UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DANIEL W. DREWS
United States Air Force

ACM 37727 (rem)

13 February 2012

Sentence adjudged 23 June 2010 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Michael E. Savage (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 48 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

HARNEY, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant consistent with his pleas of one specification of aggravated sexual assault of a child, one specification of sodomy with a child under 16 years of age, one specification of adultery, one specification of wrongfully possessing visual images of a minor engaging in sexually explicit conduct, one specification of transmitting lewd images, and one specification of obstruction of justice, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. The military judge sentenced the appellant to a

dishonorable discharge, confinement for 60 months, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to the terms of a pretrial agreement, the convening authority reduced the confinement to 48 months, but otherwise approved the remainder of the sentence as adjudged.

We previously affirmed the findings and sentence. *United States v. Drews*, ACM 37727 (A.F. Ct. Crim. App. 7 June 2011) (unpub. op.), *rev'd*, 70 M.J. 357 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces granted review to determine whether the specifications alleging adultery and obstruction of justice fail to state an offense because they do not allege a terminal element under Article 134, UCMJ.[*] *United States v. Drews*, 70 M.J. 348 (C.A.A.F. 2011) (order granting petition for review). The Court vacated our decision and remanded the case for consideration of the granted issues in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Drews*, 70 M.J. at 357.

Background

The appellant and his wife became acquainted with Mr. and Mrs. W when the appellant was assigned to Tinker Air Force Base, Oklahoma. Mr. and Mrs. W were civilians who lived in the local community. The appellant and his wife had a one-year old baby; Mr. and Mrs. W had a 14-year-old daughter, CW. CW babysat for the appellant and his wife when the two couples socialized. The appellant and CW began engaging in instant message chats, and they eventually started spending time together. Although the appellant knew that CW was only 14 years old, he engaged in sexual intercourse with her on multiple occasions. CW's father learned about the relationship when he found some photographs on CW's computer. The photographs showed the appellant performing oral sex on CW and the appellant in his military uniform with his erect penis exposed. Mr. W contacted Air Force Office of Special Investigations. While under investigation, the appellant contacted CW via text message and instructed her to destroy evidence of his misconduct and to lie to her parents by telling them that they only had sexual intercourse once.

Discussion

Specification 1 of Charge III alleges adultery, in violation of Article 134, UCMJ, but does not explicitly allege the terminal element that the conduct was either prejudicial to good order and discipline or service discrediting. Similarly, Specification 4 of Charge III alleges obstruction of justice but fails to explicitly allege the terminal element that the conduct was either prejudicial to good order and discipline or service discrediting. For

[*] Under Article 134, UCMJ, 10 U.S.C. § 934, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline; (2) of a nature to bring discredit upon the armed forces; or (3) a crime or offense not capital. *Id.*

both specifications, however, the military judge fully defined the terminal element during the guilty plea inquiry. The appellant acknowledged understanding each element and the corresponding definitions, and then explained in his own words how his actions satisfied each element. During the providency inquiry for the adultery specification, the appellant explained that he was friends with CW's parents, that they were not members of the military, and that the two couples had socialized together on multiple occasions. The appellant then admitted how his conduct satisfied the terminal element, as follows:

> On 12 September, and again on 19 September 2009, I wrongfully had sexual intercourse with [CW]. At that time, I was married to [ED]. My actions brought discredit on the armed forces because the [victim's parents] knew that I was married and were friends with my wife [E] and when they found what I had done it lowered their esteem of the military.

The appellant went on to say:

> [The adultery] was prejudicial against good order and discipline because I lived on base and other people were aware that I lived on base. Also, I'm a senior airman, had been in for six years and I do have younger Airmen who do look up to me and I was not setting a good example.

The appellant further explained that his conduct was service discrediting because "the [victim's parents] were aware of my status in the military and it lowered their esteem of it."

During his providency inquiry for the obstruction of justice specification, the appellant again stated that he understood the terminal element and explained his actions, as follows:

> On 9 October 2009, I sent a text message to [CW], stating, "It only happened once, delete all your emails and photos." I sent this text message after I spoke with [CW's father] and he told me that he might turn me in to authorities. I did this for the purpose of destroying evidence that might be used against me. My actions were prejudicial to good order and discipline because they potentially impeded an investigation.

The appellant then had the following colloquy with the military judge:

> MJ: Do you agree that your conduct caused a reasonably direct and obvious injury to good order and discipline?
>
> [The defense counsel briefly conferred with the accused.]

ACC: Yes, I did, sir, because it may have delayed [CW's father] in reporting me.

MJ: Well, how does that affect good order and discipline in the armed forces?

[The defense counsel briefly conferred with the accused.]

ACC: The longer it takes to begin an investigation, the less fresh the evidence is and there's more of a chance for error.

MJ: Well, do you agree that as part of good order and discipline that the military members have an obligation to conduct themselves honestly?

ACC: Yes, sir.

MJ: Were you asking [CW] to lie when you sent her the text, "it only happened once"?

ACC: Yes, sir.

MJ: Do you think your conduct with respect to the email to delete the emails and to lie; [sic] do you think that had an effect on the reputation of the Air Force or the military?

ACC: Yes, sir.

MJ: How so?

ACC: Because she did attempt to carry out my instructions and her parents were aware of my military status.

MJ: Well, do you also think that the public law enforcement authorities, including social services and civilian investigators, would think less of the military if its members were instructing civilians to destroy evidence in a federal investigation?

ACC: Yes, sir.

In *Fosler*, the Court 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 expressly allege the terminal element of either Clause 1 or 2. While recognizing "the possibility that an element could be implied," the

Court stated that "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." *Id*. at 230. The Court implied that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232.

Where an accused does not challenge a defective specification at trial, enters pleas of guilty to it, and acknowledges understanding all the elements after the military judge correctly explains those elements, the specification is sufficient to charge the crime unless it is "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966) (internal citations omitted)). Such is the case here. The appellant made no motion to dismiss either the adultery or obstruction of justice specifications. He entered pleas of guilty to both specifications after which the military judge thoroughly covered the elements of the offenses to include the terminal elements of conduct prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. The appellant acknowledged understanding all the elements and explained to the military judge why he believed his conduct violated those elements.

Applying a liberal construction to the adultery and obstruction of justice specifications under Article 134, UCMJ, we find that they reasonably imply the terminal elements of Clauses 1 and 2. A reasonable construction of the specifications also shows that the appellant was on notice of what he needed to defend against and is protected against double jeopardy. *See Watkins*, 21 M.J. at 210. Therefore, under the posture of this case, we find both specifications sufficient to state offenses under Article 134, UCMJ.

Conclusion

Having considered the record in light of *Fosler*, as directed by our superior court, we again find no error that substantially prejudiced the rights of the appellant. The approved findings and the 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court