UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellant
v.
Staff Sergeant KVIEN GLOVERSTUKES
United States Army, Appellee

ARMY MISC 20220597

Headquarters, Fort Bragg
G Bret. Batdorff and J. Harper Cook, Military Judges
Lieutenant Colonel Andres Vazquez, Jr., Acting Staff Judge Advocate

For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Jennifer A. Sundook, JA; Captain Timothy R. Emmons, JA (on brief and reply brief).

For Appellee: Colonel Michael C. Friess, JA; Major Joyce C. Liu, JA; Captain James C. Griffin, JA (on brief).

1 February 2023

MEMORANDUM OPINION AND ACTION ON APPEAL
BY THE UNITED STATES FILED PURSUANT TO
ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

On appeal before this court pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 [UCMJ], the Government asserts the military judge erred when he granted appellant's motion to dismiss Specifications 3 and 4 of Charge I for failure to state an offense of domestic violence under Article 128b, UCMJ. We agree and reverse the military judge's ruling.

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[1] Judge ARGUELLES decided this case while on active duty.

BACKGROUND

Charged with four specifications of domestic violence under Article 128b, UCMJ, appellant elected a trial before the military judge. Just prior to the noon recess on the first day of trial, the military judge sua sponte indicated that he had a concern that, because Specifications 3 and 4 of Charge I (hereinafter referred as "the specifications") did not expressly allege that appellant committed a "violent offense" against his intimate partner, they failed to state an offense. The specifications alleged:

> SPECIFICATION 3: In that [appellant] did, at or near Cameron, North Carolina, on or about 13 May 2021, unlawfully pick up and throw the body of [the victim], an intimate partner of the accused, on a desk.
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> SPECIFICATION 4: In that [appellant] did, at or near Cameron, North Carolina, on or about 11 May 2021, unlawfully strike[the victim], an intimate partner of the accused, in the face with his hand.

The military judge ultimately concluded that because the specifications did not contain "direct, that is to say, express language to apprise the accused of the government's theory of criminality under Article 128b," the "omission of the words 'violent offense' . . .. constitute a failure to state an offense of domestic violence under Article 128b." During argument, the military judge also cut off trial counsel when he tried to argue lack of prejudice, ruling "I don't even reach prejudice on a jurisdictional issue."

LAW AND DISCUSSION

A. Article 128b, UCMJ

On August 13, 2018, Congress passed the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 11-132, 132 Stat. 1636 (13 Aug 2018) (2019 NDAA). Included within the 2019 NDAA was a new offense, Article 128b Domestic Violence, which provided as follows:

> Any person who—
> (1) commits a violent offense against a spouse, an intimate partner, or an immediate family member of that person;
> (2) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person—
> (A) commits an offense under this chapter [10 USCS §§ 801 et seq.] against any person; or
> (B) commits an offense under this chapter [10 USCS §§ 801 et seq.] against any property, including an animal;

> (3) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person, violates a protection order;
>
> (4) with intent to commit a violent offense against a spouse, an intimate partner, or an immediate family member of that person, violates a protection order; or
>
> (5) assaults a spouse, an intimate partner, or an immediate family member of that person by strangling or suffocating;
>
> shall be punished as a court-martial may direct.

§ 532(a). This new provision took effect on 1 January 2019. 2019 NDAA § 532(b).

On January 26, 2022, the President signed Executive Order 14062 ("EO"), which provided the elements, definitions, and model specifications for the Article 128b Domestic Violence offense. 87 Fed. Reg. 20 at 4763. Among other things, the EO reiterated that for an allegation under Article 128(b)(1) involving commission of a violent offense, there were two elements: (1) that the accused committed a violent offense; (2) against a spouse, intimate partner . . .. *Id.* at 4778. The EO defined the term "violent offense" to include, among other violations of the UCMJ,[2] a violation of Article 128, UCMJ (assault), or "any other offense that has an element that includes the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* at 4780. The EO also contained a draft model specification that included the use of the term "violent offense." *Id.* at 4783.

B. Failure to State an Offense

The question of whether a specification fails to state an offense is a question of law which we review de novo. *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)).

Rule for Court Martial (R.C.M.) 307(c)(3) states that a "specification is sufficient if it alleges every element of the offense charged expressly *or by necessary implication.*" (emphasis added). Reiterating this standard, in *Turner* the Court of Appeals for the Armed Forces (CAAF) recently held that under the Fifth and Sixth Amendments, a specification is constitutionally sufficient so long as it alleges "'either expressly or by necessary implication' 'every element' of the offense." 79 M.J. at 403 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). The CAAF further explained the "by necessary implication" language:

[2] A violation of any of the following Articles of the UCMJ: 118; 119(a); 119a; 120; 120b; 122; 125; 126; 128a; and, 130. *Id.* at 4780.

> Consistent with this mandate to 'include expressly or by necessary implication every element' of the offense, in *United States v. Norwood*, this Court held that although 'in order to state the elements of an inchoate offense under Articles 80 and 81, UCMJ, a specification *is not required to expressly allege each element* of the predicate offense,' 'sufficient specificity is required so that an accused is aware of the nature of the underlying target or predicate offense.' 71 M.J. 204, 205, 207 (C.A.A.F. 2012) (further citations omitted).

Id. at 404 (emphasis added). *See also United States v. Russell*, 47 M.J. 412, 413 (C.A.A.F. 1998) ("A specification is sufficient 'so long as [the elements] may be found by reasonable construction of other language in the challenged specification.'") (citations omitted).

The CAAF also held in *Turner* that when the sufficiency of a specification is challenged at trial, as is the case here, "'we read the wording . . . narrowly and will only adopt interpretations that hew closely to the plain text.'" 79 M.J. at 403 (quoting *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011)). "Hewing closely to the plain text means we will consider only the language contained in the specification when deciding whether it properly states the offense in question." *Id.* (citing *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010)).

As the two specifications at issue in this case do not contain allegations pertaining to threats, protective orders, or strangulation, to the extent they state a domestic violence offense, they can only do so under Article 128b(1) ("commits a violent offense against a spouse, intimate partner . . .."). As there is no dispute that both specifications allege that the victim was an "intimate partner," the only question is whether appellant was on sufficient notice that he was being charged with committing a "violent offense" against his intimate partner, notwithstanding the absence of the words "violent offense."

As noted above, in *Turner* the CAAF reiterated that "a specification is not required to expressly allege each element," so long as the accused is put on sufficient notice of the offense with which he is being charged. 79 M.J. at 404. In focusing his analysis on the fact that the specifications failed to include the words "violent offense," the military judge erred in failing to take into account that Specification 3 alleges that appellant *unlawfully* picked up and threw the victim on a desk, and Specification 4 alleges that he *unlawfully* struck her the face with his hand. As such, both of these specifications describe a "violent offense" with sufficient specificity to put appellant on notice that he was being charged with domestic violence under Article 128b(1).

This is true even under our mandate to narrowly read and "hew closely" to the specific language of Specifications 3 and 4. *Fosler*, 70 M.J. at 230. Again, although the phrase "violent offense" is absent, when read in their entirety the plain language of both specifications put appellant on notice that he was charged with committing violent offenses against his intimate partner. *See Russell*, 47 M.J. at 413 ("A specification is sufficient 'so long as [the elements] may be found by reasonable construction of other language in the challenged specification.'") (citations omitted); *Turner*, 79 M.J. at 407 ("[W]e conclude that the unlawfulness element of the offense was sufficiently alleged by necessary implication").[3] Finally, the language of the recently issued EO further bolsters our holding, as it defines the term "violent offense" to include an assault under Article 128, UCMJ, or the "use of physical force" against another. As the conduct set forth in each specification easily meets the EO's definition of "violent offense," both are sufficient to state an offense under Article 128(b)(1).[4]

C. Lack of Prejudice

Rule for Court Martial 907(b)(2) expressly lists failure to state an offense as a non-jurisdictional and waivable claim. Likewise, in *Turner* the CAAF held that even if the specification does fail to state an offense, "it is unquestionably true that there simply is no prejudice to be found in this case—even when the stringent constitutional standard of harmlessness beyond a reasonable doubt is applied." 79 M.J. at 407. *See also United States v. Kim*, No. ARMY 20200689, 2022 CCA LEXIS 321, at *6 (A. Ct. Crim. App. May 26, 2022) ("[R.C.M.] 907 makes clear that claims of failure to state an offense are non-jurisdictional, and therefore waivable); *United States v. Seeto*, No. ACM 39247 (reh), 2021 CCA LEXIS 185, at *25-26 (A.F. Ct. Crim. App. 21 Apr. 2021) ("A defect in the language of the specification does not deprive the court-martial of jurisdiction over the offense itself. In any event, the plain meaning of R.C.M. 907(b)(2)(E), which expressly lists failure to state an offense as 'waivable grounds' for a motion to dismiss, is inescapable.").

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[3] Both at trial and on appeal, the parties have disputed whether adding the words "violent offense" to the specifications would constitute a "minor" or "major" amendment. Given our holding that as currently drafted the specifications each state an offense under Article 128(b)(1), we need not reach this issue.

[4] Although the EO was issued after the specifications at issue were referred, Sections 2(a) and 2(b) of the EO allow us to consider it as part of our analysis. *See* 87 Fed. Reg. 20 at 4763 (provisions of the EO are applicable so long as they are not used to capture conduct that was not criminal prior to the EO's enactment, or used as a mechanism to invalidate a proceeding). In any event, and even absent our consideration of the EO, for all of reasons set forth above we would still conclude the military judge erred in dismissing the specifications for failure to state an offense.

Applied in the case, appellant has made no showing of prejudice either at the trial below or on appeal. For example, he has made no claims that the ambiguity in the specification impacted his trial strategy, which makes sense given that it was the military judge who raised this issue sua sponte. Accordingly, even if the military judge was correct that omission of the words "violent offense" in the specifications constituted a failure to state an offense under Article 128(b), the lack of prejudice would still be fatal to his ruling dismissing the specifications. *See Turner*, 79 M.J. at 407–08 (holding no prejudice where there is no evidence that absent the government's charging decision, "Appellant would have handled his defense at court-martial any differently . . . or that Appellant would have been provided any additional protection from double jeopardy.").

CONCLUSION

For the reasons discussed above, the appeal of the United States pursuant to Article 62, UCMJ, is GRANTED, and the decision of the military judge is therefore SET ASIDE. We return the record of trial to the military judge for action consistent with this opinion.

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court