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

Before
C.L. REISMEIER, J.K. CARBERRY, G.G. GERDING
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRANDON W. BARRETT
INTERIOR COMMUNICATIONS ELECTRICIAN SECOND CLASS (E-5)
U.S. NAVY

NMCCA 201000330
GENERAL COURT-MARTIAL

Sentence Adjudged: 4 December 2009.
Military Judge: CDR Kevin O'Neil, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA.
Staff Judge Advocate's Recommendation: LCDR M.A. Marshall, JAGC, USN.
For Appellant: LT Ryan Santicola, JAGC, USN.
For Appellee: Capt Samuel Moore, USMC.

29 February 2012

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.

REISMEIER, Chief Judge:

A panel of members sitting as a general court-martial convicted the appellant, contrary to his pleas, of carnal knowledge, sodomy with a child, four specifications of indecent language to a minor, two specifications of receipt of child pornography, one specification of possession of child pornography, one specification of transferring obscene material

to a child, and two specifications of persuading a child to engage in sexual conduct, in violation of Article 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The members sentenced the appellant to 36 months confinement, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, but suspended confinement in excess of 30 months.

The case was originally submitted to the court without assignment of error. We specified a question of whether the appellant's waiver of appellate review was induced by the Government, and ordered a *DuBay*[1] hearing. Following the hearing, and with the concurrence of the Government, we concluded that the waiver of review was improperly induced. We therefore set aside the supplemental convening order dated 25 May 2010, as the case is properly before us for review. The appellant has raised one assignment of error: that Specifications 1, 2 and 3 under the original charge and Specification 1 under Additional Charge III fail to state the offense of indecent language to a child because they do not allege the "terminal element" of the general article.

Failure to State an Offense

Whether a charge and specification state an offense is a question of law we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). In *United States v. Fosler,* 70 M.J. 225 (C.A.A.F. 2011), the United States Court of Appeals for the Armed Forces (CAAF) held that the general article specification alleging adultery failed to state an offense because it did not allege the terminal element. CAAF ruled that the adultery specification, which had been challenged at trial, did not, either expressly or by necessary implication, state a terminal element. *Id.* at 226. In doing so, CAAF required specifications challenged at trial to "hew closely" to statutory language. However, CAAF cited to *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986), noting that the situation in *Fosler* was unlike that in *Watkins*, in which CAAF held that "[a]lthough failure of a specification to state an offense is a fundamental defect which can be raised at any time, we choose to follow the rule of most federal 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 (footnote omitted); *see e.g. United States v. Teh*, 535 F.3d 511, 516 (6th

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Cir. 2008) (an indictment unchallenged before appeal must be construed liberally in favor of sufficiency); *United States v. Cox*, 536 F.3d 723, 726 (7th Cir. 2008) (tardily challenged indictments should be construed liberally in favor of validity) (internal citation omitted); *United States v. Seher*, 562 F.3d 1344, 1356 (11th Cir. 2009) (an indictment challenged post-conviction should be construed in a liberal manner in favor of validity).

We are hampered by a lack of clear guidance as to the scope of *Fosler* and the extent of the continuing viability of *Watkins*. We are likewise left with no guidance as to the extent to which CAAF relied upon the existence of a guilty plea as the decisive factor to consider in determining whether to review a specification strictly or with liberality. *See Fosler*, 70 M.J. at 246 (Baker, J, dissenting). However, given CAAF's reliance on *Watkins* as a contrasting citation in support of its resolution of *Fosler*, we will rely upon both *Watkins* and the cases cited therein in this case.

As we stated in *United States v. Hackler*, ___ M.J. ___, No. 201100323, 2011 CCA LEXIS 371 (N.M.Ct.Crim.App. 22 Dec 2011), "we view allegations of defective specifications through different analytical lenses based on the circumstances of each case. Where the specification was not challenged at trial, we liberally review the specification to determine if a reasonable construction exists that alleges all elements either explicitly or by necessary implication." *Id*. at *6. Failure to object to a specification at trial does not waive the issue, it does however inform our review, such that we construe the specifications with maximum liberality in favor of validity. Here, the appellant failed to challenge the specifications at trial, therefore our review focuses on whether they were "so obviously defective that by no reasonable construction can [they] be said to charge the offense[s] for which conviction was had." *Watkins*, 21 M.J. at 210 (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d. Cir. 1965)).[2]

[2] United States courts have not been accommodating to post-conviction challenges, like the appellant's, absent a showing of substantial prejudice, such as the indictment being "so defective that by no reasonable construction can it be said to charge the offense for which" the appellant was convicted. *United States v. Jenkins-Watts*, 574 F.3d 950, 968 (8th Cir. 2009); *see also United States v. Hart*, 640 F.2d 856, 857-58 (6th Cir. 1981) (absent prejudice, a conviction first challenged post-trial will be affirmed unless the indictment cannot within reason be construed to charge a crime); *United States v. Avery*, 295 F.3d 1158, 1174 (10th Cir. 2002) ("Because of this liberal construction rule, an indictment challenged for the first time post-verdict may be found sufficient, even though that indictment would have been

By construing the specifications liberally, we conclude the appellant was on notice that he must defend against the crime of indecent language. We make this determination while noting that the specifications as charged under Article 134 do not expressly allege all of the elements. However, as we note above, where the appellant raises his challenge to the legal sufficiency of a specification for the first time on appeal, the question is whether the specification cannot be said reasonably to allege the crime for which conviction was returned. Here, the specifications allege that the appellant "communicated indecent language to a minor," referencing Article 134, UCMJ, in the charge. The offense alleged – indecent language – is stated within the specifications. The failure to explicitly reference the entirety of the elements did not call into question what offense was alleged. One would have to strain greatly on this record to conclude anything other than that the appellant was fully informed as to the crime alleged, as he never questioned the charge, specification, or elements at trial.

We recognize that the *Watkins* exception to *Fosler's* mandate to "hew closely" to the language of a statute can be read narrowly, to apply a liberal construction only to guilty pleas. However, we find that interpretation to be unpersuasive, for the same reasons we noted in *United States v. Lonsford*, __ M.J. __, (N.M.Ct.Crim.App. 29 Feb 2012). We interpret the reference in both *Watkins* and *Fosler* to the presence or absence of guilty pleas to focus on the potential for prejudice, and not on the question of whether the specification was erroneous. The legal sufficiency of the Government's charging is not determined by the pleas of an appellant.

As noted, the absence of a guilty plea does bear on the conclusion as to whether there was prejudice. While we consider the appellant's plea of not guilty to be different, in terms of potential prejudice, from a general denial of guilt, we do not consider it dispositive. The appellant never expressed confusion over the specifications. He never requested a bill of particulars; made no motion to dismiss the specification either pretrial or during the trial proceedings; and, lodged no objection to the elements in the military judge's findings instructions. The appellant did not object to what arguably was a major change. *See* RULE FOR COURTS-MARTIAL 603(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). He did not request repreferral, reinvestigation, rereferral, or the statutory delay afforded between referral and trial. *See also* Art. 35, UCMJ.

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found wanting had it been challenged pre-verdict") (internal citation omitted).

We hold that the failure to expressly allege the elements in the specifications in this case does not overcome the deference given to the specifications after a post-conviction challenge. The unchallenged specifications reasonably can be construed to charge the crimes. They put the appellant on notice as evidenced by his lack of objection at trial. Moreover, the evidence at trial fully supported his convictions and the members were properly instructed. Thus, we are satisfied that the appellant enjoyed what has been described as the "clearly established" right of due process to "'notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Fosler*, 70 M.J. at 229 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

Additional Charge I; A Violation of Article 120, UCMJ

Although not alleged as an error, we find that the appellant was convicted of an offense that was not properly referred for trial at his court-martial. We will set aside the findings of guilty as to that offense and dismiss that charge and specification in our decretal paragraph.

Additional Charge I was referred for trial with the original Charge on 14 July 2009. Its lone specification alleged that the appellant, on divers occasions between August 2005 and 16 April 2006, "engage[d] in a sexual act, to wit: sexual intercourse, and penetration of the vulva by his hand or finger, with [L. K.], who had attained the age of 12 years, but had not attained the age of 16 years." The offense alleged aggravated sexual assault of child as a violation of Article 120, UCMJ, an offense which did not come into existence until after 1 October 2007. Apparently recognizing its error, the Government sought to amend the specification on 30 November 2009 by deleting the words "a sexual act" and "and penetration of the vulva by his hand or finger," hoping to transform the specification into one charging carnal knowledge, an offense chargeable under Article 120, UCMJ, for conduct occurring prior to 1 October 2007. There is no mention of this amendment on the record; the military judge instructed the members that the specification under Additional Charge I alleged the offense of carnal knowledge; and, the members convicted the appellant of carnal knowledge.

The elements that were referred to the court do not amount to the offense of carnal knowledge, as they include no reference to the fact that the victim was not the wife of the appellant. The specification, even as modified, did not state the offense

of carnal knowledge; it expressed some variant of an inapplicable offense that did not include carnal knowledge even as a lesser included offense. Simply put, the charge of carnal knowledge was never before the court.

The distinction between the offenses is dispositive. At the time of the conduct, the offense of carnal knowledge was "an act of sexual intercourse with a person who is not" the appellant's spouse and "who has not attained the age of sixteen years." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45c(2).[3] An express reference to the element addressing marital status of the victim is not required when a specification expressly uses the words "carnal knowledge," because those words by definition address the marital status of the victim. *See United States v. Osborne*, 31 M.J. 842, 845 (N.M.C.M.R. 1990); *see also* MCM (2005 ed.), Part IV, ¶¶ 45a and 45b(2) (elements), and 45f(2) (sample specification). Here, the specification at trial not only failed to expressly allege anything regarding marital status, but also omitted the words "carnal knowledge." Inexplicably, what was referred was an offense that did not apply to the appellant's actions at the time they were committed.

The offense of conviction was carnal knowledge, an offense that was neither referred nor included within the offense referred. To affirm the conviction for carnal knowledge would require us not only to accept the addition of an element to create an offense the parties may have intended to address at trial, but to permit conviction of an offense that was never actually referred.[4] Where an offense has not been referred, we have no jurisdiction to affirm a conviction.[5] We therefore set

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[3] This offense was superseded by aggravated sexual assault of a child on 1 October 2007.

[4] We distinguish this from the analysis, *supra*, involving a deficient form of the indecent language charge properly referred. The conviction before us was based on a deficient carnal knowledge charge that was never referred at all. The former may be tested for prejudice; the latter cannot be tested as the error deprives us of jurisdiction.

[5] This case is distinguishable from those in which a constructive referral has been found, where an appellant pleads guilty to a different offense after being advised it is not the offense on the charge sheet, with the concurrence of the CA who referred the charges to the court, and with the benefit of a full discussion on the record. *See United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990) (holding CA entering into a PTA on charges other than those referred the functional equivalent of a referral order); *see generally United States v. Cooper-Tyson*, 37 M.J. 481, 482-83 (C.M.A. 1993) (noting in noncontested cases even major modifications of charges may not create

aside the appellant's conviction for Additional Charge I and the specification thereunder.

Sentence Reassessment

As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 41-42 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Although our action on findings changes the sentencing landscape, the change is not sufficiently dramatic so as to negate our authority to reassess. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). The appellant remains convicted of offenses including child pornography, indecent language, persuading minors to engage in sexual conduct, transferring obscene material to minors, and sodomy with the very same minor involved in the defective Article 120 specification. The evidence of his conduct remains essentially unchanged, as his intercourse with the minor was an integral part of the sexual relationship with the child, and was a proper matter for consideration in aggravation. The maximum punishment, originally calculated as including 168 years of confinement, now stands at 148 years. Given that the members returned a sentence of 36 months and a dishonorable discharge, we conclude that, absent the error, the sentencing authority would have imposed and the CA would have approved the same sentence that was previously adjudged and approved.

Conclusion

The findings of guilt as to Additional Charge I and the specification thereunder are set aside and that charge and specification are dismissed. The remaining findings and the sentence as approved by the CA are affirmed.

Senior Judge CARBERRY and Judge GERDING concur.

For the Court

R.H. TROIDL
Clerk of Court

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jurisdictional problems). Here, in a contested case, there was an unannounced pen-and-ink change to the specification, with the words "carnal knowledge" spoken for the first time during findings instructions.