UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NATHAN J. ARNOLD
United States Air Force

ACM 37697 (rem)

30 March 2012

Sentence adjudged 25 May 2010 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Amy M. Bechtold (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Major Daniel E. Schoeni.

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

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

UPON REMAND

PER CURIAM:

Pursuant to his pleas, the appellant was convicted at a general court-martial by military judge alone of one specification of failure to follow a general lawful order, one specification of dereliction of duty, one specification of willfully damaging government property, three specifications of larceny, and three specifications of unlawfully entering another airman's dorm room in violation of Articles 92, 108, 121, and 134, UCMJ,

10 U.S.C. §§ 892, 908, 921, 934.[*] The adjudged sentence consisted of a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings, confinement for 10 months, and the remainder of the sentence as adjudged.

This Court previously affirmed the findings and sentence. *United States v. Arnold*, ACM 37697 (A.F. Ct. Crim. App. 9 March 2011) (unpub. op.). The Court of Appeals for the Armed Forces (CAAF) subsequently granted review of whether a specification that does not expressly allege the terminal element in a Clause 1 or 2 specification under Article 134, UCMJ, is sufficient to state an offense. *United States v. Arnold*, 70 M.J. 141 (C.A.A.F. 2011) (order granting petition for review). On 21 September 2011, CAAF vacated our initial decision and remanded the appellant's case for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Arnold*, 70 M.J. 356 (C.A.A.F. 2011) (mem.). Having considered the granted issue in light of *Fosler*, and having again reviewed the entire record, we affirm.

Background

The three specifications at issue allege the appellant unlawfully entered the dorm rooms of six airmen at Lackland Air Force Base, Texas over a nearly three-week period. In none of these specifications did the Government allege the terminal element of Article 134, UCMJ.

At trial, the appellant entered a plea of guilty to all charges and specifications in accordance with his pretrial agreement. He did not object to the Article 134, UCMJ, charge and specifications as failing to state an offense. During the providency inquiry, the military judge addressed each specification alleged under Article 134, UCMJ. The military judge properly advised the appellant of the elements of the charged offenses to include Clauses 1 and 2 of Article 134, UCMJ, and defined these terms for the appellant.

The appellant admitted his guilt and affirmatively stated that he understood the elements and definitions of each offense and that, taken together, they correctly described what he did. In describing the unlawful entry allegations, he admitted to going into the various airmen's rooms with the intent of stealing personal items contained therein. He expressly acknowledged in the Stipulation of Fact and in response to the military judge's inquiries that his conduct was to the prejudice of good order and discipline in the armed services as well as service discrediting. The military judge found that the appellant's guilty plea to all the charges and specifications was voluntarily and knowingly made.

[*] Additional specifications of larceny and unlawfully entering an airman's dorm room, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934, were withdrawn and dismissed pursuant to the pretrial agreement.

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)); *see also* R.C.M. 307(c)(3). In *Fosler*, CAAF invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to allege the terminal element of either Clause 1 or 2. *Fosler*, 70 M.J. at 233.

Our superior court recently addressed the failure to allege the terminal element in an Article 134, UCMJ, specification where the appellant was convicted on the basis of his guilty pleas. *United States v. Watson*, No. 11-0523/NA (C.A.A.F. 20 March 2012); *United States v. Ballan*, No. 11-0413/NA (C.A.A.F. 1 March 2012). *Watson* relied on a key passage in the *Ballan* holding:

> while it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

Ballan, slip op. at 3-4. CAAF further stated that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ, for each specification during the plea inquiry "and where the record 'conspicuously reflect[s] that the accused clearly understood the nature of the prohibited conduct'" as a violation of Clause 1 or 2 of Article 134, UCMJ, there is no prejudice to a substantial right. *Watson*, slip op. at 11 (alterations in original) (quoting *Ballan*, slip op. at 17).

In the case before us, the appellant pled guilty and made no motion at trial to dismiss the charge and specification for failure to state an offense. During the guilty plea inquiry, the appellant acknowledged his understanding of all the elements of the alleged crimes, including the terminal elements of Article 134, UCMJ, and he explained to the military judge why his conduct was prejudicial to good order and discipline and service discrediting. After reviewing the providence inquiry, we have no doubt that the appellant understood what he was charged with, why it was prohibited, and that he was in fact guilty; therefore, we find no prejudice.

Conclusion

Having considered the record in light of *Fosler* as directed by our superior court, 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; *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