, 392–93 (C.A.A.F. 2015) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014), *reconsideration denied*, 73 M.J. 237 (C.A.A.F. 2014)). In the multiplicity context, Appellant may show plain error by showing that the specifications are facially duplicative—that is, "factually the same." *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004) (citations omitted). Whether two offenses are facially duplicative is a question of law that we will review de novo. *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Two offenses are not facially duplicative if each requires proof of a fact which the other does not. Rather than constituting "a literal application of the elements test," determining whether two specifications are facially duplicative involves a realistic comparison of the two offenses to determine whether one is rationally derivative of the other. *Id.* (citing *Hudson*, 59 M.J. at 359). This analysis turns on both "the 'factual conduct

[7] Prior to entering his unconditional guilty pleas in the present case, Appellant made a motion in which he argued that all of the specifications involving child pornography (Charge II, Specifications 1-4, and Additional Charge II and its Specification) should be dismissed on grounds that they were an unreasonable multiplication of the charges (UMC) addressed by his first court-martial. In raising this motion, trial defense counsel specifically emphasized—both in his written brief and during argument to the judge—that the matter before the court involved UMC and *not* claims of multiplicity or double jeopardy. The military judge provided Appellant partial relief by declaring that, during sentencing, he would not punish Appellant for the conduct captured by Specification 1 of Charge II.

[8] In *United States v. Campbell*, 68 M.J. 217, 219–20 (C.A.A.F. 2009), our superior court stated that the appellant "waived" his ability to raise a multiplicity issue on appeal. However, the court's previous decision in *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009), noted that military courts have at times failed to "consistently distinguish between the terms 'waiver' and 'forfeiture'" and went on to hold that a claim of multiplicity was only waived by the appellant's unconditional guilty plea because the appellant agreed to waive all waivable motions in a pretrial agreement. Applying *Gladue*, the term "forfeiture" should generally characterize the effect of an unconditional guilty plea on multiplicity claims, absent some affirmative waiver. *See United States v. St. John*¸ 72 M.J. 685, 687 n.1 (Army Ct. Crim. App. 2013) ("We interpret [*Campbell* and related cases] to mean that an unconditional guilty plea, without an affirmative waiver, results in a forfeiture of multiplicity issues absent plain error.").

alleged in each specification'" and "'the providence inquiry conducted by the military judge at trial.'" *Id.* (quoting *United States v Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997)).

Under Specification 1 of Charge II in the present case, Appellant was found guilty of wrongfully *distributing* pornographic images of his stepdaughter MK. At his first court-martial, Appellant was found guilty of wrongfully *producing* and *possessing* pornographic images of MK.[9] Having carefully examined the records of both trials, we are convinced that the conduct addressed by the production and the possession specifications at Appellant's first court-martial is not "factually the same" as the conduct addressed by the distribution allegation of Charge II, Specification 1.

Production. Appellant's production of child pornography stands as its own separate behavior and offense. During the providence inquiry at his first court-martial, Appellant made it clear that producing child pornography was—in and of itself—an activity that gave him sexual pleasure. He declared that taking the pictures of himself molesting the victim, MK, actually stimulated him to the point of erection.[10] He explained further:

> I have made pornographic images of myself and [MK's] mother. I get sexually aroused by the idea of making these images. It was the same when I took the photographs of my actions with [MK]. I am ashamed to admit this Ma'am, but I was sexually excited by taking these pictures. There is no excuse for taking pictures of these sorts of acts with a six-year-old girl.

Possession. Similarly, under the particular facts before us, Appellant's possession of child pornography was a crime separate from any other. In *United States v. Craig*, 68 M.J. 399 (C.A.A.F. 2010) (per curiam), our superior court held that receipt and possession of child pornography were not facially duplicative where the appellant received files on one medium and stored them on another. *Id.* at 400. Similarly, we find here that Appellant's possession is not facially duplicative with his production or distribution of child pornography. Here, as in *Craig*, the possession involved multiple media—Appellant stored pornographic images of MK on both the digital storage of his camera and the hard drive of his computer. Moreover, it is plain that he kept the pornographic images for his own satisfaction, independent of any desire to produce or distribute them. Indeed, he explicitly informed one fellow user of child pornography, "Yes i did have some private pics that I was willing to share of me and my daughter … but I think I'm going to keep the pictures for myself and enjoy the fun I am having with my 6yo daughter."

Distribution. It is likewise clear from the record that Appellant's distribution of child pornography was a course of conduct separate and apart from his production or

[9] At Appellant's first court-martial, the production and possession of child pornography were alleged to have occurred "between on or about 1 April 2012 and on or about 24 May 2012." The distribution of child pornography alleged at Appellant's present court-martial involves the same time frame.

[10] Included in the pornography produced by Appellant were images of MK touching his penis with her tongue, Appellant pressing his penis against her buttocks and upper thigh, and Appellant masturbating in her presence.

possession of it. During his providence inquiry, he stated that after producing the pornographic images of MK, he transferred them to others through a pedophilia website called Pedobook. Documents admitted at trial establish that—in addition to producing and possessing these images for his own gratification—Appellant uploaded them to impress and interact with others who shared his interest in child molestation. As noted above, Appellant was found guilty in the present case of 12 specifications of communicating indecent language; and, in numerous instances, the child pornography he distributed served as the focal point for these indecent communications. Occasionally, Appellant would also in fact offer his pictures of MK in exchange for child pornography from others—as one might trade baseball cards.

Ultimately, having conducted a "realistic comparison" of the offenses, we are convinced that Appellant's conviction of wrongfully distributing child pornography is not rationally derived from any offense for which he was previously convicted. *See Pauling*, 60 M.J. at 94. We find that the offenses at issue are not facially duplicative. Appellant has thus failed to demonstrate that the trial judge committed plain error by not dismissing Specification 1 of Charge II.[11]

B. Multiplicity—Distributing and Possessing Child Pornography

The foregoing AOE involves pornography of Appellant's stepdaughter, MK. At issue in Appellant's next AOE is pornography involving children other than MK. Appellant claims here that his convictions of distributing and possessing pornography of those other children (Specifications 2 and 4 of Charge II, respectively) are multiplicious. In addressing this AOE, we adopt the case law and other legal authority cited above. We again find that Appellant did not raise the present multiplicity claim at trial, and thus proceed to a forfeiture analysis. In so doing, we conclude that the offenses are not factually the same, and Appellant has therefore failed to establish plain error.

Specification 2 of Charge II alleges that Appellant distributed six specific images of child pornography—all ".jpg" files and identified by their file name.[12] During his providence inquiry, Appellant acknowledged that he did in fact distribute those six images and that those images were found in Prosecution Exhibit 2. Specification 4 of Charge II alleges that Appellant possessed "multiple" depictions of child pornography on a Western Digital (WD) hard drive. In pleading guilty to this possession offense, Appellant agreed that the WD hard drive held "dozens" of images of minors engaging in sexually explicit conduct, and that those images were now listed in Prosecution Exhibit 4.[13] From our

[11] Although not specifically raised before us now, we have also considered whether Appellant's convictions for producing, possessing, and distributing child pornography amount to an unreasonable multiplication of charges (UMC). We find that they do not.

[12] Both Specification 2 and Specification 4 of Charge II allege misconduct at the same location and during the same time frame.

[13] By our count, Prosecution Exhibit 4 actually contains 31 images of child pornography.

review of the record, including Prosecution Exhibits 2 and 4, it is clear that the six images Appellant was alleged to have distributed under Specification 2 are separate and distinct from any of those he was charged with possessing under Specification 4. For this reason alone, the specifications at issue are not facially duplicative.[14]

Moreover, even had one or more of the six images distributed by Appellant overlapped with those he possessed on the WD hard drive, the offenses of possessing and distributing child pornography would not—under the unique facts of the present case—be facially duplicative. In *United States v. Williams*, 74 M.J. 572 (A.F. Ct. Crim. App. 2014), this court found an appellant's conviction for possession of child pornography multiplicious with his convictions for receiving and distributing child pornography. However, we emphasized in *Williams* that "[n]o binding authority provides that possessing child pornography is per se a lesser included offense of receiving or distributing the same files of child pornography." *Id.* at 575. We noted that *Williams* involved its own unique set of circumstances. In that case, the appellant had downloaded child pornography from a peer-to-peer file sharing program, and all the images he downloaded were maintained in a single default folder on his computer. The appellant's distribution of child pornography consisted solely of allowing those images to remain in the default folder under conditions permitting others to access them. In finding the appellant's possession of the images multiplicious with his receipt and distribution of them, we suggested that the outcome may well have been different had additional or affirmative steps separated the appellant's possession from the receipt and distribution of contraband images. *Id.*

In the present case, those additional or affirmative steps do in fact exist. That is, Appellant came to possess the child pornography by downloading it from websites and by receiving it electronically from others. He then went beyond maintaining these depictions on his hard drive by intentionally uploading the six images in question to the website Pedobook.com. In reviewing his providence inquiry in the context of the entire record, we are convinced that—as with the pornography involving his stepdaughter, MK—Appellant had one criminal purpose in maintaining or possessing these images, and he had another criminal purpose in uploading and sharing them. We find the present case analogous to *United States v. Purdy*, 67 M.J. 780, 781 (N.M. Ct. Crim. App. 2009), where our sister court reviewed a claim of multiplicity under the plain error standard, and found specifications of receipt and possession of child pornography not multiplicious, because the appellant exhibited "a clear exercise of dominion over the child pornographic images separate and apart from his initial receipt sometime earlier." *Id.* at 781. *See also Craig*,

[14] It is worth noting that Specification 3 of Charge II alleged that Appellant wrongfully *viewed* child pornography at the same location and during the same time frame alleged in Specifications 2 and 4 of that charge. Unlike Specification 4—where the contraband images were entirely separate from those alleged in Specification 2—Specification 3 charged that Appellant wrongfully viewed three of the same images (154417.jpg, 133151.jpg, 10213.jpg) he was alleged to have possessed in Specification 2. In this instance, recognizing the overlap between Specifications 2 and 3, the military judge carefully and appropriately questioned Appellant to establish that his distribution and viewing of the matching images involved distinctly separate conduct.

68 M.J. at 400 (rejecting multiplicity challenge and affirming convictions for receipt and possession of child pornography on grounds that (1) appellant's unconditional guilty plea waived any multiplicity claim, and (2) "the receipt and possession offenses were not facially duplicative because appellant received the files on one medium and stored them on another.")

C. Unreasonable Multiplication of Charges

Appellant next alleges the military judged abused his discretion by failing to merge Specifications 5-17 of Charge II for sentencing purposes. We disagree.

Specifications 5-16 allege that Appellant communicated indecent language to interlocutors via the Pedobook website. Specification 17 involved posting indecent language to Pedobook where it could be viewed by members of the website generally. At trial, Appellant moved that Specifications 5-17 be merged for sentencing purposes on grounds that they represented an unreasonable multiplication of charges. Applying a *Quiroz* analysis, the military judge denied the motion. The judge found that each specification addressed "separate and distinct communication(s) to a separate and distinct third party"—and were thus separate criminal acts. The judge found no prosecutorial overreaching in the drafting of the charges. He also found that the number of charges did not misrepresent or exaggerate Appellant's criminality, nor unreasonably increase his punitive exposure.

Having carefully reviewed the record, we find that the military judge applied the correct law and that his findings of fact were not clearly erroneous. We hold that he did not abuse his discretion in declining to merge the specifications for sentencing.

II. Providence of Plea

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant argues that his conviction of Specification 17 of Charge II—communicating indecent language—is legally insufficient. On appeal, both Appellant and the Government address this issue in terms of sufficiency of the evidence and thereby apply the wrong legal analysis. When, as here, an appellant pleads guilty, "the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

Although we review questions of law from a guilty plea de novo, we review a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citations omitted). In order to prevail on appeal, the Appellant has the burden to demonstrate "'a substantial basis' in law and fact for questioning the guilty plea." *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The "mere possibility" of a conflict between the accused's plea and

statements or other evidence in the record is not a sufficient basis to overturn the trial results. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting *Prater*, 32 M.J. at 436). "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *United States v. Care*, 40 C.M.R. 247, 250–51 (C.M.A. 1969)). We "examine the totality of the circumstances of the providence inquiry, including [any] stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry." *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009). Among the reasons for giving broad discretion to military judges in accepting guilty pleas is the often undeveloped factual record in such cases as compared to that of a litigated trial. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002).

During the providence inquiry into Specification 17 of Charge II, the military judge properly explained to Appellant the elements of the offense: (1) at the time and place alleged, Appellant posted the comments alleged onto the Pedobook website; and (2) under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. Appellant does not claim that his plea inquiry failed to establish the first element of the offense. Rather, he argues the second element was not met, because the judge elicited "no facts to suggest how his actions affected how others viewed the military service where none of the other participants knew he was an Airman." We reject this argument.

The military judge carefully discussed with Appellant the requirement under Article 134, UCMJ, that his conduct be of a nature to bring discredit upon the armed forces. Their colloquy included the following:

> MJ: . . . While I've already told you this, I do wish to repeat it just since this is, again, a different specification. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem. With respect to service discrediting, the law recognizes that almost any irregular or improper act on the part of service member could be regarded as service discrediting in some indirect or remote sense. However, only those acts which have a tendency to bring the service into disrepute or which tend to lower it in public esteem are punishable under this Article. Do you understand the elements and definitions as I have read them to you?
>
> ACC: Yes, Your Honor.
>
> MJ: Do you have any questions about any of them?
>
> ACC: No, Your Honor.

Appellant acknowledged, in turn, that he did indeed make the numerous comments alleged in Specification 17. He declared that his comments pertained to "pictures involving children doing sexual acts." He stated that his language was "truly vulgar, filthy and disgusting" and "harmful and so horribly demeaning to the individuals who were abused in these photographs." Appellant added, "Any decent person who reads these comments is sickened by them. So I have no doubt that what I wrote grossly offends the community's sense of decency and shocks the morals of our military. The things I said also discredit the Air Force because no person should be saying these things. Let alone someone entrusted to defend this country and wear the uniform." Appellant explained that his comments were designed to "incite arousal" in child pornography users, and they were posted so as to be visible to any member of the website.[15]

"Conduct of a nature to bring discredit upon the armed forces (clause 2)" is defined broadly to include that behavior "which *has a tendency* to bring the service into disrepute or which *tends* to lower it in public esteem." *Manual for Courts-Martial*, pt. IV, ¶ 60(c)(3) (emphasis added). Public knowledge of Appellant's misconduct is not necessary. *See United States v. Phillips*, 70 M.J. 161, 165–66 (C.A.A.F. 2011) (conviction for possessing child pornography under clause 2 of Article 134 upheld, despite absence of "any direct evidence that public was or would have become aware of Appellant's conduct."). *See also United States v. Garrigan*, ACM 37920 (A.F. Ct. Crim. App. 15 February 2013 (unpub. op.), *pet. denied*, 72 M.J. 393 (C.A.A.F. 2013) (conviction for communicating indecent language under Article 134 upheld absent any evidence of public disclosure). We find that the military judge elicited facts sufficient to support the guilty plea and did not abuse his discretion in accepting that plea. We do not find a substantial basis in law and fact for questioning the providence of the plea. *See Inabinette*, 66 M.J. at 322.

[15] The testimony of one investigator from the Federal Bureau of Investigation indicated that, at or about the time Appellant was using the website, Pedobook had more than 8,000 members.

III. Sentencing Argument

Appellant argues that the sentencing argument by the Government was improper. Identifying seven comments in particular, Appellant claims that "[a]lmost the entirety of government counsel's argument was improper." At trial, defense counsel objected to four of the seven comments he deems improper, but did not object to the others.

Improper argument involves a question of law that we review de novo. *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014). When the defense has objected at trial, we review alleged improper argument for prejudicial error. *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *Frey*, 73 M.J. at 248 (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). "Where improper argument occurs during the sentencing portion of the trial, we determine whether or not we can be 'confident that [the appellant] was sentenced on the basis of the evidence alone.'" *Frey*, 73 M.J. at 248 (brackets in original) (quoting *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013)). Our superior court has identified a three-part test for determining prejudice when trial counsel has engaged in improper argument: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Hornback*, 73 M.J. at 160 (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). Our superior court has utilized these factors to review allegations of improper sentencing argument. *See, e.g.*, *Frey*, 73 M.J. at 249; *Halpin*, 71 M.J. at 480.

To the extent that trial defense counsel has failed to object to the arguments at trial, we review for plain error. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). To establish plain error, Appellant must prove: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007)). Error occurs when counsel fail to limit their arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Baer*, 53 M.J. at 237 (citing *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975)). Even within the context of the record, it is error for trial counsel to make arguments that "'unduly . . . inflame the passions or prejudices of the court members.'" *Marsh*, 70 M.J. at 102 (alteration in original) (quoting *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007)); *see also* R.C.M. 919(b), Discussion. On the other hand, trial counsel is expected to zealously argue for an appropriate sentence, so long as the argument is fair and reasonably based on the evidence. *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994).

In the present case, one of the seven allegedly improper comments involved an attempted allusion by assistant trial counsel to a scene from the Dracula tale. Trial defense counsel quickly objected. The military judge sustained this objection, and admonished assistant trial counsel that his attempt to draw this analogy was improper.

The remaining six comments claimed by Appellant to be objectionable were relatively innocuous. Assistant trial counsel argued that: (1) Appellant presented an ongoing danger to children,[16] (2) he was a pedophile,[17] and (3) his distribution of child pornography caused an ongoing victimization of the minors involved.[18] The military judge overruled defense objections to these arguments. Assistant trial counsel further argued, without objection, that: (4) Appellant's distribution of child pornography would likely encourage pedophile behavior among the recipients of his child pornography,[19] (5) his crimes contributed to a worldwide scourge of child abuse,[20] and (6) he should receive lengthy confinement for protection of society and for general deterrence.[21]

We find that Appellant's offenses were egregious and that, under the circumstances, the comments of assistant trial counsel were generally proper. *See, e.g.*, *Nelson*, 1 M.J. at 275 (noting that arguments may be based on the evidence as well as reasonable inferences drawn therefrom); *United States v. Doctor*, 21 C.M.R. 252, 256 (1956) ("[Trial counsel] may strike hard blows but they must be fair." (quoting *Berger v. United States*, 25 U.S. 78 (1935))). To the extent that any of trial counsel's arguments may have exceeded the bounds of proper argument, we find that in this particular case any error was harmless. This was a judge-alone trial. Military judges are "presumed to know the law and to follow it absent clear evidence to the contrary." *Erickson*, 65 M.J. at 225 (citation omitted). We are convinced the military judge was not unduly swayed by any argument from assistant trial counsel. Confident that he was sentenced on the basis of the evidence alone, we find no prejudice to Appellant.

[16] Assistant trial counsel argued that Appellant "is dangerous to children and [] he has no ability to stop being dangerous."

[17] Assistant trial counsel argued that Appellant is "an aggressive and ambitious and horribly destructive pedophile that will continue to be so while he is young."

[18] Assistant trial counsel argued, "Now and finally, the victims in this case which are children whose pictures that he distributed, will never be whole. And these children, these images he distributed are being victimized on a daily and nightly basis. Every time pedophiles lust over their defiled images.…"

[19] Assistant trial counsel argued, "Sir, your reason and common sense and knowledge of the ways of the world tell you that his distribution didn't just hurt the victims that were the subjects of the photos which he distributed. These photos will inspire and encourage each individual pedophile that receives the pictures."

[20] Assistant trial counsel argued that Appellant "did a lot to contribute to the scourge of child abuse around the world through the medium of Facebook—of Pedobook."

[21] Assistant trial counsel argued, "And it would be horrific if [Appellant] were released into a world where [his victims are] still children. So he must he held until he's in his 60s so he can be safer for society and must he held for that symbolic reason."

IV. Post-trial Processing Delay

The Government took 132 days to process his case from the end of trial to convening authority action. Appellant argues that this delay was unreasonable and warrants sentencing relief in the form of confinement credit.

We review de novo Appellant's claim that his due process rights were violated due to post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). Where the convening authority's action is not taken within 120 days of the end of trial, we apply a presumption of unreasonable delay. However, the Government "can rebut the presumption by showing the delay was not unreasonable." *Moreno*, 63 M.J. at 142.

We presume unreasonable delay in this case because 132 days had elapsed when the convening authority took action. We thus consider the remaining factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), including the reasons for the delay, Appellant's assertion of the right to timely review, and prejudice. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)).

Post-trial processing time in this case included transcription and assembly of the record when the court reporter was busy with other cases. Otherwise, we can find little explanation for the Government's failure to meet the *Moreno* standard.[22] On the other hand, the 12-day violation is relatively modest, Appellant did not demand timely review, and he has not shown any prejudice from post-trial delay in this case. We also consider the lack of evidence of malicious delay. Ultimately, upon balancing all *Barker* factors, we find no violation of Appellant's due process right to speedy post-trial review.

Next we review Appellant's request for relief pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *Id.* at 224. In *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), we identified a list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Those factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to Appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline,

[22] The Government urges that we attribute 28 days of post-trial processing time to defense delay in reviewing the record of trial. An affidavit from the enlisted court reporter, however, indicates that the last of the trial transcript sections was sent for defense review on 21 August 2014; and the court reporter chronology shows trial defense counsel completed their examination of the record on 9 September 2014. Thus, by our calculation, any delay attributable to defense review of the record would be 19 days.

and whether this court can provide any meaningful relief. *Id.* No single factor is dispositive, and we may consider other factors as appropriate. *Id.*

We have carefully considered the relevant factors in this case including the amount by which post-trial review standards were exceeded, the lack of bad faith or gross indifference on the part of the Government, and the absence of any prejudice to Appellant. On the whole, we conclude no *Tardif* relief is warranted.

IV. Adequacy of SJAR and Action

The copy of the record of trial provided to this court had placeholder sheets stating that Prosecution Exhibits 1-7 had been ordered sealed by the military judge, and that each exhibit could "be found at AFOSI Det 531 and may be examined under such conditions as the equipment custodian prescribes." Appellant infers from this notation that Prosecution Exhibits 1-7 were not available to the Staff Judge Advocate (SJA) and the convening authority at the time the Staff Judge Advocate's Recommendation (SJAR) and the action were completed. He argues that "the SJA erred when he advised the convening authority without utilizing a complete record of trial. As a result, the SJA's advice is legally insufficient and the rights of the Appellant were prejudiced." Appellant urges that we return the record to the convening authority for a new action based upon a "complete record of trial" and "complete and proper advisement from his legal representative."[23]

This court reviews allegations of improper completion of post-trial processing de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). If defense counsel does not make a timely comment on an error or omission in the SJAR, that error is waived unless it is prejudicial under a plain error analysis. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). To prevail under this analysis, the appellant must demonstrate three things: "(1) there was an error; (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right." *Kho*, 54 M.J. at 65 (citing *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999)).

"[B]ecause of the highly discretionary nature of the convening authority's clemency power, the threshold for showing [post-trial] prejudice is low." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Only a colorable showing of possible prejudice is necessary. *Id*. Nevertheless, an error in the SJAR "does not result in an automatic return by the appellate court of the case to the convening authority." *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996). "Instead, an appellate court may determine if the accused has been

[23] Appellant also contends that, because Prosecution Exhibits 1-7 were missing, the Government "failed to adhere to the rule mandating creating of a complete record of trial." The Government has since provided these exhibits, and they have been added to the record of trial. Accordingly, this claim has been rendered moot. *See United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982) (stating that the presumption of prejudice from substantial omissions may be overcome by the retrieval of the missing material).

prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority." *Id*. (citations omitted).

In the present case, Appellant made no timely objection or comment in the proceedings below. Even if we now accept Appellant's assumption that Prosecution Exhibits 1-7 were missing from the record at the time the SJAR and action were completed, and even were we to agree that this omission amounted to plain error, we are convinced any error would be harmless. We have examined the seven exhibits in question. Each contains multiple images of the child pornography with which Appellant was involved. The images are graphic and disturbing, some depicting the sexual abuse of infants. Nothing in those exhibits reflects favorably upon Appellant. Also, the trial transcript contains detailed descriptions of the multiple sex abuse images contained in the allegedly missing exhibits—thereby informing the SJA and convening authority as to the content of those exhibits. We find no likelihood that Appellant could have been harmed through any failure by the SJA to consider these exhibits in signing the SJAR. Nor do we find any likelihood that Appellant was harmed by the alleged failure of the convening authority to consider these exhibits in taking action. We find no colorable showing of possible prejudice to Appellant. *See Lee*, 52 M.J. at 53.

Conclusion

The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist