IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

SFC (E-6)
MICHAEL S. MALONE
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLANT

Docket No. ARMY 20230151

Tried at Fort Bliss, Texas, on 22 March 2023, before a general court-martial appointed by Commander, 1st Armored Division, Lieutenant Colonel Jessica Conn, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error[1]

I.

WHETHER APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE UNDER CHARGE 1, SPECIFICATIONS 1, 3, AND 4 ARE MULTIPLICIOUS.

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in Appendix A.

Statement of the Case

On 22 March 2023, a military judge sitting as a general court-martial convicted appellant, Sergeant First Class (SFC) Michael S. Malone, pursuant to his pleas, of three specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ) (10 U.S.C. § 928b) and two specifications of disobeying a superior commissioned officer in violation of Article 90, UCMJ. (R. at 84). The military judge sentenced appellant to thirty months confinement and a bad-conduct discharge.[2] (R. at 155). On 14 April 2023, the convening authority approved the adjudged findings and sentence, and on 25 April 2023, the military judge entered judgment. (Convening Authority Action; Judgment of the Court).

[2] The military judge apportioned appellant's sentence to confinement as follows: twenty months for Specification 1 of Charge I; twenty-six months for Specification 3 of Charge I; thirty months for Specification IV of Charge I; 10 days for Specification 1 of Charge 5; and 15 days for Specification 2 of Charge 5, with all terms of confinement served concurrently. (R. at 155).

Assignment of Error

I. WHETHER APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE UNDER CHARGE 1, SPECIFICATIONS 1, 3, AND 4 ARE MULTIPLICIOUS.

Facts Relevant to Assignment of Error

Appellant pleaded guilty to three specifications of domestic violence with the exact same date, location, and victim. (Charge Sheet; R. at 12). After accounting for the excepted language in the plea and plea agreement (R. at 12; App. Ex. II),[3] the three specifications contain the following language:

> SPECIFICATION 1: In that [appellant], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against [redacted], the intimate partner of the accused, to wit: by unlawfully striking her in the face with his hand.
>
> SPECIFICATION 3: In that [appellant], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against [redacted], the intimate partner of the accused, to wit: by unlawfully striking her in the head, face, arm, shoulder, torso, and leg with his hand.
>
> SPECIFICATION 4: In that [appellant], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against [redacted], the intimate partner of the accused, to wit: unlawfully throw [redacted] to the ground with his hand, and did thereby inflict substantial bodily harm, a broken clavicle.

(Charge Sheet; R. at 12; App. Ex. II).

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[3] The charged language for Specification 3 included "and foot" at the end of the specification. (Charge Sheet). However, consistent with the plea agreement, appellant pleaded "not guilty" to this excepted language. (R. at 12; App. Ex. II).

During the providence inquiry for Specification 1, appellant explained that he had "several verbal arguments" with his intimate partner, and "[o]nce the argument moved to the bedroom, I struck her in the face with my hand." (R. at 21). When the military judge asked, "Had that been a physical argument before you struck her with your hand," appellant responded, "No, ma'am." (R. at 22).

Next, during the providence inquiry for Specification 3, appellant and the military judge had the following exchange:

> ACC: . . . After I struck her in the face, I kept striking her with my hands. I hit her in the head, shoulder, arm, torso, and leg while I struck her.
>
> . . .
>
> MJ: So this was all part of the same event that happened in Specification 1 of Charge I; is that correct?
>
> ACC: Yes, your Honor.
>
> MJ: So, after you struck her in the face, about how much time passed before you began to hit her over other parts of her body?
>
> ACC: It continued, your Honor.

(R. at 32).

Finally, during the providence inquiry for Specification 3, appellant and the military judge had a similar exchange:

> ACC: . . . After striking her several times all over her body, I pushed her hard with both hands. She fell backwards and hit the ground hard.
>
> . . .

> MJ: And this was all part of the same transaction that you've been talking to me about?
>
> ACC: Yes, ma'am.
>
> MJ: This happened right after you hit her all over her body?
>
> ACC: Yes, ma'am.
>
> . . .
>
> MJ: And this was right after you struck her all over her body?
>
> ACC: Yes, ma'am.

(R. at 39-40).

The stipulation of fact is equally clear that the conduct occurred on the same night in the same location with the same victim as part of the same event; in fact, the stipulation refers to the entire incident as "the assault":

> . . . The argument moved to the Master Bedroom and turned physical when the Accused, without provocation or acting in self-defense/defense of others, struck the Victim in her face with his hand during the argument. At the time he struck her, he was not in fear of harm and not responding to a threat from the Victim.
>
> The Accused then continued to aggressively, without provocation or acting in self-defense/defense of others, punch the Victim in her face, head, right arm, right shoulder, right side abdomen, and right leg. See Prosecution Exhibit 5. The Victim plead for the Accused to stop; but he continued *the assault* and used his hands to push her to the ground resulting in the Victim breaking her clavicle.

(Pros. Ex. 1) (emphasis added).

Neither the parties nor the military judge raised the issue of multiplicity at trial. Appellant's plea agreement did not contain a "waive all waivable motions" provision, nor any provision referencing multiplicity. (App. Ex. II). Furthermore, before entering his plea, appellant's counsel did not expressly waive any motions. (R. at 12).

Standard of Review

Following an unconditional guilty plea, absent express waiver or consent, this court reviews claims of multiplicity for plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). To prevail under a plain error analysis, appellant must demonstrate: (1) the presence of error; (2) the plain and obvious nature of the error; and (3) material prejudice to a substantial right caused by the error. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (citation omitted). "Where the error is constitutional . . . the government must show that the error was harmless beyond a reasonable doubt to obviate a finding of prejudice." *United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019).

Law

For a multiplicity issue, to demonstrate plain error, an appellant must prove that "the specifications are facially duplicative." *United States v. St. John,* 72 M.J. 685, 687 n.1 (Army Ct. Crim. App. 2013). Offenses are facially duplicative when the factual components of the charged offense are the same. *United States v. St.*

John, 72 M.J. 685, 687 (Army Ct. Crim. App. 2013) (citation omitted). To determine whether offenses are facially duplicative, this court goes beyond the four corners of the charge sheet, looking to "the factual conduct alleged in each specification and the providence inquiry conducted by the military judge." *United States v. Pauling,* 60 M.J. 91, 94 (C.A.A.F. 2004) (internal quotation marks and citation omitted). "Whether two offenses are facially duplicative is a question of law that [this court] will review de novo." *Id.*

A. Multiple Convictions for Physical Assaults United in Time, Circumstance, and Impulse are Multiplicious

As outlined below, military courts have long held that physical assaults "united in time, circumstance, and impulse in regard to a single person" constitute a single crime. *See, e.g.*, *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981); *United States v. Clarke*, 74 M.J. 627, 629 (Army Ct. Crim. App. 2015).

"Multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments 'for the same offen[s]e.'" *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017) (quoting U.S. Const. amend. V) (alteration in original). "The Double Jeopardy Clause prohibits 'multiplicitous prosecutions . . . . [i.e.,] when the government charges a defendant twice for what is essentially a single crime.'" *Id*. (quoting *United States v. Chiaradio*, 684 F.3d 265, 272 (1st Cir. 2012) (alteration in original).

In *Forrester*, the Court of Appeals for the Armed Forces (CAAF) outlined "the analytic conflation of unreasonable multiplication of charges and multiplicity in cases where several offenses are charged as separate specifications under the same statute." *Id*. at 394-95. To this extent, "[o]ne instance of multiplicity . . . occurs when charges for multiple violations *of the same statute* are predicated on arguably the same criminal conduct." *Id*. (internal quotation marks and citation omitted) (emphasis in original). For this type of multiplicity, courts assess the statute's "allowable unit of prosecution" to determine if it prohibits each individual act or a continuous course of conduct, even when comprised of multiple acts. *Id*.

In *Clarke*, this court concluded that the "unit of prosecution" for "an uninterrupted attack comprising touchings 'united in time, circumstance, and impulse'—charged under Article 128, UCMJ . . . is the number of overall beatings the victim endured rather than the number of individual blows suffered." 74 M.J. at 628 (quoting *Rushing*, 11 M.J. at 98).[4] As part of its analysis, this court said, "Our superior court 'has held that Congress intended assault, as prescribed in [Article 128, UCMJ], to be a continuous course-of-conduct-type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty.'" *Id*. (quoting *Untied States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989).

[4] This court noted that the analysis would be different for "the specialized assaults charged under Article 120 or 134." *Clarke*, 76 M.J. at 628.

Ultimately, this court granted relief by consolidating two aggravated assault specifications into a single specification. *Id*.

Most recently, in *Goundry*, this court found plain error in a military judge accepting a guilty plea to two domestic violence specifications under Article 128b, UCMJ, that were facially duplicative. *United States v. Goundry*, ARMY 20220218, 2023 CCA LEXIS 204, *3-4 (Army Ct. Crim. App. 2023) (summ. disp.). In granting relief, this court explained that "these two separate offenses of domestic violence by assault consummated by battery were contemporaneous in time and uninterrupted," "constitute one continuous course of conduct," and "form the basis of what should have been one charged offense." *Id*. at *4.

Sister courts have reached similar conclusions. Notably, following *Forrester*, both the Coast Guard Court of Criminal Appeals and Navy-Marine Court of Criminal Appeals conducted extended analyses of the "multiple-acts/single statute" form of multiplicity in the context of physical assaults. *See United States v. Hernandez*, 78 M.J. 643, 645-47 (C.G. Ct. Crim. App. 2018); *United States v. Simpson*, 2020 CCA LEXIS 67, *25-*29 (N.M. Ct. Crim. App. 11 March 2020) (unpub.).

In its analysis, the Coast Guard Court stated the issue "boils down to this: is the unit of prosecution for assault . . . each touching (irrespective of how united in time, impulse, and circumstance), or is it a continuous course-of-action offense?"

Hernandez, 75 M.J. at 646. After painstakingly analyzing the existing superior court precedent, the Coast Guard Court said, "Bound by [superior court] precedent, we conclude that separate assaults consummated by battery of a single person that are united in time, circumstance, and impulse fall within one unit of prosecution under Article 128, not several." *Id*. at 647. Therefore, the court concluded "the three convictions under Article 128 were for touchings that fell within but one unit of prosecution and therefore violated the Double Jeopardy Clause." *Id*.

The Navy-Marine Court went further in describing this broad consensus regarding physical assaults: "[O]ur superior court, this [c]ourt, and our sister courts have routinely agreed that 'when Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault.'" *Simpson*, 2020 CCA LEXIS 67 at *27 (quoting *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984)). "Instead, acts 'united in time, circumstance, and impulse in regard to a single person' comprise but one assault." *Id*. (citing *Rushing*, 11 M.J. at 98 (accused striking at victim with his fist and then throwing a pool stick was one assault)); *Hernandez*, 78 M.J. at 647; *Clarke*, 74 M.J. at 627; *United States v. Lopez*, 2014 CCA LEXIS 441, at *9 (N-M Ct. Crim. App. 22 July 2014) (unpub.) (specifications consolidated as multiplicious where separate touchings occurred "immediately" after each other); *United States v. Lombardi*, 2002 CCA LEXIS 138, at *5 (N-M Ct. Crim. App. 26 June 2002)

(unpub.) ("we conclude that each unlawful touching of the same person in a single, uninterrupted altercation, united in time, circumstance, and impulse should not be the basis for multiple charges of assault"). In granting relief, the Navy-Marine court consolidated two multiplicious specifications. *Simpson*, 2020 CCA LEXIS 67 at *28-29.

B. Multiplicious Convictions are Prejudicial *Per Se*.

Imposing multiple convictions for what ought to be a single conviction is, in and of itself, prejudicial. *Ball v. United States*, 470 U.S. 856, 864–65 (1985).

> The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Id; *see also United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999) ("an unauthorized conviction . . . constitutes unauthorized punishment in and of itself.").

C. Facially Duplicative Convictions May Be Consolidated by a Court of Criminal Appeals.

This court may reassess a sentence marred by multiplicious convictions in accordance with *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F.

2013). Such reassessment is appropriate when, under the totality of the circumstances, "the court can determine . . . absent any error, the sentence adjudged would have been of at least a certain severity[.]" *Id.* This court should consider the following factors in determining whether reassessment or a rehearing is appropriate:

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone.
>
> . . . .
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court martial remain admissible and relevant to the remaining offenses.
>
> (4) Whether the remaining offenses are the type that judges of the courts of criminal appeals should have experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Id. at 15–16.

Argument

The failure to consolidate the domestic violence specifications in this case constitutes plain error. Appellant currently stands convicted of three domestic violence specifications for conduct that occurred on the same night in the same location with the same victim as part of the same event. Both the providence inquiry and stipulation of fact conclusively established that the three specifications

resulted from a single uninterrupted altercation with the same victim. (R. at 21-22, 32, 39-40; Pros. Ex. 1). In fact, during the providence inquiry, the military judge asked appellant to confirm the specifications were "all part of the same event" and "all part of the same transaction," which he did (R. at 32, 39). Appellant also clarified there was no break in time between the acts. (R. at 32, 39-40). The stipulation of fact referred to the entire event as "*the* assault." (Pros. Ex. 1) (emphasis added).

As such, appellant's three separate convictions run contrary to this court's conclusion that the "unit of prosecution" for "an uninterrupted attack comprising touchings 'united in time, circumstance, and impulse' . . . is the number of overall beatings the victim endured rather than the number of individual blows suffered." *Clarke*, 74 M.J. at 628 (quoting *Rushing*, 11 M.J. at 98). As outlined above, other service courts have reached similar conclusions. *Hernandez*, 78 M.J. at 645-47; *Simpson*, 2020 CCA LEXIS 67 at *27 ("[O]ur superior court, this [c]ourt, and our sister courts have routinely agreed that 'when Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault.'") (quoting *Morris*, 18 M.J. at 450).

While most of the relevant precedent admittedly involves Article 128, this court recently provided relief under a similar rationale for two specifications of domestic violence under Article 128b. *See Goundry*, 2023 CCA LEXIS 204 at *3-

*4 (merging two separate offenses of domestic violence by assault consummated by battery that were contemporaneous in time, uninterrupted, and constituted one continuous course of conduct).

At an absolute minimum, this court should provide the same corrective action from *Goundry* and consolidate the two specifications of domestic violence by assault consummated by battery (Specifications 1 and 3 of Charge I).[5] However, such relief would still be insufficient, as it would leave appellant convicted of two separate offenses.

Instead, under the circumstances, this court should merge all three domestic violence specifications into a single specification of domestic violence by aggravated assault.[6] *See United States v. Clark*, ARMY 20140252, 2016 CCA LEXIS 363, at *7-*15 (Army Ct. Crim. App. 2016) (mem. op.) (Haight, S.J.,

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[5] Proposed SPECIFICATION 1 (if only the two specifications of domestic violence by assault consummated by battery are consolidated): In that [appellant], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against [redacted], the intimate partner of the accused, to wit: by unlawfully striking her in the head, face, arm, shoulder, torso, and leg with his hand.

[6] Proposed SPECIFICATION 1 (if all three specifications of domestic violence are consolidated) : In that [appellant], U.S. Army, did, at or near Fort Bliss, Texas, on or about 1 December 2022, commit a violent offense against [redacted], the intimate partner of the accused, to wit: by unlawfully striking her in the head, face, arm, shoulder, torso, and leg with his hand and unlawfully throwing [redacted] to the ground with his hand and thereby did inflict substantial bodily harm, a broken clavicle.

dissenting) (based on the unit of prosecution for physical assaults, the appropriate remedy was to consolidate an assault consummated by battery specification and aggravated assault specification into a single aggravated assault specification).[7] Following this consolidation, this court should reassess appellant's sentence in accordance with *Winckelmann*.

[7] This is a different case from the *Clarke* case cited above. In this case, the majority determined appellant expressly waived any claim of multiplicity or unreasonable multiplication of charges after he "waived 'all waivable motions'" and "specifically agreed to waive motions regarding unreasonable multiplication of charges and multiplicity." *Clark*, 2016 CCA LEXIS 363, at *5-*6. The majority did, however, note that "[o]ur superior court has repeatedly held that individual assaults within an uninterrupted scuffle should not be parsed out and made the bases for separate findings of guilty." *Id*. at *4 (citations omitted).

Conclusion

Wherefore, appellant respectfully asks this honorable court to grant the requested relief.

[redacted]

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Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

1. As an alternative argument to the multiplicity assignment of error, appellant asserts relief is warranted based on an unreasonable multiplication of charges [UMC] for the three domestic violence specifications. At trial, neither the parties nor the military judge raised the issue of UMC. Appellant's plea agreement did not contain a "waive all waivable motions" provision, nor any provision referencing UMC. (App. Ex. II). Furthermore, before entering pleas, appellant's counsel did not expressly waive any motion. (R. at 12).

Rule for Courts-Martial [R.C.M.] 307(c)(4) states, "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The Court of Appeals for the Armed Forces [CAAF] set five factors for assessing UMC claims: (1) whether appellant objected at trial; (2) whether the offenses constitute distinctly separate criminal acts; (3) whether the number of charged offenses exaggerates appellant's criminality; (4) whether the number of charged offenses unreasonably increases an appellant's punitive exposure; and (5) whether the record shows evidence of prosecutorial overreach. *United States v. Quiroz*, 55 M.J. 334, 338–39 (C.A.A.F. 2001).

"[O]ne or more factors may be sufficiently compelling . . . to warrant relief[.]" *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). "Relief is warranted where multiple charges reference a single impulse or intent, or reflect a unity of time with a connected chain of events." *Id.* This court has found a single transaction resulting in multiple assault convictions constitutes UMC where a single incident supports multiple assault convictions. *See, e.g.*, *United States v. Perez*, ARMY 20130368, 2015 CCA LEXIS 191, at *4-*6 (Army Ct. Crim. App. 2015) (summ. disp.) ("Under the circumstances of this case, appellant should not be separately convicted of four separate assault offenses for unlawfully pushing, dragging, squeezing, and pinching [redacted] within a single transaction.").

Here, the *Quiroz* factors weigh in favor of appellant, as the second and third factors are dispositive. Simply put, appellant stands convicted of three domestic violence specifications for conduct that occurred on the same night in the same location with the same victim as part of an uninterrupted altercation. (R. at 21-22, 32, 39-40; Pros. Ex. 1). Thus, as in *Perez*, appellant "should not be separately convicted" of three separate domestic violence offenses for assaults against a single victim "within a single transaction." 2015 CCA LEXIS 191, at *4-*6.

In sum, as an alternative argument to the multiplicity assignment of error, appellant requests that this court consider whether relief is warranted based on UMC and an application of the *Quiroz* factors.

2. Appellant asserts the military judge erred in overruling the defense counsel's objection to the trial counsel's question over an uncharged strangling incident. (R. at 116-17). Although the military judge said she would only consider this testimony for appellant's "PTSD and rehabilitative potential," she erred by not immediately and categorically sustaining the defense objection.

3. Appellant asks this court to consider the sufficiency of the truncated colloquy between the trial counsel and [redacted], which revealed the two "socialize together outside of work," but [redacted] said that did not influence his testimony. (R. at 91-92).

4. Appellant asks this court to consider whether any portion of the trial counsel's sentencing argument constituted plain error (R. at 137-148), as well as whether the trial counsel's questions regarding appellant's rehabilitative potential constituted plain error. (R. at 91, 97-98).

5. Appellant notes the confusing language of the Statement of Trial Results (STR) regarding his confinement credit. While the STR correctly annotates appellant's 92 days of pretrial confinement credit in Block 21, it subsequently lists his "Total Days of Credit" as zero in Block 23. Out of an abundance of caution, and to ensure that he receives his 92 days of confinement credit, appellant asks this court to consider whether it is necessary to issue an order amending Block 23 to reflect his "Total Days of Credit" as 92.

Appendix B: Unpublished Cases

United States v. Goundry

United States Army Court of Criminal Appeals

April 6, 2023, Decided

ARMY 20220218

Reporter
2023 CCA LEXIS 204 *; 2023 WL 3451979

UNITED STATES, Appellee v. Sergeant BRENDAN S. GOUNDRY, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Goundry, 2023 CAAF LEXIS 341, 2023 WL 4062386 (C.A.A.F., May 24, 2023)*

Review denied by *United States v. Goundry, 2023 CAAF LEXIS 435 (C.A.A.F., June 27, 2023)*

Prior History: [*1] Headquarters, 1st Armored Division and Fort Bliss. Robert L. Shuck, Military Judge, Colonel Andrew D. Flor, Staff Judge Advocate.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Kevin T. Todorow, JA (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Captain Cynthia A. Hunter, JA; Captain A. Benjamin Spencer, JA (on brief).

Judges: Before WALKER, EWING[1], and PARKER Appellate Military Judges. Senior Judge WALKER and Judge EWING concur.

Opinion by: PARKER

Opinion

SUMMARY DISPOSITION

PARKER, Judge:

Appellant raises one assignment of error which merits discussion and relief. Appellant argues his convictions for domestic violence under Charge I, Specifications 1, 2, and 3, are multiplicious. The government concedes Specifications 2 and 3 are multiplicious. We agree that Specifications 2 and 3 of Charge I are multiplicious and provide relief in our decretal paragraph.

BACKGROUND

Pursuant to his pleas, appellant was found guilty of six specifications of domestic violence in violation of *Article 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 928b* [UCMJ], which included one specification of strangulation and five specifications of assault consummated by battery.[2] Pursuant to his pleas, [*2] appellant was also found guilty of one specification of failure to obey a lawful order and one specification of a violation of a lawful general regulation, both in violation of Article 92, UCMJ. Appellant was sentenced to a bad-conduct discharge, 340[3] days of confinement, and reduction to the grade of E-1.

Appellant was a military police officer stationed at Fort Bliss, Texas. Appellant and Private First Class (PFC) [TEXT REDACTED BY THE COURT] also a military police officer, began dating around March of 2021. During the course of their relationship there were three distinct date ranges that formed the basis of the

[1] Judge EWING decided this case while on active duty.

[2] Pursuant to his plea, appellant was found guilty by exceptions and substitutions to Specification 4 of Charge I. Additionally, per the plea agreement, appellant pled not guilty and the government dismissed, a seventh specification of domestic violence that formed the basis of Specification 7 of Charge I.

[3] Appellant's confinement was adjudged as follows: Specification 1 of Charge I: 100 days; Specification 2 of Charge I: 30 days; Specification 3 of Charge I: 30 days; Specification 4 of Charge I: 30 days; Specification 5 of Charge I: 30 days; Specification 6 of Charge I: 60 days; Specification 1 of Charge II: 30 days; Specification 2 of Charge II: 30 days, to be served consecutively.

domestic violence convictions. We will tailor our discussion to the 12 August 2021 offenses, since those convictions form the basis of Specifications 1, 2, and 3 of Charge I.

On 12 August 2021, appellant and PFC [TEXT REDACTED BY THE COURT] were in a hotel room in El Paso, Texas. When PFC [TEXT REDACTED BY THE COURT] attempted to leave the hotel room, appellant grabbed her body and threw her on the bed to prevent her from leaving, pulled her hair, and then strangled her by placing both of his hands around her throat and applying pressure, causing PFC [TEXT REDACTED BY THE COURT] to plea for [*3] appellant to "stop" and that "[she] couldn't breathe."[4] Hearing PFC DD's plea, appellant stopped strangling her, apologized, and the two continued their dating relationship. Eventually another soldier who had witnessed bruises on PFC [TEXT REDACTED BY THE COURT] reported appellant to her command and an investigation followed.

LAW AND DISCUSSION

Given that appellant unconditionally pleaded guilty at trial, we consider appellant's claim that Specifications 2 and 3 of Charge I are multiplicious under a plain error standard of review.[5] *United States v. Heryford, 52 M.J. 265, 266 (C.A.A.F. 2000)*. In order to show plain error and overcome forfeiture, appellant must prove that "the specifications are facially duplicative." *United States v. St. John, 72 M.J. 685, 687 n.1 (Army Ct. Crim. App. 2013)* ("An unconditional guilty plea, without an affirmative waiver, results in a forfeiture of multiplicity issues absent plain error."). "Facially duplicative means the factual components of the charged offenses are the same. *Id.* (citing *United States v. Lloyd, 46 M.J. 19, 23 (C.A.A.F. 1997)*) "'Whether two offenses are facially duplicative is a question of law that we will review de novo.'" *United States v. Pauling, 60 M.J. 91, 94 (C.A.A.F. 2004)*.

We find plain error in this case in that the military judge accepted a guilty plea to two specifications that were facially duplicative. When PFC [TEXT REDACTED BY THE COURT] attempted to leave the hotel [*4] room, appellant grabbed her and threw her on the bed, and then once on the bed, intentionally pulled her hair out of anger. These two separate offenses of domestic violence by assault consummated by battery were contemporaneous in time and uninterrupted, and constitute one continuous course of conduct, which the government concedes. Hence these two offenses have the same factual components and form the basis of what should have been one charged offense. In finding these two convictions multiplicious, we merge them to remedy this error, and then reassess the sentence since appellant's conviction to both specifications each came with an adjudged thirty days of confinement to be served consecutively.

This court also has broad discretion when reassessing sentences. *United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013)*. In this case we are in the unique position of knowing exactly what confinement punishment appellant received for each offense to run consecutively. Appellant was adjudged thirty days of confinement for Specification 2 of Charge I, and thirty days of confinement for Specification 3 of Charge I, to run consecutively. Since we find Specifications 2 and 3 of Charge I to be multiplicious and merge them into one specification, we [*5] will also provide thirty days of confinement sentence relief. We are satisfied that the sentence adjudged for appellant's remaining offenses would have been at least a bad conduct discharge, 310 days of confinement, and reduction to the grade of E-1. *See United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*; *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)*.

CONCLUSION

On consideration of the entire record, Specification 3 of Charge I is merged into Specification 2[6] of Charge I.

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[4] Appellant argues that Specifications 1, 2, and 3 of Charge I are multiplicious. We decline to discuss appellant's argument as to Specification 1, except to highlight that Specification 1 involves a domestic violence conviction by strangulation. Specifications 2 and 3 involve domestic violence convictions by assault consummated by battery involving appellant grabbing PFC [TEXT REDACTED BY THE COURT] and throwing her body with his hands, and by pulling PFC [TEXT REDACTED BY THE COURT]'s hair with his hands, respectively.

[5] We note that appellant did not have a "waive all waivable motions" provision in his plea agreement, nor did he expressly waive the issue of multiplicity at trial, although defense counsel did state that the "defense waives-does not have any motions to file."

[6] Specification 2 of Charge I is hereby amended to read as follows: "In that Sergeant Brendan Goundry, U.S. Army, did, at or near El Paso, Texas, on or about 12 August 2021, commit a violent offense against Private First Class [TEXT REDACTED

The remaining findings of guilty are AFFIRMED. Only so much of the sentence that provides for a bad-conduct discharge, confinement for 310 days, and reduction to the grade of E-1 is AFFIRMED.

Senior Judge WALKER and Judge EWING concur.

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BY THE COURT] to wit: grabbed and threw her body and pulled her hair with his hands, and at the time of the offense, Private First Class [TEXT REDACTED BY THE COURT] was the intimate partner of the accused."

United States v. Simpson

United States Navy-Marine Corps Court of Criminal Appeals

February 6, 2020, Argued; March 11, 2020, Decided

No. 201800268

Reporter
2020 CCA LEXIS 67 *; 2020 WL 1173334

UNITED STATES, Appellee v. Gregory S. SIMPSON, Gunnery Sergeant (E-7), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Subsequent History: Motion granted by *United States v. Simpson, 80 M.J. 194, 2020 CAAF LEXIS 327, 2020 WL 3790441 (C.A.A.F., June 15, 2020)*

Motion granted by *United States v. Simpson, 80 M.J. 294, 2020 CAAF LEXIS 430, 2020 WL 4554070 (C.A.A.F., July 28, 2020)*

Review granted by, in part *United States v. Simpson, 80 M.J. 293, 2020 CAAF LEXIS 657, 2020 WL 4529955 (C.A.A.F., July 28, 2020)*

Motion granted by *United States v. Simpson, 80 M.J. 314, 2020 CAAF LEXIS 470, 2020 WL 5352083 (C.A.A.F., Aug. 19, 2020)*

Motion granted by *United States v. Simpson, 80 M.J. 368, 2020 CAAF LEXIS 582, 2020 WL 6498942 (C.A.A.F., Oct. 22, 2020)*

Affirmed by *United States v. Simpson, 2021 CAAF LEXIS 235 (C.A.A.F., Mar. 10, 2021)*

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Robert D. Merrill. Sentence adjudged 2 May 2018 by a general court-martial convened at Marine Corps Base Quantico, Virginia, consisting of a military judge alone. Sentence approved by the convening authority: reduction to pay grade E-1, confinement for thirty-two months, and a bad-conduct discharge. [*1] [1]

Counsel: For Appellant: Ms. Tami L. Mitchell, Esq. (argued), Mr. David P. Sheldon, Esq. (on brief), Lieutenant Clifton Morgan, JAGC, USN (on brief).

For Appellee: Major Clayton L. Wiggins, USMC (argued), Lieutenant Clayton S. McCarl, JAGC, USN (on brief), Captain Brian Farrell, USMC (on brief).

Judges: Before KING, STEPHENS, and ATTANASIO, Appellate Military Judges. Senior Judge KING delivered the opinion of the Court, in which Judge STEPHENS and Judge ATTANASIO joined.

Opinion by: KING

Opinion

KING, Senior Judge:

Consistent with his pleas, Appellant was convicted of one specification of conspiring to create and distribute an indecent visual recording, one specification of aiding and abetting the creation of an indecent visual recording, one specification of aiding and abetting the distribution of an indecent visual recording, and three specifications [*2] of assault consummated by a battery, in violation of *Articles 81*, *120c*, and *128, Uniform Code of Military Justice [UCMJ]*, *10 U.S.C. §§ 881*, *920c*, *928 (2012)*. Appellant now raises numerous assignments, summary assignments, and supplemental assignments of error [AOEs], several of which we discuss and resolve below. The remaining AOEs have been fully considered but merit neither discussion nor relief. *See United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*. After careful review of each, we modify in part but ultimately affirm his convictions and sentence.[2]

[1] Pursuant to a pretrial agreement, the convening authority suspended confinement in excess of eighteen months. Appellant was credited with 243 days of pretrial confinement.

[2] On 6 February 2020, the Court heard oral argument on the following issues:

I. Background

The details relevant to our analysis are adequately set forth in Prosecution Exhibit [Pros. Ex.] [*3] 1, the agreed upon stipulation of fact: In 2016, Appellant was assigned as a liaison officer to the McAlester Army Ammunition Plant in Oklahoma where he began an intimate relationship with CB. At the same time, Appellant was engaged in an intimate relationship with MB. In order to conceal from CB his communications with MB, Appellant utilized an email account.

CB suspected the infidelity and gained access to the email account. CB's suspicions were confirmed when she observed exchanges of sexually explicit emails and nude photographs of a female CB believed to be MB. CB confided in her friend JR and provided the password to Appellant's email account to JR, who accessed the account and saved the emails. JR noticed the nude photographs were actually of MB's eighteen-year-old daughter, EF, and discovered that Appellant and MB discussed performing sex acts upon EF and administering medications to EF to enable them to do so. Erroneously believing EF was under the age of 18, JR reported the matter to authorities.

NCIS agents contacted Appellant, who consented to the search and seizure of his mobile phone where the emails and pictures of EF were discovered. The photographs were of EF completely [*4] nude in the bathtub or in the bedroom of her home or clothed but with the focus on her private areas. The search also revealed an email exchange between MB and Appellant where the two discussed a "threesome" with EF, numerous email requests from Appellant to MB for pictures of EF, and numerous instances where MB sent those photographs to Appellant. The record indicates MB misled EF to gain access to EF while EF was nude in the bathroom and that EF did not know MB was recording her private areas during those times.

Shortly after the investigation commenced, Appellant was transferred to Marine Corps Base Quantico, where he met TS and began living with her and her two minor children in her residence. Appellant did not disclose the true nature of the Oklahoma investigation and the couple married in June 2017. When TS learned of the Oklahoma allegations, she demanded Appellant leave the home. Appellant complied, but returned days later and began arguing with TS. That argument turned physical and TS called 911. During the course of this altercation, Appellant was alleged to have threatened to kill TS as well as threatened to "burn down [her] house with [her] kids in it."

Based upon the above [*5] conduct, Appellant entered into a pretrial agreement and pleaded guilty to the following:

Charge I: Violating *Article 81, UCMJ* by:

> Specification 2: "[Appellant] conspired with [MB] to commit an offense under the UCMJ, to wit *Article 120c(a)(2) Indecent Visual Recording* and in order to effect the object of the conspiracy: 1) MB took nude photographs of her daughter, Ms. [EF]. 2) [MB] sent the photographs to [Appellant]. 3) [Appellant] accepted receipt of those photographs by email."
>
> Specification 3: "[Appellant] conspired with [MB] to commit an offense under the UCMJ, to wit *Article 120c(a)(3) Distribution of an Indecent Visual Recording* and in order to effect the object of the conspiracy: 1) MB took nude photographs of her daughter, Ms. [EF]. 2) [MB] sent the photographs to [Appellant]. 3) [Appellant] accepted receipt of those photographs by email."

Charge II: Violating *Article 120c, UCMJ* by:

> Specification 1: Indecent Visual Recording (*120c(a)(2)*): "[Appellant] knowingly photographed the private area of [EF] without her consent and under circumstances in which she had a reasonable expectation of privacy."
>
> Specification 2: Distribution of an Indecent Visual Recording (*120c(a)(3)*): "[Appellant] knowingly distributed a recording of the [*6] private area of [EF] when he knew or reasonably should have

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I. To convict under *Article 120c(a)(3)*, must the Government prove the attendant circumstances of both an indecent viewing under *Article 120c(a)(1)*, and an indecent recording under *Article 120c(a)(2)*?

II. Whether one who causes another to deliver an indecent visual recording to oneself may providently plead guilty to distribution of that same indecent visual recording under *Articles 77* and *120c(a)(3)*, in light of *United States v. Hill, 25 M.J. 411 (C.M.A. 1988)*?

III. In light of the Government's charging theory, were Appellant's guilty pleas to Charge I, Specifications 2 and 3 provident when his alleged co-conspirator was not subject to the UCMJ?

known that the recording was made and distributed without the consent of [EF] and under the circumstances in which she had a reasonable expectation of privacy."

Charge III: Violating *Article 128, UCMJ* when he committed the following acts on the same day:

Specification 1: "[U]nlawfully grabbed [TS] by the arms with his hands and threw her around a room."
Specification 2: "[U]nlawfully grabbed [TS] by the neck with his hands and pinned her against a wall."
Specification 3: "[U]nlawfully grabbed [TS's] neck with his hands and pinned her against a wall."[3]

After pleading guilty, Appellant explained under oath that he entered into an agreement with MB wherein MB agreed to take nude photographs of EF's private areas and send them to him electronically for his sexual gratification. He admitted that the photos were taken without EF's consent and in an area in which EF had a reasonable expectation of privacy. Appellant also admitted that he was guilty as a principal under *Article 77(1), UCMJ, 10 U.S.C. § 877(1)*, by aiding and abetting the wrongful recording and distribution to another of images of EF's private areas. Finally, he admitted that the acts alleged in Specifications 1 and 2 of Charge [*7] III took place during the same day and over the course of 15 minutes to an hour. Before announcing findings, the military judge consolidated Specifications 2 and 3 of Charge I for findings[4] as well as the three specifications of Charge III for sentencing.[5]

II. Discussion

A. Whether There Is a Substantial Basis in Law or Fact to Question the Providence of Appellant's Guilty Pleas

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law de novo. *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*.

A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference. . . .
There exist strong arguments in favor of giving broad discretion to military judges in accepting pleas, not least because facts are by definition undeveloped . . . [when] an accused might make a conscious choice to plead guilty in order to "limit the nature of the information that would otherwise be disclosed in an adversarial contest."

Id. (citations omitted). "[A]ppellant bears the burden of establishing that the military judge abused that discretion." *United States v. Price, 76 M.J. 136, 138 (C.A.A.F. 2017)* (citation and internal quotations marks omitted). In order to reject [*8] a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *Inabinette, 66 M.J. at 322*.

Appellant now raises several bases for questioning the providence of his pleas.

1. Appellant asserts he may not be convicted under Article 81, UCMJ, since his co-conspirator was not subject to the UCMJ

Appellant claims that conspiracy requires that the parties agree upon a criminal goal and, since MB was not subject to the UCMJ and the conduct prohibited by *Article 120c* was not otherwise prohibited under state or federal law, it was "legally impossible for [MB] to agree with [Appellant]" to commit that offense.[6] The Government counters that "legal impossibility is not a defense" to conspiracy.[7]

Conspiracy punishes the act of two or more parties entering into an agreement to commit a crime. *United States v. Simpson, 77 M.J. 279, 284 (C.A.A.F. 2018)*

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[3] App. Ex. XXI at 8-10; App. Ex. XXIII.

[4] Appellant pleaded not guilty to Specification 1 of Charge I. Consolidated Specification 2 of Charge I read as follows: "Violation of *UCMJ, Article 81*, on or about 6 December 2016, at or near McAlester, OK, active duty U.S. Marine GySgt Gregory Simpson conspired with [MB] to commit offenses under the UCMJ, to wit *Article 120c(a)(2)* Indecent Visual Recording and *Article 120c(a)(3)* Distribution of and Indecent Visual Recording, and in order to effect the object of the conspiracy: 1) [MB] took nude photographs of her daughter, [EF]. 2) [MB] sent the photographs to GySgt Simpson. 3) GySgt Simpson accepted receipt of those photographs by email." Record at 221-22; App. Ex. XXIII.

[5] Record at 225.

[6] Appellant's Brief at 10. We will assume without deciding that Appellant's contention regarding state or federal law is correct.

[7] Appellee's Brief at 17.

(citation omitted). The power to define that crime, including the requisite nature of the agreement and the parties thereto, is vested in the legislature. *See* Whalen v. United States, 445 U.S. 684, 689, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980) (citations omitted) (explaining the "basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses resides wholly with the Congress"). Congress has defined [*9] the crime of conspiracy under the UCMJ as follows: "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court martial shall direct." Article 81, UCMJ. Congress specifically chose the clear and unambiguous language "any other person" to describe co-conspirators and "to commit an offense under this chapter" to describe the applicable crimes. Appellant's narrowing interpretation ignores this plain language and would preclude punishing an accused for conspiring with anyone not subject to the UCMJ to commit a host of purely military offenses, e.g. Article 84 (Effecting Unlawful Enlistments), Article 94 (Mutiny and Sedition), Article 100 (Subordinate Compelling Surrender), and Article 104 (Aiding the Enemy) to name but a few. This absurd result is also directly contrary to the guidance found in the *Manual for Courts-Martial*, which states: "[t]he accused must be subject to the code but the other co-conspirators need not be." *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), Part IV, ¶ 5(c). This assignment of error [*10] is without merit.

Nor do we agree with Appellant that our holding adopts the "unilateral" conspiracy framework ostensibly rejected by our superior court. The case most-relied upon by Appellant for this proposition is *United States v. Valigura*, wherein Private Valigura agreed to sell drugs to an undercover law enforcement officer and was charged with conspiring with that individual. 54 M.J. 187 (C.A.A.F. 2000). The Court of Appeals for the Armed Forces [CAAF] recognized that Appellant's co-conspirator had no criminal intent, operating instead for law enforcement purposes and reasoned that "[i]f there is no actual agreement or 'meeting of the minds' there is no conspiracy." Id. at 188. Appellant argues his case is similar, that since MB's actions were not illegal for her to commit, there was no meeting of the minds regarding a "criminal goal," leaving but one party to the agreement. But Appellant ignores the distinction that Valigura involved an undercover agent who had no intention of committing an offense. In such cases, it is "well settled that there can be no conspiracy when a supposed participant merely feigns acquiescence with another's criminal proposal in order to secure his detection and apprehension by proper authorities." [*11] Id. at 189. Unlike the "feigning agent" in Valigura, MB did agree to commit an offense under the UCMJ and took necessary steps to commit that offense. Therefore, the "meeting of the minds" lacking in *Valigura* was clear and present in Appellant's case. It matters not that MB was not herself exposed to punishment for the object of that conspiracy.

2. Appellant asserts he may not be convicted of conspiring to distribute indecent images and of distributing those same images

Appellant pleaded guilty to conspiring with MB to distribute indecent recordings of EF. As a principal under Article 77(1), UCMJ, he also pleaded guilty to the underlying crime of distributing those images. He now argues he may not be found guilty of both when "the agreement exists only between the people necessary to commit [the offense of distribution.]"[8]

Since "conspiracy poses distinct dangers quite apart from those of the substantive offense," Iannelli v. United States, 420 U.S. 770, 778, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975), conspiracy may generally be charged and punished separately from any crime which may be the object of that conspiracy. United States v. Johnson, 58 M.J. 509, 511 (N-M Ct. Crim. App. 2003) (citation omitted). "Wharton's Rule" is an exception to this general rule and prohibits punishing conspiracy separately if the agreement of [*12] two people is necessary to complete the substantive crime. This rule is captured in the *MCM*, which states: "Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense." *MCM*, Part IV, ¶ 5(c)(3). Appellant argues that Wharton's Rule prohibits his conviction of both conspiring to distribute indecent images and distributing those images because distribution "requires two people for the [distribution] to occur."[9] Perhaps, but Appellant's argument stops short.

In *United States v. Simmons*, the appellant was found guilty of, *inter alia*, nine specifications of conspiracy to alter a public document and two specifications of conspiring with a co-conspirator to commit graft. 34 M.J.

[8] Appellant's Brief at 10-11 (brackets in original).

[9] Appellant's Brief at 11.

243 (C.M.A. 1992). On review, the Army Court of Military Review consolidated all the conspiracy charges into one specification, holding "there was but one conspiracy with numerous overt acts." The Court of Military Appeals [C.M.A.] was thereafter presented with the question of whether Simmons could conspire with a co-conspirator who was the participant in the graft. While determining that "graft requires two persons and [*13] therefore 'Wharton's Rule' would apply[,]" the C.M.A. nonetheless held that, since the consolidated conspiracy specification also alleged the separate crime of altering public documents, a crime that did not require two individuals for its commission, Wharton's Rule was inapplicable to the specification as consolidated. Simmons, 34 M.J. at 243-44.

The *Simmons* court's logic built upon the earlier case of *Crocker*, where the C.M.A. held that Wharton's Rule was inapplicable to a conspiracy specification that alleged an agreement to both possess and transfer cocaine. 18 M.J. 33 (C.M.A. 1984). That court reasoned:

> When two persons agree to accomplish several criminal objectives, the plurality of objectives does not result in there being more than one conspiracy. Indeed, it would be improper to charge several conspiracies where there was only a single agreement. Since appellant and [co-conspirator] had a single agreement—which contemplated both possession and transfer of the cocaine—the draftsmen of the charges properly alleged conspiracy in a single specification. If no reference to transfer had been contained in that specification and only a conspiracy to possess had been alleged, Wharton's Rule clearly would not apply because possession [*14] does not require concerted criminal action. We do not see how the reference in this specification to another purpose of the conspiracy—namely, transfer of the cocaine—could change this result. Instead, for purposes of Wharton's Rule, the allegation that a second purpose of the conspiracy was to transfer cocaine should be treated as redundant.

Crocker, 18 M.J. at 39-40.

Here, noting the Wharton's Rule issue on the record, the military judge correctly consolidated the specification of conspiracy to take indecent photographs of EF and the specification of conspiracy to distribute those photographs into one specification alleging one conspiracy. He then stated, "I believe this consolidation also eliminates any possible concern for Wharton's Rule insofar as the consolidated specification alleges a conspiracy to photograph, which only requires one individual."[10] We concur that this consolidation alleviated any issue under Wharton's Rule and find no basis to question Appellant's plea in this regard.

3. Appellant asserts he may not be convicted of distributing indecent images when the images were sent only to him

Specification 2 of Charge II alleged Appellant, as an "aider and abettor" under Article 77(1), UCMJ, wrongfully [*15] distributed indecent recordings of EF on divers occasions, in violation of Article 120c(a)(3), UCMJ. Article 120c(a), UCMJ provides that:

> Any person subject to this chapter who, without legal justification or lawful authorization—
> (1) knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy;
> (2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; or
>
> (3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct.

Article 120c(d)(5), UCMJ defines "distribute" as: "delivering to the actual or constructive possession of another, including transmission by electronic means."

Appellant claims here that since distribution requires delivering to the possession of another, it is legally impossible for him to "distribute" [*16] the indecent recordings to himself. He also asserts that he "can only be found guilty of distribution if he would be guilty of performing the act directly."[11] In other words, he may not be criminally liable "if [MB's] acts in taking and sending the nude pictures of her adult daughter are not

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[10] Record at 222.

[11] Appellant's Reply Brief at 7.

criminal [for MB to commit]."[12] The Government responds that because Appellant "caused the distribution to happen under *Article 77(2)*" he is liable for MB's distribution as a principal.[13]

Article 77, UCMJ, states:

> Any person punishable under this chapter who—
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.

Appellant's claim that he may not "deliver" to himself ignores the Government's charging theory, which subjected Appellant to criminal liability as a principal for aiding and abetting the act of MB distributing the recordings "to another." The military judge fully explained this charging theory to Appellant in the presence of his counsel during the plea inquiry, including the elements and definitions of *Article 77(1)*.[14] After [*17] doing so, Appellant responded in the affirmative when the military judge asked "[d]id you encourage, advise, instigate, and counsel [MB] to commit the offense of distribution of an indecent recording?"[15] Moreover, in conjunction with the plea inquiry, Appellant entered into a stipulation of fact wherein he admitted that he "knowingly and willfully counseled [MB] to photograph . . . the private areas of [EF], and to send them to him via email."[16] He also admitted that he was "guilty of distribution of indecent visual recordings of [EF] even though he was not physically present with [MB] when she took the photographs . . . or when she sent the photographs[.]" Finally, Appellant conceded that MB would not otherwise have taken the photos "if [Appellant] did not counsel [her] to take the photographs [and] that [she] would not otherwise have sent them if [he] did not counsel [MB] to [do so]."[17] The record clearly indicates that Appellant understood the elements of the offense as well as his culpability under *Article 77(1)*, admitted fully to guilt under that theory, and a factual basis exists to support that plea.

We also reject Appellant's argument that he could not be criminally liable under [*18] *Article 81*, because MB's "actions were not criminal" for MB to commit. As with *Article 81* conspiracy, discussed above, the wording of *Article 77, UCMJ*, is clear and unambiguous: Appellant is exposed to criminal liability whenever he, sharing in the criminal design, "aids, abets, counsels, commands or procures" an "offense punishable by this chapter." For criminal liability founded upon *Article 77*, there is no requirement that the actual perpetrator of the criminal act be subject to the UCMJ. In fact, such perpetrator need not even be identified. *MCM*, Part IV, ¶ 1.b.(6); *see also MCM*, Part IV, ¶ 2.c.(4) (regarding the similar relationship between principals and accessories after the fact: "The principal who committed the offense . . . need not be subject to the code"). Appellant's reading of the statute would re-write *Article 77* to read "any person subject to this chapter who aids and abets another person subject to this chapter" and limit application of *Article 77* far beyond what Congress intended.

4. Appellant asserts wrongful distribution of an indecent recording under Article 120c requires both an indecent viewing and an indecent recording

Appellant next posits that the conjunctive "and" in [*19] *Article 120c(a)(3), UCMJ*, criminalizes only the

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[12] Appellant's Reply Brief at 8.

[13] Appellee's Brief at 21. During the providence inquiry, the military judge explained the elements and definitions of aider and abettor liability under *Article 77(1), UCMJ*, and Appellant admitted to liability for this offense under this provision. We therefore decline the Government's invitation to summarily resolve this assignment of error under *Article 77(2), UCMJ*. Nor must we. Subparagraph (1) has the same impact, namely, creating liability when a Service Member "counsels" another to commit "an offense punishable by this chapter."

[14] The military judge explained: "Any person who actually commits an offense is a principal. Anyone who knowingly and willfully aides or abets another in committing an offense is also a principal and equally guilty of the offense. An aider or abettor must knowingly and willfully participate in the commission of the crime as something he wishes to bring about and must aide, encourage, or incite the person to commit the criminal act. Presence at the scene of the crime is not enough, nor is failure to prevent the commission of an offense. There must be an intent to aide or encourage the person who commits the crime. Although the accused must consciously share in the actual perpetrators criminal intent to be an aider or abettor, there is no requirement that the accused agree with or even have the knowledge of the means by which the perpetuator is to carry out that criminal intent." Record at 205.

[15] Record at 210.

[16] Record at 210. Pros. Ex. 1 at 6.

[17] Pros. Ex. 1 at 6. *Id.*

distribution of recordings that are both an indecent viewing and an indecent recording. This is significant, he argues, since there is "no evidence that MB 'indecently' viewed [EF]."[18] To the contrary, Appellant claims the evidence shows that [EF] was aware [MB] was viewing her and consented to the viewing, thus depriving EF of a "reasonable expectation of privacy." Without this expectation of privacy, Appellant argues the viewing could not be indecent, thus it was legally impossible for Appellant to be guilty of distributing indecent recordings. An issue of statutory construction is a question of law we review de novo. *United States v. Wilson, 76 M.J. 4, 6 (C.A.A.F. 2017)*.

Paragraphs (1) and *(2) of Article 120c(a)* prohibit viewing or recording images of the private areas of another without that person's consent and under circumstances in which that person had a reasonable expectation of privacy. *Paragraph (3)* prohibits broadcasting or distributing those recordings when the accused knew or reasonably should have known those recordings were made *under the circumstances proscribed* in *paragraphs (1)* and *(2)*. Those circumstances are "without consent" and "under circumstances in which that other person has a reasonable expectation of privacy." [*20]

Appellant's counsel recently raised the same issue with our sister court. In analyzing the conjunctive "and" in *Article 120c(a)(3)*, the Air Force Court of Criminal Appeals determined that:

> [T]he "circumstances proscribed" language in *paragraph (3)* means recordings made "without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy," which is language common to *paragraphs (1)* and *(2)* . . . and thus explains the conjunction. Our reasoning is illuminated by the language in *paragraph (3)* that uses the verb "made," and not "viewed" or "made and viewed," to link the act of distribution with the "under the circumstances prescribed in" language at issue. Even if our plain reading leaves doubt, we find that *Article 120c(a)(3), UCMJ*, is nevertheless unambiguous. Congress and the President could not have intended we read *Article 120c(a), UCMJ*, in the unduly restrictive manner Appellant proposes we should. The statute forbids three separate acts—viewing, recording, and broadcasting or distribution of another's private area—that are violations of law when done knowingly and under identically proscribed circumstances. The acts are separated by the disjunctive, "or," in the text [*21] of both the header and the substantive paragraphs of the statute.

*United States v. Bessmertnyy, No. ACM 39322, 2019 CCA LEXIS 255, at *24 (A.F. Ct. Crim. App. Jun. 14, 2019)* (unpub. op.).

We concur with this analysis. Appellant's interpretation of the statute would not only lead to absurd results,[19] it is also contrary to the elements of this offense, which were clearly set forth by the military judge during the plea inquiry.[20] Rejecting Appellant's interpretation that *Article 120c(a)(3), UCMJ*, requires an indecent viewing *and* an indecent recording, we need not address his contention that EF lacked a reasonable expectation of privacy when she was viewed by her mother. It is enough that Appellant repeatedly admitted that EF did not know her mother was recording her private areas, contributing to the overwhelming support in the record that EF maintained her reasonable expectation of privacy from *being recorded*, a position appellate defense counsel conceded at oral argument.

5. Appellant asserts he misunderstood the portion of the pretrial agreement suspending confinement

In his pretrial agreement, Appellant agreed that any

[18] Appellant's Brief at 11.

[19] As the *Bessmertnyy* court noted: "an appellant who surreptitiously made a video recording of a victim's private area under proscribed circumstances might be found guilty of making an indecent recording, but criminal liability for indecent broadcasting or distribution of that same recording would depend on whether or not the appellant also viewed the private area of the victim at the same time the appellant made the recording." *2019 CCA LEXIS 255, at *24*.

[20] "One, that on divers occasions between on or about 1 December 2016 and on or about 19 February 2017, at or near McAlester, Oklahoma, you and or [MB] knowingly distributed a recording of the private area of [EF]; two, the recording was made without the consent of [EF]; three, that you and [MB] knew or reasonably should have known that the recording was made without the consent of [EF]; four, that the recording was made under circumstances in which [EF] had a reasonable expectation of privacy; five, that you knew or reasonably should have known that the recording was made under circumstances in which [EF] had a reasonable expectation of privacy; and, six; that your conduct was wrongful." Record at 188-189.

awarded confinement:

> May be approved as adjudged. However, all confinement in excess of eighteen months will be suspended for the period of confinement adjudged plus [*22] 12 months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action. This Agreement constitutes my request for, and the Convening Authority's approval of, deferment of all confinement suspended pursuant to the terms of this Agreement. The period of deferment will run from the date of adjournment of the court-martial until the date the Convening Authority acts on the sentence.[21]

In his action, the Convening Authority stated: "Pursuant to the pretrial agreement, all confinement in excess of eighteen months is suspended. The suspension period shall begin from the date of this action and continue for [forty-four] months. At that time, unless vacated, the suspended part of the confinement sentence will be automatically remitted."[22] Appellant now claims that his understanding was that that suspended confinement would be suspended from the date of sentencing, not the date of action and that the parties failure to reach a "meeting of the minds" regarding the length of suspension, renders the agreement unenforceable.[23]

"A pretrial agreement is a contract between the accused and the convening authority. Therefore, we look to the basic principles [*23] of contract law when interpreting pretrial agreements." *United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006)* (citation and internal quotation marks omitted). Whether the Government has complied with the material terms and conditions of an agreement presents a mixed question of law and fact. *Id.* If the Government breaches a material term in an agreement, we may do one of four things: (1) permit Appellant to withdraw from the agreement; (2) require specific performance; (3) provide alternative relief with Appellant's consent; or (4) provide an adequate remedy to cure the material breach of the agreement. *Id. at 305* (Effron, J., concurring).

The record supports the conclusion that the probationary period of confinement would begin on the date of action: the pretrial agreement stated that the deferral of all suspended confinement would end "on the date of action" and, while Rule for Courts-Martial [R.C.M.] 1108 authorizes convening authorities to suspend confinement in some circumstances, any such suspension may only occur upon convening authority's action and not before. *See also*, *Art.60(c)(2)(B), UCMJ*. On the other hand, the pretrial agreement—the contract between the parties—is technically silent on when the suspension period will begin. Therefore, to assist [*24] in determining the parties' understanding of the contract, we turn to the judge's explanation of its terms.

The military judge is required to ensure that the accused understands the pretrial agreement and the parties agree to its terms. R.C.M. 910(f)(4); *see also* *United States v. King, 3 M.J. 458 (C.M.A. 1977)*; *United States v. Green, 24 C.M.A. 299, 1 M.J. 453, 456, 52 C.M.R. 10 (C.M.A. 1976)*. "We have long emphasized the critical role that a military judge and counsel must play to ensure that the record reflects a clear, shared understanding of the terms of any pretrial agreement between an accused and the convening authority." *United States v. Williams, 60 M.J. 360, 362 (C.A.A.F. 2004)* (citation omitted).

After the sentence was announced, the military judge stated:

> So I have [the pretrial agreement], which indicates . . . [t]he confinement, which I've adjudged [thirty-two] months, that may be approved as adjudged; however, everything [in] excess of [eighteen] months will be suspended for the period of confinement plus [twelve] months thereafter . . . Do counsel agree with the Court's interpretation of [the pretrial agreement]?[24]

Both sides did.

Here, the use of the words "period of confinement" did little to clarify the parties understanding as to when the forty-four month probation period would begin. In fact, this term could have added confusion, since, due to factors such as pretrial [*25] confinement credit, "period of confinement" may not ultimately equate to the "eighteen months" period used in the convening authority's action. *See also* Dep't of Defense Manual 1325.07-M, DoD Sentence Computation Manual (Jul. 27, 2004) (setting forth measures by which approved periods of confinement may be modified post convening authority action).

Therefore, absent clarity, and to eliminate prejudice to

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[21] App. Ex. XXII at 1.

[22] Convening Authority's Action of Aug. 27, 2018.

[23] Appellant's Reply at 14.

[24] Record at 325.

Appellant caused by any misunderstanding, we will order what Appellant now reasonably claims he believed to be specific performance: suspension of confinement for a period of time equal to forty-four months from the date Appellant's sentence was announced.[25]

B. Whether the Military Judge Erred in Denying Defense Motion to Merge Assault Specifications on Findings

At trial, the Defense moved to merge for findings the three assault specifications under Charge III because the specifications represented an unreasonable multiplication of charges.[26] The military judge denied the Defense motion, agreeing with the Government that the specifications were neither multiplicious nor unreasonably multiplied because: "[t]he three specifications are aimed at three separate [*26] and distinct acts."[27] Appellant then entered into a pretrial agreement wherein he agreed to plead guilty unconditionally to Specifications 1 and 2, and plead guilty to the lesser included offense under Specification 3 of assault consummated by a battery. During the plea inquiry, Appellant admitted that the acts alleged in the first two specifications were the result of a fight that lasted "approximately ten minutes."[28] Appellant explained that there was then a five minute "cool down period" during which the parties were "trying to be more rational."[29] Following that five minutes, Appellant admitted the act of Specification 3 took place. After the plea inquiry, the judge reiterated his pretrial ruling, stating "I believe these are three distinct acts as opposed to multiple acts and one transaction. There was a five minute separation between each of the three acts."[30] Appellant now claims the military judge erred when he failed to merge the three specifications into one for findings. The Government responds that Appellant waived the issue with his unconditional guilty plea.

An accused who pleads guilty unconditionally to several specifications relinquishes his entitlement to challenge them for [*27] multiplicity unless he can show they are "facially duplicative" of one another. See *United States v. Broce, 488 U.S. 563, 575, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)*; *United States v. Campbell, 68 M.J. 217, 219 (C.A.A.F. 2009)*. This inquiry is a question of law which we review de novo. *United States v. Pauling, 60 M.J. 91, 94 (C.A.A.F. 2004)*. "Offenses are 'facially duplicative' if, on the face of the guilty plea record, it is apparent that the multiple convictions offend the *Double Jeopardy Clause* because admission to one offense cannot 'conceivably be construed' as amounting to more than a redundant admission to another." *United States v. Hernandez, 78 M.J. 643, 645 (C.G. Ct. Crim. App. 2018)* (quoting *Broce, 488 U.S. at 576*). This type of multiplicity is grounded in the *Double Jeopardy Clause of the Fifth Amendment*, which prohibits multiple punishments for the same offense. *U.S. Const. amend. V*; *see also Article 44(a), UCMJ* ("No person may, without his consent, be tried a second time for the same offense."). It occurs when "charges for multiple violations *of the same statute* are predicated on arguably the same criminal conduct." *United States v. Forrester, 76 M.J. 389, 395 (C.A.A.F. 2017)* (emphasis in original) (citation and internal quotation marks omitted).

Based upon this principle, our superior court, this Court, and our sister courts have routinely agreed that "when Congress enacted *Article 128*, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault." *United States v. Morris, 18 M.J. 450 (C.M.A. 1984)*. Instead, acts "united in time, circumstance, and impulse in regard to a single person" [*28] comprise but one assault. *See e.g.,*

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[25] Suspension provisions within pretrial agreements should be drafted with precision, mindful of the mandates of R.C.M. 1108, which states suspension of the execution of a sentence "shall be for a stated period or until the occurrence of an anticipated future event. . . . [and] shall not be unreasonably long." R.C.M. 1108(d). In addition, R.C.M. 1108(e) states, in part: "[S]eparation which terminates status as a person subject to the code *shall result in remission* of the suspended portion of the sentence." (Emphasis added). Suspension provisions should therefore also take into account the jurisdictional limitations of *Article 2, UCMJ*, the uncertainty of ultimate confinement release dates (e.g., Dep't of Defense Manual 1325.07-M), and the needs of good order and discipline. While utilizing "shell" language is a start at drafting these provisions, the drafting should not end there. *See also United States v. Angel, No. 1467, 2019 CCA LEXIS 499, at *4 (C.G. Ct. Crim. App. Dec. 13, 2019)* (unpub. op.) ("we suggest more explicit language in pretrial agreements that include a suspension term, concerning the starting point of the probationary period.")

[26] App. Ex. V.

[27] App. Ex. XVI at 3.

[28] Record at 218.

[29] *Id.* at 218-19.

[30] Record at 223.

United States v. Rushing, 11 M.J. 95, 98 (C.M.A. 1981) (accused striking at victim with his fist and then throwing a pool stick was but one assault); Hernandez, 78 M.J. at 647 (C.G. Ct. Crim. App. 2018) (three specifications of assault consummated by a battery consolidated to one when touchings were part of "continuous course of conduct"); United States v. Clarke, 74 M.J. 627 (A. Ct. Crim. App. 2015) (two assaults consolidated as stemming from touchings "united in time, circumstance, and impulse"); United States v. Lopez, No. 201300394, 2014 CCA LEXIS 441, at *9 (N-M Ct. Crim. App. Jul. 22, 2014) (unpub. op.) (specifications consolidated as multiplicious where separate touchings occurred "immediately" after each other); United States v. Lombardi, No. 200001461, 2002 CCA LEXIS 138, at *5 (N-M Ct. Crim. App. Jun. 26, 2002) (unpub. op.) ("we conclude that each unlawful touching of the same person in a single, uninterrupted altercation, united in time, circumstance, and impulse should not be the basis for multiple charges of assault"). We reiterate that holding here.

The military judge's determination that "all three acts were separated by five minutes" is not supported by the record. In fact, Appellant ultimately told the judge that the acts alleged in the first two specifications happened during a "ten minute" fight and spoke of no break during that time. Those acts were clearly "united in time, circumstance, and impulse" and should have been [*29] consolidated. The act alleged in Specification 3, which Appellant said followed a five minute cool down period, was separate and distinct from the previous two. *See* United States v. Flynn, 28 M.J. 218, 220-21 (C.M.A. 1989) (separate acts not multiplicious when even a short lapse of time involved). Therefore, we will consolidate only Specifications 1 and 2 of Charge III.

C. Whether Appellant's Trial Defense Counsel Were Ineffective

In this assignment of error, Appellant claims that his trial defense counsel [TDC] were ineffective by: (1) failing to recognize the issues discussed above; (2) "misleading" Appellant regarding the law of self-defense; (3) failing to inform Appellant about how his conviction would impact his right to vote, and; (4) failing to introduce any evidence of the financial impact that a loss of retirement benefits would have on Appellant, and; (5) failing to object to Pros. Ex. 3, TS's unsworn "victim impact statement."

The Sixth Amendment to the United States Constitution entitles criminal defendants to representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We review de novo claims of ineffective assistance, United States v. Harpole, 77 M.J. 231, 236 (C.A.A.F. 2018), and Appellant must demonstrate both "(1) that his counsel's performance was deficient, [*30] and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 687). The two prongs of this test can be analyzed independently and if Appellant fails either prong, his claim fails. Strickland, 466 U.S. at 697. "An appellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice." United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005).

"In the guilty plea context, the first part of the *Strickland* test remains the same—whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys." United States v. Bradley, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). We must also "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Having considered and found meritless Appellant's contentions regarding legal impossibility, liability as a principal under Article 77, UCMJ, and the language of Article 120c(a)(3), UCMJ, we find none of those alleged errors resulted in ineffective assistance. We turn now to the remainder of his claims.

In a post-trial affidavit, Appellant makes sweeping assertions that his counsel lied, misinformed, and "pressured" him into pleading guilty. His counsels' response affidavits are consistent with each other and refute each [*31] of these allegations, creating a dispute between the parties. Therefore, as a threshold matter, we have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes and are convinced such a hearing is unnecessary. *See* United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997).

1. Appellant asserts his trial defense counsel misled him on the law of self-defense

Appellant states that he acted in self-defense when TS instigated the physical altercation, but his counsel informed him that self-defense would "not apply"

because he "was the man." Specifically:

> They told me to say things I did not agree with, such as the incident with my wife. She instigated the incident and hit me first. Then she grabbed my cheek in a "fishhook" way and started squeezing and twisting, so I grabbed her arm to push her off, but that was causing me more pain because she still had me in the fishhook. That is when I grabbed her by her neck to push her away. That was successful in getting her to let go, but then she punched me. I was trying to protect myself. There was not a "cooling off' period, it was just one continuous fight. When the military judge asked me about self-defense and told me to discuss self-defense with [TDC], [TDC] told [*32] me to tell the military judge self-defense did not apply. [TDC] told me it would not matter that [TS] instigated the fight because I was the man, which I felt was discriminatory based on gender. He said words to the effect if I tried to claim self-defense, everything would be ruined, the guilty plea would be canceled, they would retract the pretrial agreement, I would get convicted at a contested court-martial[.][31]

In his response to Appellant's claim, lead defense counsel stated:

> We engaged in numerous conversations with [Appellant] about this topic over the course of several months and explained to him possible justifications for battering his wife. Based on [his] explanation of events to us, none of these justifications applied to his case. He admitted to us that he did not need to use force to protect himself from Ms. T.S. and that he had various ways of deescalating the argument with her short of physically striking her. At no time did I advise [him] that, as a man, he could not claim self-defense against his wife. I do remember discussing with him the reality that members would likely find his self-defense argument implausible given the size disparities between him and Ms. T.S. This [*33] was not a blanket rejection of self-defense as a justification for force—it was an assessment of the likelihood that he would be convicted at a contested court-martial. [32]

While we might generally order a factual hearing when Appellant's and his trial defense counsel's affidavits conflict, we need not do so here, where the record clearly indicates Appellant understood that self-defense was applicable to his altercation with TS. In addition to routinely telling the military judge that he had no legal excuse for causing bodily harm to TS during the *Care* [33] inquiry, the military judge specifically told Appellant that self-defense was available:

> MJ: [S]elf-defense is a potential defense to assault and battery . . . it would apply if you had a reasonable belief that harm was about to be inflicted on you—bodily harm—and you must have actually believed that the force you used was necessary to prevent bodily harm . . . [DC], have you had an opportunity to discuss the issue of self-defense?
> DC: We have, sir. Thank you . . .
> MJ: All right. Do you believe that self-defense is a possible defense in this matter?
> DC: No, sir.
> MJ: Okay. Gunny, have you had an opportunity to talk with [TDC] about that?
>
> ACC: [*34] Yes, sir.
> MJ: Do you believe that self-defense may be a defense in this case?
> ACC: No, sir.
> MJ: At any point during any of the assaults—the three specifications we talked about before, at any point, did you believe that the force you used was necessary to prevent bodily harm?
> ACC: No, sir.[34]

After being clearly informed by the military judge that self-defense could apply to his altercation with TS, we find Appellant's claim that he believed otherwise improbable. *See* *Ginn, 47 M.J. at 248* (stating "if the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts, the Court may discount those factual assertions and decide the legal issue"). Instead, when the military judge asked him if self-defense applied to him, Appellant either told the truth or falsely told the judge that it did not in order to preserve the benefit of his pretrial agreement. Either way, Appellant has failed to establish his counsel were ineffective on this issue.

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[31] Appellant's Affidavit of Nov. 15, 2018 at 2-3.

[32] Trial Defense Counsel's Affidavit of Feb. 18, 2020 at 2.

[33] *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969)*.

[34] Record at 320-321.

2. Appellant asserts his trial defense counsel failed to explain collateral consequences to him

Next, Appellant complains that his conviction will result in the loss of his right to vote [*35] in his home state during the period of suspended confinement. Further, Appellant claims "[my TDC] never informed me that that I would not be eligible to vote while I was in confinement. I only recently found out . . . that I cannot vote during the period of suspended confinement. I want to vote . . . had I known these things, I would not have plead guilty."[35] Appellant's trial defense counsel disputes this claim, responding:

> I do not specifically recall instructing [Appellant] on how his guilty plea or the pretrial agreement might impact his right to vote. This was standard advice that I routinely provided to all of my clients facing court-martial conviction, however, so I am confident that I covered the topic with him during our initial meetings and prior to recommending his acceptance of the pretrial agreement. At no time did [Appellant] express concern about losing his right to vote . . . Appellant did not make his guilty plea contingent on being able to vote, nor did we mislead him on whether he would be able to vote. It was a non-issue for him throughout the entire process.[36]

Even were we to accept Appellant's version of events, he would not be entitled to relief. While the first prong [*36] of *Strickland* remains the same for guilty pleas, "[t]he second prong is modified to focus on whether the 'ineffective performance affected the outcome of the plea process.'" *Bradley, 71 M.J. at 16* (quoting *Hill, 474 U.S. at 59*). "[T]o satisfy [this] requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (quoting *Hill, 474 U.S. at 59*). Appellant fails to establish such a probability.

Even though he claims he would not have pleaded guilty were it not for his counsels' alleged misinformation, dishonesty and coercion, mere allegations post-trial are insufficient. *See Bradley, 71 M.J. at 17* (affidavit alleging that the appellant would not have pleaded guilty if the defense counsel had made the appellant aware that the plea waived a disqualification issue is insufficient to demonstrate prejudice.) Instead, Appellant must satisfy a separate, objective inquiry and "must show that if he had been advised properly, then it would have been rational for him not to plead guilty." *Id.* Considering the strength of the Government's case and that charges of conspiring to rape EF by administering a drug as well as communicating a threat to "burn [TS's] [*37] house down with her kids in it," were dismissed as part of the pretrial agreement, Appellant has failed to persuade us that contesting those charges in the hopes of preventing the temporary suspension of his voting rights would have been a rational choice.

3. Appellant asserts his trial defense counsel failed to introduce evidence of financial impact from loss of retirement

Appellant's next claim is that, since he had over eighteen years of active duty at the time of his sentencing hearing, his trial defense counsel's failure to present loss of retirement benefits to the military judge constitutes ineffective assistance:

> With the agreement to 'voluntarily' extend[ ] my active duty service, I think I would have been retirement eligible, either for length of service or disability. They did not discuss the process my unit would have to go through to separate me with an Other Than Honorable Discharge, if they chose to separate me for misconduct. I found out that at worst, if I was separated for expiration of active service, I would have received a General Under Honorable Conditions discharge. I was not advised that an administrative separation for misconduct would have been pursued. They [*38] did not investigate whether I was eligible for an early retirement, and if so, what I would lose in retirement benefits if a punitive discharge was adjudged.[37]

Appellant's trial defense counsel responds that Appellant would not have been able to retire and that his trial defense counsel's choice was a tactical one:

> [Appellant] was not eligible for retirement at the time of his guilty plea, and, because of his misconduct, he would not have fallen within the "sanctuary" from administrative separation normally offered to servicemembers between eighteen and twenty years of service. Also, in the pretrial agreement, [Appellant] agreed to waive his right to an administrative separation board were he to not

[35] Appellant's Affidavit of Nov. 15, 2018 at 2.

[36] Trial Defense Counsel's Affidavit of Feb. 18, 2020 at 2.

[37] Appellant's Affidavit of Nov. 15, 2018 at 2.

> receive a punitive discharge at the court-martial. Finally, [Appellant] had already reached his end of active service in November 2017, months before his guilty plea. His command had placed him on legal hold, and the only reason he remained in the Marine Corps was to face court-martial. To retire from active-duty, [Appellant] must have successfully reenlisted with a general court-martial conviction for sex crimes and violent offenses. This was highly improbable. As a result, [the assistant [*39] trial defense counsel] and I decided to focus our presentencing arguments on [Appellant's] good military character and performance as a Marine rather than on a retirement benefit he would be unlikely to receive anyway. We still presented the financial impact argument to the military judge, who was familiar with the fallout from a punitive discharge, but we did not want to detract from our primary arguments by introducing evidence so far attenuated from what [Appellant] was likely to receive.[38]

Even assuming that counsels' performance was deficient, we are persuaded that Appellant suffered no prejudice. Documents entered by Appellant at sentencing indicate that Appellant entered active duty prior to 10 September 1999, informing the judge that Appellant had over eighteen years of active service at the time of sentencing.[39] Moreover, Appellant's pretrial agreement, which the judge covered with Appellant on the record, specifically included the following provision: "Loss of Retirement Benefits Notification. My defense attorney has advised me that any punitive discharge/dismissal that is adjudged and ultimately approved in my case may adversely affect my ability to receive retirement pay and [*40] any and all other benefits accrued as a result of my military service."[40] That a Marine is eligible for retirement benefits after a set number of years of active service is a fact commonly known to trial judges, who routinely instruct member's panels on such issues. We are therefore confident that this judge was well aware of any retirement-related consequences to Appellant of a punitive discharge and that Appellant suffered no prejudice as a result of any failure to present additional information to the trial court on that matter.

4. Appellant asserts his trial defense counsel failed to object to Prosecution Exhibit 3, TS's unsworn "victim impact statement"

Appellant also claims that the military judge erred in admitting Pros. Ex. 3, an unsworn written statement signed by TS and titled "Victim Impact Statement" wherein TS described the impact of Appellant's physical abuse on her and her children, including the financial and legal impacts she continued to endure. The Government did not articulate under which rule it was offering the evidence, simply asking the military judge to admit "prosecution exhibit 3."[41] When asked if he had any objection to the exhibit, TDC replied "No, Your Honor." [*41] [42]

Appellant asserts Pros. Ex. 3 was erroneously admitted, as R.C.M. 1001A, requires that a "victim impact statement" be a "court" exhibit and not a "prosecution" exhibit. Further, Appellant claims TS's statement "contained objectionable matters that did not relate to or result from [Appellant's] convictions for assaulting her" but instead referred to "uncharged misconduct" and "withdrawn charges."[43] The Government responds that Appellant waived the issue when his trial defense counsel responded that he had no objection to the document. Finally, in his reply brief, Appellant alleges that his trial defense counsel's failure to object to Pros. Ex. 3 constitutes ineffective assistance of counsel, and therefore "application of the waiver doctrine is inappropriate."[44]

Regardless of the asserted error, Appellant was not prejudiced by the manner in which Pros Ex. 3 was admitted. A victim may use an unsworn statement that may be oral, written, or both, and the victim may not be cross-examined by trial counsel or defense counsel upon it or examined upon it by the court-martial. R.C.M. 1001A(e). However, in addition to labeling the exhibit as a prosecution exhibit, Pros. Ex. 3 lacks any other indicia that it was offered by the [*42] victim in exercise of her right to be reasonably heard in accordance with R.C.M. 1001A.

On the other hand, the Government, in its own right, may offer aggravation evidence in accordance with

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[38] Trial Defense Counsel's Affidavit of Feb. 18, 2020.

[39] *See* Def. Ex. A at 8.

[40] AE XXI at 7.

[41] Record at 238.

[42] Record at 243.

[43] Appellant's Brief at 31.

[44] Appellant's Reply at 19.

R.C.M. 1001(b)(4): "Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to . . . the victim of an offense committed by the accused . . . ." We also note that R.C.M. 1001A defines "victim impact" with nearly identical words.[45] One significant distinction between statements *offered by a victim* in exercising her right to be reasonably heard and victim impact evidence *offered by the Government*, the latter may not, over Defense objection, be admitted in the form of an unsworn written statement. In practice, however, the Government frequently offers aggravation evidence that would be otherwise objectionable under the rules of evidence—due to it being hearsay or lacking formal authentication—and such objections are routinely waived by the Defense in guilty plea cases such as this for legitimate tactical reasons. *Cf.* R.C.M. 1001(c)(3) (military judge may relax rules of evidence for extenuation and mitigation evidence); R.C.M. 1001(d) (if rules of evidence relaxed under 1001(c)(3), they may relaxed [*43] to the same degree for prosecution rebuttal evidence).

Assuming there was any error in admitting Pros. Ex. 3 with the consent of the Defense, we find no prejudice in this guilty plea case. Trial was by military judge alone, who was already aware of the "uncharged misconduct" and "withdrawn charges" to which Appellant complains TS referred. To the extent this information was inadmissible, we presume the military judge knew the law and applied it correctly. *United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009)*.

For those reasons, we disagree with Appellant's assertion that his conviction must be set aside for ineffective assistance of counsel.

D. Whether the Record of Trial is Incomplete Because Pages Are Missing and It Was Incorrectly Authenticated

On 27 February 2018, the parties argued several motions at a pretrial hearing. The individual authenticating this portion of the record was the "Chief Court Reporter" who was not present at this hearing. Immediately above his signature, this note was included: "Per R.C.M. 1104(a)(2)(B), the court reporter shall authenticate the record of trial when this duty would fall upon a member under this subsection. The military judge has conducted a permanent change of duty."[46] Under the Chief Court Reporter Chief's signature [*44] was this handwritten note: "* [The Court Reporter] is no longer available; he is currently attending Officer Candidate School."[47] Appellant now argues that, since the Chief Court Reporter was not present at the portion of the record that he authenticated, the record is "incomplete." The Government responds that, even if the record was not properly authenticated, Appellant has not shown prejudice. Both parties are correct.

Whether a record of trial is complete is a question of law we review de novo. *United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000)*. R.C.M. 1103 required the Government to prepare a verbatim transcript of all sessions of Appellant's trial. R.C.M. 1104(a)(1) required that such record be authenticated to "declare that the record accurately reports the proceedings." R.C.M. 1104(a)(2) establishes the method of authentication, requiring that if neither the military judge nor the trial counsel are able to authenticate the record, the court reporter present at the relevant proceedings may do so.

The Government concedes that the Chief Court Reporter was not present at that portion of trial corresponding to the record that he authenticated. Thus, that portion of the record was not properly authenticated. However, absent a specific finding of prejudice to Appellant or an [*45] inability for this Court to conduct meaningful review of Appellant's case under *Article 59(a), UCMJ*, that procedural error is harmless. *United States v. Merz, 50 M.J. 850, 854 (N-M. Ct. Crim. App. 1999)*.

Appellant does not now claim that the portion of the record was inaccurate or that he otherwise suffered any prejudice by this error and we identify none. The proceedings at issue consisted of a single day wherein the parties litigated several motions. All of these motions, the opposing party's responses, and the judge's rulings (with the exception of a ruling granting a Defense request to prohibit the Government from using the term "victim" at trial), were reduced to writing and included in the record as appellate exhibits. Moreover, with the exception of a Defense motion to dismiss for "spoliation," none of the motions included any additional

[45] R.C.M. 1001A(b)(2): "For purposes of this rule, 'victim impact' includes any financial, social psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty."

[46] Authentication of the Record of Trial of Jul. 11, 2018.

[47] *Id.*

evidence offered at the proceedings. Finally, Appellee has submitted the original trial counsel's statement wherein he purports to authenticate this portion of the proceedings. While such a post-hoc submission does not cure the error, it is a relevant factor in determining whether such error was harmless. *See* R.C.M. 1104(d) (setting forth procedures for correcting an incomplete or defective record [*46] of trial). For the foregoing reasons, we are able to conduct an adequate review under *Article 59(a), UCMJ*, and Appellant was not prejudiced by this error.[48]

III. Conclusion

A. Consolidating Charge III, Specifications 1 and 2

The supplemental court-martial order shall reflect that Specifications 1 and 2 of Charge III are consolidated into a single specification to read:

> Specification 1: On or about 2 September 2017 at or near Fred-ericksburg, Virginia, active duty U.S. Marine GySgt Gregory Simpson unlawfully grabbed [TS] by the arms with his hands and threw her around a room and grabbed [TS] by the neck with his hands and pinned her against a wall.

Specification 3 of Charge III shall be renumbered to read "Specification 2."

B. Sentence Reassessment

Having consolidated Specifications 1 and 2 of Charge III into a single specification, we must determine if we are able to reassess Appellant's sentence. We have "broad discretion" when reassessing sentences. *United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013)*. However, we can only reassess a sentence if we are confident "that, absent any error, the sentence adjudged would have been of at least a certain severity . . . ." *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)*. A reassessed sentence must not only "be purged of prejudicial error [but] also [*47] must be 'appropriate' for the offense[s] involved." *Id.*

In determining whether to reassess a sentence or to order a sentencing rehearing, we consider the factors espoused in our superior court's holding in *Winckelmann*: (1) whether there has been a dramatic change in the penalty landscape and exposure; (2) the forum of the court-martial; (3) whether the remaining offenses capture the gravamen of the criminal conduct and whether significant or aggravating circumstances remain admissible and relevant; and (4) whether the remaining offenses are the type with which we as appellate judges have experience and familiarity to reasonably determine what sentence would have been imposed at trial. *Winckelmann, 73 M.J. at 15-16*.

Under the circumstances of this case, we find that we can reassess the sentence and it is appropriate for us to do so. Significantly here, the penalty landscape remains unchanged because the military judge had already merged for sentencing all three specifications of Charge III. The remaining convictions capture the gravamen of the criminal conduct because our decision to consolidate the two batteries sets aside no criminal conduct.

Considering the totality of circumstances presented by Appellant's case, [*48] we can confidently and reliably determine that, absent the error, Appellant's sentence would still include at least reduction to E-1, confinement for thirty-two months, and a bad conduct discharge. We find this sentence to be an appropriate punishment for the remaining convictions and this offender—thus satisfying the requirement for a reassessed sentence both purged of error and appropriate. *Sales, 22 M.J. at 308*.

After careful consideration of the record, each of the submitted assignments of error, the briefs of appellate counsel, post-trial affidavits, and oral argument, the remaining findings of guilty and only so much of the sentence as provides for confinement for thirty-two months (with all confinement in excess of eighteen months suspended for a period of forty-four months from the date of sentence), reduction to pay grade E-1, and a bad conduct discharge are **AFFIRMED**.

Judge STEPHENS and Judge ATTANASIO concur.

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[48] Appellant also avers there are pages missing from his copy of the record of trial. These pages are not missing from the original record of trial.

United States v. Lopez

United States Navy-Marine Corps Court of Criminal Appeals

July 22, 2014, Decided

NMCCA 201300394

Reporter
2014 CCA LEXIS 441 *; 2014 WL 3611300

UNITED STATES OF AMERICA v. JOACHIM L. LOPEZ, LANCE CORPORAL (E-3), U.S. MARINE CORPS

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: [*1] SPECIAL COURT-MARTIAL. Sentence Adjudged: 9 July 2013. Military Judge: LtCol Leon Francis, USMC. Convening Authority: Commanding Officer, 7th Marine Regiment (Rear), 1st Marine Division, Marine Corps Air Ground Combat Center, Twentynine Palms, CA. Staff Judge Advocate's Recommendation: LtCol D.P. Harvey, USMC.

Counsel: For Appellant: CDR Suzanne Lachelier, JAGC, USN.

For Appellee: Maj Paul M. Ervasti, USMC; LCDR Keith B. Lofland, JAGC, USN.

Judges: Before J.R. MCFARLANE, K.M. MCDONALD, M.C. HOLIFIELD, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of one specification of abusive sexual contact, and seven specifications of assault, in violation of Articles 120 and 128 of the Uniform Code of Military Justice, §§ *10 U.S.C. 920* and *928*. The military judge sentenced the appellant to reduction to pay grade E-1, 12 months' confinement, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. In accordance with the pretrial agreement (PTA), the CA suspended all confinement in excess of 180 days.

The appellant [*2] submits the following assignments of error: (1) that his guilty plea to abusive sexual contact was legally and factually insufficient; and (2) that there was an unreasonable multiplication of charges. After careful consideration of the appellant's assignments of error, the record of trial, and the pleadings of the parties, we find partial merit in the second assignment of error, for a reason different than that advanced by the appellant, and will grant relief in our decretal paragraph.

After taking corrective action, we conclude that the findings and the reassessed sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. *Arts. 59(a)* and *66(c), UCMJ*.

Background

On 3 November 2012, the appellant and his wife attended a birthday celebration for their neighbor, MM, at her home aboard Twentynine Palms, California. MM and her husband lived in the house behind the appellant's home; MM and the appellant's wife had become friends while the appellant was deployed.

During the party the appellant drank heavily and became intoxicated. Sometime thereafter, the appellant noticed another female guest, RR, leave the gathering in [*3] the garage and go into the main house. The appellant followed RR into the house, and up the stairs. While on the stairs the appellant grabbed RR's buttocks. RR responded by slapping the appellant's hand away and told the appellant not to touch her. After the incident the appellant returned to the gathering in the garage.

Later, the appellant noticed MM leaving the garage, whereupon he followed her into the house, up the stairs, and into a bedroom. Once there, the appellant grabbed MM's face with his hands and kissed her on the mouth. MM pushed the appellant off and told him to stop. "Immediately after" that, the appellant grabbed MM's face in order to kiss her again. Prosecution Exhibit 1 at 3. However, she pushed him away and told him to stop. MM then "immediately walked past [the appellant] to the door of the bedroom." *Id.* As she passed, the appellant grabbed her buttocks.

After MM exited the bedroom, the appellant followed her to the top of the stairs, whereupon he reached under her dress and touched her vaginal area through her clothing. MM again pushed the appellant away, and told him not to touch her.

Later that evening, the appellant noticed MM sitting in the garage close to the [*4] appellant's wife. The appellant then sat between them, placed his hand on MM's shoulder, and then slid his arm down so as to again touch MM's buttocks. When MM moved away from him, the appellant moved his arm so that he could rub MM's thigh with the back of his hand. This caused MM to get up and move away from the appellant.

As the appellant and his wife were leaving the party, MM hugged the appellant's wife goodbye. The appellant then stepped up to MM and also gave her a hug. While doing so the appellant reached down and grabbed MM's buttocks.

At trial, the appellant's explained to the military judge that due to his voluntary intoxication, he had little or no memory about the events that formed the basis of the charges against him. Nonetheless, based upon his limited memory, and his review of the NCIS investigation, which included statements from both RR and MM, he was convinced of his guilt. The appellant also told the military judge that his level of intoxication was not sufficient to cause him to lose control of his actions. More specifically, he said that he intended to commit the acts and that when he committed the Article 120 offense he had "the specific intent to arouse [his] [*5] own sexual desires." Record at 46-47.

Additional facts necessary to resolve the assigned errors are included herein.

Providence of the Pleas

The appellant contends that the military judge erred in accepting his plea to abusive sexual contact, because he was intoxicated and did not have the specific intent to commit the crime.[1] We disagree.

A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*. We review the military judge's decision to accept the appellant's plea of guilty for an abuse of discretion. *Id.* If "either during [*6] the plea inquiry or thereafter . . . circumstances raise a possible defense, a military judge has a duty to inquire further to resolve the apparent inconsistency." *United States v. Phillippe, 63 M.J. 307, 310-11 (C.A.A.F. 2006)*. This inquiry should include a concise explanation of the defense and "[o]nly after the military judge [makes] this inquiry can he then determine whether the apparent inconsistency or ambiguity has been resolved." *Id. at 310*; *United States v. Pinero, 60 M.J. 31, 34 (C.A.A.F. 2004)*.

Voluntary intoxication is not a defense, but may negate the specific intent required for some offenses. *United States v. Peterson, 47 M.J. 231, 233 (C.A.A.F. 1997)*; *see* RULE FOR COURTS-MARTIAL 916(l)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). The potential issue of voluntary intoxication does not arise simply because the appellant was drinking or was even intoxicated. In order for voluntary intoxication to be at issue, "the intoxication must be to such a degree that the accused's mental faculties are so impaired that a specific intent cannot be formed." *United States v. Yandle, 34 M.J. 890, 892 (N.M.C.M.R. 1992)* (citation omitted). In ascertaining the effects of intoxication on an appellant pleading guilty, courts give weight to an accused's words and actions, as recounted by both the appellant and other witnesses. *See United States v. Lacy, 10 C.M.A. 164, 27 C.M.R. 238, 240 (C.M.A. 1959)*; *United States v. Haynes, 29 M.J. 610, 612 (A.C.M.R. 1989)*. "Frequently, as here, the conduct of an accused is sufficiently focused and directed so as to

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[1] The appellant phrased his first assignment of error as a question of legal and factual sufficiency. However, "When an accused pleads guilty, there is no requirement that the government establish the factual predicate for the plea." *United States v. Ferguson, 68 M.J. 431, 434 (C.A.A.F. 2010)* (citation omitted). "The factual predicate is sufficiently established if the factual circumstances as revealed by the accused himself objectively support that plea." *Id.* (citation and internal quotation marks omitted). Accordingly, we review whether the military judge abused his discretion by accepting the appellant's guilty plea to abusive sexual contact.

amply demonstrate a particular *[*7] mens rea* or other state of mind." *Peterson, 47 M.J. at 234* (citations omitted).

In this case, the providence inquiry reveals that the appellant was intoxicated at the time he touched MM's vaginal area, however both the providence inquiry and the stipulation of fact show that his conduct was very focused and clearly directed at satisfying his sexual desires. He had the presence of mind to realize that MM would be vulnerable to his advances when she left the group and went into the house alone. He had the coordination needed to follow her upstairs, enter the bedroom, and grab her face and kiss her on the mouth. When those advances were rejected he stayed focused on his desires by first grabbing her buttocks, and then following her to the stairs in order to commit the abusive sexual contact. Based on these facts, we find that the military judge did not abuse his discretion by accepting the appellant's guilty plea.

Multiplicity

The appellant next contends that Specifications 1-4 and 6-8 of Charge II [2] are an "unreasonable multiplication of charges" as they all arose in "one course of conduct." Appellant's Brief of 16 Dec 2013 at 39-40. In that Specification 1 of Charge II involves a different victim than the other [*8] specifications, we find that portion of the appellant's argument without merit. *See United States v. Parker, 17 C.M.A. 545, 38 C.M.R. 343 (C.M.A. 1968)*. We also find that Specifications 6, 7, and 8 were all based on distinct acts, separate in time from the other assaults. Accordingly, that portion of the appellant's argument is also without merit. *See United States v. Flynn, 28 M.J. 218, 220-21 (C.M.A. 1989)* (holding that it was proper to charge multiple assaults when there was a lapse of time between the acts). However, we agree that the military judge erred by accepting the appellant's pleas to Specifications 2 through 4 of Charge II, in that all three specifications dealt with but one assault.

Whether a particular course-of-conduct involves one or more distinct offenses under a single statute depends on Congress' intent. *Sanabria v. United States, 437 U.S. 54, 70, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978)* [*9] ; *United States v. Neblock, 45 M.J. 191, 197 (C.A.A.F. 1996)*. With respect to assault, our superior Court stated "when Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault." *United States v. Morris, 18 M.J. 450, 450 (C.M.A. 1984)*; *see also United States v. Mayberry, 72 M.J. 467, 467-68 (C.A.A.F. 2013)* (summary disposition) (merging aggravated sexual assault specifications based on the same sexual act). Accordingly, we conclude that multiple acts of unlawfully touching the same person in a single, uninterrupted altercation, united in time, circumstance, and impulse should not be the basis for multiple charges of assault. *Id.*

In this case, the Government stipulated, as fact, that the touching that formed the basis for Specification 3 (grabbing MM's face and kissing her) occurred "[i]mmediately after" the touching and kissing that formed the basis for Specification 2 (grabbing MM's face a second time). PE 1 at 3. Moreover, the Government also stipulated that the acts charged in Specification 4 (grabbing MM's buttocks as she walked away) occurred "immediately" after the acts charged in Specification 3. *Id.* Given these facts, we find that Specifications 2, 3, and 4 of Charge II are multiplicious. *Morris, 18 M.J. at 451*. We will provide relief in the form of consolidation and sentence reassessment in our decretal paragraph.

Conclusion

Specifications 2, 3, and 4 under Charge II are hereby consolidated into a single Specification to read as follows:

> Specification 2: In that Lance Corporal Joachim I. Lopez, U.S. Marine Corps, on active duty, did, at or near Marine Corps Air Ground Combat Center Twentynine Palms, CA, on or about 3 November 2012, unlawfully grab MM on the face with his hands and kiss her, unlawfully grab MM's face a second time, and unlawfully grab MM's buttocks with his hand.

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[2] The appellant was found guilty of Charge II, Assault Consummated by a Battery, in violation of *Article 128, UCMJ*:

> Specification 1: Grabbing RR on the buttocks with his hand;
>
> Specification 2: Grabbing MM's face and kissing her;
>
> Specification 3: Grabbing MM's face with his hands;
>
> Specification 4: Grabbing MM's buttocks with his hand;
>
> Specification 6: Touching MM's buttocks with his hand;
>
> Specification 7: Touching MM's thigh with his hand;
>
> Specification 8: Grabbing MM's buttocks with his hand.

With these modifications, we affirm the findings. [*10] [3] Based upon our action on the findings, we have reassessed the sentence under the principles contained in *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*. Having done so, we conclude that the adjudged sentence for the remaining offenses would have been at least the same as that adjudged by the military judge and approved by the CA. Accordingly, we affirm the sentence as approved by the CA.

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[3] We need not dismiss those specifications which are incorporated into another specification. *United States v. Sorrell, 23 M.J. 122 (C.M.A. 1986)*.

United States v. Lombardi

United States Navy-Marine Corps Court of Criminal Appeals

June 26, 2002, Decided

NMCM 200001461

Reporter
2002 CCA LEXIS 138 *; 2002 WL 1400258

UNITED STATES v. Michael V. LOMBARDI, Corporal (E-4), U.S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 22 September 1999. Military Judge: S.G. Gatewood. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Air Control Group 38, 3d MAW, MARFORPAC, MCAS El Toro, Santa Anna, CA.

Disposition: Defendant's convictions and sentences affirmed with modifications.

Counsel: LT WILLIAM X. COE, JAGC, USNR, Appellate Defense Counsel.

LCDR ANN L. LITCHFIELD, JAGC, USN, Appellate Defense Counsel.

CDR PAUL W. JONES, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE R.B. LEO, K.R. BRYANT, M.E. FINNIE. Chief Judge LEO and Judge BRYANT concur.

Opinion by: M.E. FINNIE

Opinion

FINNIE, Senior Judge:

In accordance with his pleas, the appellant was convicted before a military judge sitting as a special court-martial of the use of cocaine (two specifications), assault consummated by a battery (three specifications), and drunk and disorderly conduct, in violation of Articles 112a, 128, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 912a*, *928*, and *934*. The appellant was sentenced to confinement for 90 days, forfeiture of $ 639.00 pay per month for 3 months, reduction to pay grade E-1, and a bad-conduct discharge. [*2] The convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of 60 days for a period of 6 months from the date of his action.

We have carefully reviewed the record of trial, which was submitted without assignment of error. Except as noted below, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UMCJ.

Facts

On 16 September 1998, the appellant, contrary to a court order of protection imposed against him, engaged in a verbal altercation with his estranged wife that concluded with his acts of violence against her. Record at 72-79, 94-128, 159-62; Prosecution Exhibit 2; Defense Exhibit B; Defense Exhibit C. He was charged, pled guilty to, and was convicted of three specifications of assault consummated by a battery. The special court-martial convicted the appellant, *inter alia*, of separate specifications of assaulting N. Lombardi by spitting in her face, choking her by grabbing and twisting her necklace, and pushing her with his open hands, on [*3] the same date and at the same location, in violation of Article 128, UCMJ. The record reveals that these events occurred during a single, uninterrupted attack. At trial, the appellant's civilian defense counsel, during his sentencing argument, stated that the offenses should be considered multiplicious for sentencing. Record at 196. However, the appellant's civilian counsel did not make a motion for appropriate relief to that effect. Record at 203; RULE FOR COURTS-MARTIAL 906(b)(12), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). As the issue was not raised by a defense

motion, the military judge indicated that she would not consider whether the assault offenses were multiplicious for sentencing. Record at 203.

Multiplicity

Although the appellant has not complained about the military judge's ruling, we are charged with reviewing records of trial and approving only those findings which we find to be correct in law and fact and should be approved. Art. 66(c), UCMJ. Ordinarily, any issue of multiplicity is waived by an unconditional guilty plea. *United States v. Heryford, 52 M.J. 265, 266 (2000)*; *United States v. Lloyd, 46 M.J. 19, 23 (1997)*. [*4] Waiver may be overcome by showing that the offenses are "facially duplicative" to establish plain error. *Heryford, 52 M.J. at 266*; *Lloyd, 46 M.J. at 23*. In deciding whether charged offenses are facially duplicative, we review the "language of the specifications and 'facts apparent on the face of the record'" to determine if the specifications are factually the same. *Heryford, 52 M.J. at 266* (quoting *Lloyd, 46 M.J. at 24*).

In *United States v. Teters, 37 M.J. 370 (C.M.A. 1993)*, our superior Court addressed the extent to which multiple convictions under two different statutes may be imposed for a single act. However, the Court of Appeals for the Armed Forces clarified that *Teters* did not resolve all multiplicity questions. *United States v. Neblock, 45 M.J. 191, 200 (1996)*. "It [*Teters*] addressed only the method of discerning Congress' intent on *multiple convictions under two different statutes* at a single trial where those two statutes were violated by *a single act*." *Id*. At issue is whether separate convictions under Article 128, UCMJ, may be imposed for the various [*5] attendant acts of an assault that are part of a continuous-course-of-conduct.

Whether a particular course-of-conduct involves one or more distinct offenses under a single statute depends on Congress' intent. *Sanabria v. United States, 437 U.S. 54, 70, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978)*; *Neblock, 45 M.J. at 197*. In considering the question of statutory intent with regard to an assault, our superior Court stated "when Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault." *United States v. Morris, 18 M.J. 450, 450 (C.M.A. 1984)*; *cf*. *United States v. Flynn, 28 M.J. 218, 220-21 (C.M.A. 1989)*(holding separate acts not multiplicious when a lapse of time involved). Following the guidance of our superior Court, we conclude that each unlawful touching of the same person in a single, uninterrupted altercation, united in time, circumstance, and impulse should not be the basis for multiple charges of assault. *Morris, 18 M.J. at 450*; *United States v. Rushing, 11 M.J. 95, 98 (C.M.A. 1981)*; *United States v. Stegall, 6 M.J. 176, 177 (C.M.A. 1979)*. [*6] The physical contacts that are a part of a continuous-course-of- conduct equate to one assault under Article 128, UCMJ. We do not interpret *Teters* and its progeny as having changed this principle.

While sufficient doubt as to the facts or law may warrant charging two or more offenses for contingencies of proof, it is the responsibility of the military judge -- and this Court, when necessary -- to consolidate or dismiss a specification once the attendant facts and circumstances surrounding an offense become clear. *Morris, 18 M.J. at 451*. In this case, we conclude Specifications 1, 2, and 3 of Charge II are facially duplicative and, therefore, multiplicious. *Heryford, 52 M.J. at 266*. We will provide relief in our decretal paragraph.

Conclusion

Accordingly, we consolidate Specifications 1, 2, and 3 under Charge II into a single Specification to read as follows:

> Specification: In that Corporal Michael V. Lombardi, U.S. Marine Corps, on active duty, did, in or around Yuma, AZ, on or about 16 September 1998, unlawfully strike N… Lombardi, by spitting in her face, pushing her with his open hands, and unlawfully choking N… Lombardi, [*7] by grabbing and twisting her necklace.

We need not dismiss those specifications which are incorporated into another specification. *United States v. Sorrell, 23 M.J. 122, 122, n.1 (C.M.A. 1986)*.

With these modifications, we affirm the findings. Based upon our action on the findings, we have reassessed the sentence under the principles contained in *United States v. Cook, 48 M.J. 434, 438 (1998)*, *United States v. Peoples, 29 M.J. 426, 428-29 (C.M.A. 1990)*, and *United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986)*. Having done so, we affirm the sentence as approved on review below.

Chief Judge LEO and Judge BRYANT concur.

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United States v. Clark

United States Army Court of Criminal Appeals

May 31, 2016, Decided

ARMY 20140252

Reporter
2016 CCA LEXIS 363 *

UNITED STATES, Appellee v. Specialist SHAWN C. CLARK, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Clark, 2016 CAAF LEXIS 641 (C.A.A.F., Aug. 12, 2016)*

Prior History: [*1] Headquarters, United States Army Alaska. Kurt Bohn, Military Judge, Colonel Tyler J. Harder, Staff Judge Advocate, Colonel Erik L. Christiansen, Staff Judge Advocate (post.

Counsel: For Appellant: Lieutenant Colonel Charles A. Lozano, JA; Major Aaron R. Inkenbrandt, JA; Captain Jennifer K. Beerman, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Timothy C. Donahue, JA (on brief).

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Judge PENLAND concurs. HAIGHT, Senior Judge, concurring in part and dissenting in part.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of attempted rape, attempted kidnapping, disrespect toward a noncommissioned officer, failure to obey an order, four specifications of assault consummated by battery,[1] one specification of assault with a dangerous weapon, and burglary with intent to commit rape, in violation of Articles 80, 91, 92, 128, and 129 of the Uniform Code of Military Justice, *10 U.S.C. §§ 880*, *891*, *892*, *928*, and *929* [hereinafter UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for nine years, forfeiture of all pay [*2] and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

This case is before us for review pursuant to *Article 66, UCMJ*. Appellant raises two issues, both of which we find do not merit relief.[2] We do address one of the issues raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. The remaining matters personally raised by appellant are without merit.

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[1] Specification 5 of Charge III alleged that appellant cut the victim on the hand with a "dangerous weapon, to wit: a handheld edged weapon." On appeal, both parties appear to treat this as an aggravated assault. However, the specification does not allege that the handheld edged weapon (commonly referred to as a "knife") was used in a manner likely to cause death or grievous bodily harm, nor does it allege that a "deep cut" was intentionally inflicted. *See Manual for Courts-Martial, United States* (2012 ed.), ¶54.c.(4)(a),(b). Additionally, the parties at trial, and the military judge during the providence inquiry, treated this specification as an assault consummated by battery.

[2] Appellant assigns as error that the military judge used an outdated definition of "force" when explaining the offense of rape to appellant [*3] during the providence inquiry. Regardless of the military judge's description of the unlawful force required, after careful review of the record of trial and the stipulation of fact, we find that appellant knew and understood the elements, admitted them freely, and pleaded guilty because he was guilty. *See United States v. Redlinski, 58 M.J. 117 (C.A.A.F. 2003)*.

BACKGROUND

In the early morning hours of 30 August 2013, appellant, dressed all in black, wearing gloves, armed with a knife, and with a bandana covering his face, went to Private First Class (PFC) TB's barracks room and knocked on the door. As PFC TB unlocked her door and started to open it, appellant shoved the door open, forcing PFC TB backwards. Upon pushing his way through the door, appellant pushed PFC TB further backwards and then "grabbed her by her arms in order to control her."

Appellant intended to rape PFC TB and during the attack, in order to scare his victim, he "displayed" a knife. During the struggle, PFC TB grabbed the knife and cut her hand.

Appellant stands convicted of four different assaults consummated by battery: one for hitting PFC TB with the door, one for pushing PFC TB, one for grabbing PFC TB once he was inside her room, and one for cutting her hand when [*4] she grabbed the knife. Furthermore, appellant stands convicted of one specification of aggravated assault for displaying the knife. Appellant personally asserts that the assaults "stem from a continuous course of conduct" and that "[e]ach specification flows into the next."

LAW AND DISCUSSION

Our superior court has repeatedly held that individual assaults within an uninterrupted scuffle should not be parsed out and made the bases for separate findings of guilty. *See* United States v. Flynn, 28 M.J. 218 (C.M.A. 1989); *see also* United States v. Morris, 18 M.J. 450 (C.M.A. 1984); United States v. Rushing, 11 M.J. 95 (C.M.A. 1981). Similarly, we held last year that merger of specifications is appropriate in instances of an ongoing attack comprising multiple assaults "united in time, circumstance, and impulse." United States v. Clarke, 74 M.J. 627, 628 (Army Ct. Crim. App. 2015) (quoting Rushing, 11 M.J. at 98).

Nonetheless, we find that appellant has forfeited and waived his entitlement to any relief. "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." United States v. Mezzanatto, 513 U.S. 196, 201, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995). Such waiver may include "double jeopardy." United States v. Gladue, 67 M.J. 311, 314 (C.A.A.F. 2009). We find waiver for two separate but related reasons.

First, appellant pleaded guilty to these offenses. "An unconditional guilty plea generally waives all defects which are neither jurisdictional nor a deprivation of due process of law." United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009) (citation and internal [*5] quotations marks omitted). "By pleading guilty, an accused does more than admit that he did the various acts alleged in a specification; 'he is admitting guilt of a substantive crime.'" United States v. Campbell, 68 M.J. 217, 219 (C.A.A.F. 2009) (citing United States v. Broce, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)).

Second, as part of his pretrial agreement, appellant affirmatively waived "all waivable motions" and specifically agreed to waive motions regarding unreasonable multiplication of charges and multiplicity. "When . . . an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." Gladue, 67 M.J. at 313. Even in cases where the specifications are facially duplicative, "[e]xpress waiver or voluntary consent . . . will foreclose even this limited form of inquiry." United States v. Lloyd, 46 M.J. 19, 23 (C.A.A.F. 1997). Accordingly, while concerns regarding the units of prosecution in this case exist, relief is not required for this waived issue.

Of course, this court may notice waived and forfeited error, and may approve only those findings that "should be approved." United States v. Nerad, 69 M.J. 138, 141-42, 146-47 (C.A.A.F. 2010). This is an "awesome, plenary de novo power of review," but one that is also subject to "discretion." Id. at 144-45 (citations and internal quotation marks omitted). It is only in whether to exercise this discretionary power that we depart from our dissenting colleague.

Appellant [*6] specifically agreed to plead guilty to these offenses as part of a negotiated agreement. Appellant further specifically agreed to waive issues regarding the unreasonable multiplication of charges and multiplicity. To provide relief in this case would require us to set aside specifications to which appellant specifically agreed to plead guilty and to notice alleged error that he specifically agreed to not raise.

Finally, we note as appellant agreed to plead guilty to these specifications and agreed to waive issues regarding multiplicity and unreasonable multiplication of charges, none of these issues were litigated at trial. Thus, while the *Care* inquiry reasonably raises whether the batteries formed one unit of prosecution, the factual basis for this assertion was never litigated at trial and

we are left to review an undeveloped record. Had the parties not treated the matter as waived, additional inquiry may have revealed the unit of prosecution concerns to be without merit, or not. Instead we have a providence inquiry which, while adequately establishing appellant's guilt to the charged offenses, never attempted to answer the question of whether the offenses formed one unit of prosecution. [*7] [3] This weighs in favor of accepting appellant's waiver.

While the dissent's proposition that we consolidate the three batteries into one offense and the two assaults involving the knife into another specification is not unreasonable, in our exercise of this discretionary authority, we will instead affirm all five individual assault convictions.

CONCLUSION

Having found no substantial basis in law or fact to question appellant's pleas, and finding the sentence appropriate, the findings and sentence as adjudged and approved by the convening authority are AFFIRMED.

Judge PENLAND concurs.

Concur by: HAIGHT (In Part)

Dissent by: HAIGHT (In Part)

Dissent

HAIGHT, Senior Judge, concurring in part and dissenting in part:

I concur that appellant's convictions [*8] for attempted rape, attempted kidnapping, disrespect toward a noncommissioned officer, failure to obey an order, and burglary with intent to commit rape should be affirmed. Furthermore, appellant should remain convicted of assault consummated by battery and aggravated assault with a knife. I only disagree with my fellow judges in how many convictions of assault should be approved.

The majority's declination to merge these offenses perpetuates what I perceive may be an incomplete approach to addressing this particular set of circumstances; that is, that an analysis of the correct unit of prosecution is merely a subset or alternative method of determining whether an unreasonable multiplication of charges has occurred. While the concepts of unit of prosecution, multiplicity, and unreasonably multiplication of charges overlap and address similar concerns and are often addressed simultaneously in case law, they are all three distinct.

The majority views any issue regarding the unit of prosecution for assaults as waived due to appellant's express waiver of motions regarding multiplicity and unreasonable multiplication of charges. Furthermore, the appellant agreed to "waive all waivable motions [*9] known to myself or my defense counsel at this time," a provision comparable to one our superior court has found sufficient to waive even those issues not expressly discussed with the military judge. *See* United States v. Gladue, 67 M.J. 311 (C.A.A.F. 2009). However, the unit of prosecution problem "is so plainly presented" here that I would correct the error. United States v. Chin, 75 M.J. 220, 2016 CAAF LEXIS 312, at *9 (C.A.A.F. 26 Apr. 2016) (citation and internal quotation marks omitted).

"Unit of prosecution" was never mentioned, addressed, or even apparently considered at appellant's court-martial. Apart from appellant's waivers just discussed, the record makes it clear that appellant did not knowingly give up his right to be convicted under the correct unit of prosecution. *See* Gladue, 67 M.J. at 316 (Baker, J., concurring in the result) ("I do not see how we can determine Appellant's plea was knowing and voluntary if we do not assess it in the context in which it was explained on the record to Appellant."). Therefore, despite appellant's guilty plea or any consequent waiver or forfeiture, I would notice this plain and obvious error and merge the assaults.

Multiplicity, a constitutional violation under the Double Jeopardy Clause, occurs if a court, "*contrary to the intent of Congress*, imposes multiple convictions and punishments under [*10] different statutes for the same act or course of conduct." United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993). It is well-settled that multiplicity and unreasonable multiplication of charges

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[3] For this reason, we find the case distinguishable from *Lloyd*. In that case, our superior court found the in-depth nature of military providence inquiries adequately established that the offenses were *separate.* Lloyd, 46 M.J. at 24. We do not read Lloyd as standing for the proposition that providence inquires will *always* provide a sufficient factual basis to resolve unit of prosecution issues, especially in circumstances where the parties and the military judge had no reason to inquire into the matter.

are distinct concepts. *See* United States v. Roderick, 62 M.J. 425, 433 (C.A.A.F. 2006) ("While multiplicity is a constitutional doctrine, the prohibition against unreasonable multiplication of charges is designed to address prosecutorial overreaching."). The standard for determining multiplicity focuses on the elements of the offenses, whereas the standard for determining an abuse of prosecutorial discretion is reasonableness. *See* United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001). The standard for determining the proper unit of prosecution is neither a comparison between the elements of different statutes nor a question of reasonableness. It is a separate question unto itself.

The relevant question when determining the appropriate unit of prosecution is "whether conduct constitutes one or several violations of a single statutory provision." Callanan v. United States, 364 U.S. 587, 597, 81 S. Ct. 321, 5 L. Ed. 2d 312 (1961). This determination is solely one of congressional intent, permission, and allowance. *See* United States v. Collins, 16 U.S.C.M.A. 167, 36 C.M.R. 323 (1966). In military jurisprudence, our superior court has addressed the unit of prosecution for many offenses, to include conspiracy (number of agreements vs. number of criminal objectives), damage to property (number of items damaged [*11] vs. incidents of damage), drunken driving resulting in injury (number of victims vs. acts of drunken driving), robbery (number of assaults vs. number of larcenies), and obstruction of justice (number of solicitations to provide false testimony vs. number of witnesses solicited). *See* United States v. Pereira, 53 M.J. 183 (C.A.A.F. 2000); Collins, 16 U.S.C.M.A. 167, 36 C.M.R. 323; United States v. Scranton, 30 M.J. 322 (C.M.A. 1990); United States v. Szentmiklosi, 55 M.J. 487 (C.A.A.F. 2001); United States v. Guerrero, 28 M.J. 223 (C.M.A. 1989).

The question in such cases is framed as what was permissible, proper, or allowable vs. impermissible, improper, or not allowed. The analysis was never couched in terms of reasonable vs. unreasonable or one of within discretion vs. abuse of discretion. In other words, the unit of prosecution for a given offense is either correct or incorrect. The Supreme Court addressed this very notion when addressing the appropriate unit of prosecution for the offense of transporting women across state lines (number of women vs. number of transports):

> The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment. Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did [*12] it do so? It has not done so in words in the provisions defining the crime and fixing its punishment. Nor is guiding light afforded by the statute in its entirety or by any controlling gloss. . . . Again, it will not promote guiding analysis to indulge in what might be called the color-matching of prior decisions concerned with "the unit of prosecution" in order to determine how near to, or how far from, the problem under this statute the answers are that have been given under other statutes.
>
> It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and *not unreasonably reach either of the conflicting constructions*. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it -- when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . It merely means that if Congress does not fix the punishment for a federal offense clearly and without [*13] ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.

United States v. Bell, 349 U.S. 81, 82-84, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (emphasis added).

There is no doubt as to what the unit of prosecution is for the offense of assault under Article 128, UCMJ. "Congress intended assault, as prescribed in Article 128, UCMJ, 10 USC § 928, to be a continuous course-of-conduct type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty." United States v. Flynn, 28 M.J. 218, 221 (C.M.A. 1989). While several cases in the past have labeled charges involving an incorrect unit of prosecution as also an unreasonable multiplication of charges, I have been unable to find a case with multiple convictions where the applied unit of prosecution was determined to be incorrect yet the multiple convictions were nevertheless allowed to stand. I find it difficult to see how this court can say that under the circumstances found in this case that multiple convictions "should be approved" when binding precedent unequivocally

informs us that separate findings of guilty "should not be" approved. *UCMJ art. 66(c)*; *Flynn, 28 M.J. 218*; *see also United States v. Clarke, 74 M.J. 627 (Army Ct. Crim. App. 2015)*.

In *United States v. Campbell, 68 M.J. 217 (C.A.A.F. 2009)*, our superior court, when declining to determine the unit of prosecution for possession of child pornography (same images vs. number of [*14] different media), found that because appellant pleaded guilty unconditionally to multiple specifications and failed in his burden to show the specifications were facially duplicative, appellant waived his ability to contest on appeal whether he should have been charged with only one specification of his crime. I distinguish this case from *Campbell* on several grounds. First, as explained and acknowledged by the majority, there is no current dispute regarding what the unit of prosecution is in cases such as this; that question has been answered. Second, because appellant pleaded guilty, the record of trial contains a detailed factual basis and providence inquiry that show that the specifications in this case were "'facially duplicative', that is, factually the same," *United States v. Lloyd, 46 M.J. 19 (C.A.A.F. 1997)* (citing *United States v. Broce, 488 U.S. 563, 575, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)*, in that appellant's attack was uninterrupted and "united in time, circumstance, and impulse." *United States v. Rushing, 11 M.J. 95, 98 (C.M.A. 1981)*. Indeed, it can be argued that while each specification, viewed individually, stated an offense, because this was a continuous crime, the cumulative battery specifications failed to state the multiple offenses of which appellant stands convicted. Third, as referenced earlier, even in cases of waived or forfeited error, [*15] we are still statutorily required to determine what "should be approved." *UCMJ art. 66(c)*. I believe we should apply the correct unit of prosecution to appellant's criminal misconduct.

Accordingly, I would consolidate the three simple battery specifications into a single specification and the two assaults involving the knife into a single aggravated assault specification. After merger, I would affirm the remaining findings of guilty, reassess the sentence in accordance with *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*, and *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, and affirm the approved sentence.

United States v. Perez

United States Army Court of Criminal Appeals

April 7, 2015, Decided

ARMY 20130368

Reporter
2015 CCA LEXIS 191 *

UNITED STATES, Appellee v. Specialist ANTHONY J. PEREZ, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Perez, 2015 CAAF LEXIS 660 (C.A.A.F., July 6, 2015)*

Prior History: [*1] Headquarters, 7th Infantry Division. Thomas P. Molloy, Military Judge, Lieutenant Colonel Michael S. Devine, Staff Judge Advocate.

Counsel: For Appellant: Colonel Kevin Boyle, JA; Major Robert N. Michaels, JA; Captain Brian D. Andes, JA (on brief).

For Appellee: Colonel John P. Carrol l, JA; Major John K. Choike, JA; Captain Jaclyn E. Shea, JA (on brief).

Judges: Before COOK, TELLITOCCI, and HAIGHT, Appellate Military Judges. Senior Judge COOK and Judge TELLITOCCI concur.

Opinion by: HAIGHT

Opinion

SUMMARY DISPOSITION

HAIGHT, Judge:

A military judge sitting as a general court -martial convicted appellant, pursuant to his pleas, of one specification of absence without leave and four specifications of assault consummated by a battery upon a child under 16 years, in violation of Articles 86 and 128, Uniform Code of Military Justice, *10 U.S.C. §§ 886*, *928* [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for eight months, and reduction to the grade of E-1.

The convening authority approved the sentence as adjudged. This case is before us for review pursuant to *Article 66*, UCMJ. Appellant raises one assignment of error concerning dilatory post -trial processing that merits neither discussion nor relief. [*2] Appellant personally raises several matters pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)* , that are also without merit. However, one additional issue warrants discussion and relief.

BACKGROUND

On an afternoon in early August 2012, appellant was at a neighbor's on-post quarters along with his wife, their young daughter, and the neighbor's ten-month old daughter, LT. Appellant and his wife were babysitting, and after appellant's daughter fell asleep in a crib downstairs, his wife returned to their residence "to go get something to eat real quick and then she was going to come back." While appellant's wife was away, appellant went upstairs because LT was crying and "wasn't going down for a nap." Appellant removed LT from her crib , placed her on the floor, and started to play a "game" in which he repeatedly pushed her down, said "Boom," and then lifted her back up to her feet, causing her to laugh. On the third iteration, appellant pushed LT "too hard, causing her to fall back, hit[ting] her lower back, head and face" against the crib. Appellant admitted that this push to the little girl's chest was too hard, unlawful, and done with "culpable negligence." After this first battery, all appellant "wanted her to do was to just stop [*3] crying and to play with [him] more." He felt he was "not good enough as a parent" and then "grabbed [LT] by her ankles at that point and [] dragged her [face-down] about three feet over to in front of her bouncer." It was only a matter of seconds between the time appellant pushed LT down against her crib and when he dragged her across the floor.

After being dragged, the infant was still "crying and did not want to play with [appellant] and did not want to play with her toys." Appellant picked LT up and put her in the crib. When appellant picked her up, he squeezed her too hard and left bruises on her torso. Appellant admitted that this squeezing was done out of frustration, without legal justification, and with culpable negligence. Finally, after placing LT in her crib but "right before [appellant] walked out" of the room, he pinched the crying baby on her right upper arm, hurting her. Regarding the final pinch, appellant testified he was frustrated, "not thinking right," and did not have an answer for why he did it. Appellant admitted that all four touchings were committed unlawfully and with culpable negligence.

For this misconduct, appellant was charged with, pleaded guilty to, and [*4] convicted of four individual assault specifications. However, the military judge agreed with the parties to merge the four assault specifications for sentencing purposes. The military judge specifically reasoned that the multiple charges in this case may exaggerate appellant's criminality and probably increased appellant's punitive exposure unfairly. In so reasoning, the military judge acknowledged that the criminal acts described in the multiple specifications all occurred within a short span of time "without opportunity for the accused to leave the room or allow him to regain his composure."

Although the military judge did consider the four assault specifications as but one offense for purposes of sentencing, appellant remains convicted of four assaults.

LAW AND DISCUSSION

Unreasonable Multiplication of Charges

Under the circumstances of this case, appellant should not be separately convicted of four separate assault offenses for unlawfully pushing, dragging, squeezing, and pinching LT within a single transaction.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts -Martial 307(c)(4). The prohibition against unreasonable [*5] multiplication of charges "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001)*; *see also United States v. Campbell , 71 M.J. 19, 23 (C.A.A.F. 2012)*. In *Quiroz*, our superior court listed five factors to guide our analysis of whether charges have been unreasonably multiplied:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?; and
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

55 M.J. at 338-39 (internal quotation marks and citation omitted).

Here, the military judge analyzed all of the above factors and determined that while merging for sentencing purposes was appropriate, the appellant should remain convicted of separate specifications. Such a ruling is perfectly permissible, but one exchange during the providence inquiry causes us concern and leads us to merge the specifications [*6] for findings as well. The military judge asked appellant, "And did you commit these offenses as a single act or did you do each one separately?" To this question the accused simply replied, "Single act, Your Honor." Similarly, appellant then asserted that all four offenses were committed out of a "single impulse."

As appellant's unrebutted admission and the record as a whole in this case both reflect that the assaults were committed as a single act under a single impulse, we will combine "the operative language from each specification into a single specification that adequately reflects each conviction." *United States v. Thomas, 74 M.J. 563, 569 (N-M Ct. Crim. App. 2014)*; *see also United States v. Clarke, 74 M.J. 627, 2015 CCA LEXIS 93 (Army Ct. Crim. App. 20 March 2015)*.

CONCLUSION

Specifications 2, 3, 4, and 5 of Charge I are consolidated into a single assault specification, numbered Specification 2 of Charge I, to read as

follows:

> Charge I, Specification 2: In that Specialist (E-4) Anthony J. Perez, U.S. Army, did, at or near Joint Base Lewis-McChord, Washington, on or about 6 August 2012, unlawfully push L.T., a child under the age of 16 years, on the chest with his hands; unlawfully drag the same L.T. along the floor by her feet with his hands; unlawfully squeeze the same L.T. [*7] on the torso with his hands; and unlawfully pinch the same L.T. on the arm with his fingers.

The findings of guilty to Specification 2 of Charge I, as so consolidated, and Charge I are AFFIRMED. The findings of guilty to Specifications 3, 4, and 5 of Charge I are set aside and those specifications are DISMISSED. The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of cir cumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)* and *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*.

In evaluating the *Winckelmann* factors, we first find no dramatic change in the penalty landscape that might cause us pause in reassessing appellant's sentence, as the military judge merged Specifications 2, 3, 4, and 5 of Charge I for sentencing purposes. Second, appellant was tried and sentenced by a military judge alone. Third, the nature of the remaining consolidated offense still captures the gravamen of the original offenses. Finally, based on our experience, we are familiar with the remaining offenses so that we may reliably determine what sentence would have been imposed [*8] at trial. We are confident that based on the entire record and appellant's course of conduct, the military judge sitting alone as a general court - martial would have imposed a sentence of at least that which was adjudged.

Reassessing the sentence based on the noted error and the entire record, we AFFIRM the approved sentence. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored.

Senior Judge COOK and Judge TELLITOCCI concur.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 10 November 2023.

Mitchell D. Herniak
Major, Judge Advocate
Branch Chief
Defense Appellate Division