UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JOHNATHON W. BURLEY
United States Air Force

ACM S31866

24 January 2012

Sentence adjudged 11 June 2010 by SPCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Terry A. O'Brien.

Approved sentence: Bad-conduct discharge, confinement for 45 days, forfeiture of $964.00 pay per month for 45 days, 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; Lieutenant Colonel Linell A. Letendre; Major Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to his pleas, the appellant was convicted at a special court-martial composed of officer and enlisted members of one specification of dereliction of duty, one specification of aggravated sexual assault of a child, one specification of abusive sexual contact with a child, and one specification of committing sodomy with a child, in violation of Articles 92, 120 and 125, UCMJ, 10 U.S.C. §§ 892, 920, 925. Additionally, the appellant pled guilty and was convicted of one specification of wrongfully impeding a criminal investigation, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 45 days,

forfeiture of $964.00 pay per month for 45 days and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

This case was originally submitted to this Court on its merits. However, prior to a decision by this Court, our superior court decided the case of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). In *Fosler*, our superior court set aside 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 expressly allege the terminal element of either Clause 1 or 2. In light of *Fosler,* the appellant asks this Court to set aside the findings of guilty as to the Specification of Charge IV and remand the case for a rehearing on the sentence because it fails to state an offense. We disagree.

In the case sub judice, the appellant was convicted of wrongfully impeding an investigation, in violation of Article 134, UCMJ. Article 134, UCMJ, criminalizes three categories of offenses not covered by other articles of the UCMJ: Clause 1 offenses require proof that the alleged conduct be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital crimes that violate federal law, including law made applicable by the Assimilative Crimes Act, 18 U.S.C. § 13. Because the specification at issue does not reference federal law or the Assimilative Crimes Act, it necessarily involves Clause 1 or 2. The language of the Specification of Charge IV complies with the model specification in effect at the time but does not expressly allege the terminal element that such conduct was either prejudicial to good order and discipline or service discrediting. Because the specification does not expressly allege the terminal element, we will review de novo whether the specification nevertheless implies the element, and thus survives in light of *Fosler*. *Id*. at 230.

Whether a specification states an offense is a question of law that we review de novo. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010) (citations omitted). In *Fosler*, our superior court reiterated that the military is a notice-pleading jurisdiction. *Fosler*, 70 M.J. at 229 (citing *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)). A charge and specification is sufficient if it alleges every element of the offense expressly or by implication. Rule for Courts-Martial (R.C.M.) 307(c)(3); *Sutton*, 68 M.J. at 457. This requires that the charge and specification "'contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Fosler*, 70 M.J. at 229 (brackets in original) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Failure to object to the issue of a specification's legal sufficiency does not constitute a waiver or any such legal sufficiency. R.C.M. 905(e). However, "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French,* 31 M.J. 57, 59 (C.M.A. 1990) (citations omitted). *See also United States v. Bryant,* 30 M.J. 72, 73 (C.M.A. 1990).

The accused in *Fosler* was charged under Article 120, UCMJ, with sexually assaulting a 16-year-old girl. He was found not guilty of the Article 120, UCMJ, charge and convicted of adultery under Article 134, UCMJ. At the end of the Government's case-in-chief, the accused moved to dismiss under R.C.M. 917 and 907, arguing that the adultery charge failed to state an offense. The military judge denied the motions, finding no requirement for the Government to state which clause of the terminal element is alleged or to state either of the terminal elements in the specification. The judge then instructed the members that they could convict the accused if they found his conduct to be prejudicial to good order and discipline or to be service discrediting. The members found the accused guilty of adultery; the Navy-Marine Corps Court of Appeals affirmed the findings and sentence. *United States v. Fosler*, 69 M.J. 669, 678 (N.M. Ct. Crim. App. 2010), *rev'd*, 70 M.J. at 233. On appeal, our superior court held that the terminal element was not necessarily implied in an Article 134, UCMJ, adultery specification and dismissed the charge and specification for failure to state an offense. *Fosler*, 70 M.J. at 233.

We find the appellant's case distinguishable from *Fosler*. As previously stated, we recognize that the Government did not expressly allege the terminal element in the Specification of Charge IV. In such cases, the question is whether "using the appropriate interpretative tools, can the . . . charging language be interpreted to contain the terminal element such that an Article 134 conviction can be sustained?" *Fosler*, 70 M.J. at 229. When considering how *Fosler* implicates the assessment of whether certain charged language alleges the terminal element by necessary implication, it is significant that *Fosler* involved a contested trial and an Article 134, UCMJ, specification that was challenged prior to findings, pursuant to R.C.M. 917. *Id*. at 230. In contrast, the appellant here pled guilty and did not challenge at trial the validity of the Article 134, UCMJ, specification. This distinction is critical. In *Fosler*, the majority opinion repeatedly references the case's procedural posture when discussing the more rigorous standard it used in evaluating whether the charged language alleges the terminal element by necessary implication in that context. Specifically, the majority stated that "[case law] does not foreclose the possibility that an element could be implied. . . . However, in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Fosler*, 70 M.J. at 230. As noted above, this is consistent with other cases holding that, although failure to state an offense is not waived by a failure to raise the issue at trial, those specifications challenged immediately at trial will be scrutinized more critically than those raised for the first time on appeal. *United States v. Watkins,* 21 M.J. 208, 209 (C.M.A. 1986) ("A flawed specification first challenged after trial, however, is viewed with greater tolerance than one which was attacked before findings and sentence.").

In this context, we must evaluate whether the terminal element was necessarily implied by the language of the specification. We find that it was. The specification

alleges that the appellant "did . . . wrongfully endeavor to impede an investigation into alleged criminal misconduct on the part of the [appellant] by instructing Airman [CMD] not to tell investigators the [appellant] had sex with that girl." On its face, the allegation makes clear that the appellant asked Airman CMD to withhold information from criminal investigators, and thus what conduct the appellant must defend against.

Furthermore, on its face, this specification contains language "the ordinary understanding of which could be interpreted to mean or necessarily include the concepts of prejudice to 'good order and discipline' or 'conduct of a nature to bring discredit upon the armed forces.'" *Fosler*, 70 M.J. at 229. By its very nature, camaraderie, esprit de corps, and unit cohesion will be adversely impacted when one Airman asks another Airman to help him impede a criminal investigation. Consequently, good order and discipline within a military organization is directly impacted by such conduct. Similarly, the language of this specification necessarily implies that the conduct is of a nature to bring discredit upon the armed forces, as asking a fellow Airman to withhold information concerning the aggravated sexual assault of a child clearly has a tendency to bring the Air Force into disrepute or to lower it in public esteem. Therefore, the charge and specification sufficiently alleged every element of the Article 134, UCMJ, offense, expressly or by necessary implication, and fairly informed the appellant of the charge against which he must defend.

Whereas the appellant in *Fosler* challenged the adultery specification as not stating an offense at trial, the appellant in the instant case did not. He had ample opportunity to raise an objection before and during trial to argue he was not on fair notice about the criminal allegations he was facing, to include whether Clause 1 or 2 was being alleged, or to request that the Government further define or delineate the charges against him. Moreover, the appellant acknowledged his understanding of the elements of this offense in response to the military judge's instructions, which defined both good order and discipline and service discrediting conduct, during the providence inquiry. In fact, the appellant stated "I know that it was wrong for me to do that, that it was prejudicial to good order and discipline because I'm a security forces member and I know better than to interfere with an investigation." Under the facts and circumstances of this case, we find that the charge and specification of wrongfully impeding a criminal investigation sufficiently stated an offense. The language fairly informed the appellant of the charge against him and enabled him to prepare a defense. We thus conclude that the appellant's conviction for wrongfully impeding an investigation under Article 134, UCMJ survives our superior court's decision in *Fosler*.

Conclusion

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

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court