

**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.

**THOMAS J. SCHUMACHER
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000153
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 August 2009.

Military Judge: Col John Ewers, USMC.

Convening Authority: Commanding General, 1st Marine
Division (REIN), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Maj M.J. Kent, USMC.

For Appellant: Maj Sean B. Patton, USMC.

For Appellee: CDR John J. Flynn, JAGC, USN; LT Brian
Burgtorf JAGC, USN.

29 February 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 general court-martial convicted the appellant, contrary to his pleas, of failing to obey a lawful order, simple assault, and communicating a threat in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and 934. The appellant was sentenced to one year confinement, reduction in pay grade to E-3, forfeitures of \$930.00 pay per

month for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. In an unpublished decision, we affirmed the findings and sentence as approved. *United States v. Schumacher*, No. 201000153, 2010 CCA LEXIS 389, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2010). The Court of Appeals for the Armed Forces (CAAF) affirmed our decision as to the appellant's convictions for failing to obey a noncommissioned officer and the two specifications of simple assault. CAAF set aside that portion of our judgment affirming the conviction for communicating a threat 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. Shumacher*, ___ M.J. ___, 2011 CAAF LEXIS 1052 (C.A.A.F. Dec. 7, 2011) (summary disposition). The question before us is whether the specification fails to state an offense because it omits the "terminal elements." 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 communicating a threat. 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 conviction was returned. Here, the specification alleges that the appellant "wrongfully communicated to Lance Corporal [JF] and Sergeant [BL] a threat to wrongfully injure Lance Corporal [JF] and Sergeant [BL]," referencing Article 134, UCMJ in the Charge. The offense alleged - communicating a threat - 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, however, 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 pre-trial 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