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

Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JEREMY G. BOYER
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201100548
SPECIAL COURT-MARTIAL

Sentence Adjudged: 23 June 2011.
Military Judge: LtCol Stephen F. Keane, USMC.
Convening Authority: Commanding Officer, Weapons and Field Training Battalion (MCRD), Edson Range, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol S.M. Sullivan, USMC.
For Appellant: Capt Michael D. Berry, USMC.
For Appellee: CDR Kevin L. Flynn, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

22 May 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.

PER CURIAM:

A military judge sitting as a special court-martial, convicted the appellant, contrary to his pleas, of one specification each of disobeying a superior commissioned officer, adultery, and patronizing a prostitute in violation of Articles 90 and 134, Uniform Code of Military Justice, 10 U.S.C.

§§ 890 and 934. The appellant was sentenced to a bad-conduct discharge. The convening authority (CA) approved the sentence.

In his sole assignment of error and for the first time, the appellant alleges that Specifications 1 and 6 of Charge II, adultery and patronizing a prostitute, fail to state an offense because they both fail to allege the terminal element.

Whether a specification states an offense is a matter 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 alleges every element of the offense, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *Crafter,* 64 M.J. at 211; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). When a specification does not expressly allege an element of the intended offense, appellate courts must determine whether the terminal element was necessarily implied. *Fosler*, 70 M.J. at 230. The interpretation of a specification in such a manner as to find an element was alleged by necessary implication is disfavored. *Ballan*, 71 M.J. at 33.

Neither of the two Article 134 offenses of which the appellant was found guilty expressly alleged the terminal element, i.e., that under the circumstances, the appellant's conduct was either prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. Moreover, after examining the plain language of the specification, we are unable to conclude that the specification alleged the terminal element by necessary implication. *See United States v. Nealy*, 71 M.J. 73, No. 11-0615, 2012 CAAF LEXIS 369, at *14-15 (C.A.A.F. 2012). Having found error in the specification, we test for prejudice.

The appellant has the burden of demonstrating prejudice. *Ballan*, 71 M.J. at 34 n.6 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). On this record, the appellant has failed to meet that burden. We can discern nothing from this record that might suggest that the appellant did not know or was confused as to the elements of the offenses and what he had to defend against. We reach this conclusion based on the absence of any of the following: a request for a bill of particulars; any indication that the defense was misled or confused by the pleadings; or, a motion to dismiss for failure to state an offense, prior to the pleadings before this court. We also note that neither the appellant nor his defense counsel objected or

demonstrated surprise when the trial counsel introduced evidence as to the terminal element, or when trial counsel argued that the Government satisfied the terminal element of adultery and solicitation of a prostitute. Record at 168, 269, 270. The absence of an objection to such evidence and argument suggests that the appellant knew that it was relevant, i.e., it went to an element of the offenses.

Although we conclude that the specifications were defective because they failed to allege the elements of the offense, and that this error was plain and obvious, we find no prejudice to the appellant. Art. 59(a), UCMJ.

The findings and the sentence as approved by the CA are affirmed.[1]

PERLAK, Senior Judge (dubitante):

Based on the rationale developed in my separate opinions in *United States v. Hackler*, 70 M.J. 624, 629 (N.M.Ct.Crim.App. 2011) (*en banc*), *rev. denied,* __ M.J. __, No. 12-0283, 2012 CAAF LEXIS 429 (C.A.A.F. Apr. 20, 2012), *United States v. Redd*, No. 201000682, 2011 CCA LEXIS 413, at *28, unpublished op. (N.M.Ct.Crim App. 29 Dec 2011), *rev. granted*, __ M.J. __, 2012 CAAF LEXIS 483 (C.A.A.F. Apr. 19, 2012), and *United States v. Lonsford*, 71 M.J. 501, 504 (N.M.Ct.Crim.App. 2012), *petition for rev. filed* (C.A.A.F. Apr. 19, 2012), I join the opinion of the court with analytical reservations on the treatment of the Article 134, UCMJ, offenses contained therein. Mindful of the Court of Appeals for the Armed Forces' decision in *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), the not guilty pleas entered in this case must receive an analysis consistent with or closer to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

For the Court

R.H. TROIDL
Clerk of Court

[1] We note that the appellant has a general court-martial conviction currently pending appellate review before us, NMCCA No. 201100523. The approved sentence in that case is a dishonorable discharge, eight years confinement, total forfeitures, and reduction to pay grade E-1.