UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JAMIE D. MARTINEZ
United States Air Force

ACM S31779

27 October 2011

Sentence adjudged 30 December 2009 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $933.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

HARNEY, Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of violating a lawful general regulation, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and one specification of reckless endangerment, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a reduction to the grade of E-1, 3 months of confinement, forfeiture of $933.00 pay per month for 3 months, and a bad-conduct discharge. The appellant and the convening authority entered into a Pretrial Agreement (PTA) in which

the convening authority agreed to approve no confinement in excess of 3 months.[1] The convening authority granted the appellant's clemency request and reduced the amount of confinement from 3 months to 2 months, and approved the remainder of the sentence as adjudged.

On appeal, the appellant asks the Court to reassess his sentence, asserting that his approved sentence is inappropriately severe when compared to the sentence in another case involving similar misconduct.[2] In addition to the appellant's assignment of error, we review de novo whether the charge and specification of reckless endangerment under Article 134, UCMJ, to which the appellant pleaded guilty, survives in light of our superior court's recent decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). We find no error that materially prejudices the appellant, and affirm the findings and the sentence.

Background

The appellant deployed to Camp Bucca, Iraq, between June 2009 and August 2009, in support of Operation IRAQI FREEDOM. The appellant shared a containerized housing unit or "pod" with A1C DV and four other Airmen. At about 0900 on 23 August 2009, after working the night shift together, the appellant and A1C DV took a bus from their work center back to their pod. The appellant, A1C DV, and another bunkmate, A1C CE showered and got ready for bed. Each member had been assigned their own bunk bed. The appellant used the top of his bunk bed for storage. At some point, the appellant was sitting on his bed and A1C DV was standing about six feet away. As part of some joking and teasing, A1C DV called the appellant a "fag."

Shortly after A1C DV made this comment, the appellant removed his 9mm Beretta M-9 handgun (M-9) and a full 15-round magazine from the top bunk where he stored his belongings. A1C DV asked the appellant, "what are you going to do with that?" or words to that effect. Holding the M-9 by the pistol grip, the appellant inserted the magazine and pulled the slide back, chambering a round. Using his right hand (his shooting hand), the appellant then pointed the barrel of the M-9 at A1C DV. The appellant placed the de-cocking and safety lever into the fire position, and his finger was inside the trigger guard. After three to five seconds, the appellant cleared the M-9 of all ammunition and placed it back on his bed.[3]

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[1] As part of the Pretrial Agreement, the convening authority also agreed to withdraw and dismiss with prejudice one charge and one specification of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

[2] The appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] Prior to the incident, A1C CE went to his bed to watch a movie on his laptop computer. His bed was separated from the appellant and A1C DV by lockers, and he put on headphones to listen to the movie. Thus, he could neither see nor hear the appellant and A1C DV.

For this conduct, the appellant was charged with violating a lawful general order,[4] by wrongfully drawing his firearm under unauthorized circumstances. He was also charged with reckless endangerment by pointing a loaded firearm at A1C DV.

During sentencing, A1C DV testified that the appellant "seemed really mad" and "his face was all red" immediately prior to the incident. According to A1C DV, he simply walked over to talk to the appellant, and as he did so, the appellant "just loaded his M-9, racked it back, placed it on fire and pointed it at me." Further, A1C DV testified that, while the appellant had the gun pointed at his face, the appellant stated, "'I'm going to f[***]ing kill you.' . . . 'I'm going to shoot you.'" A1C DV admitted that he was nervous when the gun was pointed at him, but waited until the next evening's shift to report the incident to his immediate supervisor. A1C DV received a letter of counseling for not reporting the incident earlier. Although A1C DV said he was "really mad" about the incident, he testified that he did not hold a grudge against the appellant.

The appellant was charged with and pleaded guilty to violating a lawful general regulation, pursuant to Article 92, UCMJ, and reckless endangerment, pursuant to Article 134, UCMJ. The latter specification alleged that the appellant:

> [D]id, at or near Camp Bucca, Iraq, on or about 23 August 2009, wrongfully and recklessly engage in conduct, to wit: pointing a loaded Beretta M-9 at [A1C DV] and placing the decocking/safety lever in the fire position, conduct likely to cause death or grievous bodily harm to [A1C DV].

Guilty Plea to Reckless Endangerment, Article 134, UCMJ

Although not raised by the appellant, we must consider whether the appellant's guilty plea to reckless endangerment under Article 134, UCMJ, survives in light of our superior court's recent decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). In *Fosler*, the Court of Appeals for the Armed Forces (CAAF) held that a charge and specification of adultery under Article 134, UCMJ, did not state an offense because they failed to allege the "terminal element" either expressly or by implication.[5] *Fosler*, 70 M.J. at 226. We find the appellant's case distinguishable from *Fosler* and thus affirm his conviction under Article 134, UCMJ.

The accused in *Fosler* was charged under Article 120, UCMJ, 10 U.S.C. § 920, with sexually assaulting a sixteen-year-old female. He was acquitted of the Article 120, UCMJ, charge and convicted of adultery under Article 134, UCMJ. At the end of the

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[4] *See* Air Force Instruction 31-207, *Arming and Use of Force by Air Force Personnel*, ¶ 2.12 (29 January 2009).

[5] Under Article 134, UCMJ, 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 of offense not capital. *See* Article 134, UCMJ.

government's case-in-chief, the accused moved to dismiss under Rules for Courts-Martial (R.C.M.) 917 and 907, arguing that the adultery charge failed to state an offense. The military judge denied the motions, finding no requirement for the government to state which clause of the terminal element is alleged or to state either of the terminal elements in the specification. The judge then instructed the members that they could convict the accused if they found his conduct to be prejudicial to good order and discipline or to be service discrediting. The members convicted the accused of adultery; the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Fosler*, 69 M.J. 669, 678 (N.M. Ct. Crim. App. 2010), *rev'd*, Fosler, 70 M.J. at 233.

CAAF granted review to determine whether the charge and specification leading to the accused's conviction for adultery under Article 134, UCMJ, stated an offense. Our superior court recognized that prior practice and case law allowed omitting the terminal element from Article 134, UCMJ, specifications, and noted that the sample specifications in Manuals for Courts-Martial dating back to 1928 typically do not contain the terminal element. As such, the Court analyzed whether the language in the sample specification necessarily implied the terminal element of adultery under Article 134, UCMJ. The Court held that it did not, and dismissed the charge and specification for failure to state an offense. *Fosler*, 70 M.J. at 233.

The issue of whether a specification states an offense is a question of law that this Court reviews de novo. *See United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994). Our superior court has long recognized that the military is a notice pleading jurisdiction. *Fosler*, 70 M.J. at 229 (citing *United States v. Sell*, 3 C.M.A. 202, 206 (1953)). A charge and specification is sufficient if it alleges every element of the offense expressly or by implication. R.C.M. 307(c)(3); *Sutton*, 68 M.J. at 457; *Crafter*, 64 M.J. at 211; *Dear*, 40 M.J. at 197. This requires that the charge and specification '"contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense."' *Fosler*, 70 M.J. at 229 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1984)). *See also Sutton*, 68 M.J. at 457; *Crafter*, 64 M.J. at 211; *Dear*, 40 M.J. at 197. Failure to object to the issue of a specification's legal sufficiency does not constitute a waiver or any such legal sufficiency. R.C.M. 905(e). However, "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French,* 31 M.J. 57, 59 (C.M.A. 1990). *See also United States v. Bryant,* 30 M.J. 72, 73 (C.M.A. 1990); *United States v. Watkins,* 21 M.J. 208, 209 (C.M.A. 1986) ("A flawed specification first challenged after trial, however, is viewed with greater tolerance than one which was attacked before findings and sentence.").

We find the appellant's case is distinguishable from *Fosler*. At the outset, we recognize that the Article 134, UCMJ, offense of reckless endangerment here did not expressly allege the terminal element. In such cases, the question is whether "using the appropriate interpretative tools, can the . . . charging language be interpreted to contain the terminal element such that an Article 134 conviction can be sustained?" *Fosler*, 70 M.J. at 229. When considering how *Fosler* implicates the assessment of whether certain charged language alleges the terminal element by "necessary implication," it is significant that *Fosler* involved a contested trial and an Article 134, UCMJ, specification that was challenged prior to findings, pursuant to R.C.M. 917. *See id.* at 230. In contrast, this case involves a guilty plea to an unchallenged specification. That distinction is critical. In *Fosler*, the majority opinion repeatedly references the case's procedural posture when discussing the more rigorous standard it used in evaluating whether charged language alleges the terminal element by "necessary implication" in that context. Specifically, the majority stated that "[Case law] does not foreclose the possibility that an element could be implied. . . . However, in contested cases, where the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id.* at 230.[6] Such a narrow reading is not mandatory when evaluating an uncontested guilty plea with an unchallenged specification. As noted above, this is consistent with other cases holding that, although failure to state an offense is not waived by a failure to raise the issue at trial, those specifications challenged immediately at trial will be scrutinized more critically than those raised for the first time on appeal. *United States v. French,* 31 M.J. 57, 59 (C.M.A. 1990).

In this context, we must evaluate whether the terminal element was "necessarily implied" by the language of the specification. We answer in the affirmative. The language of this specification makes clear what conduct by the appellant was reckless and likely to cause death or grievous bodily harm, and thus what conduct the appellant must defend against. Furthermore, on its face, this specification contains language "the ordinary understanding of which could be interpreted to mean or necessarily include the concepts of prejudice to 'good order and discipline' or 'conduct of a nature to bring discredit upon the armed forces.'" *Fosler*, 70 M.J. at 229.

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[6] The majority opinion made other, similar statements. For example, the majority also noted:

> [I]n a contested case in which Appellant challenged the charge and specification at trial, the inclusion of 'Article 134' in the charge does not imply the terminal element. [Those] words do not, by definition, mean 'prejudicial to good order and discipline,' 'of a nature to bring discredit upon the armed forces,' or a 'crime [or] offense[ ] not capital,' and we are unable to construe [them] in the charge we now review to embrace the terminal element.

United States v. Fosler, 70 M.J. 225, 231 (C.A.A.F. 2011).

The specification alleges that the appellant, while at Camp Bucca, Iraq, "wrongfully and recklessly . . . point[ed] a loaded Beretta M-9 at [AIC DV] and place[d] the decocking/safety lever in the fire position, [and that his] conduct [was] likely to cause death or grievous bodily harm to [AIC DV]." Without any other information about the attendant circumstances, the ordinary understanding of this language necessarily implies the concepts inherent in clauses 1 and 2 of Article 134, UCMJ, and thus can be interpreted to contain the terminal element. In a deployed wartime environment, there can be few offenses more obviously prejudicial to good order and discipline than one military member pointing a loaded firearm at another fellow Airman while the safety lever is in the fire position, thus exposing that fellow Airman to the risk of grievous bodily harm or death. Similarly, the language of this specification necessarily implies that the conduct is of a nature to bring discredit upon the armed forces, as this reckless and risky conduct clearly has a tendency to bring the Air Force into disrepute or tends to lower it in public esteem. Therefore, this charge and specification are sufficient as they allege every element of the Article 134, UCMJ offense expressly or by necessary implication, and fairly informed the appellant of the charge against which he must defend.

Additionally, the appellant received further information about the nature of the charge prior to and at his court-martial. Noting that an accused must be given notice of which Article 134, UCMJ clauses he must defend against in the context of a guilty plea, the majority opinion cites *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008). Because "fair notice resides at the heart of the [guilty] plea inquiry," the Court held "it is important for the accused to know whether he or she is pleading only to a crime or offense not capital under clause 3, a 'disorder or neglect' under clause 1, conduct proscribed under clause 2, or all three. . . . [A]n accused has a right to know to what offense and under what legal theory he or she is pleading guilty." *Id.*

Here, the appellant voluntarily entered pleas of guilty pursuant to a PTA with an accompanying stipulation of fact, both of which the appellant signed prior to his trial with the advice and assistance of his counsel. The stipulation of fact contained specific information about the terminal elements implied within the charged language. The appellant stipulated that his conduct was prejudicial to good order and discipline because his reckless actions disregarded Air Force regulations and "common sense." He also stipulated that the conduct was "particularly prejudicial" because the appellant had briefed his unit on weapons safety, and because Airmen, especially deployed security forces Airmen, are "expected to demonstrate the highest level of self-control, weapons safety, and judgment." Additionally, the appellant stipulated that his failure to demonstrate these qualities in the deployed environment would, if known to the general public, tend to lower the esteem of the armed forces.

Likewise, during the *Care*[7] inquiry, the military judge reviewed the elements of each offense with the appellant. Although the charge and specification for the Article 134, UCMJ, offense of reckless endangerment did not allege the terminal element, the military judge nevertheless made it clear to the appellant during the *Care* inquiry that he was pleading guilty to an offense that included conduct prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. The military judge defined the former as "conduct which reasonably causes a direct and obvious injury to good order and discipline," and the latter as "conduct which tends to harm the reputation of the service or lower it in public esteem." In response to the military judge's questions, the appellant admitted that his conduct met both criteria "because I was expected to follow an order or regulation and it can't be tolerated when it's not followed and the lack of safety is a risk to the unit and to the discipline of the unit." The appellant continued by stating, "[i]t's service discrediting behavior because if the public were aware of the horseplay with weapons it would lower the esteem of the armed forces." The appellant made similar admissions in the stipulation of fact.

In sum, the appellant voluntarily pleaded guilty to reckless endangerment, agreed to a PTA, and entered into a stipulation of fact. The military judge thoroughly explained the elements of the charges and specifications to him during his *Care* inquiry. The appellant affirmatively acknowledged that he understood the elements of the charges and specifications, to include the terminal element of reckless endangerment. Under the facts and circumstances of this case, we find that the charge and specification of reckless endangerment are sufficient to state an offense. Their language fairly informed the appellant of the charge against him, and enabled him to enter an informed plea. We thus conclude that the appellant's guilty plea and conviction for reckless endangerment under Article 134, UCMJ, survive our superior court's decision in *Fosler*.

Sentence Appropriateness

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, 383-84 (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 offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *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). We have a great deal of discretion in determining whether a particular sentence is appropriate but 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).

[7] *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Additionally, the Courts of Criminal Appeals are "required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. An appellant bears the burden of showing that any cited cases are "closely related" to his or her case and that the sentences are "highly disparate." *Id.* If the appellant meets that burden, then the government must show that there is a "rational basis for the disparity." *Id.*

The appellant argues that his sentence is too severe when compared to the punishment received by others who committed similar offenses. To support his argument, the appellant refers to his post-trial affidavit.[8] In this affidavit, the appellant compares his situation with that of another Airman involved in a weapons incident at Moody Air Force Base, Georgia. According to the appellant, the Moody Airman drew his M-9 service weapon on another Airman during an argument, angrily attempted to load the weapon, but was apprehended by Security Forces. Without providing any additional facts, the appellant states that this Airman only received a few days of confinement from a summary court-martial. The appellant argues that his incident ended without any destruction or loss of life, while the Moody Airman's incident "could have ended terribly" if he had not been apprehended. Also attached to the appellant's affidavit are 13 pages summarizing various courts-martial pulled from the webpage of a defense firm that represents military accused. Although one case summary is underlined, the appellant has not explained why it or any of the other case summaries are significant.

We decline the appellant's invitation to engage in sentence comparison. The appellant has failed to show that the incident cited in his affidavit or those in the courts-martial webpage summaries are in any way closely related to his case. The appellant has not shown that he and the unnamed Airman from Moody Air Force Base were co-actors involved in a common crime or parallel scheme, or have any other direct nexus to each other. The webpage case summaries likewise contain similarly unrelated information. Accordingly, under the facts of this case, sentence comparison is not warranted.

We next consider whether the appellant's sentence was appropriate when judged by "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. In our view, the appellant's actions are a clear departure from the

[8] On 3 February 2011, the appellant filed a Motion to Attach Documents to the record of trial. Despite the government's opposition, this Court granted the motion on 14 February 2011.

expected standards of conduct in the military and his sentence, which included a bad-conduct discharge, was appropriate. We note that the crimes occurred in a deployed location. The appellant was charged with and convicted of violating the firearm safety regulation and reckless endangerment. The military judge had the opportunity to listen to the testimony of the victim, A1C DV, and assess his credibility. The appellant admitted that his conduct was prejudicial to good order and discipline and service discrediting because he was expected to follow an order, failing to do so was a safety risk to his unit, and public awareness of horseplay with weapons would lower the esteem of the armed forces. The appellant sought and received clemency from the convening authority. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses for which he was found guilty, we do not find the appellant's sentence inappropriately severe.

Post-Trial Processing Delay

In this case, the overall delay between the date this case was docketed with the Court and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

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