**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class JOSHUA S. FLEURY**
**United States Air Force**

**ACM S31944**

**15 December 2011**

Sentence adjudged 11 April 2011 by SPCM convened at Eielson Air Force Base, Alaska. Military Judge: Michael Coco (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of $978.00 pay per month for 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Thomas Franzinger.

Appellate Counsel for the United States: Colonel Don M. Christensen.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges



PER CURIAM:

The appellant was tried by a special court-martial composed of a military judge sitting alone. In accordance with his pleas he was found guilty of one specification of failure to obey a lawful general order, four specifications of signing and making false official statements, one specification each of use and distribution of marijuana, three specifications of larceny, and one specification of selling stolen property in violation of Articles 92, 107, 112a, 121, and 134, UCMJ, 10 U.S.C. §§ 892, 907, 912a, 921, 934. The adjudged sentence consists of a bad-conduct discharge, confinement for 10 months, forfeiture of $978.00 pay per month for 10 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged except, in accordance with the terms of the pretrial agreement, he approved confinement for 5 months.

The appellant assigned no specific errors on appeal and we find no error that materially prejudices a substantial right of the appellant; however, in light of the decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), we will address whether the allegation of selling stolen property under Article 134, UCMJ, fails to state an offense because the charge and specification did not expressly allege that the appellant's conduct was to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces.

*Background*

The Specification of Charge V alleged the appellant's wrongful selling of stolen property, in violation of Article 134, UCMJ, as follows:

> In that AIRMAN FIRST CLASS JOSHUA S. FLEURY, United States Air Force, 354th Maintenance Squadron, did . . . wrongfully sell a snowboard, the property of Airmen First Class [JHH], which property, as he, the said AIRMAN FIRST CLASS JOSHUA S. FLEURY, then knew, had been stolen.

At trial, the appellant did not make any motions and did not object to the charge and specification as failing to state an offense. He proceeded to enter a plea of guilty to all charges and specifications, in accordance with his pretrial agreement. Charge V and its Specification do not expressly allege any of the three clauses of the second element of proof under Article 134, UCMJ; however, during the providency inquiry the military judge advised the appellant of the elements of the offense of selling stolen property, including Clauses 1 and 2 of Article 134, UCMJ, as follows: "That, under the circumstances, your conduct 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." The military judge also defined these terms for the appellant.

The appellant admitted his guilt and affirmatively stated he understood the elements and definitions of this offense and that, taken together, they correctly described what he did. In describing his offense, the appellant admitted to stealing a snowboard belonging to Airman First Class JHH and then later selling the stolen snowboard to a local sporting goods store. He expressly acknowledged the service discrediting nature of his crime in the stipulation of fact and in telling the military judge, "I am also aware that employees of Play It Again Sports know that I am a member of United States Air Force and that I sold them stolen property, and that my actions have directly injured the Air Force's reputation." After conducting a review of the pretrial agreement, the military judge found that the appellant's plea of guilty to all the charges was "made voluntarily and with full knowledge of its meaning and effect," and he entered findings of guilty to all the charges and specifications.

*Discussion*

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id*. at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial 307(c)(3).

In *Fosler*, our superior court invalidated a conviction for adultery under Article 134, UCMJ, for failure to state an offense because the charge and specification did not allege either expressly or by necessary implication at least one of the three clauses of the second element of proof under Article 134, UCMJ, commonly known as the terminal element. *Fosler*, 70 M.J. at 226. In setting aside the conviction, *Fosler* specifically did not foreclose the possibility that a missing element could be implied, even the terminal element in an Article 134, UCMJ, offense; however, the Court held that in contested cases where the sufficiency of the charge and specification are first challenged at trial, "we [will] review the language of the charge and specification more narrowly than we might at later stages" and "will only adopt interpretations that hew closely to the plain text." *Id*. at 230, 232. In applying this construction to the allegation of adultery, when the charge and specification were challenged at trial and the case was contested, the *Fosler* court refused to find that the terminal element of Article 134, UCMJ, was necessarily implied. *Id*. at 230.

In guilty plea cases, however, where there is no objection at trial to the sufficiency of the charge and specification, our superior court has followed "the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). Moreover, "[i]n addition to viewing post-trial challenges with maximum liberality, we view standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense." *Id*. at 210 (citations omitted).

In the case before us, unlike in *Fosler*, the appellant made no motion at trial to dismiss the charge and specification for failure to state an offense, and he pled guilty. During the guilty plea inquiry, the appellant acknowledged his understanding of all the elements of the offense of selling stolen property, including the terminal element of Article 134, UCMJ, and he explained to the military judge in his own words why his conduct was service discrediting. In this context, consistent with the reasoning in both *Fosler* and *Watkins*, we apply a liberal construction in examining the text of the charge and specification, here alleging that the appellant wrongfully sold a stolen snowboard that belonged to a fellow airman. We find that, under these circumstances, the terminal element was necessarily implied. The appellant was on notice of what he needed to

defend against, and he was protected against double jeopardy. We do not find that the charge and specification under Article 134, UCMJ, is defective for failing to state an offense.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[*] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL


STEVEN LUCAS
Clerk of the Court

[*] The Court notes that in the first paragraph of the Court-Martial Order (CMO), dated 1 June 2011, the appellant's last name is incorrectly spelled as "FLUERY," whereas the correct spelling is "FLEURY." The Court orders the promulgation of a corrected CMO.