

**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.

**KENNETH D. FARMER
SARGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100575
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 20 July 2011.

Military Judge: Col Daniel J. Daugherty, USMC.

Convening Authority: Commander, Marine Corps Base,
Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol C.M. Greer,
USMC.

For Appellant: CDR Howard A. Liberman, JAGC, USN.

For Appellee: LT Joseph M. Moyer, JAGC, USN.

24 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, pursuant to his pleas, of drunk driving, drunk and disorderly conduct, disposal of property, and carrying a concealed weapon in violation of Articles 111 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 911 and 934. The military judge also convicted the appellant, contrary to his pleas, of simple assault and communicating a threat in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928 and 934. The

approved sentence included one hundred days of confinement, reduction to pay grade E-3, and a bad-conduct discharge.

In his sole assignment of error, the appellant alleges that Specifications 2, 3, and 5 of Charge III fail to state an offense because the specifications do not expressly 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. In this instance, we find that the terminal element in the challenged specifications was not alleged, either expressly or implicitly. Having found error, we now address whether the error materially prejudiced the appellant.

A charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error. *Id.* at 34, 35 n.8; see also *United States v. Cotton*, 535 U.S. 625, 631 (2002). Applying the plain error framework, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and, (3) the error materially prejudiced a substantial right. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

Pursuant to a pretrial agreement, the appellant pled guilty to Specifications 2, (disposal of property) and 5 (carrying a concealed weapon) in violation of Article 134. Prior to accepting his pleas, the military judge explained the elements of each offense, to include the terminal element; he defined the terminal element for the appellant; the appellant acknowledged his understanding of the terminal element and then admitted and explained how his conduct was service discrediting and prejudicial to good order and discipline. Record at 34, 39. Under such circumstances, we find that the providence inquiry for Specifications 2 and 5 of Charge III provided "notice of the

offense of which [the appellant] may be convicted and all elements thereof before his plea [was] accepted and, moreover, protect[ed] him against double jeopardy." *Ballan*, 71 M.J. at 35. Accordingly, the appellant suffered no prejudice from the failure to allege the terminal element in Specifications 2 and 5.

Although the appellant pleaded not guilty to Specification 3 of Charge III, wrongfully communicating to Private First Class S a threat to shoot him, we likewise can discern no prejudice to the appellant from the failure to allege the terminal element. See *United States v. Hunt*, __ M.J. __, No. 201100398, 2012 CCA LEXIS 155, at *4-5 (N.M.Ct.Crim.App. 30 Apr 2012) (*en banc*). We reach this conclusion based on the absence of any of the following relative to Specification 3 of Charge III: a request for a bill of particulars; any indication that the defense was misled or confused by the pleadings; a motion to dismiss for failure to state an offense; or any objection or indication of surprise when trial counsel elicited testimony and made argument regarding the prejudicial impact of the appellant's conduct. Record at 71, 108.

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

Conclusion

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

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. 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 Specification 3 of Charge III. 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 plea entered in to

Specification 3 of Charge III 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