

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

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

UNITED STATES OF AMERICA

v.

**JONATHAN E. LONSFORD
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100022
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 25 September 2010.

Military Judge: CAPT J.K. Waits, JAGC, USN.

Convening Authority: Commanding Officer, Marine Fighter
Attack Squadron 251, Marine Aircraft Group 31, 2d MAW, U.S.
Marine Corps Forces Command, MCAS, Beaufort, SC.

Staff Judge Advocate's Recommendation: Capt G.T. Funk,
USMC.

For Appellant: Capt Michael Berry, USMC.

For Appellee: Maj David Roberts, USMC.

20 December 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 panel of members with enlisted representation, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of one specification of wrongful distribution of a Schedule III controlled substance and two specifications of adultery, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The members sentenced the appellant to five months confinement, reduction to

the pay grade E-1, forfeiture of \$984.00 pay per month for five months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and ordered it executed.¹

Background and Procedural History

Details of the appellant's adultery and drug distribution are available in our earlier *en banc* opinion. See *United States v. Lonsford*, 71 M.J. 501, 501-02 (N.M.Ct.Crim.App. 2012). Article 67, UCMJ, review of the drug distribution conviction is now complete, but the Court of Appeals for the Armed Forces (CAAF) reversed this court on the adultery convictions and the sentence and remanded the record to us for consideration of the legal sufficiency of the adultery specifications in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

After carefully considering the record of trial and the pleadings of the parties, we find that the adultery specifications erroneously failed to state the terminal element, but that the error did not prejudice the appellant's right to notice. The appellant's supplemental assignment of error, submitted following action by CAAF, is without merit. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

Discussion

The adultery specifications here are nearly identical to the one considered in *Humphries*, and our initial holding is consistent with that case: the Government's failure to allege the terminal element was error. Also in step with *Humphries*, the appellant did not object to the specification at trial. Having identified error, we next turn to the question whether the error has materially prejudiced his substantial right to notice under the Fifth and Sixth Amendments. *Humphries*, 71 M.J. at 215.

When we review a defective specification for plain error, the defect alone is insufficient to constitute material prejudice to a substantial right. *Id.* (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009) and *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). There is no material prejudice if we find that, under the totality of the circumstances as apparent from the entire record, the appellant had notice of the

¹ 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).

missing terminal element, or that it was "essentially uncontroverted." *Id.* at 215-16 (citations omitted).

The extensive litigation of the terminal element in this record, occurring precisely because the appellant had notice, makes this case readily distinguishable from *Humphries*. In *Humphries*, no mention was made of the terminal element during any of the Article 39(a), UCMJ, sessions, opening statements, at any point before the military judge provided the parties with his draft instructions, or during closing arguments. *Id.* at 211. Here, reference to and litigation of the terminal element is replete in the record, having been the crux of the appellant's defense of the adultery specifications. Due to the unique procedural posture of this case and history of mistrial, the parties were focused on the terminal element before this re-trial began because it played a central role in the appellant's first court-martial. The appellant carried the same line of argument into these proceedings,² and the litigation of the terminal element never ceased. At trial,³ both parties alluded to the terminal element in their proposed *voir dire*, and the trial defense counsel specifically referred to it during his opening statement.⁴ Both parties questioned witnesses about prejudice to good order and discipline and discredit to the service, and the trial defense counsel cited insufficient proof on either theory when he moved under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) for a finding of not guilty.

The appellant's awareness of and attention to the terminal element during every stage of this court-martial convinces us that, under the totality of the circumstances, he suffered no material prejudice to his substantial right to notice. We readily find notice was extant in the record. The findings as to the adultery specifications and the sentence for drug distribution

² The appellant first raised an issue related to the terminal element more than two months before trial. See Appellate Exhibit III.

³ The pretrial portion of the record is most compelling on the issue of notice, since "there is still ample opportunity . . . for a change in tactics" by the accused. *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012).

⁴ "Now, underneath a certain charge of adultery, there is an element there . . . prejudice to good order and discipline." Record at 312.

and adultery, as approved by the convening authority, are correct in law and fact, and they are affirmed.

For the Court

R.H. TROIDL
Clerk of Court