UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOSE S. MONSERRATE
United States Air Force

ACM S31649 (f rev)

29 January 2013

Sentence adjudged 19 December 2008 by SPCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Douglas B. Cox.

Approved sentence: Bad-conduct discharge, confinement for 1 month, forfeiture of $898.00 pay per month for 1 month, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Daniel E. Schoeni; Major Reggie D. Yager; Major Bryan A. Bonner; and Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Christopher T. Smith; Lieutenant Colonel Jeremy S. Weber; Major Joseph Kubler; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

Contrary to his pleas, the appellant was convicted at a special court-martial composed of officer members of one specification of wrongful divers use of cocaine, one specification of drunk and disorderly conduct of a nature to bring discredit upon the armed forces, and one specification of wrongfully communicating a threat, in violation of

Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 1 month, forfeiture of $898.00 pay per month for 1 month, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

This Court previously affirmed the findings and sentence. *United States v. Monserrate*, ACM S31649 (A.F. Ct. Crim. App. 5 January 2012) (unpub. op.), *rev'd in part*, 71 M.J. 357(C.A.A.F. 2012) (mem.). The Court of Appeals for the Armed Forces granted review to determine whether the specification alleging wrongful communication of a threat fails to state an offense because the specification does not allege the terminal elements under Article 134, UCMJ. Our decision was vacated and the case remanded for consideration of the granted issue in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *Monserrate*, 71 M.J. at 357. Having considered the granted issue in light of *Humphries* and again having reviewed the entire record, we affirm.

Failure to State an Offense

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*. (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (citing Rule for Courts-Martial 307(c)(3))).

At issue on remand is the allegation of communicating a threat, in violation of Article 134, UCMJ. Specification 2 of Charge II reads as follows:

> In that STAFF SERGEANT JOSE S. MONSERRATE, United States Air Force, 19th Logistics Readiness Squadron, Little Rock Air Force Base, Arkansas, did, within the continental United States, between on or about 13 July 2008 and on or about 15 July 2008, wrongfully communicate to [then] Airman First Class [M.C.] a threat by sending her a text message, to wit: "if someone keeps me from her ther gonna get dealt wit," or words to that effect.

As drafted, the specification does not allege that the appellant's 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 specification is defective because it does not expressly allege the terminal element, nor do we find the terminal element to be necessarily implied. *United States v. Fosler*, 70 M.J. 225, 231 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F.), *cert. denied*, 133 U.S. 43 (2012) (mem.). Because the appellant failed to object to the sufficiency of the specification at trial, we review for plain error and test for prejudice. *Humphries*, 71 M.J. at 214. In the context of a litigated case in which the defective specification is not objected to at trial, "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'" to determine if the appellant suffered prejudice. *Id*. at 215-16 (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)). Based on our review of the record, we find notice of the missing element is extant on the trial record and therefore the appellant suffered no prejudice.[1]

Airman Basic (AB) MC, serving as an informant for the Air Force Office of Special Investigations (OSI), provided information about the appellant's criminal activities, to include his wrongful use of cocaine. After the appellant was interviewed by OSI, he sent a text message to AB MC's cell phone that included a picture of the appellant's daughter along with the statement, "if someone keeps me from her ther gonna get dealt wit." AB MC testified that she became afraid after receiving the message and was concerned the appellant might hurt her because she had just "ratted him out" to OSI about his drug use and he only lived three streets away from her. She testified that she had previously received a message from the appellant where he included a picture of himself holding a gun to his head. Finally, she had earlier observed the appellant become angry, breaking his TV, and ripping a poster. As a precaution, she changed the locks on her house.

The squadron first sergeant, Master Sergeant (MSgt) PE, testified that after AB MC showed him the text message, he issued a "no-contact" order to the appellant forbidding him from contacting AB MC. During cross-examination, trial defense counsel repeatedly questioned MSgt PE about whether the alleged threat, in fact, prejudiced good order and discipline. Salient portions of the cross-examination are as follows:

> Q [Defense Counsel]. And so far as you saw you did not see any kind of effect on good order and discipline from that [text message]?
>
> A [MSgt PE]. I think it might've affected Airman [MC], it might have affected her good order and discipline, I mean she was very nervous about that text message.
>
> . . . .
>
> Q. And do you remember meeting with me earlier this week?
>
> A. Yes, sir.
>
> . . . .

[1] Contrary to the Government's position, we will not attribute the inclusion of Clause 1 in Specification 1 of Charge II as putting the appellant on notice of the missing terminal element in Specification 2 of the same charge.

Q. Do you remember telling me at that time that you did not see any affect [sic] on good order and discipline?

. . . .

Q. Do you remember speaking about this with me and not saying that -- about Airman [MC]? And just saying blanket I did not see any effect on good order and discipline?

. . . .

Q. Right, but my question to you, is do you remember when we talked about that is that you just said I did not witness any effect on good order and discipline?

During additional questioning by the trial counsel, MSgt PE opined that he would consider a threatening message sent to an Airman in his squadron to be prejudicial to good order and discipline.

Unlike in *Humphries*, where the Government did not present any specific evidence or call a single witness to testify as to why Senior Airman Humphries' conduct satisfied either clause of the terminal element of Article 134, UCMJ, the appellant's record is replete with instances that provided the appellant with the requisite notice of the missing element and put him on notice of the Government's theory of culpability. The trial counsel's opening statement and closing argument both discussed how the appellant's conduct impacted good order and discipline; AB MC testified about the negative impact the appellant's text message had on her personally; MSgt PE specifically stated that, if an Airman in his squadron received a text that the Airman considered threatening, we would consider it prejudicial to good order and discipline; and, perhaps most tellingly, the trial defense counsel explicitly questioned MSgt PE about whether the appellant's conduct impacted good order and discipline, demonstrating an unambiguous and unassailable awareness of the terminal element and clearly indicating the defense had prepared to defend against this element prior to trial.

After considering the totality of the record, as provided for by our superior court in *Humphries*, we find that the lack of notice due to the omission of the terminal element from the specification was sufficiently cured by the Government during the course of the trial. *See Humphries*, 71 M.J. at 217. The appellant was reasonably on notice that the Government was pursuing the theory that the appellant's conduct was prejudicial to good order and discipline, as opposed to other possible theories of guilt under the terminal element of Article 134, UCMJ. *Id*. Under these circumstances, we find the appellant has failed to demonstrate that the defective Article 134, UCMJ, specification caused material prejudice to his substantial right to notice.

Conclusion

Having considered the record in light of *Humphries*, we again find that 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

LAQUITTA J. SMITH
Appellate Paralegal Specialist