

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

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

**UNITED STATES OF AMERICA**

**v.**

**STEPHEN A. GONZALEZ  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100436  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 28 April 2011.

**Military Judge:** LtCol Stephen Keane, USMC.

**Convening Authority:** Commanding Officer, 5th Battalion,  
11th Marines, 1st Marine Division (REIN), FMF, Camp  
Pendleton, CA.

**Staff Judge Advocate's Recommendation:** Col D.K. Margolin,  
USMC.

**For Appellant:** LtCol Richard Belliss, USMCR.

**For Appellee:** Capt David Roberts, USMC.

**12 April 2012**

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

PAYTON-O'BRIEN, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of kidnapping, adultery, and disorderly conduct, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. After the providence inquiry into the appellant's guilty pleas, the Government elected to go forward on one of the specifications to which the appellant had entered a plea of not guilty. The

appellant was thereafter convicted by the military judge of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant was sentenced to confinement for 90 days, forfeiture of \$950.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.<sup>1</sup>

The appellant asserts the following assignments of error: (1) Specification 1 of Charge IV (kidnapping) fails to state an offense because it fails to allege either explicitly or implicitly the first and second elements;<sup>2</sup> (2) the military judge abused his discretion in accepting the appellant's plea to kidnapping as there is a substantial basis in law and fact for questioning the plea; (3) Specification 2 of Charge IV (adultery) fails to state an offense because it omits the terminal element; (4) the military judge abused his discretion in accepting the appellant's plea to adultery as there is a substantial basis in law and fact for questioning the plea; and (5) the military judge's finding improperly expanded the criminal conduct alleged against the appellant in the sole specification under Charge III (assault consummated by a battery) thereby creating a fatal variance.

After careful consideration of the record of trial and the pleadings submitted by the parties, we agree with the appellant as to the fifth assignment of error, and we will take corrective action in our decretal paragraph. With regard to the remaining four assignments of error, we resolve these assignments adversely to the appellant and conclude that following our corrective action no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **Background**

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<sup>1</sup> To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

<sup>2</sup> The appellant does not challenge on appeal the kidnapping specification for failing to include the word "willful" in the charged specification. After entry of pleas, the military judge *sua sponte* raised the issue with the parties. Record at 17. During a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference with both counsel, in the presence of the appellant, the military judge was informed by counsel that they believed the "willful" element was included by necessary implication. The defense counsel informed the military judge that the defense was put on notice of the element, that it had, in fact, stipulated to the element, and that it had no motion to dismiss. *Id.* at 18.

In May 2010, the appellant was a married man living apart from his wife. The appellant and his wife had physically separated in August 2009, but did not file for divorce until June 2010. On one occasion, in December 2009, the appellant's wife tried to reconcile with him, but the appellant believed the marriage was broken, and thereafter continued the physical separation from his wife. The appellant then became involved in a romantic relationship with HAT, a woman he had known prior to his separation from his wife. The appellant and HAT commenced a sexual relationship in February 2010.

On 17 May 2010, while in a hotel room in Oceanside, CA, the appellant and HAT became involved in an argument about the appellant's sexual advances toward her. During the argument, the appellant and HAT yelled and screamed at each other, and then HAT decided she wanted to leave the hotel room. Her first attempt at leaving was through the only door that leads to the hotel hallway (hereinafter the "hallway door"). The appellant blocked HAT's exit by standing in front of the hallway door, placing his hand over the doorknob, and batting HAT's hand away when she reached for the doorknob. HAT, not to be deterred, went to the balcony door, and tried to open it in order to leave, but she could not figure out how to unlock the door. HAT attempted another exit via the hallway door, but the appellant grabbed her and threw her down on the bed. HAT was using physical efforts against the appellant in her attempts to get out of the room, by punching and slapping at him. After throwing HAT down onto the bed, the appellant sat on top of her, held her down by the arms, placing his knees on either side of her body. Somehow, HAT managed to get free of the appellant and tried again to leave the room again via the hallway door, but the appellant blocked her attempt at exiting. It was very clear to the appellant that HAT wanted to leave the hotel room, but he intentionally detained her in the room. This detention by the appellant lasted for only about two minutes, during which time the appellant admitted that he prevented HAT from leaving the room on four occasions.

Another guest at the hotel overheard the disturbance in the appellant's room and informed the hotel manager. The manager came to the appellant's room to investigate, and it was at the moment when the manager announced his presence at the door, that the appellant finally permitted HAT to leave the hotel room. The local police were also called, and the appellant and HAT were ejected from the hotel.

The appellant was charged with kidnapping as follows:

" . . . did, at or near Oceanside, California, on or about 17 May 2010, wrongfully detained Ms. [HAT] in a hotel room, against her will, such conduct being of a nature to bring discredit upon the armed forces."

#### **Failure to State an Offense - Kidnapping**

The appellant challenges the kidnapping specification for the first time on appeal. Whether a specification states an offense is a question of law that is reviewed 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, so as to give the accused notice and protection against double jeopardy. *Id.* RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). However, we follow 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. *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) (citing *United States v. Whyte*, 1 M.J. 163 (C.M.A. 1975)); see also *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011); *United States v. Lonsford*, No. 201100022, 2012 CCA LEXIS 72, at \*6 n.3 (N.M.Ct.Crim.App. 29 Feb 2012).

The elements of kidnapping are:

- (1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;
- (2) That the accused then held such person against that person's will;
- (3) That the accused did so willfully and wrongfully; and
- (4) 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.

We find that the kidnapping specification properly states an offense. First, as the quoted language from the specification in the "Background" section above demonstrates, but for the word "detain," the specifications tracked the model specification language of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 92(f). However, we do not find the substitution of the word "detain" in lieu of model language "seized, confined, inveigled, decoyed or carried away" to be fatal to the

specification in this case. Since the word "detain" implies a restraint or withholding of the victim's movement, we are not persuaded by the appellant's argument that the substitution of this word equates to a missing element. Second, the specification notified the appellant of the time, place, victim, and means by which the offense was committed. Specifically, contrary to the appellant's argument, the specification does state that the victim was held against her will, which is the second element of the crime. Third, if the appellant had been found not guilty, the specificity of the pleading would have protected the appellant from being tried again for those same offenses at those times against that victim, thereby providing a bar against retrial for this same crime. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007).

### **Failure to State an Offense - Adultery**

Specifications alleging violations of Article 134 must include the terminal element either explicitly or by necessary implication. *Fosler*, 70 M.J. at 229. Key to this analysis is the timing of the challenge as it determines the "analytical lens" we use to determine the sufficiency of the specification. *United States v. Hackler*, 70 M.J. 624, 626 (N.M.Ct.Crim.App. 2011). Although we view specifications unchallenged at trial with a wider lens and maximum liberality, *id.*, we cannot "'necessarily imply' [the terminal element] from nothing beyond allegations of the act or failure to act itself." *United States v. Ballan*, 71 M.J. 28, 2012 CAAF LEXIS 238 at \*14 (C.A.A.F. 2012). Thus, regardless of the "lens" utilized, it is error to omit the terminal element from an Article 134 offense.

However, our analysis does not end there. As articulated in *Ballan*, in the guilty plea context we apply a plain error analysis to allegations of defective specifications first raised on appeal. *Id.* at \*16. This appellant, similar to *Ballan*, pleaded guilty to the offense, the military judge ensured he understood the terminal element, the appellant provided a factual basis to establish that his conduct was of a nature to bring discredit upon the armed forces and prejudicial to good order and discipline,<sup>3</sup> and he stipulated that his conduct was service discrediting. We find that the error in omitting the terminal element, although plain, did not materially prejudice a substantial right of the appellant. *Id.* at \*16-20. We have no doubt that the appellant enjoyed what has been described as the "clearly established" right of due process to "'notice of the

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<sup>3</sup> Record at 40-46.

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)). Consequently, we decline to grant relief.

### **Providence of the Pleas**

The appellant challenges on appeal his guilty pleas to both kidnapping and adultery. He avers that the military judge abused his discretion by accepting the appellant's pleas to these offenses when there was a substantial basis in law and fact for questioning the pleas. We disagree.

We review a military judge's decision to accept or reject an accused's guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A decision to accept a guilty plea will be set aside only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

We find that the providence inquiry and Prosecution Exhibit 1, a stipulation of fact, amply demonstrate that all elements of these two offense were met. We find that the appellant providently entered his guilty pleas to these offenses, understood their meaning and effect, and we find no inconsistencies in his pleas.

#### **A. Kidnapping**

The appellant avers that his acts amounted to a momentary detention of HAT during a domestic altercation, and not to a kidnapping. We disagree. Although the incident between the appellant and HAT lasted at most two minutes, and the appellant acknowledges his action qualify as a confinement,<sup>4</sup> HAT tried to escape the hotel room on four occasions. During each escape attempt, the appellant either blocked HAT's way with his body or physically prevented her from leaving by placing his hand over the door knob or batting her hand away in an effort to keep her from getting out of the room. It was clear from HAT's screaming and physical efforts of punching and slapping at the appellant, that she wanted to and was trying to exit the room, but the appellant continued his holding of her in the room against her will. Additionally, the appellant's actions of detaining HAT in the room were separate and distinct from his assaultive behavior

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<sup>4</sup> Appellant's Brief of 24 Oct 2011 at 13.

when he threw her upon the bed and sat on top of her. The appellant's actions were more than "momentary or incidental." See MCM, Part IV, ¶ 92c(2).

#### B. Adultery

The appellant avers that his statements during the providence inquiry concerning the impact his adulterous behavior had on his military unit are not credible, and thus, the terminal element was not satisfied. We disagree. Although the appellant struggled with the military judge's questions concerning the impact his extra-marital relationship had on the work place environment, persistent questioning by the military judge revealed that the appellant's adulterous behavior caused tension not only in his immediate work center, but in the whole unit as well, when his fellow Marines and co-workers learned of the affair. The appellant stated that a rift developed not only between him and some of his fellow Marines, as they lost respect for him due to his behavior, but amongst his co-workers themselves, as some supported the appellant's adulterous affair, and some clearly did not support his behavior. The appellant further stated that some of his fellow Marines "looked down upon him" for his behavior and as a result, the unit was not as "tight" as it was prior to his behavior coming to light. It was clear from the appellant's uncontroverted answers that his adulterous behavior had "an obvious, and measurable divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a service member." MCM, Part IV, ¶ 62c(2).

We find no matters of record that raise either irregularity or inconsistency in the appellant's pleas and it was not error for the military judge to accept his pleas. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996); see Art. 45(a), UCMJ.

#### **Findings - Variance**

Finally, we agree with the appellant's fifth assignment of error. The appellant was charged only with an assault and battery, to wit, "unlawfully grab HAT on the arms with his hands," an offense to which he pleaded not guilty. Yet, after a trial on the merits, the military judge found him guilty of an assault and battery with additional misconduct for also striking HAT. We will take action in our decretal paragraph. Upon reassessment of the sentence pursuant to the principles of *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006), *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006), and *United*

*States v. Sales*, 22 M.J. 305, 306 (C.M.A. 1986), we find that the error had no effect on the sentence.

### **Conclusion**

The findings are affirmed except for the words "and strike" in the specification under Charge III. The sentence as approved by the convening authority is affirmed.

Senior Judge MAKSYM and Judge WARD concur.

For the Court

R.H. TROIDL  
Clerk of Court