

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**J.D. HARTY**

**R.G. KELLY**

**W.M. FREDERICK**

**UNITED STATES**

**v.**

**Benjamin D. TAYLOR  
Gunnery Sergeant (E-7), U.S. Marine Corps**

NMCCA 200600526

Decided 23 May 2007

Sentence adjudged 17 June 2005. Military Judge: T.A. Daly.  
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial  
convened by Commanding General, Marine Corps Base, Camp Pendleton,  
CA.

CAPT RYAN WILSON, JAGC, USN, Appellate Defense Counsel  
LT A.M. SOUDERS, JAGC, USN, Appellate Defense Counsel  
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel  
LT GUILLERMO J. ROJAS, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge sitting as a special court-martial, convicted the appellant, in accordance with his pleas, of attempted service discrediting conduct by attempting to hire, entice, or persuade a child under the age of 14 years to enter San Diego County or to go to another part of San Diego County, for the purpose of committing willful and lewd or lascivious acts to gratify the appellant's lust, passions or desires, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 165 days, reduction to pay grade E-6, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

We have reviewed the record of trial, the appellant's four assignments of error,<sup>1</sup> and the Government's response. We

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<sup>1</sup> I. THE APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF THE CHARGE IS IMPROVIDENT DUE TO THE DEFENSE OF ENTRAPMENT.

conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Background**

The appellant admitted that in the 2002-2003 timeframe he was involved in a sexual relationship with Jennifer, a 41-year-old married prostitute and heroin addict. Early in 2003, the appellant asked Jennifer to set him up with a younger woman with whom he could do things on the weekends, and who did not have her personal problems. Unbeknownst to the appellant, Jennifer was a cooperating witness for the Naval Criminal Investigative Service (NCIS). Jennifer reported to NCIS that the appellant wanted to have sex with a child and, based on this information, NCIS set up a sting operation.

On 7 February 2003, Jennifer made a recorded phone call to the appellant from the NCIS office on board Camp Pendleton, California. She informed the appellant that she found two girls for him, and asked him which one he wanted. Without asking any questions about their ages, the appellant replied that he wanted the younger one. She then told him that she was 12 years old. The appellant said "Oh yeah. Okay." He agreed to meet Jennifer and the 12-year-old girl's older sister the following Monday. Record at 48-49.

On 10 February 2003, the appellant met with Jennifer, who provided more information about "Lisa," a fictitious 12-year-old girl. She informed the appellant that Lisa was coming from Los Angeles County to meet him in the Oceanside area of San Diego County, and also that the girl's mother had committed suicide. She further explained that Lisa's older sister did not want Lisa living with her because she had a new boyfriend.

Later that day, Jennifer called the appellant from the NCIS office on board Camp Pendleton. NCIS Special Agent (SA) Marin Larson, acting in an undercover capacity by pretending to be Lisa's older sister "Marin," also spoke to the appellant. Marin asked the appellant whether he wanted the same relationship with Lisa as he had with Jennifer, including having sex with Lisa. The appellant replied, "Yeah." *Id.* at 53. Marin asked whether the appellant had ever done this before with a child and he replied, "No." *Id.* Marin then asked the appellant how he knew that he was going to want the same relationship. The appellant

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II. THE APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF THE CHARGE IS IMPROVIDENT SINCE THE PREEMPTION DOCTRINE APPLIES.

III. SPECIFICATION 1 OF THE CHARGE FAILS TO STATE AN OFFENSE.

IV. THE APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF THE CHARGE IS IMPROVIDENT DUE TO THE FAILURE OF THE MILITARY JUDGE TO ADDRESS ALL OF THE REQUIRED ELEMENTS.

replied that nothing was for certain and that Lisa may not even like him, although he thought he was a "pretty nice guy." *Id.* at 54. The appellant stated that he wanted to have sex with Lisa as long as Lisa wanted to do it with him. The appellant agreed to have Lisa come live with him and asked Marin about his enrolling Lisa in school. The appellant further agreed to pay Jennifer and Marin \$100.00 each as a finder's fee. They agreed to meet at a restaurant to conclude the deal for Marin's younger "sister." Prosecution Exhibit 1 at 2. Later that evening, the appellant arrived at the restaurant as planned and was arrested by NCIS. The finder's fees were found in envelopes in the appellant's car.

At his court-martial, the appellant admitted that his conduct was service discrediting, in that it would reflect badly on the Marine Corps if civilians knew that a staff noncommissioned officer was contracting with a prostitute and the older sister of a 12-year-old girl to assist him in enticing a 12-year-old girl to move in with him for the ultimate purpose of having sex with her.

#### **Failure to State an Offense**

We will discuss the appellant's assignments of error out of order. In his third assignment of error, the appellant contends that the specification fails to state an offense because the elements are not clearly defined and are inaccurate. Specifically, the appellant claims that "[t]he gravamen of the specification is attempting to kidnap a child as detailed in California Penal Code Section 207(b)." Appellant's Brief of 31 Jul 2006 at 11. We disagree.

In Specification 1 under Charge I, the Government charged the appellant with violating Article 134,<sup>2</sup> UCMJ. The specification alleged that the appellant:

did, at or near Oceanside, California, on or about between 7 February 2003 and 10 February 2003, violate California Penal Code Section 664 in that he attempted to violate California Penal Code Section 207(b) by attempting to hire, entice, or persuade a child under the age of fourteen years to enter San Diego County or to go to another part of San Diego County, for the purpose of committing willful and lewd or lascivious

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<sup>2</sup> Article 134, UCMJ, creates three different types of crimes, commonly referred to as clause 1, 2, and 3 offenses:

Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act . . . .

acts as defined in California Penal Code Section 288 for the purpose of gratifying the lust, passions or desires of the said GySgt Taylor, but failed or was prevented or intercepted in the act's perpetration, punishment for the completion of such act being described under California Penal Code Section 208(b), and under the circumstances the conduct of Gunnery Sergeant Taylor was to the prejudice of good order and discipline, or of a nature to bring discredit upon the armed forces.

Charge Sheet.

The standard for determining whether a specification states an offense is "whether [the] specification alleges 'every element' of [the offense] 'either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy.'" *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)(quoting RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984). Failure to object does not waive the issue of a specification's legal sufficiency. R.C.M. 905(e). If, however, a specification has not been challenged prior to findings and sentence, the sufficiency of the specification may be sustained on appeal if the necessary facts appear in any form, or by fair construction can be found, within the terms of the specification. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)(quoting *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)(citations and quotation marks omitted)). "The question of whether a specification states an offense is a question of law, which this Court reviews *de novo*." *Id.* (citing *Dear*, 40 M.J. at 197; *Mayo*, 12 M.J. at 288.

The elements of a violation of Article 134, UCMJ are:

- (1) That the accused did or failed to do certain acts; and
- (2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces **or** was of a nature to bring discredit upon the armed forces.

MCM, Part IV, ¶ 60b (emphasis added).

In this case, the Government charged the appellant with conduct prejudicial to good order and discipline in the armed forces or service discrediting conduct<sup>3</sup> in that he violated California state law by attempting to hire, entice, or persuade a

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<sup>3</sup> Although the specification alleges, in part, conduct prejudicial to good order and discipline, the parties agreed that the Government was charging and proceeding on a service discrediting theory under Article 134, UCMJ. Record at 20-21.

child under the age of 14 years to enter San Diego County or to go to another part of San Diego County, for the purpose of committing willful and lewd or lascivious acts with the child in order to gratify the lust, passions or desires of the appellant.<sup>4</sup> We find that the specification is legally sufficient to allege service discrediting conduct in violation of clause 2, Article 134, UCMJ.

First, all of the elements of the offense are stated either expressly or by necessary implication. The specification states that the appellant: (1) attempted to hire, entice, or persuade a child under the age of 14 years to enter San Diego County or move within San Diego County; (2) for the purpose of committing lewd and lascivious acts with the child; (3) in order to gratify the lust, passions or desires of the appellant; and, (4) that such conduct was of a nature to bring discredit upon the armed forces.

Second, the specification provides the appellant with notice of the offense charged through: (1) the Article of the Code violated; (2) the time frame of the offense; (3) the location of the offense; and, (4) the conduct alleged to have been committed by the appellant. In fact, the civilian defense counsel admitted to the military judge that the defense was on notice of what the appellant's offense was and that it was charged as an Article 134, clause 2, UCMJ, offense, and that the elements for the underlying crime would come from the California Penal Code statutes. Record at 21-23.

Third, the specification alleges sufficient facts, and the record as a whole provides a sufficient factual basis, for the appellant to use in a claim of double jeopardy if he is later prosecuted for the same offense. Charge Sheet; see *Dear*, 40 M.J. at 197 (holding "the defendant may turn to the entire record of trial in raising double-jeopardy protection")(citing *United States v. Williams*, 21 M.J. 330, 332 (C.M.A. 1986)).

Having satisfied all three prongs of the test enunciated in *Dear*, we conclude that Specification 1 under Charge I states an offense under clause 2 of Article 134, UCMJ. Accordingly, we decline to grant relief.

### **Providence of the Pleas**

In his first, second, and fourth assignments of error, the appellant alleges that his pleas are improvident, because: (1) he was entrapped; (2) the Charge creates a new form of attempt and

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<sup>4</sup> Specifically, § 207(b) of the California Penal Code provides:

Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentation, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

is therefore preempted by Article 80, UCMJ; and, (3) the military judge failed to inquire into all elements of an attempt offense. We disagree.

In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)(quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). In guilty plea cases, the quantum of proof is less than that required at a contested trial. *United States v. Pinero*, 60 M.J. 31, 33 (C.A.A.F. 2004).

To "determin[e] the providence of [an] appellant's pleas, it is uncontroverted that an appellate court must consider the entire record in a case." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). Pleas of guilty should not be set aside on appeal unless there is a "substantial basis in law and fact for questioning the guilty plea." *Jordan*, 57 M.J. at 238 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); *see also* R.C.M. 910(j). The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. R.C.M. 910(j); *see* Art. 59(a), UCMJ.

#### 1. Entrapment

In his first assignment of error, the appellant contends that the military judge erred by not rejecting his guilty plea as improvident because the facts established the defense of entrapment. Appellant's Brief at 8. Specifically, the appellant contends that the criminal design did not originate with him and that he did not have a predisposition to commit the alleged crime.

"Where an accused's responses during the providence inquiry suggest a possible defense to the offense charged, the [military] judge is well advised to clearly and concisely explain the elements of the defense in addition to securing a factual basis to assure that the defense is not available." *Pinero*, 60 M.J. at 34 (quoting *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976)). The military judge must resolve inconsistencies and apparent defenses or the guilty pleas must be rejected. *Id.* (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)); *Jemmings*, 1 M.J. at 418.

"[E]ntrapment has two elements: [G]overnment inducement and an accused with no predisposition to commit the offense." *United States v. Howell*, 36 M.J. 354, 358 (C.M.A. 1993).<sup>5</sup> Inducement is

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<sup>5</sup> R.C.M. 916(g), Discussion provides further guidance: "The fact that persons acting for the Government merely afford opportunities or facilities

more than merely providing the appellant the means or opportunity to commit a crime, or deploying artifice or stratagems. Only "circumstances suggesting overreaching by [the] government agent or any pressuring by him of the appellant to commit these offenses" will suffice. *Id.* at 360.

Following the conclusion of the Government's sentencing case; the military judge *sua sponte* raised the issue of entrapment by asking the appellant's counsel whether she had "investigated" the issue. Record at 167. The appellant's civilian defense counsel affirmatively stated that the defense team had talked to the appellant and they did not believe that the defense was applicable based on their entire investigation and interview of all the witnesses. *Id.* The military judge then asked the appellant whether he understood the nature of the defense, and also asked whether he understood "the concept of being predisposed to do something as opposed to being convinced to do something against [his] will?" *Id.* at 168. The appellant admitted that his misconduct was the result of his conscious and freely made decision.

Following an overnight recess, the trial counsel requested that the military judge give a more detailed reading of the entrapment instruction to the appellant. The military judge stated that after listening to Prosecution 2 and 3 (the audiotapes of the appellant's phone conversations with Jennifer and NCIS of 7 and 10 February 2003),<sup>6</sup> he was "inclined" to grant the request. Record at 172. The appellant's civilian counsel did not object. *Id.* The military judge thereafter instructed the appellant from the Military Judge's Benchbook, as follows:

MJ: All right.

I am going to give you an instruction that I do normally give in regards to entrapment defense, and I want you to tell me whether or not you think this applies to you.

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for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials."

<sup>6</sup> During sentencing, the Government introduced the audiotape recordings of the appellant's conversations with Ms. J. L. on 7 February 2003, and with Jennifer and NCIS SA Larson, acting undercover as the 12-year-old girl's older sister "Marin" on 10 February 2003, as Prosecution Exhibits 2 and 3, respectively. In Prosecution Exhibit 3, the appellant and Marin discussed the appellant's intentions with regard to Lisa at a considerably greater length and detail than reflected in the providence inquiry. Marin said that she understood that the reason he wanted Lisa was to not just be his "daughter." The appellant replied "Yeah, yeah, I'll take care" of Lisa. Marin replied "Well, let's not beat around the bush here, I mean, [Jennifer] says that the relationship that you all have is the kind of relationship that you want with Lisa, you know. As far as everything, having sex and being with her." The appellant replied "Yeah." Prosecution Exhibit 3.

All right?

ACC: Yes, sir.

MJ: Entrapment is a defense when government agents or people cooperating with them cause an innocent person to commit a crime which otherwise would not have occurred. You cannot be convicted of the offense of kidnapping if you were entrapped.

An innocent person is one who is not predisposed or inclined to readily accept the opportunity encouraged by someone else to commit the offense charged. It means that you must have committed the defense [sic] charged only because of inducement, entitlement, or perjuring by representatives of the government.

The offense [sic] of entrapment exists if the original suggestion and initiative to commit the offense originated with the government and not with you, and you were not predisposed or inclined to commit the offense of kidnapping.

In order to find you guilty, I must be convinced beyond a reasonable doubt that you were not entrapped.

Do you understand those definitions?

ACC: Yes, sir.

MJ: Do you believe that the defense of entrapment applies to you in this case?

ACC: No.

MJ: Now that I have given you these further definitions, are you still confident that you were predisposed to commit this offense?

By that, what I mean is, the original plan to find a younger woman was something that you discussed initially with Jennifer []. Correct?

ACC: Yes, sir.

MJ: So it wasn't something that she raised. Would you agree with that?

ACC: Yes, sir.

MJ: Ultimately, the identification of this fictitious Lisa was something that she came up with, but it

was something that she pursued as result of you indicating that you wanted somebody younger than her, and somebody that was willing to go to Las Vegas and things of that nature. Correct?

ACC: Yes, sir.

*Id.* at 173-74.

During the appellant's unsworn statement, the issue of entrapment was raised again. Specifically, the following colloquy between the appellant and his civilian defense counsel (CC) was as follows:

Q. (By CC): Given that you have not done anything like this before, or had any fantasies about anything like what you've pled to, why would you say you gave in to the urges of to [sic] Jennifer and Agent Larson to take control of this 12 year-old [sic]. Do you have any idea?

A. (By the appellant): Well, I don't know. I mean, you know, I think to let her come stay with me, I thought, maybe it would be better than living on the street. She said their mother had committed suicide. Besides that, I mean, I just felt sorry for this person.

Q. Well, but you pled guilty to, in addition to taking her off the street in a positive sense, that if she wanted it you would have had sex with her. Why did you suppose you gave in to that?

A: I - I don't know.

*Id.* at 258-59.

Following the conclusion of the appellant's unsworn statement, the trial counsel asked the military judge to require the appellant to reestablish his intent to have sex with Lisa. The military judge declined, explaining:

But having sat in the room and seen the demeanor of the accused, in addition -- in conjunction with my specific -- well, on two different occasions, specifically, discussing with him the concept and potential defense of entrapment, when I saw his response and I understood "giving in" to mean nothing in the context - to mean nothing more than follow through on what he initially put into action.

Now that being said, if the defense wants to reopen the unsworn statement to clarify something, I can see how somebody just reading the bland record may think that raises entrapment in the sense that he felt that he was

simply giving in and being coerced into something. But based on everything that he's told me in the providence inquiry, and based on his demeanor, I understand what was happening, and I don't believe that there is an issue of entrapment in this case.

. . .

He specifically told me that the initial idea came up with him. He clarified that on the record in his unsworn statement.

I don't think that an issue of entrapment is raised by the statement.

*Id.* at 263-64.

We find that the record, as a whole, objectively supports the appellant's acknowledgement that he was predisposed to attempt to hire, entice, or persuade a 12-year-old child for the purpose of engaging in lewd or lascivious acts in order to gratifying his lust, passions or desires through sexual contact with the child. The NCIS agent and Jennifer who created the persona of 12-year-old "Lisa" did nothing to pressure the appellant, nor did they overreach. Indeed, in view of the appellant's immediate and repeated agreement to acquire Lisa in order to have sex with her, we conclude that there was no inducement by the Government. The appellant was very clear about the type of relationship that he wanted with the child. Although he would not force the child to have sex with him, he wanted to acquire her to have consensual sex with her. Far from being pressured, he was actively engaged in negotiating to acquire the 12-year-old and clearly had given it much thought. Reviewing the evidence as a whole, it is clear that the appellant was acting on his own initiative and in furtherance of his own disposition. We find that he was not entrapped. Therefore, we find there is no substantial basis in law and fact to disturb the appellant's pleas.

## 2. Preemption

In his second assignment of error, the appellant asserts that his guilty plea to Specification 1 of the Charge, under clause 2 of Article 134, UCMJ, is improvident because, the offense creates a new attempt offense that has fewer elements than an attempt under Article 80, UCMJ, and is, therefore, in violation of the preemption doctrine.<sup>7</sup> In support of his argument, the appellant claims that the military judge's providence inquiry and the appellant's answers do not cover each of the elements of an attempt offense under Article 80, UCMJ, to

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<sup>7</sup> We will not apply waiver for failing to raise this issue at trial, because preemption can involve both jurisdiction and whether the specification states an offense. See R.C.M. 905(e)(Lack of jurisdiction or failure to state an offense are not waived by failure to raise the issue at trial.).

wit: (1) "what overt act was done with the intent to commit an offense under the code;" (2) whether the "act was more than mere preparation;" and, (3) whether the "[act] tended to effect the commission of the intended offense." Therefore, the appellant concludes that the attempted disorder charged under Article 134, UCMJ, must contain fewer, or at least different, elements than required by Article 80, UCMJ. Appellant's Brief at 10.<sup>8</sup> We disagree.

The military preemption doctrine prohibits the application of Article 134, UCMJ, to conduct that is otherwise covered by Articles 80 through 132, UCMJ. MCM, Part IV, ¶ 60c(5)(a). Our superior court has described the preemption doctrine as follows:

[P]reemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way.

*United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)(citations omitted). Therefore, the preemption doctrine does not apply, unless two questions are answered in the affirmative:

The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, which, because of their sweep, are commonly described as the general articles.

*United States v. McGuinness*, 35 M.J. 149, 151-52 (C.M.A. 1992)(quoting *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978)). We need not address the first question because we conclude that the offense involved is not composed of fewer than the essential elements of an attempt under Article 80, UCMJ, and therefore is not "a residuum of elements of a specific offense." *Id.*

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<sup>8</sup> We note that the appellant makes the same argument under his fourth assignment of error without regard to the preemption doctrine. There, he argues that the appellant did not admit each of the four elements of an attempt offense and therefore the record lacks a factual basis to support a finding of guilty. Appellant's Brief at 12-14.

The appellant pled guilty to service discrediting conduct by violating § 207(b) of the California Penal Code by attempting to hire, entice, or persuade a child under the age of 14 to move into San Diego County or within San Diego County for the purpose of committing a willful and lewd and lascivious act with the child in order to gratify his own lust, in violation of Article 134, UCMJ, charged under clause 2. We must decide whether this "attempt" is different than an Article 80, UCMJ, attempt.

An attempt under Article 80, UCMJ, has the following essential elements:

- (1) That the accused did a certain overt act;
- (2) That the act was done with the specific intent to commit a certain offense under the code;
- (3) That the act amounted to more than mere preparation; and
- (4) That the act apparently tended to effect the commission of the intended offense.

MCM, Part IV, ¶ 4b.

Here, all parties agreed that the elements of the charged offense would arise from the California Penal Code.<sup>9</sup> Record at 21-23. The military judge advised the appellant that the elements were:

One, that between on or about 7 February 2003 and 10 February 2003, at or near Oceanside, California, you attempted, in violation of the California State Penal Code, Section 664, to kidnap a child in violation of the California Penal Code, Section 207b and 288.

The second element is that you attempted to hire, entice, or persuade a child under the age of 14 years to go to another part of San Diego County.

The third element is that you did this for the purpose of committing willful and lude [sic] and lascivious acts as prohibited in California Penal Code, Section 288, for the purposes of gratifying your lust, passions, or desires.

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<sup>9</sup> The military judge informed the parties that the term "lewd and lascivious" was not defined in California Penal Code § 288, but that the term is defined in the California Jury Instructions, Criminal, at CALJIC Instruction 10.41, entitled, "Lewd Acts with a Child Under 14 Years." Record at 22. The military judge informed both parties that he would define the term "lewd and lascivious" according to that instruction, and neither party objected. *Id.* at 22-23.

And the fourth element is that such conduct was to prejudice of good order and discipline, or of a nature to bring discredit upon the Armed Forces.

Record at 41. The military judge then addressed the concepts of overt acts and preparation, stating:

Preparation must consist of devising or arranging that means or measures necessary for the commission of the attempted offense. *For you to be guilty of Specification 1 of the Charge you must have . . . gone beyond preparatory steps, and you must have engaged in acts that amounted to a substantial step in the direct movement toward the commission of the intended offense.*

*A substantial step is one that is strongly corroborative of your criminal intent, and indicative of your resolve to commit the offense.*

*Id.* at 41-42 (emphasis added).

The appellant admitted that he made arrangements with his contacts to meet at a specific location in Oceanside, California for the purpose of "meeting and picking up the girl." *Id.* at 56. The appellant agreed to pay both of his contacts \$100.00 each as a finder's fee for locating and delivering to him a child under the age of 14 years for the purpose of him having sex with that child. *Id.* at 61-62. The appellant believed that when he went to the appointed place that he would give the finders fee to his contacts and then they would ride with him or he would follow them to where the child was. *Id.* at 62. According to the stipulation of fact, Prosecution Exhibit 1, the appellant arrived at the appointed place where he anticipated receiving the child or being taken to the child and that he had each contact's finder's fee with him in envelopes.

These facts, established during the providence inquiry, cover all of the essential elements of an attempt under Article, 80, UCMJ; and the elements, as described and defined by the military judge, sufficiently cover the essential elements of an attempt although not in the precise language of the MCM. *See* MCM, Part IV, ¶ 4b. Therefore, a new "attempt" offense was not created by eliminating elements required by Article 80, UCMJ, as the appellant suggests.<sup>10</sup> Rather, the attempted disorder was merely alleged under an alternative article of the UCMJ.

It is well-settled that alleging an offense under an alternative article of the UCMJ is not fatal as long as the

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<sup>10</sup> For the same reasons, we decline to grant relief under the appellant's fourth assignment of error, that contains the same argument concerning elements under Article 80, UCMJ, and that the providence inquiry does not cover those elements. The providence inquiry does establish each essential element of an attempt under Article 80, UCMJ.

alleged conduct properly states a criminal offense, and the error did not prejudicially mislead the appellant. R.C.M. 307(d); see *United States v. Costello*, 20 M.J. 659, 660 (N.M.C.M.R. 1985) (holding that error in the designation of the article of the code is not grounds for reversal of a conviction if the error did not prejudicially mislead the accused)(citing R.C.M. 307(d) and *United States v. Olsen*, 22 C.M.R. 250, 254 (C.M.A. 1957)).

We have already determined that Specification 1 under the Charge states an offense, including that the appellant was put on notice of what he was charged with and that he was not misled thereby. We also conclude, therefore, that labeling the offense as a violation of Article 134, UCMJ, rather than a violation of Article 80, UCMJ, did not prejudice the appellant. Pleading an alternative article had no bearing on the maximum authorized punishment or appellant's guilty pleas. See MCM, Part IV, ¶ 4e (maximum punishment for an attempt is the same as the offense attempted with certain limitation not involved here); see also R.C.M. 201(f)(2)(B)(i)(placing jurisdictional punishment limitations on a special court-martial). Under these circumstances, no relief is warranted.

#### **Conclusion**

The findings, and the sentence as approved below, are affirmed.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL  
Clerk of Court