UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHARLES L. WALTON
United States Air Force

ACM 37664 (f rev)

10 August 2012

Sentence adjudged 25 February 2010 by GCM convened at Joint Base Lewis-McChord, McChord Field, Washington. Military Judge: Don M. Christensen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, reduction to E-2, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Nicholas W. McCue; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ORR, WEISS, and CHERRY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

WEISS, Judge:

The appellant was tried by a general court-martial composed of a military judge sitting alone and found guilty[1] of one specification of assault consummated by a battery,

[1] Due to an apparent oversight on the part of the military judge, the record of trial does not reflect an entry of pleas by the appellant. However, as the appellant litigated all charges and specifications at trial, the record makes clear that the appellant's intent was to plead not guilty.

one specification of sodomy, one specification of adultery, and one specification of maltreatment, in violation of Articles 128, 125, 134, and 93, UCMJ, 10 U.S.C. §§ 928, 925, 934, 893, respectively.[2] The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 12 months, reduction to the grade of E-2, and a reprimand.[3]

This Court previously affirmed the findings and sentence. *United States v. Walton*, ACM 37664 (A.F. Ct. Crim. App. 18 July 2011) (unpub. op.), *rev'd*, 70 M.J. 375 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces granted review to determine whether the specification alleging adultery fails to state an offense because the specification does not allege either potential terminal element under Article 134, UCMJ. *Walton*, 70 M.J. at 375. Our decision was vacated and the case remanded for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Walton*, 70 M.J. at 375. Having considered the granted issue in light of *Fosler* and subsequent cases, and again having reviewed the entire record, we affirm.

Background

The appellant was a 29-year-old, noncommissioned officer with over twelve years of service. He was married to an Air Force service member and had two young children. At the time of the offenses, Airman First Class (A1C) VL, was fresh out of technical training school and newly arrived to her first permanent duty station at McChord Air Force Base, Washington. She was unmarried and 18 years of age. The appellant was A1C VL's sponsor as a newcomer and her duty supervisor as well. Offering to assist her with preparations for her upcoming First Term Airman's Class, the appellant entered A1C VL's on-base dormitory room and thereafter engaged in sexual intercourse with her. The appellant litigated all charges and specifications at trial, but did not challenge the legal sufficiency of the adultery charge either at trial or on his initial appeal.

Discussion

Whether a charge and specification state 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.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (citing R.C.M. 307(c)(3))).

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[2] The appellant was found not guilty of the greater offenses of rape and forcible sodomy, as well as not guilty of a specification of an indecent act and a second specification of maltreatment.

[3] The convening authority waived the mandatory forfeitures for a period of six months for the benefit of the appellant's wife and children.

At issue on remand is the allegation of adultery in violation of Article 134, UCMJ. The charge sheet described the offense as follows:

> Charge III: Violation of the UCMJ, Article 134
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> Specification: In that STAFF SERGEANT CHARLES L. WALTON, United States Air Force, 62d Operations Group, McChord Air Force Base, Washington, a married man, did, at or near McChord Air Force Base, Washington, on or about 16 October 2008, wrongfully have sexual intercourse with Airman First Class [VL], a woman not his wife.

As drafted, the adultery specification does not allege the terminal element of the general article of the UCMJ. That is, that the appellant's conduct 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. Article 134, UCMJ, Clauses 1 and 2. The adultery specification is defective because it does not expressly allege the terminal element, nor do we find the terminal element is necessarily implied. *Fosler*, 70 M.J. at 230-31; *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Because the appellant failed to object to the sufficiency of the specification at trial, we review for plain error and test for prejudice. *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

Under plain error analysis, the appellant has the burden of demonstrating that there was error, that the error was plain and obvious, and that the error materially prejudiced a substantial right. *Id*. at 214, 217 n.10 (citations omitted). The failure of the specification to allege either or both clauses of the terminal element applicable to the offense of adultery was plain and obvious error. *Id*. at 214. A finding of error, however, does not alone warrant dismissal. *Id*.; *Ballan*, 71 M.J. at 34. "The question, then, is whether the defective specification resulted in material prejudice to [the appellant's] substantial right to notice." *Humphries*, 71 M.J. at 216 (citation omitted). Upon our review of the record, considering the totality of circumstances in this case, we find no such prejudice.

In making this prejudice determination in the context of a litigated case in which the defective specification is not objected to at trial, "we look 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.'" *Id*. at 215-16 (*citing United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)). Unlike in *Humphries*, in which our superior court found prejudice resulting in dismissal of the adultery charge and specification, 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 prosecution's case-in-chief, the victim, A1C VL, was called to testify. On direct and redirect examination, in testimony relevant

to the adultery offense and implicitly linked to the specific clause of the terminal element relating to prejudice to good order and discipline, the trial counsel established the disparity in age, military experience and rank, as well as the military supervisory and sponsor relationship between the appellant and A1C VL. A1C VL also testified that after the appellant had sexual intercourse with her in the dormitory room, she didn't feel she could tell anyone because he was her supervisor and that he could get her in trouble. A1C VL further testified that her initial plan was to avoid the appellant at work by trying to stay out of the office as much as possible, but that she finally decided to report the appellant's misconduct "[b]ecause I knew that there was no other way of me getting out of there or out of the office and that I would have to work with him, and I just couldn't any more."

Although the case was tried before a military judge alone, in his closing argument, the trial counsel described the elements of adultery, including the terminal element. The trial counsel also made clear the Government's theory of guilt was adultery to the prejudice of good order and discipline,[4] and he tied the testimony of A1C VL to proof of this theory.[5] On the other hand, the defense theory of the case was that A1C VL's story was a fabrication, and that there was no adultery because an act of sexual intercourse never happened.[6]

After considering the totality of circumstances in this case, as provided for by our superior court in *Humphries*, we find that the lack of notice due to the omission of the terminal element from the adultery specification was sufficiently cured by the Government during the course of the trial. *See Humphries*, 71 M.J. at 217. Although the

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[4] Trial counsel argued that: "So the question then is whether this conduct is prejudicial to good order and discipline, because as you know not every act of adultery constitutes an offense."

[5] Trial counsel continued to argue that:

> But the factors to be considered--and I'll go through them quickly, Your Honor--the accused's marital status, military rank, and position. Obviously, the accused is married. Obviously, the accused was a staff sergeant, at the time. His position was that individual's supervisor.
>
> Co-actor's marital status, military rank, grade, or position, an 18-year old airman first class who was his subordinate, who was subject to his orders.
>
> The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces. In other words, the status of the accused's spouse; [NW] is a military member.
>
> Where the adultery occurred: in Airman [VL's] dorm room.
>
> Those factors meet the requirement to establish that this conduct was prejudicial to good order and discipline.

[6] In his closing, the trial defense counsel argued: "Now I spent a lot of time covering this. The point being, Staff Sergeant Walton did not have sexual intercourse with [A1C VL], not consensual and not forcefully, not any way. It didn't happen," and that, "The sex and the sodomy did not happen."

specific words "prejudice to good order and discipline" were not mentioned during the testimony of A1C VL, the clear import of the questions asked by the trial counsel and the answers given by the witness are such that the appellant was reasonably on notice that the Government was pursuing a theory of conduct that was prejudicial to good order and discipline, as opposed to other possible theories of guilt under the terminal element of Article 134, UCMJ. *See id*. Moreover, in closing, the Government detailed the elements of the offense of adultery, argued its specific theory of criminality, and tied the evidence to proof of that theory—an act of adultery that was prejudicial to good order and discipline. *See id*. Under these circumstances, we find the appellant has failed to demonstrate that the defective Article 134, UCMJ, specification caused material prejudice to his substantial right to notice.

Conclusion

Having considered the record in light of *Fosler*, as directed by our superior court, as well as the subsequent cases of *Ballan* and *Humphries*, we again find that the approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court