IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	)	6 April 2018
	)	ANSWER TO APPELLANT'S SUBSTITUTE ASSIGNMENTS OF ERROR ON BEHALF OF THE UNITED STATES
	)	Dkt. No. 1391 Case No. CGCMG 0361
v.	)	
Mathew A. ROGERS, Seaman Recruit (E-1), U.S. Coast Guard, Appellant	)	Tried at Norfolk, VA by a general court-martial convened by Commander, Ninth Coast Guard District, on 20 September 2016, 10 November 2016, 6 February 2017, and 21 February 2017.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel and pursuant to Rule 15(b) of the Court of Criminal Appeal's Rules of Practice and Procedure, submits this answer and brief in response to Appellant's Substitute Assignments of Error filed with this Court on March 20, 2018, and as a supplement to its Answer and Brief filed on March 20, 2018.

STATEMENT OF THE CASE

The United States relies on the Statement of the Case within its Answer and Brief filed with this Court on March 20, 2018.

STATEMENT OF FACTS

The United States relies on the Statement of Facts within its Answer and Brief filed with this Court on March 20, 2018.

RESPONSE TO ERRORS ASSIGNED

I.

SPECIFICATION 3, CHARGE III STATED AN OFFENSE UNDER CLAUSE 2, ARTICLE 134, UCMJ, AS IT ALLEGED ALL ELEMENTS REQUIRED TO ESTABLISH A VIOLATION OF 18 U.S.C. § 499 AND THE TERMINAL ELEMENT OF CLAUSE 2.

A. Standard of Review

Questions of whether a specification is defective and the nature of the remedy for such a defect are questions of law reviewed *de novo*. *United States v. Norwood*, 71 M.J. 204, 206 (C.A.A.F. 2012). Where defects in a specification are raised for the first time on appeal, dismissal of the specification is appropriate if there is plain error. *United States v. Gaskins*, 72 M.J. 225, 232 (C.A.A.F. 2013) (citing *United States v. Humphries*, 71 M.J. 211, 213–215 (C.A.A.F. 2012)). Plain error will typically be found regarding a defective specification if: there was (1) error; (2) that was plain or obvious; and (3) that materially prejudiced a substantial right of the accused. *United States v. Guardado*, 77 M.J. 90, 93 (C.A.A.F. 2017).

B. The United States was permitted to charge Appellant's violation of 18 U.S.C. § 499 under clause 2, Article 134, UCMJ.

As outlined under paragraph 60.b.1 of MCM, pt. IV, offenses under clause 2, Article 134, UCMJ, require proof that: (a) the accused did or failed to do certain acts; and (b) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was a of a nature to bring discredit upon the armed forces. Therefore, Appellant's violation of 18 U.S.C. § 499 could be charged as a clause 2 offense if it was shown by the United States to constitute a "certain act" that under the circumstances, "was of a nature to bring discredit upon the armed forces."

Although, the United States may have also charged Appellant's violation of 18 U.S.C. § 499 under clause 3, Article 134, UCMJ, there is no requirement within paragraph 60 of MCM, pt. IV that prohibited the United States from charging Appellant's violation of § 499 under clause 2. In fact, in charging Appellant's conduct as a clause 2 offense as opposed to a clause 3 offense, the United States increased their burden by adding an additional element that required proof—i.e., that Appellant's violation of § 499 brought discredit upon the armed forces. Additionally, in charging Appellant's violation of § 499 as a clause 2 offense, the United States was required to prove every element of § 499 in order to prove Appellant engaged in a "certain act," just as if it had charged Appellant's violation of § 499 as a clause 3 offense. Furthermore, while the military judge's instructions to the members refer to specification 3, Charge III as a clause 3 offense, this constituted a scrivener's error as the charge sheet, the evidence presented trial, as well as trial counsel's arguments, clearly indicate that specification 3, Charge III was charged as a clause 2 offense and not a clause 3 offense. Charge Sheet; R. VI at 45–46; R. X at 84. Thus, Appellant had adequate notice of, and did not suffer prejudice as a result of, the United States' decision to charge his violation of § 499 as a clause 2 offense, nor was specification 3, Charge III defective for not stating the terminal element of clause 3.

C. Appellant's interpretation of the elements of 18 U.S.C. § 499 fails to adhere to the plain language of the statute.

As addressed in Sections I.B–C of the United States' Answer and Brief filed on March 20, 2018, the fourth offense enumerated under 18 U.S.C. § 499 does not require that the pass or permit at issue be false or forged. While Appellant asserts that specification 3, Charge III omits the "sixth element" of § 499—i.e., that the accused

falsely made, forged, counterfeited, altered, or tampered with such pass or permit, Appellant's interpretation of § 499 and the elements contained within the chart on page 13 of his Substitute Assignments of Error and Brief have no basis in the language of § 499. The first element of the fourth offense under § 499 is "willfully." Specification 3, Charge III included this element when it charged "the accused willfully." Charge Sheet. The second element of the fourth offense under § 499 is "allows any other person to have or use any such pass or permit." Specification 3, Charge III included this element when it charged "allow another person, J.C.W. to have [his] military identification card, which . . . constitutes a pass or permit." *Id.* The third element of the fourth offense under § 499 is "issued for his use alone." Specification 3, Charge III included this element when it charged "issued for EM3 Rogers' use alone." *Id.* In light of this, nowhere within the plain language of the fourth offense under § 499 is there an element requiring that the pass or permit at issue be false or forged and in requiring that such an element be required, Appellant misinterprets the plain language of the statute. And grammatically, Appellant's proposed interpretation does not makes sense. As pointed out at page 11 of the United States' Answer and Brief filed on March 20, 2018, how could a duly issued pass or permit issued for an individual's use alone be false or forged? Therefore, the United States was not required to show that Appellant's military identification card was false or forged and therefore did not exclude a central element of the fourth offense under § 499 in charging it under specification 3, Charge III.

Furthermore, under specification 3, Charge III, the United States also had to prove that: (1) the military identification card was issued by or under the authority of the United States; (2) Appellant's conduct violated 18 U.S.C. § 499; and (3) Appellant's conduct

was of a nature to bring discredit upon the armed forces.[1] While the first two elements were not required by the plain language of the fourth offense under § 499, the United States included these elements within specification 3, Charge III in addition to the three enumerated elements of the fourth offenses under § 499. The United States included the third element listed above as it was a required element of clause 2, Article 134, UCMJ, thereby properly charging the terminal element of clause 2.

D. Applying the rule of *ejusdem generis* to Chapter 30, Title X, it is clear that the language "any such pass or permit" contained with the fourth offense under § 499 does not refer to passes or permits that are false or forged.

18 U.S.C. § 499 is based on "An Act To punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes." Ch. 30, title X, §3 (H.R. 291), 40 Stat. 228 (June 15, 1917). Section 2 of Title X states:

> Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be made, forged, counterfeited, mutilated, or altered, or shall willingly assist in falsely making, forging, counterfeiting, mutilating, or altering, the seal of any . . . office of the United States, or whoever shall knowingly use, affix, or impress *any such fraudulently made, forged, counterfeited, mutilated, or altered seal* to or upon any . . . paper, of any description, or whoever with wrongful or fraudulent intent shall have possession of *any such falsely made, forged, counterfeited, mutilated, or altered seal*, knowing the same to have been so falsely made . . . shall be fined . . . or imprisoned . . . or both. (emphasis added).

In Section 2, Congress used specific language—i.e., any such fraudulently made, forged, counterfeited, mutilated, or altered—to describe the seals of the United States that people

[1] As addressed in Section I, B above, specification 3, Charge III alleged an offense under clause 2, Article 134, UCMJ, and not clause 3, thus despite Appellant's assertion, the United States was not required to prove the terminal element of clause 3, Article 134, UCMJ—i.e., that 18 U.S.C. § 499 was an offense not capital. *See supra,* Section I.B.

shall not have in their possession with wrongful or fraudulent intent. It did not simply use the generic language of any such seal, which would have covered legitimate seals of the United States. Compared to the language contained within Section 2, the language of Section 3, states "shall willfully allow any other person to have or use any such pass or permit, issued for his use alone." Because Congress wanted this clause to apply to legitimately issued passes or permits, it did not state that the passes and permits must be forged, counterfeit, altered, or tampered, immediately following the language "any such" as it did in Section 2. Rather, it simply required that they be "issued for his use only." Applying the rule of *ejusdem generis* (general terms reflect the specific terms that accompany them) to the entirety of Title X, and not just Section 3 alone, illustrates that "such pass or permit" need not be forged, counterfeit, altered, or tampered with.

II.

SPECIFICATION 3, CHARGE III STATED AN OFFENSE UNDER CLAUSE 2, ARTICLE 134, UCMJ, AS IT ALLEGED ALL ELEMENTS OF THE OFFENSE.

A. Standard of Review

The same standard of review applies as that listed in Section I.A above.

B. Specification 3, Charge III did not allege a violation of paragraph 77.b(2) of MCM, pt. IV.

Specification 3, Charge III was not defective on the basis of omitting three non-terminal elements of paragraph 77.b(2) of MCM, pt. IV as it was charged as a violation of clause 2, Article 134, UCMJ, and not paragraph 77.b(2). Although, Appellant is correct in stating that "Article 134 contains an enumerated offense that addresses "[f]alse or unauthorized pass offenses," Paragraph 77.b(2) is inapplicable to the situation at hand as specification 3, Charge III was never charged as a violation of paragraph 77.b(2) since

Appellant's military identification card was duly issued and therefore not false or unauthorized. Instead, specification 3, Charge III alleged a violation of 18 U.S.C. § 499 under clause 2, Article 134. As addressed in Section II.C of the United States' Answer and Brief filed on March 20, 2018, the fourth offense under § 499 which Appellant was charged with violating under specification 3, Charge III, does not require that military identification card at issue be false or unauthorized as is required under paragraph 77.b(2).

Furthermore, in treating specification 3, Charge III as alleging a violation of paragraph 77.b(2), Appellant seeks to require that the United States charge Appellant's conduct under an offense which it would be unable to prove as there is no dispute that Appellant's military identification card was not false or unauthorized. While imaginative, this amounts to nothing more than a self-serving argument that the United States should have charged him with offenses for which proof would have been lacking, rather than the offense with which he was actually charged—for which there was proof beyond a reasonable doubt. No doubt many individuals in Appellant's situation would wish for the same. The United States chose to charge Appellant's conduct as a violation of the fourth offense under § 499, because as addressed in Section I.B.1 of the United States' Answer and Brief filed on March 20, 2018, § 499 does not contain a requirement that Appellant's military identification card be false or unauthorized. For these reasons, Appellant's treatment of specification 3, Charge III as an offense under paragraph 77.b(2) is baseless and the chart found on page 16 of Appellant's Substitute Assignments of Error and Brief is irrelevant.

WHEREFORE, the United States prays that this honorable Court affirm the findings and sentence.

Respectfully submitted,

DATE: 6 April 2018

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 6 April 2018.

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