UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL B. WITTMAN
United States Air Force

ACM 38135

24 October 2013

Sentence adjudged 26 January 2012 by GCM convened at Ramstein Air Base, Germany. Military Judge: Dawn R. Eflein and Jefferson B. Brown (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 16 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brett D. Burton; and Gerald R. Bruce, Esquire.

Before

MARKSTEINER, SANTORO, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SANTORO, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of false official statement, wrongful appropriation, and harassment, in violation of Articles 107, 121, and 134, UCMJ, 10 U.S.C. §§ 907, 921, 934.[1] The

[1] The terms of a pretrial agreement required the convening authority to dismiss a charge and specification, but did not impose a limitation on sentence. The appellant pled not guilty to conspiracy to commit indecent conduct in violation of Article 81, UCMJ, 10 U.S.C. § 881; this charge and specification was withdrawn and dismissed with prejudice after arraignment by the convening authority. The appellant pled not guilty to a second false official statement offense that was dismissed without prejudice by the military judge. The appellant also pled not guilty to

adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 16 months, and reduction to E-1. Before us the appellant asserts that his plea of guilty to making a false official statement was improvident and that the specification alleging harassment failed to state an offense. We disagree and affirm.

Background

The appellant and now-Staff Sergeant (SSgt) TZ, first met and became friends while assigned in Korea in 2008. Both were then reassigned to Germany in 2009. SSgt TZ began dating someone and, as a result, spent less time with the appellant. Dismayed, the appellant embarked on a scheme he thought would force SSgt TZ to spend more time with him. As a Security Forces member, the appellant decided that if he could convince SSgt TZ that he (SSgt TZ) was under investigation and that the appellant could make the investigation go away, then SSgt TZ would be grateful, spend more time with him, and rekindle their friendship.

To effect this plan, the appellant and a third party posed on the Internet as an adult female, sought out and befriended SSgt TZ, and cajoled him into masturbating for "her" on a webcam. The appellant subsequently told SSgt TZ, in person and over chat messaging, that he had learned the Air Force Office of Special Investigations (AFOSI) was investigating SSgt TZ for criminal acts with a minor because the "female" was underage. The appellant also discussed the likelihood SSgt TZ would face lengthy confinement and discharge from the service. During these discussions, the appellant used his status as a law enforcement officer possessing "insider knowledge" of criminal investigations to convince SSgt TZ of the truth of his statements.

To further the appearance of an official investigation, the appellant decided to create a fictitious Air Force (AF) Form 1168, a statement form used by Air Force criminal investigators. He went to the Security Forces building at Vogelweh Air Station to obtain blank AF Forms 1168. While he was there, he encountered another Security Forces member, SrA EN, and asked her to take a ride with him to meet SSgt TZ at Spangdahlem Air Base. During the ride, the appellant told SrA EN he was working with AFOSI on an investigation. He fabricated a phone call to AFOSI agent "Pete Lasher" and told SrA EN what to write on the AF Form 1168, on "Lasher's" behalf:

> On 16 March 2009 [the fictitious female] was on Cam Frog Online[.] She stated she was 18 yrs. old and worked at a deutch [sic] bank. [SSgt TZ] then proceeded to do sexual acts over the internet, later realizing that the female was in fact under age [sic]. I contacted [the appellant] on the above situation he informed me that there is no need for him to be charged and he

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solicitation of another to commit an offense, but entered a plea of guilty to attempted solicitation. The appellant entered a plea of guilty to this Charge under Article 134, not Article 80 (attempts), but this error was cured by the convening authority's dismissal of the charge and specification with prejudice.

> will work with the investigation. [SSgt TZ] is facing Art. 134 x 2 and Art. 92. [T]wo times Art. 134 could be facing up to 25 yrs. in prison[,] for lude [sic] acts against a minor and indecent exposure. [The appellant] and I are working with [SSgt TZ] to remove the case[.] [I]f done so all documents will be shredded.

Although SrA EN wrote what the appellant dictated, the appellant himself signed the form as "Peter Lasher."

The appellant was unable to find SSgt TZ that day but returned to Spangdahlem several days later. He met with SSgt TZ and gave him the fictitious AF Form 1168, intending for him to believe there was an ongoing investigation and the AF Form 1168 had been generated by AFOSI Special Agent Lasher. The appellant told SSgt TZ he had befriended Special Agent Lasher when they were stationed together in Korea and was using his friendship with Special Agent Lasher to get the investigation dropped.

However, unbeknownst to the appellant, by this time SSgt TZ had already contacted AFOSI and knew that there was no ongoing investigation. An investigation into the appellant's conduct then ensued.

False Official Statement

We review a military judge's decision to accept a guilty plea for abuse of discretion and disturb it only if there is a "substantial basis" in law and fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The elements of Article 107, UCMJ, false official statement, are: (1) that the appellant signed a certain official document or made a certain official statement; (2) that the document or statement was false in certain particulars; (3) that the appellant knew it to be false at the time of signing it or making it; and (4) that the false document or statement was made with the intent to deceive. *Manual for Courts-Martial, United States* (MCM), Part IV, ¶ 31.b. (2008 ed.). The military judge advised the appellant of these elements and further told him:

> An official record is one made in a line of duty. A direct relationship to the accused's duties and status is necessary to make a statement in the line of duty. Not every comment written by a service member is within the line of duty. There must be a nexus between the service member's status and the statement as seen from either[] you[] or [SSgt TZ]. In determining whether a statement is made in the line of duty, consider the totality of the circumstances to include the circumstances surrounding the statement[,]

whether there is a military interest in the subject matter, and whether there exists a clear and direct relationship to military duties.

The appellant said he told SrA EN he was cooperating with AFOSI's investigation into SSgt TZ's conduct, that Pete Lasher was an AFOSI agent, and that what he was having her write on the statement form was coming from Special Agent Lasher. When he presented the AF Form 1168 to SSgt TZ, he told him that it was the AFOSI agent himself who had signed the statement. In response to the military judge's questioning, the appellant explained that he used Air Force Form 1168s as part of his official duties as a law enforcement officer and had done so on previous occasions while investigating criminal cases. Finally, the appellant specifically agreed that the AF Form 1168 was official and made in the line of duty as defined by the military judge.

Before us, however, the appellant argues that the AF Form 1168 was not made in the line of duty and therefore was not "official." Article 107, UCMJ, applies to "statements affecting *military* functions." *United States v. Spicer*, 71 M.J. 470, 473 (C.A.A.F. 2013). This includes statements made either when the speaker is "acting in the line of duty *or* the statements directly relate to the speaker's official military duties." *Id.* (emphasis added).

The appellant obtained the blank AF Form 1168 from the official supply of forms maintained by his Security Forces unit at Vogelweh. He obtained the assistance of another Security Forces member to complete the form, telling her they were both taking a statement from an OSI special agent relating to an ongoing criminal investigation. He then signed the form representing himself to be an OSI special agent. The appellant presented the completed AF Form 1168 to the victim, representing the form as an official statement taken as part of the investigation and made by a law enforcement officer.

The AF Form 1168 contained a Privacy Act statement that specifically referred to both the Department of the Air Force and the Department of Defense. It identified the "unit taking statement" as the 569th United States Forces Police Squadron (the appellant's unit), the "location" as AFOSI, references to specific provisions of the Uniform Code of Military Justice, and a section indicating that the statement was made under oath (as well as a fictitious signature of the second OSI agent who purportedly administered the oath).

Throughout this entire course of conduct, the appellant himself was a law enforcement officer, SSgt TZ knew this, and the appellant represented himself as capitalizing on his insider knowledge of law enforcement and the investigation. Although the appellant's motivations were personal, we conclude that the false statement was made in the line of duty and that the military judge did not abuse his discretion in accepting the appellant's plea.

Harassment

The specification to which the appellant pled guilty alleged that:

> [The appellant] did . . . willfully and maliciously engage in a knowing pattern of harassment directed at [SSgt TZ], to wit: repeatedly telling [SSgt TZ] via telephonic and electronic means that he was under criminal investigation and was subject to incarceration, which seriously alarmed the said [SSgt TZ] and caused him substantial emotional distress, and which conduct was of a nature to bring discredit upon the armed forces.

At trial, the appellant moved to dismiss this specification on several grounds, including failure to state an offense, failure to provide notice, due process, violation of the First Amendment,[2] and multiplicity. The military judge ruled adversely to the appellant in all respects. Thereafter, the appellant entered an unconditional guilty plea to this specification.

An unconditional guilty plea results in the waiver of all but the appellant's argument that the specification fails to state an offense. Rules for Courts-Martial 907(b)(1)(B) and 910(j); *United States v. Boyett*, 42 M.J. 150, 152 (C.A.A.F. 1995). Therefore, our appellate review is limited to that issue and is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

The appellant argues that the specification is deficient because it fails to allege the statements listed would cause a reasonable person to suffer substantial emotional distress. He asserts the reasonable forseeability of severe emotional distress is (a) an element of the offense and (b) is required to be pled in the specification for an offense to be alleged. We disagree.

"A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused *notice* and *protection against double jeopardy*." *Crafter*, 64 M.J. at 211 (emphasis added). "A specification that is susceptible to multiple meanings is different from a specification that is facially deficient." *Id*.

The conduct at issue was charged as a violation of Article 134, UCMJ. This article has two elements: (1) that the appellant did or failed to do certain acts, and (2) that, under the circumstances, the appellant's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *MCM*, Part IV, ¶ 60.b. As drafted, the conduct alleged was a willful and malicious pattern of harassment, which the specification identified as "repeatedly telling

[2] U.S. CONST. amend I.

[SSgt TZ] via telephonic and electronic means that he was under criminal investigation and was subject to incarceration." The specification also alleges the *result* that the conduct had – *i.e.*, substantial emotional distress.

Prior to receiving the appellant's guilty plea, the military judge told him that the definition of "harassment" was a "[k]nowing and willful course of conduct directed at a specific person which would *cause substantial emotional distress in a reasonable person* or which placed that person in reasonable fear of bodily injury." (emphasis added). Later, during the *Care*[3] inquiry, the military judge expanded on the definition:

> [T]here are a couple of things that are going to be in play. One, it would have been reasonable for [SSgt TZ] to have substantial emotional distress based on your actions and . . . that he actually did experience substantial emotional distress.

He further defined "malicious" as meaning "the intent without justification or excuse to commit a wrongful act. 'Wrongful' means without legal justification or authorization." The appellant acknowledged understanding of these definitions.

As the appellant explained his actions to the military judge, he acknowledged that it was reasonable for someone to be severely emotionally distressed as a result of his conduct. He also acknowledged that he acted with malice as the judge had defined that term and that he had no legal justification or excuse for his conduct. Prior to accepting the appellant's guilty plea, the military judge confirmed with defense counsel and the appellant that the guilty plea likely would waive appellate review of some or most of the bases for the motion to dismiss the specification. Understanding this, the appellant elected to plead guilty and the judge accepted his plea.

Before us, and citing *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003), the appellant argues that because the "reasonable person" standard was not included in the specification, he was not on notice that the act was criminal. Although *Saunders* is procedurally distinguishable because it involves a contested specification and not an unconditional guilty plea, our superior court considered and rejected the argument the appellant makes here.

Saunders was charged with harassment under Article 134 for a series of acts of conduct and thereby "causing [the victim] substantial emotional distress and reasonable fear of bodily injury, such conduct being of a nature to bring discredit upon the armed forces." *Saunders*, 59 M.J. at 5. The specification in *Saunders*, like in the appellant's case, did not allege that a reasonable person would have suffered severe emotional distress. The military judge in *Saunders* nevertheless defined harassment for the members

[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

as conduct "which would cause substantial emotional distress in a reasonable person." Our superior court held that the appellant in *Saunders* was under fair notice that he risked prosecution under Article 134 and that the specification, as drafted, stated an offense.

We therefore conclude, as did our superior court in *Saunders*, that the specification was not defective and did state an offense.

The appellant additionally argues that *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), requires dismissal of the specification. *Fosler*, however, addressed the failure to plead an element of the offense – the so-called "terminal element" under Article 134, UCMJ. Our superior court's decision in *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), is instructive. In *Ballan*, the accused pled guilty to an Article 134 specification that did not allege the "terminal element"; that is, that the conduct was prejudicial to good order and discipline or service discrediting. Despite the terminal element not appearing in the specification, the military judge nonetheless advised the accused of that element and the applicable definitions during the plea colloquy. The accused thereafter acknowledged that his conduct met the definitions, and the military judge accepted his plea. On appeal, the Court of Appeals for the Armed Forces held:

> There was no prejudice to the substantial rights of Appellant [in the military judge's acceptance of his plea]; this case, involving a defective specification and a proper plea inquiry, is distinguishable from a contested case involving a defective specification. In cases like this one, any notice issues or potential for prejudice are cured while there is still ample opportunity either for a change in tactics or for the accused to withdraw from the plea completely . . . . In a contested case, on the other hand, there is no equivalent, timely cure that would necessarily be present . . . .

Ballan, 71 M.J. at 35-36.

Although the appellant seeks to distinguish *Ballan* by arguing that, unlike Ballan, he challenged the sufficiency of the specification, we nonetheless find the *Ballan* rationale persuasive. To preserve his notice argument (and perhaps his other trial-level arguments as well), the appellant could have chosen to litigate fully the specification, or could have entered a conditional guilty plea with the consent of the government. He did neither of these things.

We conclude that the specification was not defective. Assuming *arguendo* that it was, we would nonetheless apply the *Ballan* rationale and hold that in this case, where the appellant was advised before his plea of the elements and definitions of the offense –

elements and definitions which on appeal he concedes describe conduct that may lawfully be proscribed – he suffered no prejudice to his substantial rights.[4]

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 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

LEAH M. CALAHAN
Deputy Clerk of the Court

[4] Although the appellant asks us to "revisit" the holdings in *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), and *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), we are not at liberty to overrule our superior court.

[5] We note a clerical error in the Court-Martial Order (CMO) incorrectly states the appellant's sentence was adjudged on 16 February 2012; therefore, we order promulgation of a corrected CMO.