UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class VANESSA RODRIGUEZ
United States Air Force

ACM 37878

11 July 2013

Sentence adjudged 22 January 2011 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Donald R. Eller, Jr.

Approved Sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

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, ROAN, and WEBER
Appellate Military Judges

OPINION OF THE COURT

WEBER, Judge:

Contrary to her pleas, the appellant was convicted by a panel of officer members at a general court-martial of one specification of child endangerment, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 30 days, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the findings and sentence as adjudged.

The appellant raises two issues on appeal: (1) Whether the Specification of the Charge fails to state an offense because it fails to allege the terminal element of Article 134, UCMJ; and 2) Whether trial counsel made an impermissible "Golden Rule" argument during findings and an improper sentencing argument, denying the appellant a fair trial. We grant relief on the first issue, rendering moot the second issue.

Background

The appellant's conviction resulted from a series of events in early 2010 following the birth of her son, GP. Over a period of about a month before GP turned three months old, the appellant noted that her husband got "rougher" with the infant and that GP had blood all over his mouth, "a lot of bruising" on his face, a "dent" on his head, swelling in his ankles, and was acting fussier than normal. The appellant asked her husband about these issues, since her husband watched GP while the appellant was at work. The husband provided explanations for the injuries, some of which the appellant said she accepted and some that she doubted at the time. Despite the mounting issues, the appellant waited weeks to take GP to the base clinic, and failed to mention anything about the injuries during a well-baby check and an immunizations session that took place during this time. When the appellant finally took GP to the clinic, she advised the doctor about the swollen ankles but said nothing about the "dent" in his head, his bloody mouth, or the bruising on his face. A full x-ray scan revealed that GP had 41 broken bones in various stages of healing, including broken bones in both arms and legs, a fractured skull, and fractures of several ribs. Subsequent analysis determined that the injuries were consistent with non-accidental trauma and the appellant's husband, a civilian, was charged in a civilian court with inflicting the injuries.

The appellant was charged with one specification of child endangerment, alleging that she had a duty to care for GP but endangered him through culpable negligence by failing to obtain medical care, resulting in his grievous bodily harm. Per long-standing practice at the time, the Government did not specify any of the clauses of the terminal element of Article 134, UCMJ, on the charge sheet. Trial defense counsel raised no issue concerning the specification, and did not seek a bill of particulars or move for a dismissal of the charge and specification for failure to state an offense.

Failure to State an Offense

The appellant argues that her conviction for child endangerment should be set aside and dismissed because the Specification fails to allege the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2). We agree.

Whether a charge and specification state an offense and the remedy for such error are questions of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33

(C.A.A.F. 2012). "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." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); Rule for Courts-Martial 307(c)(3).

In the instant case, we find that the Government failed to allege the terminal element either expressly or by necessary implication. The Government urges us to find that an ordinary understanding of child endangerment under the facts alleged necessarily implies that the actions were service-discrediting. However, this particular clause of the terminal element is not necessarily implied in the Specification itself under our superior court's view. *See Ballan*, 71 M.J. at 33 (rejecting the Government's contention that the terminal element was necessarily implied in allegations of indecent acts with a child and indecent acts with another, holding that the Court was prohibited from necessarily implying "a separate and distinct element from nothing beyond allegations of the act or failure to act itself.")

Because the appellant did not complain about the missing element at trial, we analyze this case for plain error and in doing so find that the failure to allege the terminal element was "plain and obvious error that was forfeited rather than waived." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012). *See also United States v. Gaskins*, 72 M.J. 225, 232 (C.A.A.F. 2013). In the context of a plain error analysis of defective indictments, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *Id*. at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). In the plain error context, "the defective specification alone is insufficient to constitute substantial prejudice to a material right." *Id*. at 215 (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). Therefore, reviewing courts "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.'" *Id*. at 215-16 (quoting *Cotton*, 535 U.S. at 633; *Johnson v. United States*, 520 U.S. 461, 470 (1997)). If so, the charging error is considered cured and material prejudice is not demonstrated. *Id*. at 217.

Our superior court's decisions in *Humphries* and *Gaskins* compel us to find that the appellant suffered material prejudice to a substantial right. We recognize that the appellant has provided scant indicia of prejudice in her brief to this Court. We likewise recognize that unlike *Humphries*, the child endangerment charge here was the only charge in the court-martial and the Government did anything but ignore it. In addition, whereas *Humphries* involved an adultery charge in which the terminal element is central to the criminality of the conduct, this case involved child endangerment resulting in grievous bodily harm, conduct for which the criminality is more apparent. Finally, while the Government in this case did not present any evidence concerning the terminal

element, trial counsel did discuss the terminal element in his closing argument and made it clear at that point that the Government was focusing on a theory that the appellant's conduct was service-discrediting as opposed to prejudicial to good order and discipline. This statement drew no comment from defense counsel, and the appellant herself told the members in her sentencing unsworn statement, "I really want to apologize to the Air Force for any discredit I brought upon the Air Force," indicating she understood the Government's service-discrediting theory at least by that stage of the proceeding.

However, our superior court recently reinforced *Humphries* in *Gaskins*, observing, with regard to Article 134, UCMJ, specifications of indecent acts with a child and indecent assault, that:

> Where, as here, (1) Appellant's trial occurred before this Court's decision in [*United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011)], (2) no mention or evidence of the terminal element is extant in the record of trial, and (3) the evidence at trial did not otherwise notify Appellant of the Government's theory of criminality, or show that Appellant nonetheless did defend against the terminal element, it is impossible to guess what Appellant's strategy might have been had the Government alleged the terminal element and put Appellant on notice of which theory of criminality it was pursuing. Cases, like this one and *Humphries*, where the Government fails to (1) allege an element of the offense, (2) mention its theory of criminality with respect to the terminal element, and (3) put on any direct evidence of the terminal element are simply inapposite to those Supreme Court cases in which the Government put on evidence that went directly to the omitted aggravating factor or element, unless we disregard the sage reminder from *Fosler* that the elements of Article 134, UCMJ, are distinct and non-fungible.
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> In this case, the Government relied solely on evidence of the bad acts, the first element of Article 134, UCMJ, to prove the offenses at trial. The military judge instructed the members in the disjunctive, telling them that they could find Appellant guilty of the Article 134, UCMJ, specifications if they concluded that Appellant's conduct was either prejudicial to good order and discipline or service discrediting. Under these circumstances, both Appellant and this Court lack knowledge of a matter of critical significance – namely, on which theory of criminality Appellant was tried and convicted.

Gaskins, 72 M.J. at 234 (citations omitted).

Here, there is no evidence of the missing element "somewhere extant in the trial record." As in *Gaskins*, the Government failed to allege the terminal element, mention its

theory of criminality with respect to the terminal element in its case-in-chief, or introduce any direct evidence of the terminal element. The military judge instructed the members in the disjunctive. The reference to the terminal element in trial counsel's closing argument does not correct the lack of notice, as this came after the defense rested, whereupon any decisions about the appellant's trial strategy had already been made and executed.

We are also mindful that in *Humphries*, our superior court also allowed the Government to cure any error by demonstrating that the missing element was "essentially uncontroverted." *Humphries*, 71 M.J. at 215-16. However, as the *Gaskins* Court noted, cases such as this are "simply inapposite" compared to the Supreme Court cases in which the Government put on evidence that went directly to the omitted aggravating factor or element. *Gaskins*, 72 M.J. at 234. Since the Government never introduced evidence in this case concerning the missing element, we may not find that the missing element was "essentially uncontroverted."

In sum, we can find nothing in the record that reasonably placed the appellant on notice of the Government's theory as to which clause of the terminal element of Article 134, UCMJ, she violated.[*] Given the mandate set out by our superior court in *Humphries* and *Gaskins*, we are compelled to set aside and dismiss the Charge and its Specification. Because we take this action, it is unnecessary to discuss the appellant's second issue. We also note as facially unreasonable the overall delay of more than 540 days between the time this case was docketed with this Court and completion of our review. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). However, our decision today means this Court can offer the appellant no meaningful relief for the delay.

Conclusion

Having considered the record in light of *Humphries* and *Gaskins*, the findings of guilty to the Charge and its Specification and the sentence are set aside and dismissed.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[*] The Government argues that we should adopt Judge Stucky's dissenting view that the Article 32, UCMJ, 10 U.S.C. § 832, hearing provided the appellant with sufficient notice of the Article 134, UCMJ, terminal element. *United States v. Humphries*, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting). We note this rationale did not persuade the majority in *Humphries* and decline to apply it to this case, especially where, as here, the Investigating Officer's report did no more than list Clauses 1 and 2 of the terminal element without discussing proof of the element or analyzing which of the clauses was at issue.