

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	Misc. Dkt. No. 2011-07
Appellant)	
)	
v.)	
)	ORDER
Technical Sergeant (E-6))	
ROBERT C. BRISSETTE,)	
USAF,)	
Appellee)	Panel No. 2

HARNEY, Judge:

On 24 June 2011, contrary to his pleas, the appellee was convicted of one specification of indecent acts with a minor, in violation of Article 134, UCMJ, 10 U.S.C. § 934.¹ The adjudged sentence consisted of a bad-conduct discharge and confinement for 13 months. On 13 September 2011, the military judge set aside the finding of guilty and sentence, after deciding that, in light of the decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the appellee had been tried and convicted without being properly notified as to the terminal element of the Article 134, UCMJ, offense. The military judge then dismissed the specification and the charge, without prejudice.

On 16 September 2011, the Government filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862. The Government raises the following issue for our consideration: that the military judge erred in ruling it was a major change for the Government to add the terminal element to the charge of indecent acts with a minor under Article 134, UCMJ. We disagree and deny the Government's appeal.

Background

The appellee was charged with committing numerous sexual offenses upon his step-daughter on divers occasions, including indecent acts under Article 134, UCMJ. The appellee pleaded not guilty to all charges and specifications and was convicted only of the Article 134, UCMJ, charge, with exceptions. The Article 134, UCMJ, specification, as preferred, did not allege a "terminal element": that the charged conduct was prejudicial to good order and discipline, was service discrediting, or violated a non-capital federal criminal statute. During an Article 39(a), UCMJ, 10 U.S.C. § 839(a),

¹ In accordance with his pleas, the appellee was acquitted of one specification of engaging in a sexual act, two specifications of committing sodomy, and one specification of assaulting a child, in violation of Articles 120, 125, and 128, 10 U.S.C. §§ 920, 925, 928, respectively.

session, the Government orally moved to amend the Article 134, UCMJ, specification to include the terminal element, “such conduct being of a nature to bring discredit upon the armed forces.”

The appellee objected and stated that the addition would be “a major change because it adds an additional element of proof which now we have to defend against . . . and if that change were to be made, we would potentially be asking that the Article 32 be reopened to determine whether the terminal element was satisfied.” The Government cited several cases, including *United States v. Fosler*, 69 M.J. 669 (N.M. Ct. Crim. App. 2010), *rev’d*, 70 M.J. at 233, to point out that “the government need not allege the terminal element and, therefore, because it’s not a requirement, it’s a minor change. It is seen as surplusage and the government is seeking to amend the specification in case there’s a change in the law and because that’s the direction we received from the appellate government shop.”

The military judge determined that it was a minor change, and ruled that the specification, as drafted, was “sufficient to place the accused on notice of the offense and all of the elements thereof.” The military judge stated he was aware of the ongoing appeal and oral argument in *Fosler* before the Court of Appeals for the Armed Forces (CAAF), but opined that “[t]he case law since time immemorial, at least as I can recall, has not required that the terminal element be alleged.” The appellee did not request additional time to prepare for the newly amended charge. At no time during the proceedings did the appellee explicitly raise a motion to dismiss the charge and specification for failure to state an offense under Rule for Courts-Martial (R.C.M.) 907, or under another basis.

After the appellee’s trial, but before the record was authenticated, CAAF decided *Fosler*. The appellee then asked the military judge to reconsider his earlier ruling that the amendment was minor. On 13 September 2011, the military judge revised his original ruling and, holding that the amendment constituted a major change, set aside the finding of guilty as well as the sentence, and dismissed the Article 134, UCMJ, specification without prejudice. On 16 September 2011, the Government notified the military judge of its intent to appeal his ruling under Article 62, UCMJ.

Discussion

Under Article 62, UCMJ, this Court may act only with respect to matters of law, and a military judge’s conclusions of law are reviewed de novo. *See* R.C.M. 908(c)(2); *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). Unless the military judge’s findings of fact are clearly erroneous, we are bound by his determinations and may not find facts or substitute our own interpretation of the facts. *See United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). Whether a specification states an offense is a question of law. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); *United States v. Dear*, 40 M.J. 196,

197 (C.M.A. 1994). Whether a change in a specification is a minor change or a major change is also a question of law. *United States v. Sullivan*, 42 M.J. 360, 364-66 (C.A.A.F. 1995).

The military is a notice-pleading jurisdiction, *Fosler*, 70 M.J. at 229 (citing *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)), and a charge and specification is sufficient if it alleges every element of the offense expressly or by implication. R.C.M. 307(c)(3); see also *Sutton*, 68 M.J. at 457. Such legal sufficiency requires first, that the charge and specification “contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend, and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *Fosler*, 70 M.J. at 229 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). A failure to object to the issue of a specification’s legal sufficiency does not constitute a waiver or any such legal sufficiency. R.C.M. 905(e). However, “[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal.” *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990). See also *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990); *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986).

The accused in *Fosler* was charged with sexually assaulting a sixteen-year-old female under Article 120, UCMJ, 10 U.S.C. § 920, and with adultery under Article 134, UCMJ. He was acquitted of the Article 120, UCMJ, charge and convicted of adultery. At the end of the Government’s case in chief, the accused moved to dismiss under R.C.M. 917 and for a failure to state an offense by not alleging the terminal element.² The military judge denied the motions, finding no requirement that the Government had to either state which clause of the terminal element is alleged or state either of them in the specification. The judge then instructed the members that they could convict the accused if they found his conduct prejudicial to good order and discipline or service discrediting. The members convicted the accused of adultery; the Navy-Marine Corps Court of Appeals affirmed the findings and sentence. *Fosler*, 69 M.J. at 678.

On appeal, our superior court examined the issue of whether a terminal element could be implied in an adultery specification such that it stated an offense and held that, under the facts of that case, it failed to do so. *Fosler*, 70 M.J. at 233. Applying the constitutional framework from recent LIO jurisprudence,³ the Court decided that “[t]he mandates of constitutional notice requirements . . . substantially limit the extent to which the terminal element can permissibly be implied . . . [and] an accused must be notified *which of the three clauses* he must defend against.” *Id.* at 232-33 (emphasis added).

² The Court of Appeals for the Armed Forces (CAAF) agreed the lower court was correct to consider the second motion as one brought under Rule for Courts-Martial 907. *United States v. Fosler*, 70 M.J. 225, 227 (C.A.A.F. 2011).

³ *Id.* at 228 (citing *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011); *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009); *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008)).

Accordingly, the Court found that “to survive an R.C.M. 907 motion to dismiss, the terminal element must be set forth in the charge and specification.” *Id.* at 233.

The Government argues that *Fosler* is distinguishable from this case in that its holding is limited to the offense of adultery. We disagree. To the extent *Fosler*’s holding embraces constitutional notions of due process and notice, it necessarily has broader application. Indeed, in some ways this case is procedurally indistinguishable from *Fosler*.⁴

In *Fosler*, the trial defense counsel challenged the Article 134, UCMJ, specification by moving to dismiss it both under R.C.M. 917 and R.C.M. 907. Here, trial defense counsel challenged the specification when he objected to the Government’s motion to add the terminal element. In arguing that the amendment would constitute a major change requiring that “the Article 32 be reopened,” trial defense counsel substantively complained of the same defect as that in *Fosler* - the charge and specification, as drafted, did not implicate the terminal element, and thus did not provide him with adequate notice as to what he must defend against. To argue that the additional language was major and would require a new Article 32, UCMJ, hearing and a new preferral, *see* R.C.M. 603(d), assumes the change added a party, an offense, or a substantial matter not previously fairly included, or was likely to mislead the appellee as to the offense charged. *See* R.C.M. 603(d), (a).

Without question, the specification, as amended, stated an offense. As in *Fosler*, the critical question here is whether the terminal element was implied notwithstanding the change. If so, the change was minor and the military judge erred when he subsequently ruled otherwise. *See Fosler*, 70 M.J. at 230. To answer the critical question, “we must interpret the text of the charge and specification,” and though it is possible “an element could be implied . . . in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that *hew closely to the plain text.*” *Id.* (emphasis added).⁵ The Government argues that the pre-amended specification should be read liberally, and not under this stricter standard. It asserts the appellee’s objection at trial merely challenged the change, not the legal sufficiency of the charge and specification, and was therefore not raised until this present appeal. We disagree. As discussed above, the essence of the appellee’s objection was that the pre-amended charge and specification did not provide him with adequate notice. The procedural parallels of this case and *Fosler* compels an application here of the same narrow construction that was applied in *Fosler*.

⁴ For example, in *Fosler*, the challenged specification alleged a violation of Article 134, UCMJ, 10 U.S.C. § 934, but did not expressly allege a terminal element. Here, the charge and its pre-amended specification also did not expressly allege a terminal element. In *Fosler*, the accused was charged with, but acquitted of, other non-Article 134, UCMJ, offenses. In this case, the appellee was charged with, but acquitted of, other non-Article 134, UCMJ, offenses.

⁵ As CAAF noted, in narrowly reading a charge and specification, “the terminal element might be alleged using words with the same meaning,” but this “does not mean that the text of every element is equally susceptible to implication consistent with constitutional notice requirements.” *Fosler*, 70 M.J. at 233 n.5.

In determining whether the terminal element was necessarily implied in the pre-amended specification, we narrowly read its wording and reject interpretations that are not closely derived from its plain text. *Id.* The specification reads:

In that [the appellee], United States Air Force, 7th Equipment Maintenance Squadron, Dyess Air Force Base, Texas, did, within the continental United States, on divers occasions between on or about 19 October 1998 and on or about 30 September 2007, commit an indecent act upon the body of [DLC], a female under 16 years of age, not the wife of the said [appellee], by fondling her on and around her vulva, touching her on her breast, lifting her shirt and sucking on her breast, and inserting a foreign object the size of a pen in her vulva, with the intent to gratify the sexual desires of the said [appellee].”

The Government cites *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), to argue that “engaging in indecent acts with a minor” inherently implies the terminal element in that it “fully encompasses” the concept of service discrediting conduct.

In *Resendiz-Ponce*, the Supreme Court found, in an attempted illegal reentry indictment, that the element of an overt act need not be specifically alleged as it was implied in the word “attempt.” *Id.* at 107. It reasoned that “[n]ot only does the word ‘attempt’ as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and the intent elements.” *Id.* Here, the Government argues that the word “indecent” similarly equates to the concept of service discrediting conduct. The Supreme Court’s analysis, however, did not end there. It ultimately found that “the use of the word ‘attempt,’ coupled with the specification of the time and place of respondent’s attempted illegal reentry, satisfied both” constitutional requirements of notice and protection against double jeopardy precisely *because* those allegations effectively narrowed the realm of possible overt acts that the defendant was being alleged to have performed, and thereby sufficiently informed him that he would have to defend against something he did around that time and in that place. *Id.* at 108. The Government further analogizes the indecent acts charged here with the attempt charged in *Resendiz-Ponce* by arguing that the words “did . . . commit an indecent act,” the timeframe, and the allegation that it was committed with “a female under 16 years of age,” taken together, necessarily informed the appellee that he would also be required to defend against an allegation that the conduct discredited the service.

Ordinarily, we would conclude that this specification plainly describes the acts that the appellee must defend against insofar as it alleges the time, place and type of conduct, characterizing them as indecent, and that the acts were committed upon the body of a minor to whom he was not married. However, closely hewed to its plain text, the specification does not expressly allege any circumstantial impact. Alleging that the conduct was “indecent” and committed with a person not yet 16 years old does not

expressly “set forth” that the Government would try to prove at trial that the acts alleged resulted in some discredit to the Air Force or the armed services at large. Surely, one may intuit that the public would generally disapprove of the acts alleged here, and extend some of that disapproval to the Air Force, insofar as the appellee was affiliated with it. Intuition, however, does not deliver notification, by necessary implication or otherwise, of what element(s) the appellee must defend against.

When filtered through *Fosler*’s strict construct, we are hard-pressed to conclude that, on its face, the specification indicates, by necessary implication, that the alleged acts can be equated with the concepts of conduct prejudicial to good order and discipline or service discrediting. We are further compelled to disagree that the specification’s allegations sufficiently narrowed down the realm of possible terminal elements the appellee could have been expected to defend against; even if the terminal element(s) could be implied, nothing in the specification indicated which one(s) did. Arguably, the conduct described could be either conduct prejudicial or service discrediting, or both. An inescapable point of *Fosler* is that the appellee had a right to know which. *Fosler*, 70 M.J. at 230.

Minor changes are permitted “at any time before findings are announced if no substantial right of the accused is prejudiced,” but major changes may not be made over the objection of the accused unless the charge and specification is preferred anew. R.C.M. 603(c), (d). *See also United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003) (citing R.C.M. 603(d)). Our superior court enunciated a two-pronged test for us to use in determining whether an amendment to a specification constitutes a major change: (1) does the change result in an “additional or different offense” and (2) does the change prejudice a “substantial right of the [accused].” *Sullivan*, 42 M.J. at 365 (quoting Fed. R. Crim. P. 7(e)). The second prong is satisfied if the amendment causes unfair surprise, “denying the defendant notice of the charge against him, thereby hindering his defense preparation.” *Id.*

In the case sub judice, the appellee claims that the amended language created a different offense because it now contained an additional element. We believe that *Fosler*’s strict construct is triggered by the appellee’s objection and requires this Court to treat the amended language as substantively different, thus satisfying the first prong of the *Sullivan* test. Furthermore, the appellee was prejudiced in that he was deprived of his right to be notified anew and to demand reinvestigation of the re-drafted charge, pursuant to R.C.M. 603(d). Although the Government eventually notified the appellee which terminal element he had to defend against, they did not do so properly. Consistent with the holding in *Fosler*, absent proper notification of the terminal element, the appellee was thereby deprived of his constitutional right to fair notice.

ORR, Chief Judge concurring.

ROAN, Judge dissenting.

I believe that the majority misconstrues the holding of *Fosler*, and therefore I respectfully dissent.

The issue of whether a specification states an offense is a question of law that we review de novo. See *Sutton*, 68 M.J. at 457. In *Fosler*, our superior court reiterated that the military is a notice-pleading jurisdiction. *Fosler*, 70 M.J. at 229 (citing *Sell*, 11 C.M.R. at 206). A charge and specification is sufficient if it alleges every element of the offense expressly or by implication. R.C.M. 307(c)(3); *Sutton*, 68 M.J. at 457. This requires that the charge and specification “contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend, and second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *Fosler*, 70 M.J. at 229 (quoting *Hamling*, 418 U.S. at 117). Because an accused has a constitutional right to be informed of the charges against him, “in contested cases, when the charge and specification are first challenged at trial, we read the wording [of the charge and specification] more narrowly and will only adopt interpretations that hew closely to the plain text.” *Id.* at 230. However, the *Fosler* court reiterated that a specification is constitutionally “sufficient if it alleges every element of the charged offense expressly or by *necessary implication*.” R.C.M. 307(c)(3) (emphasis added); see also *Fosler*, 70 M.J. at 230.

In a specification in which the Government does not allege the terminal element, the question is whether “using the appropriate interpretative tools, can the . . . charging language be interpreted to contain the terminal element such that an Article 134 conviction can be sustained?” *Fosler*, 70 M.J. at 229. In this context, we must evaluate whether the terminal element was “necessarily implied” by the language of the specification. *Id.* Based on the explicit misconduct detailed in the specification, I have no difficulty concluding the appellee was given fair notice of both the express and implied elements that he had to defend against. The specification identifies the purported victim, details the indecent acts he is said to have engaged in, states the extensive time frame the indecent acts were said to have occurred, alleges that the purported victim was under 16 years of age, and indicates the appellee’s military affiliation. Unlike an act of adultery, which standing alone does not constitute an offense under the UCMJ, few could seriously argue that a specification charging an adult male noncommissioned officer with touching a young girl for the purpose of gratifying his sexual desires fails to notify him that such conduct is prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. It certainly contains language “the ordinary understanding of which could be interpreted to mean or necessarily include the concepts of prejudice to ‘good order and discipline’ or ‘conduct of a nature to bring discredit upon the armed forces.’” *Fosler*, 70 M.J. at 229. As the Court stated in *Watkins*, I am confident that the appellant “was not misled.” *Watkins*, 21 M.J. at 210.

While acknowledging that a terminal element may be implied and, in fact, admitting “that this specification plainly describes the acts that the appellee must defend against insofar as it alleges the time, place and type of conduct, characterizing them as

indecent” the majority curiously concludes that “[a]lleging that the conduct was ‘indecent’ and committed with a person not yet 16 years old does not inform the appellee that the Government would try to prove at trial that the acts alleged resulted in some discredit to the Air Force or the armed services at large.” I do not agree with the majority’s logic on this point. The *Fosler* Court did not define with any specificity when a criminal element would be necessarily implied, in essence leaving it to be determined on a case-by-case basis. As now Chief Judge Baker noted in his dissent in *Fosler*, if the terminal element is not implied in a case such as this, when would it ever be? Much as a military judge instructs a court-martial panel not to divest themselves from the use of their common sense and knowledge of the ways of the world when evaluating evidence, the same must be said when determining whether an accused alleged to have committed crimes akin to being called a pedophile would know that such acts were also service discrediting. Indeed, the use of the term “indecent” in the specification itself put the appellee on notice he would have to defend against Clause 2 of Article 134, UCMJ. The Manual for Courts-Martial defines indecency as “that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.” *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 90.c (2005 ed.). The very definition of indecency implicates the morals of society, clearly an indication that appellant’s conduct, as alleged, would call the Air Force into disrepute and thereby be service discrediting if he were convicted. Hewing closely to the offense specifically charged, the specification fairly informs the appellant of the charge against him, enables him to prepare a defense, and protects him against the possibility of double jeopardy.⁶

The majority states:

[W]e are further compelled to disagree that the specification’s allegations sufficiently narrowed down the realm of possible terminal elements the appellee could have been expected to defend against; even if the terminal element(s) could be implied, nothing in the specification indicated which one(s) did. Arguably, the conduct described could be either conduct prejudicial or service discrediting, or both. An inescapable point of *Fosler* is that the appellee had a right to know which.

I disagree with the majority’s conclusion for two reasons. First, such an approach is not mandated by *Fosler*. If the charge and specification necessarily imply the terminal element, the accused has been put on fair notice of what he must defend against. “The law is ‘not whether it could have been made *more definite and certain*, but whether it contains the elements of the offense intended to be charged.” *Fosler*, 70 M.J. at 245 (Baker, J., dissenting) (alterations in original) (quoting *Hagner v. United States*, 285 U.S. 427, 431 (1932)). Taken to its logical conclusion, the majority’s rationale would require

⁶ This is not to say that Clause 2 is per se included in an allegation of indecent acts with a minor. The Government, of course, must always prove beyond a reasonable doubt that the appellee’s conduct was of a nature to discredit the armed forces. Rather, the issue is simply whether that element is necessarily implied in the charged offense.

the Government to expressly allege the particular terminal element in every Article 134, UCMJ, specification, regardless of whether the accused objected and even if Clause 1 and/or Clause 2 were clearly implied by the charging language; this is a result not supported by *Fosler* or other precedent. Second, the majority's concerns are unfounded in this particular case as the Government resolved any possible confusion on the issue by amending the specification to specifically inform the appellee that his conduct was service discrediting. Although in my opinion both elements were implied in the specification, the appellee was explicitly informed that he had to only defend against clause 2 at trial, a result that certainly works to his benefit.

Finally, I disagree with the majority's decision that the modification to the specification amounted to a major change. R.C.M. 603(a) defines a minor change as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." Because I believe that Clause 2 was already implied in the language of the charged offense, the Government's act of specifically including it on the charge sheet did nothing more than overtly state an element that was already present. No offenses were added and the appellee cannot reasonably claim to have been surprised by the change.

Having concluded that adding the service discrediting language to the charge and specification was a minor change and did not unfairly prejudice the appellee, I would find the military judge erred and grant the Government's appeal.

On consideration of the United States Appeal under Article 62, UCMJ, it is by the Court on this 19th day of December, 2011,


ORDERED:

That the United States Appeal Under Article 62, UCMJ is hereby **DENIED**.

FOR THE COURT

OFFICIAL




ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court