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

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**UNITED STATES**

**v.**

**Captain GERALD D. HARVEY**
**United States Air Force**

**ACM 37864**

**04 September 2012**

Sentence adjudged 20 October 2010 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Scott E. Harding (sitting alone).

Approved sentence: Dismissal and a reprimand.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Major Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

GREGORY, WEISS, and HARNEY
Appellate Military Judges



PER CURIAM:

On 20 October 2010, the appellant was tried by a general court-martial composed of a military judge sitting alone at Scott Air Force Base, Illinois.[1] Consistent with his pleas, the military judge convicted the appellant of one specification of dereliction of duty and one specification of violation of a lawful general order, in violation of Article 92, UCMJ, 10 U.S.C. § 892; one specification of conduct unbecoming an officer

[1] This case was referred to a general court-martial by the convening authority, Commander, Third Air Force, United States Air Forces Europe, pursuant to Special Order (SO) A-1, dated 13 October 2009. The charges were served on the appellant on 13 October 2009. The same convening authority re-referred the case to a general court-martial on 12 January 2010, pursuant to SO A-7, when the case was transferred to Scott Air Force Base, Illinois, for trial. The appellant was notified on 20 January 2010.

and gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933; and one specification of adultery, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a dismissal and a reprimand. The convening authority approved the sentence as adjudged.[2]

Before this Court, the appellant asserts that (1) the adultery specification fails to state an offense because it does not to allege the terminal element of Article 134, UCMJ; and (2) that his sentence, which included a dismissal, was inappropriately severe.[3] We disagree and, finding no error that prejudiced a substantial right of the appellant, affirm.

*Background*

The appellant was a chaplain for the United States Air Force Chaplain Corps assigned to the 39th Air Base Wing, Incirlik Air Base, Turkey. As a chaplain, the appellant provided marriage counseling and thus had a duty to maintain a professional relationship with the individuals he counseled. Beginning in May 2009, Technical Sergeant BD and his wife, RD, sought marriage counseling from the appellant. In June 2009, while counseling BD and RD, the appellant engaged in a sexual relationship with RD. The appellant and RD had sexual intercourse twice: once on base in his office and once off base in his car. The appellant also sent sexually explicit e-mails to RD through a Government e-mail system. BD found the sexually explicit e-mails the appellant sent to RD and turned them over to investigators. During the time he committed the offenses, the appellant was married. BD and RD were also married with two children but divorced after BD discovered the sexually explicit e-mails and sexual relationship between the appellant and RD.

*Adultery Specification and Terminal Element*

The appellant was charged with adultery for wrongfully having sexual intercourse with AD, a married woman not his wife. The specification did not allege the terminal element of Article 134, UCMJ.[4] At trial, the appellant pled guilty to this charge and specification. During the *Care*[5] inquiry, the military judge described and defined each elements of adultery, including the terminal element, in violation of Article 134, UCMJ. The military judge then asked the appellant if he understood that his guilty plea admitted that these elements "accurately describe[d]" his conduct, to which the appellant answered in the affirmative. The military judge further verified that "the elements and definitions

[2] Consistent with the terms of the pretrial agreement (PTA), the convening authority agreed not to (1) approve any confinement if a dismissal was adjudged or (2) charge the appellant with any other UCMJ offenses arising out of the investigation that led to the court-martial. The PTA contained no additional restrictions on punishment.
[3] The appellant raises this assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[4] Under Article 134, UCMJ, 10 U.S.C. § 934, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime or offense not capital.
[5] *United States v. Care*, 40 M.J. 247 (C.M.A. 1969).

taken together correctly describe[d]" the appellant's conduct, and asked the appellant to describe the conduct in his own words, which he did. The appellant admitted that his conduct was prejudicial to good order and discipline and was service discrediting "[b]ecause they affected a military member, and they may have affected his state of mind while he was on the job" and "[b]ecause if members of the public found out that I had an affair with someone that came to me for counseling, it would make the Air Force look bad." The military judge accepted the appellant's guilty plea as provident and found him guilty of adultery.

Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification that fails to allege the terminal element under Article 134, UCMJ, fails to state an offense. *United States v. Fosler*, 70 M.J. 225, 233-34 (C.A.A.F. 2011) (dismissing as defective a specification that failed to allege the terminal element). *Fosler*, however, did not involve a guilty plea. The Court later addressed the failure to allege the terminal element in an Article 134, UCMJ, specification where the appellant was convicted on the basis of a guilty plea in *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). *See also United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012); *United States v. Watson*, 71 M.J. 54 (C.A.A.F. 2012). In *Ballan*, the Court held that:

> [W]hile it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

*Ballan*, 71 M.J. at 30. The *Ballan* court further held that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ for each specification during the plea inquiry and where the record "conspicuously reflect[s] that the accused 'clearly understood the nature of the prohibited conduct'" as a violation of Clause 1 or 2 of Article 134, UCMJ, there is no prejudice to a substantial right. *Id*. at 35 (brackets in original) (quoting *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008) (citations omitted)).

Here, the appellant entered into a pretrial agreement and pled guilty to the charge and specification of adultery. The military judge described and defined the Clause 1 and 2 terminal elements during the plea inquiry and asked the appellant whether he believed his conduct was either prejudicial to good order and discipline or service discrediting. The appellant acknowledged understanding all the elements, and explained to the military judge why he believed his conduct was both prejudicial to good order and discipline and service discrediting. Thus, "while the failure to allege the terminal elements in the specification was error, under the facts of this case the error was insufficient to show

prejudice to a substantial right." *Watson*, 71 M.J. at 59; *see also Ballan*, 71 M.J. at 36; *Nealy*, 71 M.J. at 77.

*Sentence Severity*

The appellant next argues that his sentence was inappropriately severe because his case was a "close call" and he received a "dismissal in a case that only narrowly went to a court-martial." He asserts that his chain of command supported his Resignation in Lieu of Court-Martial request[6] and even considered imposing nonjudicial punishment. He claims that the military judge failed to give him individualized consideration by sentencing him to a dismissal. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006); *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007); *see also United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have a great deal of discretion in determining whether a particular sentence is appropriate but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. The adjudged and approved sentence was clearly within the discretion of the military judge and the convening authority, and was appropriate in this case. We also note that the appellant willingly entered into a pretrial agreement that ensured he would not have to serve any confinement if a dismissal was adjudged. Although the appellant would have us disapprove his dismissal, we decline to do so. Accordingly, we hold that the approved sentence in this case is not inappropriately severe.

*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;

[6] The Secretary of the Air Force denied the appellant's resignation request.

*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