# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, BERG, and KRAUSS
Appellate Military Judges

**UNITED STATES, Appellee**
**v.**
**Private E2 PAYSON C. AVERILL**
**United States Army, Appellant**

ARMY 20090491

Headquarters, United States Army Maneuver Center of Excellence
James Pohl, Military Judge
Colonel Tracy A. Barnes, Staff Judge Advocate (pretrial and recommendation)
Lieutenant Colonel Jeffery D. Lippert, Deputy Staff Judge Advocate (addendum)

For Appellant: Captain Kristin McGrory, JA; Mr. Frank J. Spinner, Esquire (on brief).

For Appellee: Major Amber J. Williams, JA; Captain Kenneth W. Borgnino, JA (on brief).

7 December 2011

---
SUMMARY DISPOSITION
---

Per Curiam:

A panel of officer and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of aggravated sexual assault, indecent conduct, and adultery, in violation of Articles 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, and 934 (2007) [hereinafter UCMJ]. *See Manual for Courts-Martial*, *United States*, (2005 ed.) [hereinafter *MCM*], Part IV, para. 62.b. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E1.[1]

[1] Prior to taking action, the convening authority considered the addendum to the staff judge advocate recommendation (SJAR). The SJAR addendum was signed by Lieutenant Colonel Lippert as the "Deputy Staff Judge Advocate." However, Article 60(d), UCMJ, requires a convening authority to obtain the written recommendation of his staff judge advocate or legal officer, not the deputy staff

(continued . . .)

Appellant's case is now before this court for review under Article 66, UCMJ. Appellant raises two assignments of error.[2] In addition, it is evident that Specification 1 of Charge II, setting forth a violation of Article 134, UCMJ, does not expressly allege a terminal element. We have considered the Article 134 charge and specification in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and we have also considered the issues raised by appellant, the government's answer, and the record of trial. We find the issues raised by appellant to be without merit, and we hold that Specification 1 of Charge II, when liberally construed, states the offense of adultery.

## LAW AND DISCUSSION

Whether a charge and specification state an offense is a question of law that is reviewed de novo. *United States v. Roberts*, __ M.J. ___, slip op. at 4 (Army Ct. Crim. App. 14 Oct. 2011). Together, the charge and specification must "allege every element of the offense either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy," *id.* (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). Rule for Courts-Martial 307(c)(3). Here, appellant pleaded not guilty to the charge of adultery—which in this case does not expressly allege that appellant's conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces. However, appellant did not object to the language of the charge and specification at trial, nor did he object in his post-trial matters to the convening authority, or in his appeal to this court. Appellant's silence on this issue speaks volumes and informs our decision on this matter. *See United States v. Hoskins*, 17 M.J. 134, 136 (C.M.A.

---

(. . . continued)
judge advocate. Consequently, it was plain error for the deputy staff judge advocate to sign the SJAR addendum. *United States v. Hudgins*, 69 M.J. 630, 631 (Army Ct. Crim. App. 2010). Regardless, we find no prejudice in this case. Appellant did not allege the error to this court nor did he make "any colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

[2] In one assignment of error, appellant avers that the military judge erred when he did not instruct the panel that appellant first possessed the burden to prove the affirmative defenses of consent and mistake of fact as to consent by a preponderance of the evidence. UCMJ art. 120(t)(16). We hold that the military judge erred by not giving a legally sufficient explanation when he provided an instruction that was inconsistent with Article 120, UCMJ. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). However, under the facts of this case, we are satisfied that this error was harmless beyond a reasonable doubt. The instruction that was given was clear and correctly conveyed that the burden to disprove the affirmative defenses beyond a reasonable doubt rested solely with the government. *Id.*

1984) (listing factors that directly impact the ultimate decision of whether a charge and specification necessarily imply an element). Where a charge and specification are not challenged at trial, their language is to be liberally construed. *Roberts*, __ M.J. at ___, slip op. at 4 (citing *United States v. Watkins*, 21 M.J. 208, 209–10 (C.M.A. 1986)). *Cf. Fosler*, 70 M.J. at 230. This liberal rule of interpretation is applicable even where an appellant does not plead guilty. *United States v. Fox*, 34 M.J. 99, 102 (C.M.A. 1992); *Roberts*, __ M.J. at ___, slip op. at 5; *United States v. Berner*, 32 M.J. 570, 572 (A.C.M.R. 1991).

In the absence of an objection at trial, we will not set aside a charge and specification unless it is "so obviously defective that it could not be reasonably construed to embrace [the] terminal element." *Roberts*, __ M.J. at ___, slip op. at 5; *United States v. Watkins*, 21 M.J. 208, 209–10 (C.M.A. 1986). We hold that in this case the Article 134 charge and specification can be so construed, and, therefore, state the offense of adultery. In this case, appellant did not object at trial; therefore, his standing to challenge the charge and specifications is circumscribed. *Roberts*, __ M.J. at ___, slip op. at 4. *Cf. Fosler*, 70 M.J. at 230. In addition, the allegations contained in the adultery specification mirror those supporting the separately charged specifications alleging an aggravated sexual assault and an indecent act. In other words, altogether the charges notified appellant that the adultery was committed by engaging in sexual intercourse with a substantially incapacitated woman that was not his spouse in violation of Article 134, UCMJ. Therefore, the adultery charge and specification in this case necessarily imply that appellant's conduct was prejudicial to good order and discipline or service discrediting.

Furthermore, this textual relationship of necessary implication provided appellant with fair notice. The charge sets forth a violation of Article, 134, UCMJ, and the specification states the date, location, and the victim of the offense. *See, e.g., United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (holding a maltreatment specification provided notice because "it set[] forth the Article of the Code, name of the victim, the time frame of the offense, and the comments alleged to have been made by appellant"). Additionally, the panel was instructed in open court, without comment from appellant or his defense counsel, that the Article 134 offense contained terminal elements and required proof of the same. Buttressed by the presumption of the defense counsel's competence, this is strong evidence that appellant was not misled about the nature of the charge leveled against him. *See MCM*, Part IV, paras. 60.c.(6)(a), and 62.b. Finally, the factual allegations in the specification combined with the record of trial sufficiently protect appellant against double jeopardy.

## CONCLUSION

On consideration of the entire record, and in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), we find appellant's arguments to be without merit. We hold the findings of guilty and the sentence as approved by the convening

authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court