

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class WILLIAM R. MULLEN
United States Air Force**

ACM 37959

13 December 2011

Sentence adjudged 10 May 2011 by GCM convened at Joint Base Andrews Naval Air Facility Washington, Maryland. Military Judge: Katherine Oler (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

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

Before

**ORR, ROAN, and HARNEY
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of a military judge sitting alone convicted the appellant in accordance with his pleas of two specifications of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920; one specification of aggravated assault and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one specification of indecent acts with another, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court sentenced the appellant to a dishonorable discharge, 19 years of confinement, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority approved 10 years confinement but approved the remainder of the sentence as adjudged. The appellant assigned no specific errors, and we find no error that materially prejudiced a substantial right of the appellant. We will

address, however, the legality of the guilty findings of indecent acts with another in light of our superior court's decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

Charge IV alleges that the appellant committed indecent acts with another, in violation of Article 134, UCMJ.¹ Although the specification does not expressly allege the terminal element under either clause one or two,² we do not find this omission fatal to the charge in this case. In *Fosler*, our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either clause one or two. While recognizing “the possibility that an element could be implied,” the Court stated that “in contested cases, when 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.” *Fosler*, 70 M.J. at 230. The Court implied that the result would have been different had the appellant not challenged the specification: “Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages.” *Id.* at 232.

If an accused does not challenge a defective specification at trial, pleads guilty to it, and acknowledges understanding of all the elements after the military judge correctly explains those elements, the specification is sufficient to charge the crime. *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). Such is the case here. The appellant made no motion to dismiss the charge, pled guilty, acknowledged understanding all the elements, and explained to the military judge why he believed his conduct was prejudicial to good order and discipline and service discrediting. Under this posture of this case, we do not find the charged indecent acts under Article 134, UCMJ, deficient for failing to expressly allege the terminal element.

¹ The appellant was charged with “Indecent Acts with Another” under an Article 134, UCMJ, 10 U.S.C. § 934, punitive article applicable to sexual assault offenses committed prior to 1 October 2007. See *Manual for Courts-Martial, United States (MCM)*, A27, ¶ 90 (2008 ed.). Consistent with Article 134, UCMJ, as it existed at the time the appellant committed the offenses, the specification of Charge IV reads as follows:

In that AIRMAN FIRST CLASS WILLIAM R. MULLEN, United States Air Force, 11th Force Support Squadron, Joint Base Andrews, Maryland, did, at or near Andersen Air Force Base, Guam, on divers occasions between on or about 11 April 2006 and on or about 30 September 2007, wrongfully commit an indecent act with [JM] by inserting his fingers into the vaginal opening of [JM] while the said [JM] was sleeping.

² 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.

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



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint horizontal line.

STEVEN LUCAS
Clerk of the Court