

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KERN, ALDYKIEWICZ and MARTIN
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant ELVIS W. THOMPSON
United States Army, Appellant

ARMY 20100545

III Corps and Fort Hood
Gregory A. Gross, Military Judge
Colonel Phillip N. Foster, Staff Judge Advocate

For Appellant: Colonel Patricia A. Ham, JA; Lieutenant Colonel Imogene M. Jamison, JA; Major Richard E. Gorini, JA; Captain James P. Curtin, JA (on brief).

For Appellee: Lieutenant Colonel Amber J. Roach, JA; Major Katherine S. Gowel, JA; Captain T. Campbell Warner, JA (on brief).

30 May 2013

SUMMARY DISPOSITION

Per Curiam:

Appellant was tried at a general court-martial composed of officer and enlisted members and was originally charged with abusive sexual contact, in violation of Article 120(h), Uniform Code of Military Justice [hereinafter, UCMJ], 10 U.S.C. § 920(h) (2006 & Supp. I 2007), *amended by* 10 U.S.C. § 920 (Supp V 2011), for offenses occurring between 1 October 2007 and 1 October 2008. The appellant was also charged with indecent assault against the same victim, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2000), for offenses occurring between 13 July 2005 and 30 September 2007. *See Manual for Courts-Martial, United States* (2002 ed.), pt. IV, ¶ 87.b., *deleted by* Exec. Order No. 13447, 72 Fed. Reg. 56179 (Sep. 28, 2007). The panel convicted appellant, contrary to his pleas, of indecent acts as a lesser-included offense of indecent assault, in violation of

Article 134, UCMJ.* The panel sentenced appellant to confinement for one year and reduction to the grade of E-1. The convening authority approved the sentence as adjudged and ordered it executed.

The case is now before this court for review under Article 66, UCMJ. We have considered the record of trial and the assignments of error raised by appellant. In consideration of our superior court’s decision in *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), we are compelled to set aside the findings of guilty.

The sole remaining charge in this case and its specification allege appellant committed indecent acts upon his niece, a female over sixteen years of age. The specification does not allege the Article 134, UCMJ, terminal elements of conduct that is prejudicial to good order and discipline (Clause 1) or of a nature to bring discredit upon the armed forces (Clause 2). “Where, as here, a specification neither expressly alleges nor necessarily implies the terminal element, the specification is defective.” *United States v. Gaskins*, 72 M.J. ___, slip op. at 16 (C.A.A.F. 23 May 2013) (citing *United States v. Fosler*, 70 M.J. 225, 229–30 (C.A.A.F. 2011)). However, appellant did not object to the form of the specification at trial, and “where defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error—which, in most cases will turn on the question of prejudice.” *Humphries*, 71 M.J. at 213–14 (citing *United States v. Cotton*, 535 U.S. 625, 631–32 (2002)). Therefore, appellant must demonstrate “the Government’s error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [appellant’s] substantial, constitutional right to notice.” *Id.* at 215; UCMJ art. 59(a). To assess prejudice, “we 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 (citing *Cotton*, 535 U.S. at 633; *Johnson v. United States*, 520 U.S. 461, 470 (1997)).

After thoroughly reviewing the record, we do not find any indication that appellant was on notice of the missing terminal elements. The government never proffered its theory of criminality with respect to the terminal elements, and did not “put on any direct evidence of the terminal element[s].” *Gaskins*, 72 M.J. at ___, slip op. at 23. See *United States v. Goings*, 72 M.J. ___ (C.A.A.F. 23 May 2013)

* At the conclusion of the evidence and before findings, the military judge granted, in part, the appellant’s motion for a finding of not guilty as to the abusive sexual contact charge pursuant to Rules for Courts-Martial 917. The military judge announced the finding of not guilty was granted as to the specified language of incapacitation, and provided the panel with instructions as to the lesser-included offense of indecent acts. The panel found appellant not guilty of the lesser-included offense for this Charge.

(finding the appellant was not prejudiced by the government's failure to plead the terminal elements because it proffered its theory of criminality, presented direct evidence on the terminal elements, and appellant put on a vigorous defense). While the government asserts that the defense's attempt to admit evidence of appellant's retirement (Dep't of Def., Form 214, Certificate of Release or Discharge from Active Duty (Aug. 2009)) was designed to counter the theory that the charged offense was service discrediting, we find the record does not reveal the defense attempted to offer this evidence specifically to negate either theory of the terminal element. *See United States v. Tunstall*, 72 M.J. ____ (C.A.A.F. 23 May 2013) (finding appellant was not prejudiced where the defense introduced evidence for the specific purpose of negating both theories of the terminal element). Based on a totality of the circumstances in this case, we are not convinced appellant was placed on sufficient notice of the government's theory as to which clause(s) of Article 134, UCMJ, he violated. As a result, appellant's substantial rights to notice were materially prejudiced by the government's failure to allege the terminal elements. *See* UCMJ art. 59(a).

CONCLUSION

Accordingly, on consideration of the entire record and in light of *Humphries*, the findings of guilty and the sentence are set aside. Charge II and its specification are dismissed without prejudice, for there is no bar to a new trial on the underlying misconduct. *See United States v. Saintaupe*, 56 M.J. 888, 891 (Army Ct. Crim. App. 2002), *aff'd*, 61 M.J. 175 (C.A.A.F. 2005). A new trial may take place under the jurisdiction of the same or different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the approved findings and sentence, hereby set aside by this decision, are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court