UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DELVIN S. PRINCE
United States Air Force

ACM 37809

17 August 2012

Sentence adjudged 28 October 2010 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Donald R. Eller, Jr. (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Captain Robert D. Stuart.

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

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

On 28 October 2010, the appellant was tried by a general court-martial composed of a military judge sitting alone at Langley Air Force Base, Virginia. Consistent with his pleas, the military judge convicted the appellant of one specification of assault consummated by a battery and one specification of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928; one specification of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934; and one specification of destruction of personal property, in violation of Article 109, UCMJ, 10 U.S.C. § 909. The military judge sentenced the appellant to a dishonorable discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority

approved only so much of the sentence as provided for a dishonorable discharge, confinement for 24 months, and reduction to E-1.[1]

Before this Court, the appellant asserts that (1) the communicating a threat specification fails to state an offense because it does not allege the terminal element of Article 134, UCMJ, and (2) the specification for aggravated assault is factually insufficient.[2] We disagree and, finding no error that prejudiced a substantial right of the appellant, affirm.

Background

At 2330 hours on 8 June 2010, the appellant dropped by the house of his girlfriend, Staff Sergeant MH. At the time, MH was four months pregnant with the appellant's child. Over the course of the next six hours, the appellant hit MH in the face and head, drug her by the hair, and choked her. During the altercation, he grabbed a kitchen knife and held it over MH as she was on the floor. While holding the kitchen knife, the appellant told MH that he was going to kill her. The appellant then took out his pocket "Gerber" knife and held the point of that knife to MH's leg, making cuts in the shape of an "X" and twirling the knife on a mole or freckle for about a minute.

Communicating a Threat

The appellant was charged with communicating a threat for threatening to kill MH while holding a knife in his hand. The specification did not allege the terminal element of Article 134, UCMJ.[3] At trial, the appellant pled guilty to this charge and specification. The appellant admitted in his stipulation of fact that he threatened to kill MH two times and that he made one of those threats while holding a knife. During the *Care*[4] inquiry, the military judge described and defined each of the elements of communicating a threat, 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 taken together correctly describe[d]" the appellant's conduct and asked the appellant to describe the conduct in his own words, which he did. When asked to explain why he was guilty, the appellant stated:

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[1] As part of a pretrial agreement, the convening authority agreed to approve no confinement in excess of 24 months and to withdraw and dismiss several other charged offenses.

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

[3] 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.

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

On 9 June 2010 I told [MH] that I was going to kill her. I made the communication known to [MH] by telling her. Since I had a knife in my hand under the circumstances what I said to [MH] amounted to a threat. It was wrongful for me to threaten [MH]. Under the circumstances my conduct was prejudicial to good order and discipline of the Air Force. Air Force members should not act in the way I acted and it was prejudicial to good order and discipline.

The military judge then engaged in the following colloquy with the appellant about the terminal elements:

MJ: Now, you talked about prejudice to good order and discipline. Again, to be prejudicial to good order and discipline there has to be a reasonably direct and obvious injury to good order and discipline. How do you think that your actions here with [MH] caused a direct and obvious injury to good order and discipline?

[The appellant conferred with counsel.]

ACC: Sir, Air Force members should not act in the way I acted.

[The appellant again conferred with counsel.]

MJ: Plus she's active duty Air Force as well?

ACC: Yes, sir.

MJ: What unit is she assigned to?

ACC: The 735.

MJ: The same unit you're in?

ACC: Yes, sir.

MJ: She's assigned here to Langley Air Force base as well?

ACC: Yes, sir.

MJ: Would you agree that making threats to another military member in the same unit as you could cause disruption in the unit?

ACC: Yes, sir.

MJ: In fact, I mean, since she's still in the same unit, it did, in fact, cause some disruption at least between the two of you and you both were assigned to the same group, correct?

ACC: Yes, sir.

MJ: Service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem. Now, you sort of—I mean, you were kind of talking about both of those things at the same time. You talked about Air Force members shouldn't make these sort of comments to each other. Would you agree that people on the outside looking in would have some concerns about a military member who would, under these circumstances, communicate a threat to another military member?

ACC: Yes, sir.

. . . .

MJ: Do you think then that under these circumstances that this conduct was the type that would harm the reputation of the service or lower it in public esteem in general?

ACC: Yes, sir.

MJ: Do you think your conduct was not just prejudicial to good order and discipline, but also service discrediting?

ACC: Yes, sir.

. . . .

MJ: Do you agree and admit that under the circumstances your conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces?

ACC: Yes, sir.

The military judge accepted the appellant's guilty plea as provident and found him guilty of communicating a threat.

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). Our superior court has held that, where the specification fails to allege the terminal element under Article 134, UCMJ, the specification fails to state an offense. *United States v. Fosler*, 70 M.J. 225,

233 (C.A.A.F. 2011). The Court dismissed the specification as defective. *Fosler*, however, did not involve a guilty plea. Our superior 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. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394). *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. *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008) (citations omitted), *quoted in Ballan*, 71 M.J. at 35.

Here, the appellant admitted in his stipulation of fact that his conduct was both prejudicial to good order and discipline and service discrediting. He then entered into a pretrial agreement and pled guilty to the charge and specification of communicating a threat. 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[s] 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.

Aggravated Assault with a Dangerous Weapon

The appellant was charged with aggravated assault with a dangerous weapon for twirling his Gerber knife on MH's mole and cutting an "X" on her leg. At trial, the appellant pled guilty to this specification. The appellant admitted in his stipulation of fact that he used the Gerber knife in a way likely to produce grievous bodily harm. During the *Care* inquiry, the military judge informed the appellant of the elements of assault with a dangerous weapon, to include the element stating that the weapon was used in a manner to produce grievous bodily harm. The military judge explained that "grievous bodily harm" means serious bodily injury, described as "fractures, dislocated

bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious body injuries." The military judge further explained that "[i]t isn't necessary that death or grievous bodily harm actually result." He elaborated by stating that a weapon is dangerous if used in a manner that is "likely to produce death or grievous bodily harm, when the natural and probable results of its particular use would be death, or in this case, grievous bodily harm." When asked to explain his conduct, the appellant admitted that he cut MH's leg with the Gerber knife, and that he held the point of the knife on a freckle on her leg and twirled it around for about one minute. He agreed that the knife was a dangerous weapon and that he used it in a manner likely to produce grievous bodily harm. Upon further questioning by the military judge, the appellant also agreed that the knife, when taken to its "logical and perceivable uses, would probably cause grievous bodily harm" and admitted that he "could have deeply cut" MH. The military judge accepted the appellant's guilty plea as provident and found him guilty of aggravated assault.

On appeal, the appellant asserts that the evidence is insufficient to show that he used the knife in a manner likely to produce grievous bodily harm. We disagree.[5] A military judge is charged with determining whether a guilty plea is supported by an adequate basis in law and fact. *United States v. Inabinette*, 66 M.J. 320, 321-22 (C.A.A.F. 2008). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *Id.* at 322. We will overturn a guilty plea as improvident if there was a "substantial basis" in "law or fact" in the record of trial to question the guilty plea. *Id.* Here, we do not find a substantial basis in law or fact in the record of trial to overturn the appellant's guilty plea to aggravated assault. The military judge explained the elements to the appellant. The appellant stated he understood the elements and admitted in the stipulation of fact and during the *Care* inquiry that he used the pocket Gerber knife in a way likely to produce grievous bodily harm. The appellant further stated he understood that the natural and probable result of using the knife was such that it could cause grievous bodily harm. We find the appellant's guilty plea to aggravated assault with a dangerous weapon was provident, and that the military did not abuse his discretion.

Appellate Delay

We note that the overall delay of over 18 months between the time this case was docketed at the Air Force Court of Criminal Appeals 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

[5] Although the appellant asserts that the issue is factual sufficiency of the evidence, the proper issue before this Court is the providency of the guilty plea. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (when an appellant has pleaded guilty, the issue "must be analyzed in terms of providency of his plea, not sufficiency of the evidence.").

review and appeal, and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135 (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 contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] 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
Paralegal Specialist

[6] The court-martial order (CMO) erroneously omits the portion of the adjudged sentence that provides for the appellant "to be reduced to the grade of E-1," which was ultimately approved in the convening authority's Action. We order the promulgation of a corrected CMO.