**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant JASON S. MCINTYRE**
**United States Air Force**

**ACM S31782**

**30 November 2012**

Sentence adjudged 17 October 2009 by SPCM convened at Spangdahlem Air Base, Germany. Military Judge: Jennifer L. Cline.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; and Major Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Naomi N. Porterfield; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ROAN, CHERRY, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MARKSTEINER, Judge:

The appellant was tried by a special court-martial consisting of officer and enlisted members. Contrary to his pleas, he was found guilty of six specifications of stealing certain matters from the mail at Kleine Brogel Air Base, Belgium, in violation of Article

134, UCMJ, 10 U.S.C. § 934.[1] The appellant was sentenced to a bad-conduct discharge, confinement for 3 months, forfeiture of $933.00 pay per month for 3 months, and reduction to E-1. The convening authority did not approve the forfeitures, but approved the remainder of the sentence as adjudged. On appeal, the appellant asserts several errors, only one of which we need discuss: Whether this Court should set aside the findings and sentence based on the Government's failure to separately charge and prove, either expressly or by necessary implication, the terminal element of each Article 134, UCMJ, offense.

*Background*

The appellant was stationed at the 71st Munitions Support Squadron (MUNSS), Kleine Brogel Air Base, Belgium. After having been removed from a command post job because he lost his security clearance, he was assigned to work at the installation's post office. While working there, he removed items from incoming mail, including electronics and video games, and took them to his off base home. After receiving a tip, the Office of Special Investigations opened an investigation, which ultimately led to the case currently before us.

*Failure to State an Offense*

"Whether a specification is defective and the remedy for such error are questions of law, which we review de novo." *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012) (citations omitted). The alleged error here is that the six Article 134, UCMJ, specifications fail to allege the terminal element of the offenses.

> [T]he specification[s] at issue here w[ere] legally sufficient at the time the case was referred . . . and tried . . . and is problematic today only because of intervening changes in the law. Under current law, the terminal element of Article 134, UCMJ, like any element of any criminal offense, must be separately charged and proven [a]nd regardless of context, it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication. . . . Where the law was settled at the time of trial and has subsequently changed, we apply the law as it exists today.

*Id*. (internal quotation marks and citations omitted). "Where defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error - which, in most cases, will turn on the question of prejudice." *Id*. at 213 (citations omitted). Therefore, the appellant must demonstrate that "under the totality of the circumstances in this case, the Government's error in failing to

[1] The court-martial order (CMO), dated 4 February 2010, incorrectly lists the single charge as "Charge I." We view this as a minor typographical error, based on the charge sheet and the entire record of trial.

plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [the appellant's] substantial, constitutional right to notice." *Id*. at 215. To assess prejudice, "we look to the record to determine whether notice of the missing element is extant in the trial record, or whether the element is essentially uncontroverted." *Id*. at 215-16 (internal quotation marks and citations omitted). In the case before us, neither the specifications nor the record provides notice of which, if any, terminal element or theory of criminality the Government pursued.

In its opening statement, the Government forecast in considerable detail the evidence that would be offered to prove each of the six specifications. However, there was not so much as a passing reference as to how the appellant's conduct violated Clause 1 or 2 of the terminal element of the charged offense, or to any evidence or proof that would be offered to support such a proposition.

Subsequently, during the Government's case in chief, five witnesses were called, and a video tape was played showing the appellant returning one of the stolen items for a refund (a gift card) at the Post Exchange. Testimony from the witnesses laid the foundation for admission of a collection of prosecution exhibits in well-executed, textbook fashion, including, but not limited to, various allegedly stolen items. Nevertheless, no evidence was offered nor testimony elicited purporting to demonstrate why the appellant's conduct satisfied either or both clauses of the terminal element of Article 134, UCMJ.

During the Government's case in chief, trial counsel asked one witness, Airman G, to describe Master Sergeant B's reaction upon learning his mail may have been stolen. Trial defense counsel objected to relevance, as the statement sought would have occurred outside the charged time frame. The discussion continued:

> ATC: Your Honor, I'm going to lay a foundation for an excited utterance by another victim in this case.
>
> MJ: I'll allow some leeway at this point in time to see where he's going, and then, defense counsel --
>
> DC: I would ask for relevancy of that first. If he would give a proffer for what's relevant, Your Honor.
>
> MJ: Trial counsel?
>
> ATC: It's relevant to *one of the specifications* on the charge sheet.
>
> MJ: Obviously that, but in what way?

ATC: Perhaps we should have a session outside of the members, Your Honor.

(Emphasis added). In an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the discussion continued:

ATC: Airman [G] will testify that she personally observed Master Sergeant [B], one of the addressees of a package he never received; she observed how angry and upset he was that day. And she has experienced observing his anger in the past because he does specific things in gestures and facial expressions and mannerisms when he gets upset. She will testify that he made an excited utterance right after he learned that he also may have been the victim of a mail theft.

MJ: Defense counsel, with that, do you have any objections?

DC: . . . I think that is not relevant to any of the charged things, that he's expressing concern that he is a victim of mail theft. One, he doesn't know he's a victim of mail theft. But whatever expression he makes is not relevant to prove any of the charges.

MJ: Isn't the accused charged with stealing certain matter from Sergeant [B]?

DC: But what they are getting in is victim impact testimony, Your Honor. I mean, him expressing concern that something has been stolen from him is victim impact, it's not --

MJ: Not necessarily. It can also go to the fact that he didn't give anybody permission to take his mail.

. . . .

ATC: Your Honor, the testimony will go to the element that Master Sergeant [B] never received his package, *which is one of the elements of the specification.*

MJ: And then based on what he said too, *it also goes to an inference that he had not given anybody else permission to do that.*

(Emphasis added).

The discussion between the military judge and counsel continued to focus on whether the witness would be permitted to testify about Master Sergeant [B]'s reaction as

an excited utterance, which was being offered to show that he believed his mail had been stolen. The military judge ruled as follows:

> MJ: [to witness] And do you understand that, Airman [G], that you can't get into the specific words he used or who it was that took the package? But you can get into the fact that he told you that a package possibly had been stolen from him too. That's correct. He said, "possibly been stolen," is that right?
>
> WIT: Yes he said that he had learned that [the appellant] had possibly stolen his package --
>
> MJ: "Possibly stolen his package." Okay. So, that can be used, but you can't say who it was or anything about that individual.

Considered in the abstract, one might find that evidence of a senior noncommissioned officer's (NCO) adverse emotional response to the appellant's misconduct, at a small geographically isolated organization like the 71st MUNSS, to constitute evidence extant in the record sufficient to put the appellant on notice that the Government's theory of criminality is based on prejudice to good order and discipline. In sum, such a theory might be stated: An angry or upset senior NCO in an organization like the 71st MUNSS is prejudicial to good order and discipline.

However, when read in the context of *this record* and *this case*, it is clear that the Government, the defense, and the military judge did not consider the dialogue above to relate in any way to either potential terminal element of Article 134, UCMJ. Rather, their articulated rationale supporting the relevance and/or admissibility of any evidence about Master Sergeant B's reaction was related to the wrongfulness of the appellant's possession of property belonging to Master Sergeant B (that Master Sergeant B "never received his package [and that he] . . . had not given anybody else permission to do [so]"). It would be inconsistent to suggest that testimony about Master Sergeant B's reaction provided the appellant notice as to the Government's theory of culpability under the terminal element when the judge and both lawyers all appear to agree that such testimony was relevant to the wrongfulness of the appellant's possession of property belonging to Master Sergeant B – *an entirely different element of the offense* – rather than any service discrediting or prejudicial impact.

The only other reference to a theory addressing how the appellant's offenses could potentially impact good order and discipline occurred during voir dire, when trial counsel engaged in the following exchange with the members:

> TC: Would each of you agree that stealing packages from the military mail system could impact morale?

That's an affirmative response by all members.

TC: In a similar vein, would each of you agree that stealing packages from the military mail system could have a negative impact on good order and discipline?

That's an affirmative response by all members.

Trial counsel repeated this exchange when additional enlisted members were added to the panel.

As in *Humphries*, the military judge's panel instructions correctly listed and defined the terminal element of Article 134, UCMJ, as an element of the charged offenses, but this came after the close of evidence, and "again, did not alert [the appellant] to the Government's theory of guilt." *Humphries*, 71 M.J. at 216 (citation omitted). There were some references in the government's sentencing case to the impact of appellant's conduct on "morale" and "good order and discipline." Also during sentencing, the squadron commander discussed how a single senior NCO's adverse emotional reaction to appellant's offenses could potentially affect the entire squadron. Again, however, like the judge's instructions, these statements occurred after the close of evidence.

Additionally, "while the Government . . . presented evidence during the proceedings from which a reasonable trier of fact could conclude that [the appellant's] conduct satisfied either clause 1 or 2 of the terminal element of Article 134, UCMJ, . . . that answers quite a different question than whether [the appellant] was on notice of the Government's theory of guilt with respect to the terminal element." *Id*. at 216 n.8.

We look to the factors identified by our superior court in *Humphries* to determine whether reference to good order and discipline during voir dire and or the Article 39(a), UCMJ, evidentiary discussion about Master Sergeant B's reaction was sufficient to put the appellant on notice of the Government's theory of criminality. Here, as in *Humphries*, the Government: (1) never mentioned in its opening statement how the appellant's conduct satisfied either clause of the terminal element; (2) did not present any specific evidence or call a single witness to testify as to why the appellant's conduct satisfied either clause; (3) made no attempt to tie any of the evidence or witnesses that it did call to either or both terminal elements; and (4) even during closing arguments, at no point referenced the terminal element. *See id*. at 216, 211.

At the end of the day, this case requires us to discern whether the single voir dire question and the subsequent exchange about Master Sergeant B's reaction upon learning of the appellant's wrongdoing passes *Humphries*' scrutiny. On different facts, the

testimony about Master Sergeant B's reaction might well, in combination with the voir dire question, constitute sufficient evidence extant on the record to do so. However, on these narrow and specific facts – where the judge and both sides agreed that the sole reference that could have been understood to tie appellant's conduct to an impact prejudicial to good order and discipline (senior NCO's reaction) was relevant to the wrongfulness element of a single specification, as opposed to the terminal element of any or all the Article 134, UCMJ specifications – the law we must apply today dictates that the Government's failure to separately charge and prove the terminal element of the Article 134, UCMJ, violations, either expressly or by necessary implication, constitutes error prejudicial to the substantial rights of this appellant.

*Conclusion*

Accordingly, the findings and sentence are set aside.[2] The record is returned to The Judge Advocate General for remand to an appropriate convening authority who may order a rehearing.

OFFICIAL


STEVEN LUCAS
Clerk of the Court

[2] Having reversed on other grounds, it is unnecessary to address the appellant's remaining assignments of error in this case.