

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

**Before  
B.L. PAYTON-O'BRIEN, R.Q. WARD, K.K. THOMPSON  
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:** LT Jared Hernandez, JAGC, USN.

**For Appellee:** LT Ian MacLean, JAGC, USN.

**28 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.**

PER CURIAM:

A panel with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of failing to obey a lawful order, two specifications of simple assault, and one specification of 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 members sentenced the appellant to confinement for one year, forfeiture of \$930.00 pay per month for three months,

reduction to pay grade E-3, and a bad-conduct discharge. The convening authority approved the sentence.

The appellant's case is again before this court for review. The procedural history of this case is set forth in our prior decision of 29 February 2012. *United States v. Schumacher*, No. 201000153, unpublished op. (N.M.Ct.Crim.App. 29 Feb 2012) (*per curiam*). Upon review, the Court of Appeals for the Armed Forces (CAAF) returned the record of trial to the Judge Advocate General of the Navy for remand to this court for further consideration of the Article 134 offense in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *United States v. Schumacher*, 71 M.J. 348 (C.A.A.F. 2012). For the reasons stated below, we affirm the findings and sentence as approved by the convening authority. Arts. 59(a) and 66(c), UCMJ.

The appellant's communication of a threat was charged as an Article 134, UCMJ, offense, and the specification thereunder failed to allege the terminal element of prejudice to good order and discipline or service-discrediting conduct. Pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), it was error to omit the terminal elements from the specification. Although there was error, the appellant has the burden of demonstrating 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 and footnote omitted); see also Art. 59(a), UCMJ. To assess prejudice, "we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries* at 215-16 (quoting *United States v. Cotton*, 535 U.S. 625, 633 (2002)).

The record in this case reveals that the appellant had notice of the Government's theory of criminality, which specifically was that appellant's conduct was prejudicial to good order and discipline. In *Humphries*, the CAAF 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*.

A review of the record indicates that the appellant received notice of the terminal element during both the pretrial

proceedings and the actual trial. Before empanelling the members, the military judge informed the parties during an Article 39(a) session that he was going to instruct the members as to the elements of the charged offenses.<sup>1</sup> After *voir dire* and empanelling the members, the military judge provided the parties a written copy of the instructions.<sup>2</sup> These instructions included the Article 134 offense, and the terminal element.<sup>3</sup> Although offered an opportunity, the defense did not object.<sup>4</sup> The military judge then verbally instructed the members that the terminal element was part of the Article 134 offense,<sup>5</sup> and the terminal element was defined.

During its opening statement, the trial counsel referenced the terminal element, indicating that the Government would introduce the testimony of two witnesses, Sergeant (Sgt) L and Lance Corporal (LCpl) F, to prove the element.<sup>6</sup> The Government then produced those witnesses during their case-in-chief to testify on the terminal element, which was different than the Government's actions in *Humphries*. During its case-in-chief, the Government asked LCpl F and Sgt L questions pertaining to the terminal element.<sup>7</sup> During such questioning, the defense counsel registered numerous objections to the evidence, citing

---

<sup>1</sup> Record at 55-56.

<sup>2</sup> *Id.* at 107.

<sup>3</sup> *Id.* at 110-11.

<sup>4</sup> *Id.* at 107.

<sup>5</sup> *Id.* at 110-11. The entirety of the military judge's instruction was: "In the specification of Additional Charge II, the accused is alleged to have committed the offense of communicating a threat in violation of Article 134, UCMJ. In order to find the accused guilty of that offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements: First, that on or about the 6th of November 2008 on board Camp Pendleton, California, the accused communicated certain language, that is, "I killed many people in my f\*\*\*\*\* life, and I'm not afraid to kill an MP" or words to that effect; second, that the communication was made known to Lance Corporal [F] and Sergeant [L]; third, that the language used by the accused under the circumstances amount to a threat, that is, a clear present determination or intent to injure the person of Lance Corporal [F] and Sergeant [L] presently or in the future; fourth, that the communication was wrongful; and fifth 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."

<sup>6</sup> *Id.* at 123.

<sup>7</sup> *Id.* at 296, 360.

relevance, speculation, and lack of foundation. In response to the objections, the trial counsel responded that the questions were asked in order to establish the terminal element.

At the close of evidence, the military judge instructed the members again on the terminal element.<sup>8</sup> Further, the trial counsel explicitly addressed it during closing argument.<sup>9</sup> Thus, in contrast to *Humphries*, the communication of a threat was not a "throw-away" charge because the Government attempted through its examination of witnesses to introduce evidence of the 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 examination. Trial defense counsel objected, in an effort to keep the evidence from being admitted.

We hold that the appellant was not prejudiced by the missing element because the omission was sufficiently cured by the Government during the court of trial, and the defense's actions during trial even further demonstrated they were aware of the missing element. The appellant has failed to meet his burden in this case. The record plainly demonstrates that the appellant was aware that the Government was proceeding on the theory that his communication of a threat satisfied the terminal element by demonstrating prejudice to good order and discipline.

We affirm the guilty findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL  
Clerk of Court

---

<sup>8</sup> *Id.* at 502; Appellate Exhibit XXIII at 5.

<sup>9</sup> Record at 512.