

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARKALLE D. REDD
AVIATION ORDNANCEMAN AIRMAN (E-3), U.S. NAVY**

**NMCCA 201000682
GENERAL COURT-MARTIAL**

Sentence Adjudged: 30 September 2010.

Military Judge: LtCol Peter Rubin, USMC.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, Washington.

Staff Judge Advocate's Recommendation: CDR T.F. DeAlicante,
JAGC, USN.

For Appellant: LCDR Michael R. Torrisi, JAGC, USN.

For Appellee: Capt Samuel C. Moore, USMC.

29 December 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

MAKSYM, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of violating a lawful order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The general court-martial, then composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of rape, aggravated sexual contact, indecent exposure, and adultery in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934. The members sentenced the appellant to five years

confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence and, except for the punitive discharge, ordered it executed.

The appellant assigns six errors: (1) the military judge erred by omitting language from his instructions to the members that alleviated the burden on the Government to prove specific intent for the forcible rape and aggravated sexual contact specifications; (2) the military judge erred by instructing the members that mistake of fact as to consent was a defense to forcible rape and aggravated sexual contact only if the mistake was reasonable under the circumstances; (3) the evidence was factually and legally insufficient to sustain the appellant's convictions for forcible rape and aggravated sexual contact; (4) the specifications for forcible rape and aggravated sexual contact are constitutionally deficient because they omit part of the definition of force; (5) the evidence is factually and legally insufficient to sustain the appellant's conviction for indecent exposure; and (6) the two adultery specifications are constitutionally deficient for failing to allege that the appellant's conduct was either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. After considering the pleadings of the parties, hearing oral argument at the United States Naval Academy, reviewing the entire record of trial, and taking into consideration the recent decision of the Court of Appeals for the Armed Forces (CAAF) in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), we 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

Charges were preferred against the appellant on 1 April 2010. Among the charges was a specification for rape that read as follows:

In that [the appellant], on active duty, did, onboard USS JOHN C. STENNIS (CVN 74), at sea, at or near 4-44-4-A, (Supply Storeroom), on or about 26 January 2010, cause [MMFA¹ MJD], U.S. Navy, to engage in a sexual act, to wit: vaginal intercourse, by using strength

¹ Machinist's Mate Fireman Apprentice.

sufficient that she could not avoid or escape the sexual act.

Charge Sheet, Charge II, Specification 1. Yet another specification alleged aggravated sexual contact:

In that [the appellant], on active duty, did, onboard USS JOHN C. STENNIS (CVN 74), at sea, at or near 4-44-4-A, (Supply Storeroom), on or about 26 January 2010, cause [MMFA MJD], U.S. Navy, to engage in sexual contact, to wit: touching her genitalia with his tongue, by using strength sufficient that she could not avoid or escape the sexual act.

Charge Sheet, Charge II, Specification 2. The appellant was also charged with indecent exposure and two specifications of adultery. Neither of the adultery specifications alleged that his conduct was prejudicial to good order and discipline or of a nature to bring discredit on the armed forces.

At trial, the Government submitted evidence in connection with the rape and aggravated sexual contact specifications in the form of testimony from MMFA MJD, the appellant's victim. She testified that the appellant placed himself on top of her, unbuttoned and unzipped her pants, and proceeded to engage in a sexual act and initiated sexual contact in spite of her repeated protestations. Record at 231-35. The Government also presented evidence in support of the indecent exposure specification through testimony from MMFN² CT, the counter-party in the sexual act that formed the basis for the allegation, and by admitting into evidence one of the appellant's statements to the Naval Criminal Investigative Service (NCIS). Prosecution Exhibit 7; Record at 197, 216-17, 301-38.

At the close of the evidence, just prior to instructing the members on the elements of the charged offenses, the military judge asked, "Do counsel have any objections or requests for additional instructions, aside from the instruction already provided - - or that will be provided?" Record at 44. Trial defense counsel said, "No Sir." *Id.* The military judge subsequently gave the following instruction regarding the elements of rape:

² Machinist's Mate Fireman.

In order to find the accused guilty of [rape], you must be convinced by legal and competent [sic] beyond a reasonable doubt:

One, that on or about 26 January 2010, onboard USS JOHN C. STENNIS, at sea, at or near 4-44-4-A, Supply Storeroom, the accused caused [MMFA MJD] to engage in a sexual act, to wit: vaginal intercourse; and

Two, that the accused did so by using strength against [MMFA MJD] sufficient that she could not avoid or escape the sexual act.

Id. at 507. For the aggravated sexual contact specification, the trial judge instructed the members as follows:

In order to find the accused guilty of [aggravated sexual assault], you must be convinced by legal and competent evidence beyond a reasonable doubt:

One, that on or about 26 January 2010, onboard USS JOHN C. STENNIS, at sea, at or near 4-44-4-A, Supply Storeroom, the accused caused [MMFA MJD] to engage in a sexual contact, to wit: touching her genitalia with his tongue; and

Two, that the accused did so by using strength sufficient that [MMFA MJD] could not avoid or escape the sexual contact.

Id. at 510. The military judge also gave the following mistake-of-fact instruction:

The evidence has also raised the issue of mistake on the part of the accused as to whether [MMFA MJD] consented to the sexual conduct forming the basis of the offense of rape . . . and/or the offense of aggravated sexual contact.

Mistake of fact is a defense as to those offenses. Mistake of fact as to consent means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under the circumstances.

Id. at 511-12.

Discussion

The appellant's first, second, third, and fourth assignments of error all relate directly or tangentially to the question of whether the element of force in the crimes of rape by force and aggravated sexual contact by force as pleaded against the appellant imputes an additional element of specific intent to the crimes. Thus we address that threshold issue before delving into the substance of the appellant's assignments of error. Our analysis will be two-fold, first looking at whether the statutory language relating to "force" incorporates specific intent to the offenses of rape by force and aggravated sexual contact by force and, second, determining whether the appellant's assignments of error relating to that argument warrant relief.

As the appellant correctly points out, the word "intent" is not contained in the statutory definition of "force." Appellant's Brief of 14 Mar 2011. Furthermore, in light of the changes made to Article 120 in the past few years, and the discrete nature of the appellant's assertion that it is the word "force" that imports an additional element of specific intent to these crimes, we cannot rely solely on the old adage that "Rape is . . . said to require only a general criminal intent." *United States v. King*, 28 C.M.R. 31, 34 (C.M.A. 1959). We therefore look to the language of the statute as passed by Congress, the elements of the offenses as delineated in the *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), and the instructions relative to those crimes in the *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 (1 Jan 2010) (*Benchbook*).

The portion of Article 120 that criminalizes rape by force reads as follows: "Any person subject to this chapter who causes another person of any age to engage in a sexual act by using force against that other person . . . is guilty of rape and shall be punished as a court-martial may direct." Art. 120(a), UCMJ. The elements of the offense of rape by force as laid out in the MCM mirror the language of the statute almost exactly: "That the accused caused another person, who is of any age, to engage in a sexual act by using force against that other person." MCM, Part IV, ¶ 45b(1)(a)(i). In the appellant's case, "sexual act" means "contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight" *Id.*, Part IV, ¶ 45a(t)(1).

The portion of Article 120 that criminalizes aggravated sexual contact by force reads as follows: "Any person subject to this chapter who engages in or causes sexual contact with . . . another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct." Art. 120(e), UCMJ. The elements of the offense of aggravated sexual contact by force also mirror the statutory language: "That the accused engaged in sexual contact with another person . . . and [t]hat the accused did so by using force against that other person." MCM, Part IV, ¶ 45b(5)(a)(i-ii). In the appellant's case, "sexual contact" means "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." *Id.*, Part IV, ¶ 45a(t)(2).

As "force" applies to the specifications pleaded against the appellant (i.e., force by using strength), it is defined for both rape and aggravated sexual contact as "action to compel submission of another or to overcome or prevent another's resistance by . . . physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct. *Id.*, Part IV, ¶ 45a(t)(5). Similarly, the Military Judges' Benchbook, provides a definition of force and admonishes judges as follows:

When the sexual act [or sexual contact] is alleged by force, include the following instruction:

"Force" means action to compel submission of another or to overcome or prevent another's resistance by . . . physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act.

Instruction 3-45-3.d.Note 6; Instruction 3-45-4.d.Note 4.

The appellant argues that the language "action to compel submission" or "action to overcome or prevent resistance" connotes specific intent. Appellant's Brief at 11. We disagree. Specific intent "involves a further or ulterior purpose beyond the mere commission of the act." *United States v. Bryant*, 39 C.M.R. 380, 382 (A.B.R. 1968) (citations omitted). We find no such language in the statutory definition of force, the statutes criminalizing rape by force or aggravated sexual

contact by force, the elements of those crimes as set forth in the MCM, or in the Benchbook instructions on rape or aggravated sexual contact. The words on which the appellant relies are merely descriptive and illustrative. There is no "further or ulterior purpose" in the use of force beyond making the victim engage in the conduct that is clearly criminalized by the rest of the statutory language (i.e., some sexual act or sexual contact). In fact, "[t]he language of the statute does not refer to any specific state of mind on the part of the person" committing the sexual assault nor does it "require a particular state of mind as a condition for conviction." *United States v. Lord*, 32 C.M.R. 78, 82-83 (C.M.A. 1962) (citations omitted). Without doubt, there are crimes under Article 120 that contain an element of specific intent. However, with regard to the offenses advanced against the appellant, the term "force" does not add an additional element of specific intent that needs to be proven beyond the other elements of the crimes as delineated in the statutory language or in the elements section of the MCM.

I. The Instructions on Force

For his first assignment of error, the appellant argues that the military judge's failure to give the entire statutory definition of force relieved the Government of its burden to prove specific intent as the *mens rea* required to convict him of rape by force and aggravated sexual contact by force. Appellant's Brief at 8-10. The issue of whether members are properly instructed is a question of law that we review *de novo*. *United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003) (citing *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003)). Trial defense counsel did not object to the military judge's instructions regarding force. "Failure to object to an instruction given or omitted waives the objection absent plain error." *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011) (citing RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.)). "The plain error standard is met when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citation and internal quotation marks omitted).

The record demonstrates that the trial judge gave the members the elements of rape and aggravated sexual contact, but did not give the complete definition of "force." When reading the elements of rape and aggravated sexual contact, the trial judge gave the following as the second element in these specifications:

Two, that the accused did so by using strength against [MMFA MJD] sufficient that she could not avoid or escape the sexual act.

Record at 507 (Charge I, Specification 1).

Two, that the accused did so by using strength sufficient that [MMFA MJD] could not avoid or escape the sexual contact.

Record at 510 (Charge I, Specification 2).

Although this second element includes part of the definition of "force," it omitted the first part of the definition, namely that "'force' means action to compel submission of another or to overcome or prevent another's resistance by" Benchbook, Instruction 3-45-3.d.Note 6. This was constitutional error.

In light of this partial instructional omission, we must ask whether, despite the absence of the entire instruction on force, we are convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. DiPaola*, 67 M.J. 98, 102 (C.A.A.F. 2008) (quoting *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). In other words, "[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* at 102 (citing *McDonald*, 57 M.J. at 20). We answer in the affirmative. The omission amounted merely to a procedural error as opposed to one affecting the entire court-martial "framework." *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008).

Additionally, the omitted language does not incorporate a specific intent element into the statute for force relating to either rape or aggravated sexual contact. As the Government points out in its brief, there are crimes under Article 120 that contain a specific intent element. Government Brief of 13 May 2011 at 11-12. In fact, one of those provisions was in play during this case (i.e., the element of sexual contact), which requires "an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person," and the military judge provided an appropriate instruction on sexual contact in this case. Record at 510. In contrast, rape and aggravated sexual assault do not contain a specific intent element, as discussed above. As such, there is no additional plain error stemming from the trial judge's failure to give the complete "force" instruction.

II. The Instructions on Mistake-of-Fact as to Consent

For his second assignment of error, the appellant alleges that the military judge erred when he instructed the members on mistake-of-fact as to consent. He argues that the trial judge should have advised the members that the mistake-of-fact in the appellant's case simply needed to be reasonable, not reasonable under the circumstances. This argument also hinges on the appellant's contention that the force element infuses the rape and aggravated sexual contact specifications with a specific intent element. Consequently, the appellant argues the mistake-of-fact defense would be available even if the mistake were unreasonable. Appellant's Brief at 13.

We find that the trial judge properly instructed the members on the defense of mistake-of-fact as to consent and that no error was committed. Article 120(r) permits a mistake-of-fact as to consent defense for rape and aggravated sexual contact. The mistake-of-fact as to consent defense is explained as follows:

It is an affirmative defense to a prosecution for Article 120(a), rape [and] Article 120(e), aggravated sexual contact . . . that the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable *under all the circumstances*.

R.C.M. 916(j)(3), Defenses, Ignorance or mistake of fact, Sexual offenses (emphasis added). See also Benchbook, Instruction 3-45-3.d.Note 11.1; Instruction 3-45-4.d.Note 9.1 (both stating, with regard to mistake-of-fact as to consent for rape and aggravated sexual contact, that "[t]he ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances"). Unlike the trial judge's force instruction, which omitted a portion of the definition, the judge's instruction on mistake-of-fact was not deficient in any way. Record at 512. It could only be viewed as defective if we were convinced by the appellant that rape by force and aggravated sexual contact by force contain a specific intent element as to force. As stated above, we do not discern such a specific intent element based upon our reading of the statute and its elements. As such, we find no error on the part of the trial judge and will not grant relief on this issue.

III. Factual and Legal Sufficiency of Forcible Rape and Aggravated Sexual Contact Convictions

The appellant's third assignment of error is that his convictions for rape and aggravated sexual assault are factually and legally insufficient. He argues that the Government did not prove beyond any reasonable doubt that he used the requisite level of force necessary under the statute and did not prove beyond any reasonable doubt that he did not have a reasonable belief that MMFA MJD was consenting to his sexual advances. Appellant's Brief at 15. We disagree. Article 66(c), UCMJ, requires this court conduct a *de novo* review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond any reasonable doubt. *Turner*, 25 M.J. at 325.

We find that a rational trier of fact could have found that the essential elements of rape and aggravated sexual assault were satisfied and we are convinced beyond a reasonable doubt of the appellant's guilt. The appellant's argument that he did not use the level of force required under the statute is based upon his argument that the definition of force implies a specific intent *mens rea* for the crimes of rape by force and aggravated sexual contact by force. Appellant's Brief at 15-16. We have rejected that argument above. Similarly, the appellant's argument pertaining to mistake-of-fact as to consent, also fails.³ The prosecution called the victim as a witness, and she testified that the appellant placed himself on top of her, removed some of her clothing, and engaged in a sexual act and sexual contact with her, all while she was saying "no" and

³ The appellant also argues that the convictions are legally or factually insufficient because of faulty instructions by the military judge about mistake-of-fact as to consent. Because we found above that the military judge's instructions on mistake-of-fact as to consent were satisfactory, we will not provide relief for factual insufficiency based upon the appellant's theory that the members misapplied the law due to allegedly defective instructions. See Appellant's Brief at 18.

asking him not to do any of these things. Record at 231-35. We are convinced beyond any reasonable doubt that the appellant did not hold a genuine mistake of fact as to consent because the victim repeatedly insisted that he stop while he was engaging in the sexual act and the sexual contact. As such, we find that the convictions for rape and aggravated sexual contact are legally and factually sufficient.

IV. The Language of the Specifications for Forcible Rape and Aggravated Sexual Contact

For his fourth assignment of error, the appellant argues that the specifications alleging forcible rape and aggravated sexual contact fail to state offenses. The appellant claims that the specifications are faulty because they omit the language of specific intent contained in the statutory definition of force and that because such language is absent he was not on notice of the specific theory of criminality under which he was being prosecuted. Appellant's Brief at 19. We disagree and review this issue independent of any issues relating to the military judge's instructions on force. *Id.* at 22.

Whether a specification states 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). A specification states an offense if it meets the following criteria: (1) it alleges, either expressly or by implication, every element of the offense; (2) it provides the accused notice of the charge; and (3) it protects against double jeopardy. *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994). Failure of a specification to state an offense is a fundamental defect which can be raised at any time. *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). However, the CAAF follows the same rule adopted by most federal circuit courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal. *Watkins*, 21 M.J. at 209 (citing *United States v. Whyte*, 1 M.J. 163 (C.M.A. 1975)); *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)); see also *United States v. Norwood*, No. 201000495, 2011 CCA LEXIS 85, at *4 (N.M.Ct.Crim.App. 5 May 2011).

We find that under the analysis set forth in *Dear*, the rape and aggravated sexual contact specifications properly state offenses. First, as the quoted language from the specifications in the "Background" section above demonstrates, the specifications tracked the model specification language of the

MCM and mirrored the elements of the two offenses as spelled out in the statute. MCM, Part IV, ¶¶ 45b(1)(a)(I) and 45(a)(t)(1). Second, both specifications notified the appellant of the time, place, victim, and means by which the offenses were committed. Third, if the appellant had been found not guilty, the specificity of the pleadings would have protected the appellant from being tried again for those same offenses at those times against those victims, thereby providing a bar against retrial for these same crimes. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). The appellant argues that he was unaware of which of the three separate and distinct theories of criminal liability under the omitted language of the definition of force he was being prosecuted under. Appellant's Brief at 21. We do not agree with the appellant's reading of the definition of force that would add additional theories of liability to the element of force and therefore find that the Government properly alleged that portion of the definition of force that was necessary (i.e., using force by strength). The appellant was properly informed of the theory against which he needed to defend. See *Bryant*, 39 C.M.R. at 382-83 (discussing how "specific intent . . . must be alleged, either expressly or by fair, if not clear, implication" if it is an essential element of an offense, while "general intent ordinarily need not be separately alleged") (citations omitted). The rape and aggravated sexual contact specifications each properly state an offense. We refrain from dismissing either of them.

V. Factual and Legal Sufficiency of Indecent Exposure Conviction

The appellant's fifth assignment of error is that his conviction for indecent exposure is factually and legally insufficient because the Government did not prove that the appellant intentionally exposed his penis in a place where the exposure would reasonably be expected to be viewed by others. Appellant's Brief at 22. We disagree.

Applying the standard for reviewing claims of factual and legal sufficiency as described above, we find that the evidence was both legally and factually sufficient to sustain the appellant's conviction for indecent exposure. At trial, the Government was required to prove the following: (1) that the appellant exposed his penis; (2) that the exposure was done in an indecent manner; (3) that the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by people other than the appellant's family or household; and (4) that the exposure was intentional. MCM, Part IV,

¶ 45b(14). The Government met its burden in this case. It is not in dispute that the appellant and MMFN CT engaged in a sexual act outside a barracks building near the pizza parlor on North Island Naval Base, after which the appellant ejaculated near MMFN CT's posterior and onto the ground. In fact, the appellant stated as much in his statement to NCIS, which was admitted into evidence, and in that statement noted that he could see other people smoking nearby while committing these acts. PE 7. The appellant argues, however, that he did not intentionally expose his penis in a place where the exposure would reasonably be viewed by others, because it was dark and the appellant's body was close up against MMFN CT's during the sexual act, therefore it could not reasonably be expected that his penis would be seen by a member of the public. Appellant's Brief at 23. Just because the appellant did not think that those smoking nearby saw him and MMFN CT have sex, and just because it was dark while the act happened, does not mean that the exposure of his penis outside of a barracks with others nearby is not indecent. The exposure still "could reasonably be expected to be viewed" by the others nearby. When viewing the evidence in its totality, we are convinced of the appellant's guilt beyond a reasonable doubt. Therefore, we find that the evidence admitted below is legally and factually sufficient to sustain the appellant's conviction.

VI. Failure of Adultery Specifications to State an Offense

For his final assignment of error, the appellant asserts that the adultery specifications failed to state an offense because they do not allege that the conduct was either prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. Based upon the CAAF's recent decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), we agree that the specifications departed from the statutory language. However, we also find that the appellant suffered no prejudice given trial defense counsel's failure to object to these specifications at trial and the fact that the military judge properly instructed the members on all the elements of the adultery specifications, including the terminal elements of prejudice to good order and discipline and service discrediting.

Where there is no objection to the defect at trial, the standard of review for a specification that fails to conform to the statutory language is stated above. The charge sheet in this case contained two specifications alleging adultery under Article 134, UCMJ. The language of both specifications stated

that the appellant, "a married man, did . . . wrongfully have sexual intercourse with . . . a woman not his wife." Charge Sheet, Charge III, Specifications 1 and 2. Neither specification contained language explicitly alleging that this conduct was prejudicial to good order and discipline or was of a nature to bring discredit on the armed forces. However, when instructing the members on the offense, the military judge listed the following elements: (1) that the appellant had sex with certain women; (2) that he was married to another woman at the time; and (3) "that under the circumstances, the conduct of the accused 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." Record at 519. The military judge went on to explain what the terms "conduct prejudicial to good order and discipline" and "service discrediting conduct" meant. He also instructed the members that "[n]ot every act of adultery constitutes an offense" under the UCMJ, and that the Government needed to prove "beyond a reasonable doubt that the accused's adultery was either directly prejudicial to good order and discipline or service-discrediting." *Id.* Finally, the military judge listed certain circumstances the members should consider in determining whether the Government had met its burden, the same circumstances discussed in the MCM. *Id.* at 520-21; see also MCM, Part IV, ¶ 62c. At no time prior, during, or after these instructions did trial defense counsel object to the two specifications.

Although the specifications themselves neither included nor implied language alleging prejudice to good order and discipline or service discrediting conduct, thus implicating *Fosler*, we have tested this error for prejudice and find none. See *United States v. Hackler*, __ M.J. __ (N.M.Ct.Crim.App. 22 Dec 2011). The CAAF in *Fosler* held that "[i]n a contested case in which Appellant challenged the charge and specification at trial," the inclusion of "Article 134," "wrongfully," and an allegation of adultery did not, in and of themselves, imply the terminal elements. 70 M.J. at 230. Because the CAAF included the words "[i]n a contested case in which the Appellant challenged the charge and specification at trial," it may be argued that the more liberal *Watkins* analysis is the correct lens through which to view the sufficiency of these adultery specifications. *Id.* at 231.

While *Watkins* and *Dear* can be viewed as being in tension, the better read is that *Watkins*, like *Fosler*, informs courts how to determine whether a specification meets the standard outlined in *Dear*. We therefore not only look to legal error, but also to

the prejudicial effect of that error when determining the proper outcome of a case. In this instance, the military judge fully instructed the members on the elements of the adultery specifications, including the prejudice to good order and discipline or service-discrediting language. Record at 519. Combined with the failure of trial defense counsel to object to the specifications at trial, this explanation remedied any prejudice inherent in the deficient specifications. We therefore affirm the findings of guilty as to both specifications under Charge III.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

Judge PAYTON-O'BRIEN concurs.

PERLAK, Judge (concurring in part and dissenting in part):

I respectfully part company from the analysis of the majority as to both of the adultery specifications and respectfully dissent from the majority's conclusion as to the second adultery specification. I otherwise concur in the majority opinion as to findings and, upon reassessment, the sentence.

Specification 1 under Charge III, alleging adultery under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, does not explicitly state the terminal element. However, consistent with the reasoning in my concurrence in *United States v. Hackler*, __ M.J. __ (N.M.Ct.Crim.App. 22 Dec 2011), I find that this specification does, by necessary implication, give all requisite notice that the conduct to be defended is, on its face, prejudicial to good order and discipline. The specification, in my view, complies with the requirements of RULE FOR COURTS-MARTIAL 307(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), by stating that the adultery occurred, *inter alia*, "onboard USS JOHN C. STENNIS (CVN 74), at sea" Charge Sheet. The adultery, standing alone, may or may not be a crime in the civilian community, but its specific occurrence involving the crew of a nuclear-powered aircraft carrier while under way carries by necessary implication notice of prejudice to good order and discipline. I would affirm the guilty finding to this specification upon a determination that there is no error on the face of the specification. I would not proceed to any greater analysis of resultant prejudice.

Specification 2 under Charge III, again alleging adultery, neither explicitly nor by necessary implication states the terminal element. While its occurrence "on board Naval Base, Coronado" may be indicative of a challenge to good order and discipline, "at or near Building 783" is not, on its face, specific as to the nexus of that location and a facially apparent affront to good order and discipline. With this error in the specification, I disagree with the majority's view that an analysis under *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *Hackler* results in a holding of no prejudice and an affirmed guilty finding.

We do not know with clarity the extent to which the Court of Appeals for the Armed Forces' holding in *Fosler* relied on the not guilty plea itself, the greater specificity with which the specification was contested, or some combination of the plea and its challenges. Here, we have an appellant who was presumed innocent of the facially erroneous specification (post-*Fosler*) before him. He pled not guilty to this specification, both in writing (Appellate Exhibit XXIV) and verbally, through counsel, on the record (Record at 53). Other than this general denial of culpability, there was no other challenge.

In my view, a circumstance where an appellant fails to challenge a specification, pleads guilty, and, advised of the then-missing element and pertinent definitions, follows through with his plea, must be distinguished from an appellant who maintains his innocence. The pregnant question is how far that distinction goes. Absent amplifying guidance from the Court of Appeals for the Armed Forces on the scope, limitations and effect of a not guilty plea, standing alone, I would set Specification 2 under Charge III aside for failure to state an offense, for want of the terminal element. The situation present in this case is a not guilty plea to an erroneous specification, joined by the military judge unwittingly curing the errors apparent in the specification by supplying the missing element through his instructions and definitions to the members. This cure, which may give us confidence in affirming a guilty plea, raises questions in a not guilty plea case which must be resolved in the appellant's favor.

I would set aside the finding of guilty to Specification 2 under Charge III, affirm the remaining guilty findings, and reassess the sentence. I readily conclude that removal of an adultery specification would not dramatically change the sentencing landscape in this case and join the majority in

affirming the approved sentence. *See United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citing *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

For the Court

R.H. TROIDL
Clerk of Court