

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

**Before  
C.L. REISMEIER, J.A. MAKSYM, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BRANDON M. MAGNAN  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000414  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 12 March 2010.

**Military Judge:** CDR David Berger, JAGC, USN.

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

**Staff Judge Advocate's Recommendation:** Col Stephen C.  
Newman, USMC.

**For Appellant:** Capt Bow Bottomly, USMC.

**For Appellee:** Capt Robert Eckert, USMC.

**29 February 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.**

PER CURIAM:

Contrary to his pleas, the appellant was convicted by a general court-martial composed of officer and enlisted members of two specifications of orders violations, one specification of abusive sexual contact, one specification of wrongful sexual contact, one specification of forcible sodomy, three specifications of assault, and one specification of being drunk and disorderly in violation of Articles 92, 120, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920,

925, 928, and 934. The appellant was sentenced to confinement for 3 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and ordered it executed. We affirmed the findings and sentence on 21 July 2011. *United States v. Magnan*, No. 201000414, 2011 CCA LEXIS 131, unpublished op. (N.M.Ct.Crim.App. 21 Jul 2011). The Court of Appeals for the Armed Forces (CAAF) affirmed our judgement as to findings in all respects but one, setting aside that portion of the decision affirming the conviction for being drunk and disorderly in violation of Article 134, UCMJ, and the sentence, and remanded for consideration in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Magnan*, \_\_\_ M.J. \_\_\_, 2012 CAAF LEXIS 9 (C.A.A.F. Jan 5, 2012) (summary disposition). The question before us is whether the specification fails to state an offense because it omits the "terminal element." We once again affirm the finding and the sentence as approved. Arts. 59(a) and 66(c), UCMJ.

We apply the mandate of *Fosler* to ensure the specifications "hew closely" to the elements of an offense when the legal sufficiency of the specification is challenged at trial. 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." 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 for which conviction was had." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d. Cir. 1965).

By construing the specifications liberally, we conclude the appellant was on notice that he must defend against the crime of being drunk and disorderly. We make this determination while noting that the specification as charged under Article 134 does 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 the conviction was returned. Here, the specification alleges that the appellant was "drunk and disorderly" referencing Article 134, UCMJ in the Charge. The offense alleged - drunk and disorderly - is stated within the specification. The failure to explicitly reference the entirety of the elements did not call into question what offense was alleged. On this record, 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 potential for prejudice differs between guilty and not guilty pleas. When analyzing post-trial challenges to the legal sufficiency of specifications, we do not consider the pleas of an appellant to be the dispositive factor in determining prejudice. The appellant never expressed confusion over the specifications. He never requested a bill of particulars, he made no motion to dismiss the specification either pretrial or during the trial proceedings, and he 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 repreferal, reinvestigation, rereferral, or the statutory delay afforded between referral and trial. See also Art. 35, UCMJ.

We hold that the failure to expressly allege the elements in the specification in this case does not overcome the deference given to the specification after a post-conviction challenge. The unchallenged specification reasonably can be construed to charge the crime. The specification put the appellant on notice as evidenced by his lack of objection at trial. Moreover, the evidence at trial fully supported his conviction 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)).

The remaining finding and the sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court