UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major JAMES M. FAUSEY
United States Air Force

ACM 37862

01 February 2013

Sentence adjudged 17 November 2010 by GCM convened at Scott Air Force Base, Illinois. Military Judge: J. Wesley Moore (sitting alone).

Approved sentence: Confinement for 2 years and a dismissal.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Roberto O. Ramirez; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge sitting alone convicted the appellant in accordance with his pleas of one specification of committing an indecent act with a child under the age of 16 years and one specification of attempting to commit an indecent act with a child under the age of 16 years, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934.[1] The court sentenced him to a dismissal and confinement for two years. The convening authority approved the sentence as adjudged. The appellant assigns as error that the specifications in Charge I (indecent acts) and Charge II

[1] The appellant was charged, pursuant to Article 134, UCMJ, 10 U.S.C. § 934, with indecent acts with a child, as applicable to sexual assault offenses committed prior to 1 October 2007. *See Manual for Courts-Martial, United States (MCM)*, A27-3 (2008 ed.).

(attempted indecent acts) fail to state offenses because they do not expressly allege the terminal element.[2] Finding no prejudice to a substantial right of the appellant, we affirm.

Terminal Element

Whether a charged specification states 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*. (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.); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). "[I]n order to state the elements of an inchoate offense under Articles 80 and 81, UCMJ, a specification is not required to expressly allege each element of the predicate offense." *United States v. Norwood*, 71 M.J. 204, 205 (C.A.A.F. 2012).

During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged offenses. For the Article 134, UCMJ, offense of indecent acts with a child under the age of 16 years, the military judge included the terminal element and defined the phrases conduct "to the prejudice of good order and discipline in the armed forces" as well as conduct "of a nature to bring discredit upon the armed forces." The military judge asked the appellant if he understood the elements and definitions, and if those elements and definitions correctly described his conduct. The appellant answered in the affirmative. The appellant explained that his "conduct was of a nature to bring discredit upon the armed forces, because in the eyes of the public, and society in general, if they were to know what I did, it would bring a very unfavorable view of the military, and the officer corps." Thus, as in *Ballan*, we find that the appellant here suffered no prejudice to a substantial right. The military judge correctly advised the appellant of all the elements, to include the terminal element. The plea inquiry showed that he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Regarding the attempted indecent acts with a child under the age of 16 years, we find that, on its face, the specification sufficiently alleges a violation of Article 80,

[2] Under Article 134, UCMJ, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime or offense not capital.

UCMJ. *See Norwood*, 71 M.J. at 205. Notably, had there been error, such error would have been harmless because the military judge discussed the terminal element of the predicate offense with the appellant and again defined conduct "to the prejudice of good order and discipline in the armed forces" and "of a nature to bring discredit upon the armed forces." The military judge again asked the appellant if he understood the elements and definitions, and if those elements and definitions correctly described his conduct. The appellant answered in the affirmative and explained that his conduct was service discrediting because "if the public were to learn of what I had attempted to do, it would be viewed very poorly [in the eyes of the public]." The appellant also stated that his conduct was prejudicial to good order and discipline. Therefore, pursuant to *Norwood* and *Ballan*, we find that the appellant's claims are without merit.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] 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 findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] 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)).