5 October 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Airman (E-2) MICHAEL S. TUNSTALL, USAF, *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 12-0516/AF Crim. App. Dkt. ACM 37592

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION FOR INDECENT ACTS MUST BE SET ASIDE BECAUSE THE MILITARY JUDGE ERRED IN INSTRUCTING THE MEMBERS THAT INDECENT ACTS IS A LESSER INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT.

II.

WHETHER THE FINDING OF GUILTY MUST BE DISMISSED IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 907(b)(1) BECAUSE IT FAILS TO STATE AN OFFENSE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF THE FACTS

In April of 2009, Appellant was assigned to the 1st Special Operations Equipment Squadron at Hurlburt Field, Florida. (J.A. at 15.) On 17 April 2009, Appellant, Airman First Class ("A1C") KAS, A1C WD, and A1C TJ spent the day at hanging out together drinking at the dorms and at the beach. (J.A. at 74-77.) Later in the day, the four Airmen went to A1C TJ's room to play a drinking game. (J.A. at 78.)

At some point during the game, after several drinks during the course of the day, A1C KAS removed her clothes then straddled Appellant. (J.A. at 80.) Appellant proceeded to digitally penetrate A1C KAS in the dorm room while the other two Airmen were present. (J.A. at 80.) After a short period of time, A1C KAS fell to the floor and began to vomit. (J.A. at 82.) A1C KAS was conscious, but was neither moving nor talking. (J.A. at 219.) Appellant and A1C TJ assisted A1C KAS to the nearby sink. (J.A. at 83.) A1C KAS continued to dry heave while she was leaning over the sink. (J.A. at 84.) Appellant digitally penetrated A1C KAS again while she was bent over the sink. (J.A. at 85.) Seeing this, A1C TJ stated to Appellant, "[i]t's not time for that. I mean she's sick, we need to take care of her." (J.A. at 85.) Appellant stopped, and the two men helped A1C KAS to the bathroom toilet. (J.A. at 86.) A1C TJ left the bathroom to get a glass of water. (J.A. at 87.) Appellant then closed and locked the

bathroom door. (J.A. at 87.) While there, Appellant engaged in sexual intercourse with A1C KAS. (J.A. at 191, 398.)

Meanwhile, Senior Airman ("SrA") HD, A1C TJ's suitemate, having walked into the suite and seen A1C KAS in the bathroom naked and sick, became concerned. (J.A. at 247-49.) He told Appellant, as he assumed that the two were together, to get A1C KAS rinsed off. (J.A. at 249.) Appellant closed the door. (Id.) After some time, SrA HD wondered what was taking so long. (J.A. at 249-50.) He went to the bathroom door and banged on, punched, and kicked it, yelling to Appellant to open the door. (J.A. at 251-52.) After approximately 20 minutes, Appellant emerged from the bathroom wearing nothing but a towel. (J.A. at 252.) A1C KAS was in the tub, naked and curled up in a ball. (J.A. at 88, 252.) SrA HD entered the bathroom, physically lifted A1C KAS out of the tub, and carried her to her room. (J.A. at 253-54.) She was in and out of consciousness with her eyes rolling to the back of her head. (J.A. at 89.) SrA HD dressed A1C KAS and placed her on her bed. (J.A. at 90.) A1C KAS awoke the next morning having no memory of the events in the room after the beginning of the card game. (J.A. at 185-86.)

During the charged timeframe, Appellant was married. (J.A. at 395-96.) An application for dissolution of the marriage had been filed; however, there was no evidence that a final order dissolving the marriage had ever been issued. (J.A. at 400-02.)

Additional facts necessary to the disposition of the case are set forth in the argument below.

SUMMARY OF THE ARGUMENT

Appellant's conviction for indecent acts should be affirmed because it is a lesser included offense of the alleged aggravated sexual assault. It was impossible to commit the charged act alleged in this specification without also committing an indecent act. Despite Appellant's characterization, open and notorious sexual conduct is not an element of indecent acts and therefore does not affect the analysis of this issue.

Appellant's conviction for adultery should also be affirmed because Appellant and his trial defense counsel had actual notice of the terminal element of the alleged adultery specification as early as receipt of the Article 32 investigator's report. Appellant's trial defense counsel manifested this actual notice by testing the government's evidence through related cross examination, offering evidence of their own, and specifically articulating knowledge of the terminal element to the military judge in the middle of the presentation of the evidence. As a result, Appellant suffered no prejudice from the absence of the terminal element in the adultery specification.

ARGUMENT

I.

A SPECIFICATION ALLEGING THE COMMISSION OF A SEXUAL ACT UPON A SUBSTANTIALLY INCAPACITATED PERSON ALLEGES BOTH THE HIGHER OFFENSE OF AGGRAVATED SEXUAL ASSAULT AND THE LESSER OFFENSE OF INDECENT ACT.

Standard of Review

Whether an offense is a lesser included offense is question of law reviewed de novo. United States v. Miller, 67 M.J. 385, 387 (C.A.A.F. 2009). Whether the members were properly instructed is also a question of law reviewed de novo. United States v. Miergrimado, 66 M.J. 34, 36 (C.A.A.F. 2008) citing United States v. Schroder, 65 M.J. 49, 54 (C.A.A.F. 2007).

Law and Analysis

The test for determining lesser included offenses under the UCMJ provides in pertinent part that "[a]n accused may be found guilty of an offense necessarily included in the offense charged." United States v. Alston, 69 M.J. 214, 215 (C.A.A.F. 2010)(citing Article 79, UCMJ.) The Supreme Court set forth an elements test stating that one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, an instruction on the lesser included offense should not be given. Schmuck v. United States, 489 U.S. 705, 716

(1989). This elements test does not require that the two offenses at issue employ identical statutory language. Alston, 69 M.J. at 216. Instead, the meaning of the offenses is ascertained by applying the normal principles of statutory construction. Id. (citing Carter v. United States, 530 U.S. 255, 263 (2000).) Thus, the Court should determine, after applying the normal principles of statutory construction, whether the lesser included offense elements are a subset of the charged offense elements. United States v. Bonner, 70 M.J. 1, 2 (C.A.A.F. 2011); United States v. Jones, 68 M.J. 465, 467 (C.A.A.F. 2010).

The specification at issue here alleged, under Article 120, UCMJ, that Appellant did "engage in a sexual act, to wit: digital penetration by [Appellant] of the vagina with [A1C KAS], who was substantially incapable of declining the participation in the sexual act." (J.A. at 41.) The specification alleges an aggravated sexual assault. Article 120(c)(2), UCMJ; *see* Manual for Courts-Martial, pt. IV, para. 45(g)(3)(c) (2008 ed.) ("MCM")(sample specification).

The offense of aggravated sexual assault upon a person substantially incapable of declining participation in the sexual act occurs when "[a]ny person subject to this chapter who . . . engages in a sexual act with another person of any age if that other person is substantially incapable of . . . declining

participation in the sexual act." Article 120(c)(2), UCMJ. Included in the definition of a sexual act is "the penetration, however slight of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." Article 120(t)(1)(B).

The offense of indecent acts occurs when "[a]ny person subject to this chapter who engages in indecent conduct." Article 120(k). Indecent conduct means "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120(t)(12).

Comparing the elements of the offenses, it is clear that the charged offense in this case wholly encompassed not only the elements of the crime of aggravated sexual assault, but also the crime of indecent acts. As the lower Court correctly observed,

> Surely, "it is impossible to" penetrate someone's genital opening without their permission in order to abuse, humiliate, harass, or degrade or to arouse or gratify a sexual desire "without first having committed" conduct that is also sexually immoral by virtue of being grossly vulgar, obscene, and repugnant to common propriety and that tends to excite sexual desire or deprave morals with respect to sexual relations."

(J.A. at 10.) Hence, applying the normal principles of statutory construction, the lesser included offense elements are a subset of the greater elements. *See* United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011)(affirming conviction for lesser offense where it was "impossible to prove [the greater offense] without also proving [the lesser offense]").

In fact, the United States could have transplanted the essential facts from the alleged aggravated sexual assault specification, without alteration, into a legally sufficient indecent acts specification: Appellant did engage in a sexual act, to wit: digital penetration by [Appellant] of the vagina with [A1C KAS], who was substantially incapable of declining the participation in the sexual act. *See* MCM pt. IV, para. 45(b)(11).

Appellant attempts to analogize this case to one involving variance between pleadings and proof. (App. Br. at 12.) To be clear, this is not a case where the proof of Appellant's actions varied from the pleadings. Appellant was alleged to have digitally penetrated A1C KAS while she was substantially incapable of declining participation in the sexual act. (J.A. at 41.) The evidence proved, at a minimum, because Appellant's digital penetration of A1C KAS occurred while A1C KAS was bent over a sink, naked and dry heaving, that his conduct was indecent. After having been properly instructed on the elements

of the charged offense of aggravated sexual assault and on the lesser included offense of indecent acts, the members convicted Appellant of indecent acts. (J.A. at 297-304, 393.) Under these circumstances, the military judge appropriately concluded that an instruction on the lesser included offense of indecent acts was required to be given in this case and completed his duty to give that instruction.[1] *See* Miergrimado, 66 M.J. at 36.

Appellant attempts to blur the clarity of this issue and cites to United States v. Clifton, 69 M.J. 719 (C.G. Ct. Crim. App. 2011), asserting that Appellant was not given notice of the "element" of "open and notorious" sexual conduct as it relates to indecency. (App. Br. at 18-9.) Importantly, as Appellant also notes, open and notorious sexual conduct is ***not an "element" of an indecent acts*** offense. (App. Br. at 17.) Indecent conduct contains two elements. That the sexual conduct is open and notorious is not one of them. Article 120(k). Rather, open and notorious sexual conduct is one of many possible "aggravating circumstances" sufficient to support an indecent acts conviction. United States v. Izquierdo, 51 M.J. 421, 422 (C.A.A.F. 1999) citing United States v. Berry, 20 C.M.R. 325, 330 (C.M.A. 1956).

[1] Trial defense counsel did not object to this lesser included offense instruction being provided to the members. (J.A. at 294-95, 372.)

The Supreme Court and this Court have clearly set the standard for determining when one offense is a lesser included offense of a charged offense. Schmuck, 489 U.S. at 716; Alston, 69 M.J. at 215. That standard includes evaluation of the elements, but not a consideration of the myriad of possible "aggravating circumstances." Modification of this standard is unnecessary and inappropriate. As this Court held in Jones, "to require the elements test for LIOs has the constitutionally sound consequence of ensuring that one can determine *ex ante*—solely from what one is charged with—all that one may need to defend against." 68 M.J. at 472. Utilizing this straightforward elements test, after applying the normal principles of statutory construction, it is clear that an indecent acts offense is a lesser included offense of the aggravated sexual assault offense as charged in this case.

In sum, the military judge did not err in instructing the members on the lesser included offense of indecent acts. The lower Court correctly affirmed Appellant's conviction. Appellant's claim for relief on this issue should be rejected and his conviction for committing an indecent act should be affirmed by this Court as well.

II.

APPELLANT'S ADULTERY CONVICTION SHOULD BE AFFIRMED BECAUSE THOUGH THE SPECIFICATION DID NOT ALLEGE THE TERMINAL ELEMENT, THERE WAS NOT MATERIAL PREJUDICE TO ANY OF APPELLANT'S SUBSTANTIAL RIGHTS.

Standard of Review

Whether a specification states an offense is a question of law reviewed de novo. United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). "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).

Law and Analysis

This issue centers on the adultery specification alleging a violation of Article 134, UCMJ which reads as follows:

> In that [Appellant], United States Air Force, 1st Special Operations Maintenance Squadron, Hurlburt Field, Florida, a married man, did, at or near Hurlburt Field, Florida, on or about 17 April 2009, wrongfully have sexual intercourse with [A1C KAS], a woman not his wife.

(J.A. at 15.) As drafted, the adultery specification does not allege the terminal element of the general article of the UCMJ. That is, that Appellant's conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces. Article 134, UCMJ,

Clauses 1 and 2. Therefore, this Court has made clear that such a specification is defective because it does not expressly allege the terminal element. United States v. Fosler, 70 M.J. 225, 230-31 (C.A.A.F. 2011); United States v. Ballan, 71 M.J. 28, 33 (C.A.A.F. 2012); United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012).

Error alone though does not automatically entitle Appellant to relief here on appeal. Article 59(a), UCMJ. Rather, Appellant is only entitled to relief where he can meet his burden to prove that the error resulted in material prejudice to a substantial right. Id. Here, Appellant argues that his conviction must be dismissed without a prejudice analysis relying on R.C.M. 907(b)(1). (App. Br. at 28.) This Court has specifically rejected this argument at least twice. Ballan, 71 M.J. at 34; Humphries, 71 M.J. at 212-13. In doing so, this Court has definitively held that in the absence of an objection at trial, the prejudicial effect of a defective specification will be reviewed under a plain error analysis. Ballan, 71 M.J. at 34; Humphries, 71 M.J. at 213-14.

Under a plain error analysis, Appellant alone has the burden of demonstrating that there was error, that the error was plain and obvious, and that the error materially prejudiced a

substantial right.[2] Humphries, 71 M.J. at 214, 217 n.10.; United States v. Girouard, 70 M.J. 5 (C.A.A.F. 2011). As noted above, under this Court's current precedent, this defective specification amounted to plain and obvious error. However, Appellant cannot meet his burden to establish material prejudice in this case.

To determine whether the defective specification resulted in material prejudice to a substantial right, this Court looks to the record to determine whether the notice of the missing element is somewhere extant in the trial record, or whether the element is "essentially uncontroverted." Humphries, 71 M.J. at 215-16 citing United States v. Cotton, 535 U.S. 625, 633 (2002). In this case, the record is saturated with evidence that Appellant had actual notice of the terminal element of this

[2] The United States asserts that though this Court created a military plain error doctrine with three prongs in United States v. Powell, 49 M.J. 460, 463-65 (C.A.A.F. 1998), the correct standard applicable to all federal courts, including military courts, was set forth by the Supreme Court in Puckett v. United States, 556 U.S. 129, 135 (2009) quoting United States v. Olano, 507 U.S. 725, 734 (1993). This plain error standard contains four prongs. If all of the three prongs articulated above have been met, the Court of Appeals has the ***discretion*** to remedy errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. Puckett, 566 U.S. at 135. Applying this four prong plain error test, considering the military's long history of not requiring the terminal element of Article 134 specifications to be expressly pled, Appellant's representation by two qualified and certified military defense counsel, Appellant's failure to allege any cognizable prejudice, and the quality of the evidence establishing Appellant's guilt with regards to the terminal element, affirming Appellant's conviction even with a determination that this specification was defective in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See* Humphries, 71 M.J. 222 (Stucky, J., dissenting.)

adultery specification that he needed to defend against and that he did in fact defend against that element at trial.

Looking first to what was provided to Appellant pre-trial, actual notice of all the elements of the offense to adultery were spelled out for him as early as 17 August 2009 when he signed for the receipt of the Article 32 investigator's report. (J.A. at 45.) The United States acknowledges that this same fact was present in Humphries and that the majority of this Court ultimately reversed SrA Humphries' adultery specification despite this fact. Humphries, 71 M.J. at 217. The majority opinion in Humphries, however, did not squarely address this fact or express whether this actual notice was insufficient. Id. at 222 (Stucky, J., dissenting)(recognizing that an Article 32 investigation was completed and SrA Humphries and his trial defense counsel were served a report spelling out all of the elements of the adultery specification.)

The justification for finding no material prejudice in cases where a properly conducted Article 32 investigation has been completed is identical to the justification for finding no prejudice in guilty plea cases like Ballan. This Court has recognized that "[t]he guilty plea process within the military justice system thus ensures that an appellant has notice of the offense of which he may be convicted and all elements thereof before his plea is accepted and moreover, protects him against

double jeopardy." Ballan, 71 M.J. at 35. Because a military judge at trial specifically instructs an appellant at trial of all the elements and definitions of an offense prior to accepting their guilty plea, the Court will have no doubt that the appellant understood what he was being charged with. Id. An appellant being presented with this identical information from an investigating officer conducting an official Article 32 investigation yields absolutely no less actual notice. This is particularly true where there is direct evidence that both an appellant and his trial defense counsel received the report. Such is the case here. (J.A. at 44-45.) Where the only difference between a military judge informing an appellant of the terminal element and an investigating officer informing an appellant of the terminal element is truly form over substance, in a plain error prejudice analysis, the appellant should not receive relief.[3] To hold otherwise "disturbs the careful balance the plain error doctrine was meant to strike between judicial efficiency and the redress of justice." Humphries, 71 M.J. at 222 (Stucky, J., dissenting).

During trial itself, it is blatantly obvious that Appellant and his trial defense counsel were well aware of their need to

[3] Based on this, the United States respectfully requests this Court to expressly hold that in courts-martial where a properly conducted Article 32 investigation was completed listing all of the elements, including the terminal element, and the report is provided to an appellant, that there is no material prejudice even in cases involving a litigated Article 134 specification.

defend against the terminal element of this adultery specification. Throughout the government's case-in-chief, trial defense counsel cross examined several of the government's witnesses on issues related to the terminal element of adultery. Trial defense counsel asked several witnesses if they knew that Appellant was married on the day he sexually assaulted A1C KAS (J.A. at 114-15, 211, 231, 240-41.) He also asked several witnesses if they knew Appellant was getting a divorce. (Id.) By asking these questions, trial defense counsel elicited evidence he was able to later argue about in closing argument in an effort to acquit Appellant of this specification.[4]

Additionally, during the government's case-in-chief, trial counsel presented evidence that overwhelmingly proved the terminal element of the adultery specification. Each of the involved Airmen was assigned to the same installation, many to the same unit. (J.A. at 73, 157, 181, 184, 202-03, 214, 235, 243.) This criminal offense occurred in the dorms on the installation. (J.A. at 209.) This incident was so disruptive to the many Airmen in the dorms that several showed up to the room; one witness had to intervene by punching and kicking the door for several minutes; and immediately following the adultery, a scuffle between Appellant and another military

[4] In fact, trial defense counsel identified this terminal element as "the most important element" and then read it verbatim to the members from the military judge's instructions. (J.A. at 349.)

member ensued. (J.A. at 168-69, 237, 303-04.) Moreover, after having sexually assaulted A1C KAS, Appellant attempted to convince her not to tell anyone. (J.A. at 188.) Finally, evidence was presented that Appellant's wife was a civilian. (J.A. at 395.) All of this evidence proved the terminal element of adultery and put Appellant squarely on notice of the terminal element and his need to defend against it. *Cf.* Humphries, 71 M.J. at 216 (holding that the government did not present any specific evidence or call a single witness as to why SrA Humphries' conduct satisfied either clause 1, clause 2 or both clauses of the terminal element of Article 134.)

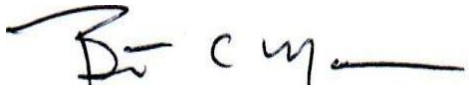
Furthermore, and most compellingly, in the defense case-in-chief, Appellant presented evidence directly related to the terminal element of this adultery specification. Appellant offered, through his trial defense counsel, his application for dissolution of marriage. (J.A. at 278.) In doing so, trial defense counsel specifically articulated two points that provide final and unwavering proof that there is no prejudice in this case because actual notice was evident. First, trial defense counsel specifically stated, "[i]n the third element of adultery is under the circumstances that conduct, the adultery, was prejudicial to good order and discipline, or service discrediting." (J.A. at 279.) Second, trial defense counsel argued that this application for dissolution of the marriage was

evidence "going against" this third element. (J.A. at 280-83.) It is undisputable then that trial defense counsel had actual notice of the terminal element of this adultery specification. It is also undisputable, given the submission of this evidence, that Appellant was provided the opportunity to and did in fact defend against this terminal element.

Considering that Appellant: was provided actual notice of this adultery specifications terminal element through the Article 32 investigator's report; that both he and the government presented evidence on this terminal element in their respective case-in-chiefs; that Appellant's trial defense counsel elicited evidence on the terminal element through cross-examination; and that Appellant's trial defense counsel unquestionably demonstrated his actual notice of need to defend against this terminal element by stating so on the record, it is impossible for Appellant to meet his burden to establish material prejudice to a substantial right. Thus, in accordance with Article 59(a), Appellant is not entitled to relief here on appeal and his claim must be denied.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.



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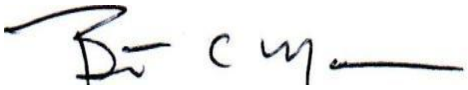
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 5 October 2012.



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