UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant DONALD W. SWENSEN
United States Air Force

ACM 37555 (rem)

13 February 2012

Sentence adjudged 1 September 2009 by GCM convened at Kadena Air Base, Japan. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, 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 Anthony D. Ortiz; and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Scott C. Jansen; Major Joseph J. Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

UPON REMAND

PER CURIAM:

Pursuant to his pleas, the appellant was convicted at a general court-martial by military judge alone of one specification of engaging in sexual contact with a child under the age of 12, two specifications of indecent acts with a child under the age of 16, and one specification of wrongfully endeavoring to influence the actions of a witness, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The adjudged sentence

consisted of a dishonorable discharge, confinement for 11 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings, confinement for 7 years, and the remainder of the sentence as adjudged, but suspended and waived mandatory forfeitures for 6 months.

This Court previously affirmed the findings and sentence. *United States v. Swensen*, ACM 37555 (A.F. Ct. Crim. App. 19 May 2011) (unpub. op.), *rev'd*, 70 M.J. 357 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces (CAAF) subsequently granted review of whether a Clause 1 or 2 specification under Article 134, UCMJ, that does not expressly allege the terminal element, is sufficient to state an offense. *United States v. Swensen*, 70 M.J. 336 (C.A.A.F. 2011) (order granting petition for review). On 21 September 2011, CAAF vacated our initial decision and remanded the appellant's case for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Swensen*, 70 M.J. at 357. Having considered the granted issue in light of *Fosler*, and again having reviewed the entire record, we affirm.

Background

Two of the three specifications at issue alleged the appellant committed an indecent act upon the body of BW, a female under 16 years of age, by grabbing her breast with the intent to arouse his sexual desires, in violation of Article 134, UCMJ. The third specification, also charged under Article 134, UCMJ, alleged the appellant wrongfully endeavored to influence the actions of a witness by asking her not to report the appellant's crimes to the proper authorities until after the appellant retired. In none of these specifications did the Government expressly allege the terminal element of Article 134, UCMJ.

At trial, the appellant entered a plea of guilty to all charges and specifications in accordance with his pretrial agreement. He did not object to the Article 134, UCMJ, charge and its specifications as failing to state an offense. During the providency inquiry, the military judge addressed each specification alleged under the Article 134, UCMJ, charge. The military judge properly advised the appellant of the elements of the charged offenses, to include Clauses 1 and 2 of Article 134, UCMJ, and defined these terms for the appellant.

The appellant admitted his guilt, and affirmatively stated that he understood the elements and definitions of each offense and that, taken together, they correctly described what he did. In describing the two indecent acts allegations, he admitted to inappropriately grabbing BW's breast. He also admitted to asking a witness not to report his conduct to the authorities until after he retired. He expressly acknowledged in the Stipulation of Fact, and in response to the military judge's inquires, that his conduct was to the prejudice of good order and discipline in the armed services as well as service

discrediting. The military judge found that the appellant's guilty plea to all the charges and specifications was voluntary and knowingly made.

Discussion

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*. at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial (R.C.M.) 307(c)(3).

In *Fosler*, our superior court invalidated a conviction for adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss for failure to state an offense. *Fosler*, 70 M.J. at 223. This is because the charge and specification did not allege at least one of the three clauses of the second element of proof under Article 134, UCMJ, commonly known as the terminal element. *Id*. at 226-27. In setting aside the conviction, *Fosler* did not foreclose the possibility that an element could be implied, including the terminal element in an Article 134, UCMJ, offense; however, CAAF held that, in contested cases where the sufficiency of the charge and specification are first challenged at trial, "we [will] review the language of the charge and specification more narrowly than we might at later stages" and "will only adopt interpretations that hew closely to the plain text." *Id*. at 230, 232. Thus, at least given the particular circumstances contained in *Fosler*--a contested trial for adultery where the sufficiency of the charge and specification are first challenged at trial--the law will not find that the terminal element of Article 134, UCMJ, is necessarily implied. *Id*. at 230.

In guilty plea cases, however, where there is no objection at trial to the sufficiency of the charge and specification, our superior court has followed "the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). Moreover, "[i]n addition to viewing post-trial challenges with maximum liberality, we view standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense." *Id*. at 210 (citations omitted).

In the case before us, unlike in *Fosler*, the appellant pled guilty and made no motion at trial to dismiss the charge and specifications at issue for failure to state an offense. During the guilty plea inquiry, the appellant acknowledged his understanding of all the elements of the alleged crimes, including the terminal elements of Article 134, UCMJ, and he explained to the military judge why his conduct was prejudicial to good order and discipline and service discrediting. In this context, consistent with the reasoning in both *Fosler* and *Watkins*, we apply a liberal construction in examining the

text of the charge and specifications in this case. In doing so, we find that the terminal elements in all three specifications of Charge II were necessarily implied, the appellant was on notice of what he needed to defend against, and he is protected against double jeopardy. Therefore, we find that the charge and its specifications under Article 134, UCMJ, are not defective for failing to state an offense.

Conclusion

Having considered the record in light of *Fosler*, as directed by our superior court, 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

STEVEN LUCAS
Clerk of the Court