UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NATASHA S. JUSTICE
United States Air Force

ACM 37446 (f rev)

13 September 2012

Sentence adjudged 27 March 2009 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Mark L. Allred.

Approved sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Marla J. Gillman; Major Anthony D. Ortiz; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Charles G. Warren; Major John M. Simms; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to her plea, the appellant was convicted of one specification of endangering a child by failing to get medical attention which resulted in severe traumatic

brain injury and cortical blindness, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The adjudged and approved sentence consists of a bad-conduct discharge.

This Court previously affirmed the findings and sentence in an unpublished decision. *United States v. Justice*, ACM 37446 (A.F. Ct. Crim. App. 14 July 2011) (unpub. op.), *rev'd*, 70 M.J. 422 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces (CAAF) granted review of whether an Article 134, UCMJ, Clause 1 or 2 specification that fails to expressly allege either terminal element states an offense. *Justice*, 70 M.J. at 422. On 30 November 2011, the CAAF vacated our 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). *Id.* After reviewing the entire record and our previous decision in light of *Fosler,* we dismiss the charge and specification without prejudice.

Background

On 29 June 2007, the appellant took her six-week-old son, JWJ, to the hospital emergency room because he was having seizures. Upon examination, medical personnel determined that JWJ had severe head trauma. They also discovered that JWJ had broken ribs and a skull fracture. More doctors were called in to administer additional medical testing. After completing the tests, the doctors determined that the injuries were non-accidental inflicted trauma. When a doctor described the nature of JWJ's injuries to the appellant, she said she did not know the cause of JWJ's injuries. During a later interview with a social worker, the appellant asked whether it was shaken baby syndrome.

Prior to taking JWJ to the hospital on Friday 29 June 2007, the appellant noticed him spitting up blood that prior Sunday, he was also spitting up and sleepy on Wednesday, and he had a swollen head on Thursday. She was also overheard by TSgt CPH in the emergency room saying to her husband, "if we'd brought [JWJ] in on Tuesday when he was coughing up blood maybe this wouldn't have happened."

The offense at issue, the Specification of Charge II, alleges that the appellant endangered her child JWJ, who was under 16 years of age, by failing to obtain medical treatment for him, in violation of Article 134, UCMJ, as follows:

> In that SENIOR AIRMAN NATASHA S. JUSTICE . . . at or near Hickam Air Force Base, Hawaii, between on or about 24 June 2007 and on or about 29 June 2007, had a duty for the care of [JWJ], a child under the age of 16 years [sic] and did endanger the physical health of said [JWJ], by failing to obtain medical treatment for said [JWJ], and that such conduct constituted

[1] In accordance with her plea, she was acquitted of maiming the same child, in violation of Article 124, UCMJ, 10 U.S.C. § 924.

> culpable negligence which resulted in grievous bodily harm, to wit: severe traumatic brain injury and cortical blindness.

At trial, the appellant made a motion to dismiss asserting that the Specification of Charge II failed to state an offense or, in the alternative, violated the Ex Post Facto clause of the United States Constitution.[2] Her trial defense counsel argued that child neglect could only be charged under the new Child Endangerment provisions associated with Executive Order 13447. The military judge ruled otherwise. Specifically, he stated:

> As stated in the Manual for Courts-Martial, "[t]hough not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline of the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the court." [*Manual for Courts-Martial, United States*, Part IV, ¶ 60.a. (2008 Ed.)].

After the military judge denied her motion, she entered a plea of not guilty to both of the charges and specifications.

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* Rule for Courts-Martial 307(c)(3).

In *Fosler*, our superior court invalidated a conviction for adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss for failure to state an offense. *Fosler*, 70 M.J. at 233. This is because the charge and specification did not expressly allege at least one of the three clauses that meet the second element of proof under Article 134, UCMJ, commonly known as the "terminal element." *Id*. at 226. In setting aside the conviction, *Fosler* did not foreclose the possibility that a missing element could be implied, to include the terminal element in an Article 134, UCMJ, offense; however, the CAAF held that, in contested cases where the sufficiency of the charge and specification are first challenged at trial, "we [will] review the language of the charge and specification more narrowly than we might at later stages" and "will only adopt interpretations that hew closely to the plain text." *Id.* at 230, 232. Thus, when

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[2] U.S. CONST. art I, § 9, cl. 3.

given the particular circumstances contained in *Fosler*--a contested trial for adultery where the sufficiency of the charge and specification are first challenged at trial--the law will not find that the terminal element of Article 134, UCMJ, is necessarily implied. *Id*. at 230.

Subsequently, the CAAF held that indecent acts with a child specifications did not necessarily imply any of Article 134, UCMJ, terminal elements. The Court stated that "regardless of context, it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication." *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394). The Court went on to instruct:

> Error alone does not, however, warrant dismissal. While the rules state that a charge or specification that fails to state an offense should be dismissed, [Rule for Courts-Martial] 907(b)(1), a charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error.

Id. at 34 (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). While the failure to allege the terminal element of the Specification of Charge II is error, the appellant is only entitled to relief if the error prejudiced her substantial rights. *Id.* at 30. The appellant has the burden of demonstrating prejudice. *Id.* at 34 n.6. However, a guilty plea "is distinguishable from a contested case involving a defective specification." *Id.* at 35. In essence, independent of knowledge of the potential elements, the appellant in a contested case may be at a disadvantage because she "could not know which theory of criminality [s]he needed to defend against." *Id.* at 34 n.7.

In the case before us, the appellant made a motion at trial to dismiss Charge II and its Specification for failure to state an offense, but her claim was not based upon a lack of notice of the terminal element. Therefore, we consider the defective nature of the Specification of Charge II as being raised for the first time on appeal. Based upon the military judge's ruling on the Motion to Dismiss, this Court is convinced that she was well aware of all the elements of the crime of endangering a child under16 years of age, including the terminal elements of Article 134, UCMJ. This record establishes a full awareness by the appellant of both the offense alleged and the elements supporting this offense. The appellant did not request a bill of particulars, nor did she claim surprise or object when the military judge provided instructions prior to counsels' arguments to the members. Given the military judge's ruling denying the Motion to Dismiss, we are confident that the appellant was aware of the terminal elements even though they were not alleged. After reviewing the entire record of trial using a plain error analysis, we believe that the appellant has met her burden of showing material prejudice of a substantial right caused by this defective specification.

Similarly, in *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), our superior court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element but which was not challenged at trial. Applying a plain error analysis, the Court found that the failure to allege the terminal element was plain and obvious error which was forfeited rather than waived. But, whether a remedy was required depended on "whether the defective specification resulted in material prejudice to Appellant's substantial right to notice." *Id*. at 215. Distinguishing notice issues in guilty plea cases and cases in which the defective specification is challenged at trial, the court explained that the prejudice analysis of a defective specification under plain error requires close review of the record: "Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . 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. After a close review of the record, the court found no such notice.

Concluding that "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued," the Court identified several salient weaknesses in the record to highlight where notice was missing: (1) the Government did not even mention the adultery charge in its opening statement let alone the terminal elements of the charge; (2) the Government presented no evidence or witnesses to show how the conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element; (3) the Government made no attempt to link evidence or witnesses to either clause of the terminal element; and (4) the Government made only a passing reference to the adultery charge in closing argument but again failed to mention either terminal element. *Id*. at 216. In sum, the court found nothing that reasonably placed the appellant "on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated." *Id*.

Prior to our superior court's decisions in *Fosler, Ballan* and *Humpries*, we would have easily concluded, as did the military judge, that the Specification of Charge II stated an offense. First, the specification, as written, complied with the current state of the law at the time of the trial. It plainly described the acts that the appellant must defend against insofar as it alleged the time, place and type of prohibited conduct. However when considering the case post-*Fosler*, the specification does not expressly allege any circumstantial impact specifically relating to one or both of the terminal elements. The rulings in the above mentioned cases lead us to the conclusion that only alleging that the conduct resulted in grievous bodily harm to a person not yet 16 years old does not expressly "set forth" that the Government would try to prove at trial that the acts alleged resulted in some discredit to the Air Force or the armed services at large. Surely, one may intuit that the public would generally disapprove of the act alleged here and extend some of that disapproval to the Air Force, insofar as the appellant was affiliated with it.

Intuition, however, does not deliver notification, by necessary implication or otherwise, of what element(s) the appellant must defend against.

When filtered through *Fosler*'s strict construct, as later nuanced in *Humphries*, we are hard-pressed to conclude that, on its face, the specification indicates that the alleged acts can be equated with the concepts of conduct prejudicial to good order and discipline or service discrediting. We are further compelled to disagree that the specification's allegations sufficiently narrowed down the realm of possible terminal elements the appellant could have been expected to defend against; even if the terminal element(s) could be implied, nothing in the specification indicated which one(s) did. Clearly, the conduct described could be either conduct prejudicial or service discrediting, or both. The Government did not call any witness or present any specific evidence to show how the appellant's conduct satisfied either terminal clause of Article 134, UCMJ, nor did they mention the terminal elements during their opening or closing arguments. An inescapable point of *Fosler* is that the appellant had a right to know which theory the Government was specifically alleging in order to build a defense to the charged crime. *Fosler*, 70 M.J. at 230.

C*onclusion*

Having considered the record in light of *Fosler*, as directed by our superior court, we are unable to find that the specification, as written, provided proper notice to the appellant. Therefore, the findings and the sentence are set aside. The charge and specification are

DISMISSED.

OFFICIAL

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