**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class MARK J. JORDAN**
**United States Air Force**

**ACM S31939**

**7 March 2013**

Sentence adjudged 10 March 2011 by SPCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Mark L. Allred.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of $978.00 pay per month for 12 months, and reduction to E-1.

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

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

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges



PER CURIAM:

Before a special court-martial, the appellant entered mixed pleas of: (1) guilty to one specification of engaging in sexual acts on divers occasions with a minor who had attained the age of 12 years but had not attained the age of 16 years old, in violation of Article 120, UCMJ, 10 U.S.C. § 920; (2) guilty to one specification of committing sodomy on divers occasions with a child who had attained the age of 12 years but who was under the age of 16 years, in violation of Article 125, UCMJ, 10 U.S.C. § 925; (3) not guilty to one specification of wrongfully endeavoring to impede an investigation on divers occasions, in violation of Article 134, UCMJ, 10 U.S.C. § 934; and (4) not guilty to one specification of communicating a threat on divers occasions, in violation of

Article 134, UCMJ. The military judge accepted the appellant's pleas of guilty, and a panel of officers found the appellant guilty of the two specifications under Article 134, UCMJ. The members sentenced the appellant to a bad-conduct discharge, confinement for 12 months, forfeiture of $978.00 pay per month for 12 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant asserts: (1) The evidence is legally and factually insufficient to support his conviction for communicating a threat; (2) The military judge erred in failing to exclude evidence of uncharged misconduct; (3) The military judge erred in failing to instruct the members on uncharged misconduct; and (4) The specifications charged under Article 134, UCMJ, fail to state an offense, because they do not allege the terminal element. Finding no error, we affirm.

*Background*

The appellant met the victim, JD, in May 2008, via text message. Both the appellant and JD lived in Michigan. The appellant was 19 years old. JD was 13 years old. The appellant knew JD's age. They communicated with each other via text and telephone calls every day until they met in person on 4 July 2008. That same day, the appellant digitally penetrated JD and she performed oral sex on him. They began having sexual intercourse regularly in August 2008. In January 2009, the appellant entered the Air Force delayed entry program.

In February 2009, JD discovered she was pregnant. When she and the appellant told her parents about the pregnancy in February 2009, the appellant became upset and made comments about how his father might react to the news.[1] The appellant made similar comments to JD about his father in February 2010, after the baby was born.

A few days after the appellant and JD told her parents about her pregnancy, the appellant's mother, RS, came to speak to JD's family. She expressed concern that the appellant, who had not yet left for basic training, would be disciplined by the Air Force for getting JD pregnant. She proposed sending $500 a month to JD if JD and her family did not name the appellant as the father of the baby. RS also emphasized that there could not be a "paper trail" identifying the appellant as the father, stating that she "knew all the rules of the military," he would "serve 20 years in prison," and he "would be executed."

The appellant left for basic training in June 2009. In September 2009, JD gave birth to a baby boy. She received money order payments of $500 per month from September 2009 through May 2010. Initially, JD did not name the appellant as the father of the baby. Later, however, she informed local authorities in Michigan that the appellant

[1] The appellant made statements, such as "You don't know my dad"; "[M]y dad's a very crooked cop. He has people in high places. He knows judges that will give fake warrants and they will come over. They will tear your house apart"; "Your house will be firebombed"; and "his dad would stop at nothing. He will harm [JD] and he'll come after the baby."

was the father. When Michigan authorities declined to prosecute, JD contacted the Air Force Office of Special Investigations in June 2010.

*Legal and Factual Sufficiency*

In Specification 2 of Charge III, the Government charged the appellant with communicating a threat on divers occasions, in violation of Article 134, UCMJ. The specification reads as follows:

> In that [the appellant] did, at or near the continental United States, on divers occasions, between on or about 2 June 2009 and on or about 17 June 2010, wrongfully communicate to [JD] a threat to injure [JD] by stating his father would harm her and take away her son, or words to that effect.

The appellant argues this specification is legally and factually insufficient.[2] We find the evidence legally and factually sufficient to support the appellant's conviction for communicating a threat on one occasion vice "divers occasions."

The elements of communicating a threat are as follows:

> (1) That the [appellant] communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
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> (2) That the communication was made known to that person or to a third person;
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> (3) That the communication was wrongful; and
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> (4) That, under the circumstances, the conduct of the [appellant] was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

*Manual for Courts-Martial, United States*, Part IV, ¶ 110.b (2008 ed.).

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the

[2] The appellant also asserts the military judge failed to instruct the members that they could modify the specifications to reflect their findings with respect to the charged timeframe. The record reflects the military judge instructed the members on variance, telling them that if they had "doubt about the time, place, or manner" in which the offenses described in the specifications may have been committed, but were convinced beyond a reasonable doubt that the offense was committed, they could "make minor modifications in reaching [their] findings by changing the time, place, or manner described in the specification, provided that [they] do not change the nature or identity of the offense."

evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "In resolving legal-sufficiency questions, [we are] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citing *Turner*, 25 M.J. at 325); *see also United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *Bethea*, 46 C.M.R. at 224-25.

With the exception of the "divers occasions" language, we find the evidence legally and factually sufficient to support the appellant's conviction of Specification 2 of Charge III. On one occasion during the charged timeframe—in February 2010—the appellant used the threatening language towards JD. She testified the appellant contacted her in February 2010, after she called the appellant a "deadbeat dad" on MySpace. In response to questioning by trial counsel about what the appellant told her, JD stated, "He said putting stuff like that on your MySpace, [his] dad could find out easier and [his] sisters are on MySpace—because I had talked to one of [the appellant's] sisters and I told [the appellant] about that and he started panicking over the phone and he said, 'Well, now I'm really afraid for you and the kid . . . because now my dad for sure knows about the kid and now, I don't know what he's going to do to you guys and I'm not there to protect you.'" JD stated that the implication was that she would be harmed by the appellant's father, whom he had described as a "crooked cop" who would "firebomb" JD's house.

We find that a "reasonable factfinder could conclude beyond a reasonable doubt that a reasonable person in the recipient's place would perceive the contested statement by [the] appellant to be a threat." *United States v. Brown*, 65 M.J. 227, 230 (C.A.A.F. 2007) (quoting *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995)). Although the appellant told JD that his father, not the appellant, would harm her and take away her son, his words still constitute a threat. Notably, our superior court has held that a threat with a "disclaimer of personal involvement" by the appellant does not diminish the sufficiency of the evidence. *United States v. Johnson*, 45 C.M.R. 53, 55 (C.M.A. 1972).[3]

[3] In *United States v. Johnson*, 45 C.M.R. 53, 54 (C.M.A. 1972), the appellant leveled the following threat to the victim: "I am not threatening you, but I am telling you that I am not personally going to do anything to you, but in

We find the same to be true in this case. "[C]onsidering the evidence in the light most favorable to the prosecution . . . and making allowances for not having personally observed the witnesses," we are convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 324-25. We further find the appellant uttered the threat on one occasion, in February 2010, not on divers occasions as alleged in the specification. *See United States v. Walters*, 58 M.J. 391, 396 (C.A.A.F. 2003) ("[A]ny findings by exceptions and substitutions that remove the 'divers occasions' language must clearly reflect the specific instance of conduct upon which [the trier of fact's] modified findings are based.").

*Uncharged Misconduct and Spillover Instruction*

The appellant next argues the military judge erred when he admitted evidence of uncharged misconduct under Mil. R. Evid. 404(b) and then later failed to properly instruct the members on uncharged misconduct, giving only an instruction on spillover. We have reviewed these issues in light of the record of trial and find no error, plain or otherwise, regarding the evidence the military judge admitted or the spillover instruction he gave.

We review a military judge's decision on the admissibility of evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010); *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002); *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). An abuse of discretion occurs when the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *White*, 69 M.J. at 239 (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)). Additionally, whether a military judge properly instructs the members is a question we review de novo. *United States v. Medina*, 69 M.J. 462, 464-65 (C.A.A.F. 2011) (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)); s*ee also United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010).

The appellant cites several instances of alleged uncharged misconduct. These instances range from acts related to the facts and circumstances of the charged offenses

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two days you are going to be in a world of pain. I would suggest you damn well better sleep light." In evaluating the sufficiency of the evidence upon which the appellant was convicted of communicating a threat, the Court stated the "[a]ppellant's comments are to be examined by looking to the component words and their total meaning impact." *Id*. at 55. The Court found the evidence sufficient for the trier of fact to find "beyond a reasonable doubt that an unequivocal threat was communicated." In reaching this decision, the Court noted the appellant's "disclaimer of personal involvement when viewed with the totality of the circumstances and the balance of his remarks do not downgrade the sufficiency of the evidence." *Id.*

(*e.g.*, sexual conduct between JD and the appellant to which the appellant had pled guilty), acts or statements by the appellant that do not appear to even be misconduct (*e.g.*, calling JD names, telling her to get an abortion, referring to his son as a "little b**tard," or not visiting JD in the hospital), and acts or statements where the appellant may have lied or boasted to JD about either having to "join the Air Force" or some military-related activities (*e.g.*, telling JD he was stationed in Korea, that he went target shooting with his recruiter, that the military banned cigarette smoking). During JD's testimony, defense counsel objected to only one alleged act of uncharged misconduct; the military judge overruled the objection.[4]

We have reviewed the instances of purported uncharged misconduct raised by the appellant in light of Mil. R. Evid. 404(b). Applying the plain error test, we find that the military judge did not err when he admitted the testimony surrounding these instances. *See United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998) (in the absence of an objection, issues of admissibility are waived, warranting relief only if admission constitutes plain error). We are hard pressed to find that any of these instances constitute uncharged misconduct. Assuming arguendo the military judge did err, we find any error to be harmless. Even without the specific instances of alleged uncharged misconduct, the Government presented sufficient evidence of obstructing justice and communicating a threat.

Additionally, when reviewing proposed instructions with counsel, the military judge told both sides that he did not intend to give the instruction on uncharged misconduct, but he planned to give the spillover instruction. The military judge invited defense counsel to object or to notify the judge if he had "something further to add."[5] Defense counsel did not object to either (1) the military judge not giving the uncharged misconduct instruction or (2) the military judge giving the spillover instruction. We find

[4] On direct examination of JD, trial counsel asked her if she had any "sexual activity" with the appellant when she was in Texas for his graduation from basic training in July 2009. Defense counsel objected to the relevance of the question. Trial counsel explained that it went to the "facts and circumstances surrounding their relationship . . . ." During direct examination of JD's mom, the appellant's trial defense counsel objected to the relevance of testimony concerning the appellant and JD's ongoing sexual relations after the appellant had entered the military. The military judge sustained the objection.

[5] The military judge advised counsel as follows:

> And I didn't see any evidence come in of a [Mil. R. Evid.] 404(b) nature where I said, over your objection or otherwise, I allowed uncharged misconduct to come in for a specific purpose. However, related to this is the instruction we will come to in a moment of spillover where I tell the members that each offense must stand on its own.
>
> So at this point I am telling you that I do not plan to give [the uncharged misconduct instruction], but I do plan to give the spillover instruction and you can look at what I have got going there.
>
> Defense, you seem to be nodding that you understand that, at least, and if you decide when you see what I propose that you have some objection of some sort or something further to add, I would consider that. The same to you trial counsel.

that the military judge did not err when he gave the spillover instruction. That instruction adequately addressed for the members the issues that appellant now claims were inadequately addressed.

*Article 134, UCMJ, Specifications*

The appellant asserts that Specifications 1 and 2 of Charge III fail to state an offense under Article 134, UCMJ, because they did not allege the terminal element. We find notice of the missing terminal element extant in the record and thus find no error.

Whether specifications are defective and the remedy for such errors are questions of law, which we review de novo. *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). When defects in specifications are not raised at trial, we analyze for plain error. *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). S*ee also United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011). Failure to allege the terminal element of Article 134, UCMJ, in a specification is plain and obvious error. *Humphries*, 71 M.J. at 214-15. Whether there is a remedy for this error will depend on whether the defective specification resulted in material prejudice to the appellant's substantial right to notice pursuant to the Fifth and Sixth Amendments.[6] *Id. See also* Article 59(a), UCMJ, 10 U.S.C. § 859(a). To determine whether the defective specification resulted in material prejudice to a substantial right, this Court "look[s] to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 215-16 (citing *Cotton*, 535 U.S. at 633); *see also Johnson v. United States*, 520 U.S. 461, 470 (1997).

In *Humphries*, our superior court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element but was not challenged at trial. *Id*. at 217. Applying a plain error analysis, the Court found the failure to allege the terminal element was plain and obvious error, which was forfeited rather than waived. *Id*. at 215. Distinguishing notice issues in guilty plea cases and cases in which the defective specification is challenged at trial, the Court explained that the prejudice analysis of a defective specification under plain error review requires close scrutiny of the record. *Id*. at 215-16. After a review of the record, the Court in *Humphries* found nothing that reasonably placed the appellant on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated. *Id*. at 216. Finding there was prejudice as a result of no notice of the missing element, our superior court dismissed the adultery charge and specification.

Unlike *Humphries*, the record in the appellant's case demonstrates no such prejudice as a result of the missing terminal element. The record reflects that during the

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

prosecution's case-in-chief, JD was called to testify. On direct examination, the trial counsel elicited testimony from JD relevant to the service discrediting clause of the terminal element for both specifications. Trial counsel established through JD that the appellant portrayed a military that was constantly watching the appellant. He claimed that he could send satellites to her house to see everything she did and even tap her phones. JD also testified that she "felt bad" for the appellant because he "said the military would beat him up," and had already "kick[ed] down his door" and "broke his computer." She also testified that the appellant told her the military "treated him really bad" and that, "when people were caught smoking on base, they would shoot the cigarette out of your hand . . . ." The appellant also told JD that, if the military found out he was the father of their child, "he would be in prison the rest of his life then he would be executed." JD said she "believed" the appellant when he said these things, and she had no previous exposure to the military aside from the appellant. JD further testified that she finally decided to contact the Air Force because, "I finally had enough of everything between him and his mom. I couldn't deal with it no more; I wanted it to stop; I wanted [it] to end, for him to leave me alone."

On redirect examination, the following colloquy took place with the trial counsel, JD, the military judge, and defense counsel:

> [TC]: Defense counsel brought up your knowledge of the military. Before meeting [the appellant], what was your knowledge of the military?
>
> [JD]: I didn't know anything really about the military.
>
> [TC]: What was your opinion of the military?
>
> [JD]: I thought it looked like they were people who had really good honor and they defended our country and they were just really good people.
>
> [TC]: Did you yourself want to join the military?
>
> [JD]: Yes.
>
> [TC]: After your experience with [the appellant], do you still have that opinion?
>
> [JD]: Not at the—
>
> [DC]: *Your honor, what is the relevance to the charge?*
>
> [MJ]: What is your reaction to that?
>
> [TC]: [No response.]

[MJ]: *Is this an Article 134 offense?*

[TC]: *Yes, sir.*

[MJ]: *Okay. Do you have to prove—what elements do you have to prove?*

[TC]: *I have to prove that it had an effect on good order and discipline or it disparaged the—*

[MJ]: *Something like that. Is this relevant to that element?*

[TC]: *Yes, Your Honor.*

[MJ]: *Okay. What's your response to that, Defense Counsel?*

[DC]: *We are satisfied.* Thank you, Your Honor.

[MJ]: Okay. Objection is overruled. Go ahead.

(Emphasis added).

After considering the totality of circumstances in this case, as provided for by our superior court in *Humphries*, we find notice of the terminal element to be extant in the record. *See Humphries*, 71 M.J. at 215-16. The tenor of trial counsel's questions and JD's answers were such that the appellant was reasonably on notice of the terminal element and that the Government was at least pursuing a "service discrediting" theory of criminality. Moreover, during his redirect examination of JD and in response to a question from the military judge, trial counsel attempted to explain to the military judge that he needed to provide evidence to prove either prejudice to good order and discipline or service discrediting conduct for the Article 134, UCMJ, offenses. As trial counsel was about to describe both parts of the terminal element, the military judge interrupted and asked for a response from defense counsel, who indicated he was "satisfied." Under these circumstances, we have determined the appellant was on notice of the terminal element and we find no prejudice to a substantial right of the appellant. *See id*.

*Sentence Reassessment*

In light of our modifying the finding that the appellant committed the acts alleged in Specification 2 of Charge III on one occasion, February 2010, rather than on divers occasions, we must assess the impact on the sentence and either return the case for a sentence rehearing or reassess the sentence ourselves. Before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been at least of a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A "dramatic change in the

'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine "the sentence would have been at least of a certain magnitude," we must order a rehearing. *Doss*, 57 M.J. at 185 (citing *Sales*, 22 M.J. at 308).

The appellant received the maximum jurisdictional punishment for a special court martial: a bad-conduct discharge, confinement for 12 months, forfeiture of $978.00 pay per month for 12 months, and reduction to E-1. Finding that the appellant committed the offense of communicating a threat on one occasion vice divers occasions does not reduce the maximum punishment. Thus, the "penalty landscape" has not substantially changed under these circumstances. *See Riley*, 58 M.J. at 312. Applying the criteria set forth in *Sales*, we conclude that the modified findings would have had no effect on the sentence. *See Sales*, 22 M.J. at 308. We are confident that the members would have imposed the same sentence for the offenses for which the appellant was convicted. *See Doss*, 57 M.J. at 185.

*Conclusion*

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[7] Article 66, UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the modified findings and reassessed sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

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