IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Ernest MORGAN, Jr.
Yeoman Second Class (E-5), U.S. Navy

NMCCA 200001387 Decided 23 March 2004

Sentence adjudged 4 February 2000. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
LT CLARICE JULKA, JAGC, USN, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. A general court-martial of officer and enlisted members sentenced the appellant to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant contends that (1) the evidence of lack of consent was legally and factually insufficient, and (2) the staff judge advocate failed to serve the addendum to his post-trial recommendation upon the trial defense counsel.

We have carefully considered the assignments of error, the Government's response, the appellant's reply, and the record of trial. We conclude that the second assignment of error has merit. Because of the necessity for remand for a new convening authority's action, we defer our resolution of the first assignment of error regarding sufficiency of the evidence.

"New Matter" in Addendum to Post-Trial Review

The appellant contends that the staff judge advocate's failure to serve his addendum to the staff judge advocate's recommendation (SJAR) upon the trial defense counsel (TDC) amounted to prejudice because the addendum placed misleading new matter before the convening authority that the appellant had no opportunity to explain or rebut. We agree.

The prosecution's key witness at trial was the alleged victim, Airman Recruit (AR) S. Before the Government offered any evidence on the merits, the trial counsel advised the military judge and the TDC that he intended to offer a pair of blue jeans the alleged victim said she wore during the encounter with the appellant. The TDC objected, saying that he had submitted a discovery request for such evidence and the Government had responded that AR S no longer had the jeans in her possession. The TDC also objected on grounds of authenticity, relevance and cumulativeness.

AR S was called to testify in an Article 39a, UCMJ session. She testified, under oath, that she wore the jeans in question at the time of the incident and that after the incident, she gave them to her cousin, Charlene Skinner. After her testimony, the military judge directed both counsel to call Ms. Skinner to verify AR S's testimony. In that telephone conversation, Ms. Skinner denied receiving any blue jeans from AR S.

AR S was then recalled to the stand. The military judge advised her of the telephone conversation with Ms. Skinner, then advised her of her rights under Article 31b, UCMJ, with respect to perjury or false statement and obstruction of justice. AR S admitted that she had lied when she testified that she gave the blue jeans to Ms. Skinner. The military judge observed that AR S had essentially confessed to perjury, but denied a motion by the TDC to preclude the Government from calling AR S as a witness.

AR S later testified at length in the Government's case-in-chief in support of the charges. During cross-examination, she admitted that she had previously lied on the witness stand, under oath, and that she knew she was lying.

In his post-trial clemency petition, the appellant stated:

> 4. Third, the victim in this case committed perjury at trial and potentially attempted to submit false physical evidence. During the government's case-in-chief, AR [S] admitted to openly lying under oath during a session of court. In his closing argument, even the prosecutor stated about AR [S]'s perjury: "The government despises her actions. We find them

> disgusting." Despite this, AR [S] was never tried for her offense. Ironically, the maximum punishment for perjury is the same as the maximum punishment for indecent assault. AR [S]'s deceit places her entire testimony and the fairness of YN2 Morgan's trial in doubt. In addition, a failure to prosecute her for an equally serious violation of the Uniform Code of Military Justice creates an appearance of bias. Clemency for YN2 Morgan would correct that appearance.

Clemency Petition of 7 Jul 2000. The staff judge advocate submitted a Supplemental Memorandum to his SJAR that responded to the clemency petition. In pertinent part, the memorandum, or addendum, said:

> The defense counsel states the victim, AR [S], committed perjury at trial and potentially attempted to submit false physical evidence. The victim was never charged with committing perjury and there is no evidence other than that submitted by the defense counsel in support of these allegations.

Supplemental Memorandum 5800 Ser N02L3/741 of 25 Jul 2000. Nothing before us indicates that this addendum was served on the TDC. The convening authority promptly took his action on 26 July 2000.

If an addendum to the SJAR contains "new matter," the defense must be served and given 10 days to respond. RULE FOR COURTS-MARTIAL 1106(f)(7), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). While discussion by the staff judge advocate of the correctness of the defense comments is not ordinarily considered "new matter," if the discussion is "erroneous, inadequate, or misleading," *United States v. Narine*, 14 M.J. 55, 57 (C.M.A. 1982), the failure to serve the defense may be prejudicial. *United States v. Buller*, 46 M.J. 467 (C.A.A.F. 1997); *see also United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).

We conclude that the addendum was misleading, if not erroneous, in its treatment of a significant evidentiary issue raised by the defense in the clemency petition. The clear import of the staff judge advocate's comments is that the TDC was making unsubstantiated allegations. However, as previously stated, both the trial counsel and the military judge acknowledged that AR S lied under oath. As we read the record, the military judge went a step further and concluded that the lie amounted to perjury or false swearing. If the subject of this discussion had been a minor witness who testified regarding matters of marginal probative value, we might resolve this issue differently. However, the liar in this case was the prosecution's star witness, the alleged victim of the charged offenses. No eyewitness testified; no physical evidence was offered. The

appellant's statement as given to the Naval Criminal Investigative Service included both inculpatory and exculpatory material. Under these circumstances, AR S's false testimony was a critical factor in her credibility that the appellant understandably wished to have the convening authority consider. Unfortunately, the staff judge advocate's comments did not provide the convening authority with an accurate assessment of this important issue.

The appellant asserts that had he been served with the addendum, he could have submitted statements or affidavits from the trial counsel and military judge, excerpts from the record of trial, and information regarding the decision not to prosecute AR S for perjury. In our view, that constitutes a "colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). Given the posture of this case, we are persuaded by the guidance of our superior court:

> Quite frankly, records that came to the Courts of Criminal Appeals with defective staff work are simply not ready for review. When such errors are brought to our attention or to the attention of the Courts of Criminal Appeals, the record should be returned promptly to the convening authority for preparation of a new SJA recommendation and action.

United States v. Lee, 50 M.J. 296, 298 (C.A.A.F. 1999). Accordingly, we will return the record for a new SJAR and convening authority's action.

Conclusion

The convening authority's action is set aside. The record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority for a new staff judge advocate's recommendation and action. The record shall then be returned to this court for further review. *Boudreaux v. United*

States Navy-Marine Corps Court of Criminal Review, 28 M.J. 181 (C.M.A. 1989).

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court