

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

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

UNITED STATES OF AMERICA

v.

**STEPHEN J. MCGUIRE
CAPTAIN (O-3), U.S. MARINE CORPS**

**NMCCA 201000611
GENERAL COURT-MARTIAL**

Sentence Adjudged: 29 June 2010.

Military Judge: LtCol Gregory L. Simmons, USMC.

Convening Authority: Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.

Staff Judge Advocate's Recommendation: Col K.J. Brubaker, USMC; Addendum: Major Brett M. Wilson, USMC.

For Appellant: Mr. Peter J. Van Hartesveldt, Civilian Counsel; LT Jared Hernandez, JAGC, USN; Maj Jeffrey R. Liebenguth, USMC.

For Appellee: LT Philip Reutlinger, JAGC, USN; LT Ian D. MacLean, JAGC, USN.

30 November 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.**

PAYTON-O'BRIEN, Senior Judge:

A general court-martial composed of members convicted the appellant, contrary to his pleas, of two specifications of conduct unbecoming an officer and two specifications of fraternization, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934. The members

sentenced the appellant to confinement for four years and a dismissal. The convening authority approved the sentence as adjudged.¹

Background

On 31 January 2012, we issued an opinion in this case dismissing Specification 2 of Charge II, reassessing the sentence to confinement for three years and a dismissal, and affirming the remaining findings of guilty. *United States v. McGuire*, No. 201000611, 2012 CCA LEXIS 28, unpublished op. (N.M.Ct.Crim.App. 31 Jan 2012). On 10 July 2012, the Court of Appeals for the Armed Forces (C.A.A.F.) reversed our decision as to the fraternization offenses and as to the sentence; affirmed our decision in all other respects; and returned the record of trial to the Judge Advocate General of the Navy for remand to this court for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *United States v. McGuire*, 71 M.J. 357 (C.A.A.F. 2012). Consequently, the appellant's case is again before this court for review and the sole issue before us is whether the appellant suffered substantial prejudice to a material right due to the Government's failure to plead the terminal element for the Article 134 offenses. A summary of the facts of the case is included in our earlier opinion.

Article 134 Terminal Element

The appellant's fraternization offenses are charged under Article 134, UCMJ, and the specifications thereunder fail to allege the terminal element of either conduct that is prejudicial to good order and discipline or service-discrediting. Pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), it was plain error for the Government to omit the terminal elements from these specifications. *Humphries*, 71 M.J. at 212. Nonetheless, in order to receive relief the appellant has the burden to show that, "the Government's error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [the appellant's] substantial, constitutional right to notice." *Humphries*, 71 M.J. at 215 (citations omitted); see also Art. 59(a), UCMJ. In order to assess prejudice this court must, "look to the record to determine whether notice of the missing element is somewhere

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

extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 215-16 (citations omitted).

To begin, we find that the missing element was "essentially uncontroverted." If evidence is "overwhelming" and the missing element is "essentially uncontroverted," then this court need not correct a failure to plead an element of an offense by dismissing the charge. *United States v. Cotton*, 535 U.S. 625, 633 (2002). Defense counsel, in his opening statement, stated, "I know [trial counsel] wants to make this look like an aggressor situation, but it takes two to fraternize. Fraternization is a two-way street, and *you're going to see it in this case.*"² The defense counsel further stated that, "[y]ou'll have to decide whether the camping trip in August of 2009 was fraternization. But that's not what this case is about, obviously."³ These phrases during opening statements demonstrate that the defense's trial strategy was to basically concede the fraternization charge in order to focus on the more serious sexual assault charges. The defense counsel made a similar statement in closing argument, by stating, "Now, we are *only here to contest two charges on that charge sheet.* I said in my opening, I'll say it again: Charge I and the specification thereunder and Charge II, Spec I. That [sic] why we're fighting today. You do what you will on the other charges, members. I'm going to talk about sex during my argument and that's it."⁴

Furthermore, trial defense counsel did not defend against the fraternization charge during the trial. The defense even asked Corporal (Cpl) K, the victim, a series of questions about the fraternization charge, including "And if you fraternized, it takes two to fraternize, doesn't it" and "You were a party to any fraternization that occurred in this case, right"; Cpl K responded affirmatively to those questions.⁵ At the end of the Government's case, the defense specifically declined to raise a RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) motion. The defense did not defend against the fraternization charge and even elicited testimony during cross-examination that there was fraternization between the appellant and Cpl K. In this case, the defense basically conceded the

² Record at 602 (emphasis added).

³ *Id.*

⁴ *Id.* at 602 (emphasis added).

⁵ *Id.* at 694.

fact that there was fraternization as part of their trial strategy. Therefore, we hold that the appellant was not prejudiced because the charge, and therefore the missing element was "essentially uncontroverted" by the defense.

Even if we were to find that the element was not "essentially uncontroverted," the appellant was still not prejudiced because notice of the missing element is "extant" in the trial record. Although the terminal element was never expressly mentioned by either the Government or the defense, both parties' clear and unmistakable knowledge as to the existence of the element is reflected throughout the record. In *Humphries*, the court found that there was no notice, and identified several flaws in the record, including that: the Government (1) did not mention the Article 134 charge in their opening statement; (2) did not present evidence or testimony about how Humphries' conduct satisfied clause 1 or 2 of the terminal element; and (3) did not attempt to tie together evidence or witnesses to the Article 134 charge. 71 M.J. at 216. This case is distinguishable from *Humphries*.

First, the Government addressed the missing element in their opening statement by saying the appellant, through a "series of actions, continuously broke down -- eviscerated the commonly understood barriers between officers and enlisted." ⁶ The Government also stated that the camping trip the appellant went on with two enlisted members was not professional development or mentoring, but rather a social trip.⁷ These statements highlight the negative impact fraternization had within the command. Similarly, the defense counsel made references during opening statement to the fraternization charge, stressing that the appellant was not in Cpl K's direct chain of command and did not evaluate Cpl K.⁸ The defense counsel stated that Cpl K had the phone numbers of four different officers in his phone, but that the appellant's phone number was the only officer out of the four who had never directly supervised Cpl K.⁹ These statements reveal that the defense knew that the Government's theory of criminality was that the fraternization was prejudicial to good order and discipline within the appellant's command. Thus, unlike in

⁶ *Id.* at 593.

⁷ *Id.* at 594.

⁸ *Id.* at 600.

⁹ *Id.* at 601.

Humphries, both the Government and the defense addressed the missing element in opening statements.

The Government also produced witnesses during their case-in-chief that put the appellant on notice of the terminal element, which was different than the Government's actions in *Humphries*. Cpl K testified that the appellant told him to call the appellant by his first name during the camping trip, but he had a hard time not calling an officer "sir."¹⁰ The Government also elicited testimony that after the events at issue in the case, the appellant asked Cpl K a question at work, and Cpl K replied, "I don't f***** know, dude."¹¹ Cpl K testified that he had never spoken in such a manner to an officer before, and that the appellant did not counsel him on this disrespectful language.¹² Most importantly, Cpl K testified that he reported the appellant's actions because, "I mean, if I were to get assigned with a flight or something with that guy, I don't think I could do my job at all and there's no way I could hide it, so I figured that, you know, I needed to do something about it, sir."¹³ Cpl W, also a member of the same squadron, testified in the Government's case-in-chief that the appellant asked him and Cpl K to call him by his first name on the camping trip, and that it took multiple requests throughout the day before he finally could manage to call the appellant by his first name.¹⁴ The obvious point of this testimony was to demonstrate that the fraternization between the appellant and the young Marines was prejudicial to good order and discipline within the squadron.

The testimony from several other witnesses relating to the appellant's relationship with Cpl K gave further notice of the missing element. Gunnery Sergeant M, a member of the squadron, stated that officers and enlisted "absolutely" do not call each other by their first names, "[b]ecause that's not what we do in the Marine Corps."¹⁵ Staff Sergeant P, another member of the appellant's command, stated that Cpl K told him that the appellant was a "good friend of his" when he was reporting the

¹⁰ *Id.* at 632-33.

¹¹ *Id.* at 657.

¹² *Id.* at 657-58.

¹³ *Id.* at 660.

¹⁴ *Id.* at 865-66.

¹⁵ *Id.* at 836.

appellant's action, which shows another enlisted member knew about their relationship.¹⁶ Lastly, other enlisted members of the unit knew about the interactions between the appellant and Cpl K because Cpl W testified that a few other junior Marines knew about the camping trip and were also invited, so the knowledge and impact of an inappropriate officer-enlisted relationship was not limited to the interactions between appellant and Cpl K.¹⁷

More significantly, we also note that during cross-examination of Cpl K, the defense counsel asked questions relating to the negative impact on the command from their relationship. Defense counsel asked questions about whether there was a direct command relationship between the appellant and Cpl K, whether Cpl K called the appellant by his first name during the camping trip, and whether Cpl K had the appellant's phone number in his phone.¹⁸ The military judge also asked questions about how officers within the squadron generally addressed enlisted personnel, in order to see if the appellant's actions were within normal customs.¹⁹

The Government then tied these pieces of evidence together during closing argument by highlighting the inappropriateness of a friendship between a corporal and officer, and of an officer sharing intimate details with enlisted members in a social setting.²⁰ Furthermore, the Government stated that the appellant, completed "[a] series of actions that showed complete disregard, a complete disregard, for the commonly understood boundaries between officers and enlisted Marines."²¹ Lastly, on the fraternization charge, the Government stated, "[t]he most important part about that misconduct on the charge sheet, again, is it shows the deliberate evisceration of the boundaries between officers and enlisted Marines."²² The Government did not specifically mention the terminal element in closing, but still brought together the evidence presented at trial to demonstrate

¹⁶ *Id.* at 821.

¹⁷ *Id.* at 890.

¹⁸ *Id.* at 673-89.

¹⁹ *Id.* at 744.

²⁰ *Id.* at 1058, 1060.

²¹ *Id.* at 1059.

²² *Id.* at 1060.

that the appellant's conduct was prejudicial to good order and discipline. Thus, in contrast to *Humphries*, the fraternization was not a "throw-away" charge, because the Government put on this evidence and then linked it to the missing terminal element.

While individually these facts might not be enough to put the appellant on notice, the totality of the circumstances shows that the notice of the missing element was extant throughout the record of trial. The appellant received notice from the Government that his conduct was prejudicial to good order and discipline both in opening statement and through witness testimony. Additionally, trial defense counsel mentioned this issue in opening and elicited testimony that shows the defense knew this was the theory relied upon by the Government. We hold that the appellant was not prejudiced by the missing element because the omission was sufficiently cured by the Government during the course of trial, and the defense's actions during trial even demonstrated they were aware of the missing element.²³ Further, we hold that the omitted element was essentially uncontroverted through the defense's tactical decision to concede the appellant's guilt to the Article 134 offense.

Conclusion

On consideration of the entire record and in light of *Humphries*, we hold that the findings as to the two specifications under Charge III are correct in law and fact. Accordingly, the findings of guilty of Charge II and the specifications thereunder are affirmed. Having reassessed the sentence based upon these offenses and the previously affirmed

finding of guilty of conduct unbecoming an officer, we affirm a sentence to confinement for three years and a dismissal.

²³ In our prior opinion, we discussed the concept of the missing terminal element being alleged by necessary implication. We need not decide this case based upon that line of reasoning because notice of the missing element is extant in the trial record and the missing element was essentially uncontroverted.

Judge WARD and Judge McFARLANE concur.

For the Court

R.H. TROIDL
Clerk of Court