IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20230151
Sergeant First Class (E-7) **MICHAEL S. MALONE, JR.** United States Army	Appellant	Tried at Fort Bliss, Texas, on 22 March 2023, before a general court-martial convened by Commander, Headquarters, Fort Bliss, Lieutenant Colonel Jessica Conn, Military Judge, presiding.

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

Assignment of Error[1]

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

Statement of the Case

On 22 March 2023, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of three specifications of domestic violence and two specifications of disobeying a superior commissioned officer, in

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error. *Id.* at 437 ("We will expect the Courts of Military Review to specify issues and request briefs of those issues which they believe are deserving of that increased attention.").

violation of Articles 90 and 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 928b [UCMJ].[2] (R. at 84; Statement of Trial Results [STR]). The military judge sentenced appellant to confinement for thirty months and a bad conduct discharge.[3] (R. at 155; STR). The military judge credited appellant with ninety-two days of pretrial confinement credit. (R. at 157). The convening authority approved the findings and sentence adjudged and waived automatic forfeitures effective upon entry of judgment. (Action). On 25 April 2023, the military judge entered judgment. (Judgment).

Statement of Facts

On the evening of 30 November 2022, an argument broke out between appellant and his girlfriend, [redacted]. (R. at 21–22, 32; Pros. Ex. 1 at 3). At some point, [redacted] became fearful and attempted to dial 911 without success. (Pros. Ex. 1 at 3–4). Photos of [redacted]'s phone reflect canceled calls to 911 at 1227, 1234, and 1236. (Pros. Ex. 4). The canceled calls at 1234 and 1236 reflect multiple entries of "911." (Pros. Ex. 4).

The argument moved to the master bedroom wherein appellant struck the victim on the right side of her face with his hand. (R. at 21, 23, 27; Pros. Ex. 1 at

[2] Every finding of guilty in the Entry of Judgment is for an offense that occurred after 1 January 2021. (STR; Judgment).
[3] The military judge adjudged concurrent, segmented sentences. (STR).

3). Appellant recalled being "angry and upset" and wanting the victim to get away from him because she was close to his face. (R. at 23–24).

The argument moved into the master bathroom. Appellant punched her with both hands in the face, head, right arm, right shoulder, right side abdomen, and right leg as she yelled at him to stop. (R. at 32–33; Pros. Ex. 1 at 4). When asked how much time passed between his first strike to the victim's face and his punches to her body, appellant testified his strikes "continued." (R. at 32). At this point, appellant had "just lost [his] temper." (R. at 32). These strikes resulted in lacerations and bruises on her face and body. (Pros. Ex. 5, 12).

When "the fight was pretty much over," appellant threw her to the ground by using his hands to push her, causing her to fall backwards and break her right clavicle. (R. at 39–42; Pros. Ex. 1 at 4, 5 at 6). This injury would require surgery to repair. (Pros. Ex. 7–8). When he walked away, the victim was able to shut the bathroom door and call 911. (R. at 33–34; Pros. Ex. 4; *see also* Pros. Ex. 1 at 4–5). A photo of [redacted]'s phone reflects a thirteen-minute call with 911 placed at 1236. (Pros. Ex. 4; *see also* Pros. Ex. 1 at 3–4).

Thereafter, appellant entered into a plea agreement with the convening authority. (App. Ex. II). That agreement contained a separate limitation on confinement ranges for each specification to each run concurrently. (App. Ex. II at 4–5). At trial, the military judge advised appellant, "[A]ny motions to dismiss or

to grant other appropriate relief should be made at this time." (R. at 12). In response, appellant's counsel asserted, "Defense has no motions," and then entered appellant's pleas of guilty. (R. at 12).

Assignment of Error

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

Standard of Review

An unconditional guilty plea ordinarily waives a multiplicity issue. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). "Furthermore, double jeopardy claims, including those founded in multiplicity, are waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). If a claim of multiplicity is merely forfeited, this court reviews for plain error. *United States v. Coleman,* 79 M.J. 100, 102 (C.A.A.F. 2019).

Law

A. Waiver.

An unconditional guilty plea waives multiplicity claims when the offenses are not facially duplicative. *United States v. Craig*, 68 M.J. 399 (C.A.A.F. 2010); *United States v. Campbell*, 68 M.J. 217 (C.A.A.F. 2009); *see generally United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). A valid waiver leaves no

error for this court to correct on appeal. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quotation omitted).

Nevertheless, Article 66(c), UCMJ as amended by the National Defense Authorization Act for Fiscal Year 2021 authorizes this court to exercise its discretion to review issues affirmatively waived at trial with respect to the sentence. 10 U.S.C. § 866(d)(1)(A)(2021); Pub. L. No. 116-283, 134 Stat. 3611-12; *see generally United States v. Steele*, 83 M.J. 188 (C.A.A.F. 2023); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016)(discussing the language of "should be approved").

B. Forfeiture.

Multiplicity claims are "forfeited by failure to make a timely motion to dismiss, unless they rise to the level of plain error." *Coleman,* 79 M.J. at 102 (quotation omitted). For an appellant to prevail under plain error review, there must be (1) an error, (2) that was clear or obvious, and (3) which prejudiced a substantial right of the accused. *Id.* (quoting *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019)).

C. Multiplicity.

A charge is multiplicious if the proof of such charge also proves every element of another charge. R.C.M. 907(b)(3)(B); *see also Coleman,* 79 M.J. at 102 (citing *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)); R.C.M.

907(b)(3)(B) discussion. The *Blockburger* elements test is focused on a strict facial comparison of the elements of the charged offenses, not to the pleadings or proof of these offenses. 284 U.S. 299 (1932); *Coleman,* 79 M.J. at 102 (quoting *Teters*, 37 M.J. at 377).

This is a three-part inquiry. *Coleman,* 79 M.J. at 103. Courts first determine whether the charges are based on separate acts. *Id*. If the charges are not based on separate acts, courts determine whether Congress made an overt expression of legislative intent regarding whether the charges should be viewed as multiplicious. *Id.* If no such expression, courts must seek to infer Congress's intent based on the elements of the violated statutes and their relationship to each other. *Id*.

When charges for multiple violations of the same statute are predicated on arguably the same criminal conduct, the court must first determine the allowable unit of prosecution, which is the actus reus of the defendant. *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017) (quotations omitted). Congress intended assault charged under Article 128, UCMJ to be a continuous course-of-conduct-type offense and 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); *see United States v. Clarke*, 74 M.J. 627 (Army Ct. Crim. App. 2015); *United States v. Clark*, ARMY 20140252, 2016 CCA LEXIS 363 (Army Ct. Crim. App. 31 May 2016).

Argument

A. Waiver.

Appellant waived multiplicity claims at trial. First, appellant knowingly and voluntarily entered an unconditional guilty plea. (R. 21–56; App. Ex. II). "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.'" *Campbell*, 68 M.J. at 219 (citation omitted). Notably, the express language of his plea agreement includes separate confinement ranges for each specification to run concurrently. (App. Ex. II at 4–5). Second, his counsel's assertion that defense had no motions in response to the military judge's advisal about motions to dismiss was an affirmative waiver of multiplicity claims.[4] (R. at 12). Thus, there is no error for this court to correct. *Davis*, 79 M.J. at 331.

While this court may pierce waiver under Art. 66(c), UCMJ to consider multiplicity, appellant does not assert "cause or prejudice" to justify doing so. *See Campbell*, 71 M.J. at 23; *United States v. Steele*, ARMY 20170303, 2023 CCA LEXIS 4888 *1, *3–4 (Army Ct. Crim. App. 13 Nov. 2023); *see also Forrester*, 76 M.J. at 395 ("[The question of multiplicity" is significant for purposes of determining a maximum sentence."); *see generally* Pub. L. No. 116-283, 134 Stat.

[4] The government notes the plea agreement did not contain language waiving all waivable motions but considers that fact immaterial in this case.

3611–12. Moreover, this assertion of multiplicity was never litigated at trial. *See Clark*, 2016 CCA LEXIS 363, at *7 ("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."). Thus, these facts do not merit review in the exercise of the court's discretion.

B. Multiplicity.

To the extent this court finds appellant merely forfeited multiplicity claims, there was no error because the specifications are not multiplicious.

1. <u>Specification 4 contains a unique element.</u>

Specifications 1 and 3 of Charge I should not be merged with Specification 4 of Charge I. The Article 128b, UCMJ, offense of domestic violence requires proof that a violent act was done with the intent to commit a certain offense under the UCMJ. For Specification 4, that "certain offense" was aggravated assault which requires that substantial or grievous bodily harm be done. Art. 128(b), UCMJ. "Substantial bodily harm" means a bodily injury that involves a temporary but substantial disfigurement, or a temporary or substantial loss or impairment of function of any bodily member. Dept't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3a-52-9 (29 Feb. 2020) [Benchbook].

In contrast, the "certain offense" for Specifications 1 and 3 was assault consummated by a battery and it requires no such proof of substantial bodily harm.

Article 128(a), UCMJ. Instead, assault consummated by a battery requires mere bodily harm be done. Benchbook, para. 3-54-2. "Bodily harm" is any physical injury to or offensive touching of another person, however slight. *Id.* Because Specification 4 contains a unique element, "separate offenses warranting separate convictions and punishment can be presumed to be Congress' intent." *Teters*, 37 M.J. at 377–78; *Coleman*, 79 M.J. at 103.

2. <u>Specifications 1 and 3 are predicated on different criminal conduct.</u>

Specifications 1 and 3 of Charge I should not be merged. The allowable unit of prosecution for assault consummated by a battery is bodily harm. Unlike in *Clarke* where the acts were "united in time, circumstance, and impulse" such that the unit of prosecution was "the number of overall beatings the victim endured rather than the number of individual blows suffered," appellant's offenses were separated in time, were interrupted, and did not constitute one continuous course of conduct. *Cf. Clarke*, 74 M.J. at 629 (citing *Rushing*, 11 M.J. at 98). Instead, under the plain language of pt. IV, para. 77(a), MCM and in view of the facts of this case, appellant completed the offense each time he inflicted bodily harm.

First, the strike to her face (Specification 1) and the punches to her face and body (Specification 3) took place in two separate locations: the master bedroom and the master bathroom. Second, these acts were separated in time. While appellant stated his punches were "continuing" and "right after" the initial strike to

her face, the 911 call times show approximately nine minutes passing between the time the victim became fearful and the time she was able to shut the bathroom door. (R. at 33–34; Pros. Ex. 4; *see also* Pros. Ex. 1 at 3–4). Third, appellant's testimony demonstrated the impulse and bodily harm were distinct. Specification 1 involved a strike to the victim's face with appellant's hand when he was "angry and upset" and wanted her to get away from him. (R. at 23–24). In contrast, Specification 3 involved punches to her face and body with both his hands when appellant "lost his temper," and resulted in bruising and lacerations. (R. at 32–33; Pros. Ex. 1 at 4, 5, 12). Thus, these acts are separate and, in turn, their specifications are not multiplicious. *See Forrester*, 76 M.J. at 396.

C. Consolidation of the Charges.

To the extent this Court finds the specifications should be merged, the government requests this Court merge Specifications 1 and 3 only. In the alternative, if this Court finds all the specifications should be merged, the government requests this Court merge the specifications into Specification 4. *See United States v. Palagar*, 56 M.J. 294 (C.A.A.F. 2002) (holding the lower court did not err in permitting the government to elect which finding of guilty would be affirmed); *see also United States v. Cherukuri*, 53 M.J. 68, 74 (C.A.A.F. 2000).

D. Sentence Reassessment.

Appellant requests this Court reassess his sentence pursuant to *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). (Appellant's Br. at 15). But there is no need to do so because the nature and character of appellant's offense remain unchanged per the language of appellant's proposed specification. (Appellant's Br. at 14). *See, e.g., United States v. Knight*, ARMY 20220576, ____ CCA LEXIS ___, at n.3 (Army Ct. Crim. App. 30 Nov. 2023) (sum. disp.). Moreover, appellant received the benefit of the pre-trial agreement when the military judge adjudged segmented and concurrent sentences pursuant to its terms. (R. at 155; STR; App. Ex. II). Thus, this court should affirm the adjudged sentence as thirty months' confinement and a bad conduct discharge are appropriate in this case.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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APPENDIX

United States v. Steele

United States Army Court of Criminal Appeals

November 13, 2023, Decided

ARMY 20170303

Reporter
2023 CCA LEXIS 488 *; 2023 WL 7989450

UNITED STATES, Appellee v. Master Sergeant ANDREW D. STEELE United States Army, Appellant

Prior History: **[*1]** Headquarters, 7th Infantry Division. Sean Mangan and Lanny J. Acosta, Jr., Military Judges (trial), J. Harper Cook and Matthew S. Fitzgerald, Military Judges (rehearing), Lieutenant Colonel James W. Nelson, Acting Staff Judge Advocate (trial), Lieutenant Colonel Robert A. Rodrigues, Staff Judge Advocate (rehearing).

United States v. Steele, 82 M.J. 695, 2022 CCA LEXIS 346, 2022 WL 2092830 (A.C.C.A., June 9, 2022)

Core Terms

merits, waived, sentence, new claim, appeals, changes

Counsel: For Appellant: Captain Lauren M. Teel, JA (argued);[2] Major Rachel P. Gordienko, JA; Captain Lauren M. Teel, JA (on brief); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Lieutenant Colonel Dale C. McFeatters, JA; Captain Lauren M. Teel, JA (brief on specified issues).

For Appellee: Captain Jennifer A. Sundook, JA (argued); Major Mark T. Robinson, JA (on brief); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Jennifer A. Sundook, JA (brief on specified issues).

Judges: Before SMAWLEY, EWING[1], and PARKER, Appellate Military Judges. Chief Judge SMAWLEY and Judge PARKER concur.

Opinion by: EWING

Opinion

MEMORANDUM OPINION ON FURTHER REVIEW

EWING, Judge:

Appellant's case is before our court for the third time following remand from the Court of Appeals for the Armed Forces. In our first opinion, we remanded for a sentencing rehearing because **[*2]** of a defective transcript. *See* *United States v. Steele, ARMY 20170303, 2019 CCA LEXIS 95 (Army Ct. Crim. App. 5 March 2019)* (mem. op) ("*Steele I*"). Following appellant's *sentencing* rehearing, appellant raised, for the first time, a constitutional challenge to the *merits* of his court-martial conviction for indecent exposure. In our second opinion, we applied the "cause and prejudice" standard for second or successive appeals and held that appellant had shown "neither good cause for his failure to raise his new claim in his first appeal" nor that he would "suffer actual prejudice or manifest injustice" based on his new claim. *United States v. Steele, 82 M.J. 695, 697 (Army Ct. Crim. App. 2022)* ("*Steele II*"). *See also* *Id. at 698-99* (citing cases from other appellate courts applying this standard). As such, we did not reach the merits of appellant's claim and denied relief. *Id. at 700*.

Following further appellate review, our superior court remanded appellant's case to us with instructions to clarify whether appellant had waived or forfeited his new claim in *Steele II*. Specifically, the CAAF explained:

> In this case . . . the ACCA's opinion was unclear in a key respect: The ACCA did not expressly rule on whether Appellant waived his constitutional challenge to his indecent exposure argument. The issue of waiver is important based on the principles explained above. On one **[*3]** hand, if Appellant did

[2] The court heard oral argument in Steele II on 30 March 2022 at George Washington University Law School as part of the court's outreach program.

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

> not waive this challenge, then the ACCA should have considered it either for error or plain error. On the other hand, if Appellant did waive the issue, then the ACCA was under no obligation to review the issue at all, but it could review the issue in the exercise of its discretion under *Article 66(c), UCMJ*. . . . A CCA may select its own standard for exercising its discretion under *Article 66(c), UCMJ*, to review waived issues or forfeited issues where there is no plain error. . . . If it so chooses, the CCA may require a showing of cause and prejudice before it will review such issues.

United States v. Steele, 83 M.J. 188, 191 (C.A.A.F. 2023) (cleaned up) ("*Steele (C.A.A.F.)*"). Stated differently, the CAAF approved of our court's employment of the "cause and prejudice" standard but only in the context of our *Article 66, UCMJ* power. *Id. See also Article 66(c), UCMJ*, *10 U.S.C. § 866(c) (2012)* (CCAs "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.").

While not a precise one-to-one match with the employment of the test in the federal system, we had conceived of *Steele II's* "cause and prejudice" standard *to itself be the gatekeeping test* for whether an appellant had **[*4]** waived a new claim in a second or successive appeal. That is to say, if an appellant could satisfy the cause and prejudice standard for bringing a new claim in such a case, then we would reach the merits of that claim. The converse would also be true. *See Steele II, 82 M.J. at 699* (noting that the standard "strikes the right balance between acknowledging that in some cases appellants will be able to bring new meritorious claims on second and successive appeals, while at the same time incentivizing parties to raise claims at the earliest possible time").

We recognize that our superior court has rejected this approach by requiring us to address the waiver/forfeiture question as a *threshold* matter, separate and apart from any employment of the cause and prejudice standard. *Steele (C.A.A.F.), 83 M.J. at 191*. We do so below, and hold that appellant waived his new merits claim. While we could nonetheless reach the merits of appellant's claim under the version of our *Article 66, UCMJ* power applicable here, we refuse to do so. Finally, in light of our superior court's decision and recent changes to *Article 66, UCMJ*, we respectfully decline the CAAF's invitation to apply the cause and prejudice standard in the context of our *Article 66, UCMJ* authority.

WAIVER

Appellant's new claim in *Steele II* was **[*5]** a constitutional challenge to the merits of his indecent exposure conviction. *82 M.J. at 697*. As we noted then, appellant "did not present this claim to the military judge at his original court-martial, to our court in his first appeal, or to the military judge at his sentencing rehearing." *Id.*

Appellant waived this new merits claim.

Two lines of reasoning independently and collectively lead to waiver. First, our court affirmed appellant's findings in *Steele I* and remanded for resentencing only. *Steele I, 2019 CCA LEXIS 95, at *9-10* ("Upon consideration of the entire record, the findings of guilty are AFFIRMED. The sentence is SET ASIDE."). The CAAF, our court, our sister service courts, and other courts have all held that appellants are not entitled to a second bite at the direct-appeal apple. *See United States v. Smith, 41 M.J. 385, 386 (C.A.A.F. 1995)* ("[w]hile [an] appellant is entitled to plenary review under *Article 66 . . . he is only entitled to one such review.*") (emphasis added); *United States v. Navarette, ARMY 20160786, 2022 CCA LEXIS 255, at *11 (Army Ct. Crim. App. 29 Apr. 2022)* (mem. op.); *United States v. Henry, ACM 38886 (reh), 2020 CCA LEXIS 13, at *11 (A.F. Ct. Crim. App. 14 Jan 2020)*. *See also United States v. Rodriguez, 821 F.3d 632, 633 (5th Cir. 2016)* ("[a] criminal defendant is not entitled to two appeals."); *United States v. García-Ortiz, 657 F.3d 25, 30 (1st Cir. 2011)* ("[a] court of appeals normally does 'not review in a second direct appeal an issue that underlies a previously affirmed conviction.") (quoting *United States v. Gama-Bastidas, 222 F.3d 779, 784 (10th Cir. 2000)*). Moreover, even if *Steele II* could somehow be conceived as a wholesale continuation **[*6]** of *Steele I* as to both the merits and sentencing (which we do not believe to be the case), appellant's new merits claim in *Steele II* is akin to filing a years-late merits brief in violation of this court's rules. *See United States v. Bridges, 61 M.J. 645, 647-48 (C.G. Ct. Crim. App. 2005)* (refusing to hear new merits claims following a sentencing rehearing and noting the violation of the court's rules related to timely filings).

Second, courts have recognized that *waiver* of an issue on appeal is distinct from *forfeiture* of an issue by failing to raise it in the trial court. *See, e.g., United States v.*

Noble, 762 F.3d 509, 527-28 (6th Cir. 2014) (citing United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1992), and describing the difference between trial-level forfeiture and appellate waiver); Grayson O Co. v. Agadir Int'l LLC, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief . . ."); World Wide Minerals, LTD. v. Republic of Kaz., 296 F.3d 1154, 1160, 353 U.S. App. D.C. 147 (D.C. Cir. 2002) ("a party waives its right to challenge a ruling of the district court if it fails to make that challenge in its opening brief.").

Finally, even if appellant had merely forfeited rather than waived his new merits claim, we would not provide relief under the plain error standard. For the reasons explained in Chief Judge Smawley's concurrence in Steele II, 82 M.J. at 700-01, appellant cannot begin to show that his guilty finding for indecent exposure amounted to "plain, or clear, or obvious" error. United States v. Witt, 83 M.J. 282, 285 (C.A.A.F. 2023).

ARTICLE 66

The above waiver **[*7]** discussion notwithstanding, under the version of *Article 66* applicable to this appeal, we are to affirm only guilty findings and sentences that are (1) correct in law; (2) correct in fact; and (3) should be approved. *Article 66(c), UCMJ*, *10 U.S.C. § 866(c) (2012)*. We have previously held that while waiver "extinguish[es]" any claim of legal error, this version of *Article 66* provides us with the power to "notice" waived error under our "should be approved" authority, which we described as a "safety valve of last resort." United States v. Conley, 78 M.J. 747, 750, 752 (Army Ct. Crim. App. 2019). As we explained in *Steele II* and reiterate here, appellant's case does not "call out for relief." Steele II, 82 M.J. at 700 n.6 (citing Conley, 78 M.J. at 753). As such, while we could reach the merits of appellant's new claim under our *Article 66* power, we refuse to do so.

In light of the CAAF's decision in this case and the recent changes to *Article 66, UCMJ*, we will end there. While the CAAF invited us to employ the cause and prejudice test in the *Article 66, UCMJ* context, *see* Steele (C.A.A.F.), 83 M.J. at 191, addressing that here would largely amount to an anachronism looking backward or an advisory opinion looking forward.

In the *National Defense Authorization Act for Fiscal Year 2021*, Congress amended the CCAs' *Article 66, UCMJ* power for appeals where all of the guilty findings were for offenses occurring on or after 1 January 2021. *Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12*. This new *Article 66* authority states, in pertinent part, that we may "affirm only such findings **[*8]** of guilty as the Court finds *correct in law, and in fact* . . . [and] may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, *should be approved. Id.* (emphasis added); *see also* United States v. Harvey, 83 M.J. 685, 690 (N.M. Ct. Crim. App. 2023) (discussing the new *Article 66, UCMJ* and an additional change to our factual sufficiency review standard); United States v. Scott, M.J. , 2023 CCA LEXIS 456, [slip op.] at 2-3 (Army Ct. Crim. App. 27 Oct. 2023).

These changes to our Article 66 authority are inapplicable to appellant's case, and thus we have no moment to discuss them in any detail here. The precise contours of these changes will become clear over time and caselaw development. But in this context it does not make sense to announce that we will be using the cause-and-prejudice test or any other test in exercising our *Article 66* authority. The version of *Article 66* applicable to appellant's case will soon be obsolete, and we do not yet fully understand how the changes will affect our jurisprudence moving forward.

Thus, it suffices to say here that appellant waived his new claim for the reasons discussed herein and is not entitled to relief from our court. *See* PDK Labs. Inc. v. United States DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part) ("if it is not necessary to decide more, it is necessary not to decide more"). **[*9]**

CONCLUSION

Upon consideration of the entire record, the appellant's findings of guilty are, again, AFFIRMED. The sentence to reduction to the grade of E-5 is AFFIRMED.

Chief Judge SMAWLEY and Judge PARKER concur.

End of Document

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.

Core Terms

specifications, assault, waived, convictions, offenses, charges, guilty plea, multiplication, knife, battery, sentence, military, cases, door, rape

Case Summary

Overview

HOLDINGS: [1]-A servicemember who pled guilty to attempted rape, attempted kidnapping, disrespect toward a noncommissioned officer, failure to obey an order, four specifications of assault consummated by battery, assault with a dangerous weapon, and burglary with intent to commit rape, in violation of UCMJ arts. 80, 91, 92, 128, and 129, 10 U.S.C.S. §§ 880, 891, 892, 928, and 929, waived his right to claim that the Government unreasonably multiplied the charges when it charged four specifications of assault based on the same incident, because he agreed to waive all waivable motions in his plea agreement; [2]-Even assuming the military judge used an outdated definition of "force" when explaining the offense of rape during the providence inquiry, there was no error because the servicemember understood the elements of rape, admitted them freely, and pleaded guilty because he was guilty.

Outcome

The court affirmed the findings and sentence.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Accusatory Instruments > Joinder & Severance > Joinder of Offenses

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

HN1[] **Joinder & Severance, Joinder of Offenses**

The United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) has repeatedly held that individual assaults within an uninterrupted scuffle should not be parsed out and made the bases for separate findings of guilty. Similarly, the United States Army Court of Criminal Appeals has held that merger of specifications is appropriate in instances of an ongoing attack comprising multiple assaults united in time, circumstance, and impulse.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double

Jeopardy

HN2[] **Fundamental Rights, Criminal Process**

A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the United States Constitution. Such waiver may include double jeopardy.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

HN3[] **Trial Procedures, Pleas**

An unconditional guilty plea generally waives all defects which are neither jurisdictional nor a deprivation of due process of law. 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.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > ... > Trial Procedures > Pleas > Voluntariness

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] **Pretrial Proceedings, Charges & Specifications**

When an accused intentionally waives a known right at trial, it is extinguished and may not be raised on appeal. Even in cases where specifications are facially duplicative, express waiver or voluntary consent will foreclose even this limited form of inquiry. Of course, the United States Army Court of Criminal Appeals may notice waived and forfeited error, and may approve only those findings that should be approved. That is an awesome, plenary de novo power of review, but one that is also subject to discretion.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN5[] **Pretrial Proceedings, Charges & Specifications**

The United States Army Court of Criminal Appeals does not read the United States Court of Appeals for the Armed Forces' decision in United States v. 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.

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

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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

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.

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

HN1[↑] 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. ***HN2***[↑] "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. ***HN3***[↑] "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. ***HN4***[↑] "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,

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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)*.

"[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]**

[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*. ***HN5***[↑] 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.

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 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.

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United States v. Knight

United States Army Court of Criminal Appeals

November 30, 2023, Decided

ARMY 20220576

Reporter
2023 CCA LEXIS 506 *; 2023 WL 8457882

UNITED STATES, Appellee v. Sergeant First Class HUNTER D. KNIGHT, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, U.S. Army Military District of Washington, Adam S. Kazin, Military Judge. Lieutenant Colonel Peter G. Juetten, Acting Staff Judge Advocate.

Core Terms

factual sufficiency, specification, pinching, abdomen, kicking, spouse, finding of guilt, reasonable doubt, violent offense, unlawfully, sentence, warrants, commit, foot, leg

Counsel: For Appellant: Captain Sarah H. Bailey, JA; Major Mitchell Herniak, JA.

For Appellee: Lieutenant Colonel Jacqueline DeGaine, JA.

Judges: Before PENLAND, HAYES, and POND, Appellate Military Judges. Judge HAYES and Judge POND concur.

Opinion by: PENLAND

Opinion

SUMMARY DISPOSITION

PENLAND, Senior Judge:

Appellant was convicted at a general court-martial, contrary to his pleas, by a panel of officers and enlisted soldiers, of one specification of domestic violence in violation of *Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b* [UCMJ]. The military judge sentenced appellant to 60 days of confinement and reduction to the grade of E4.

Appellant personally submitted two matters for our consideration under *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. The first warrants brief discussion and partial relief; the second warrants neither.

DISCUSSION

This court reviews questions of factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the court of [criminal appeals] are themselves convinced of the accused's guilt **[*2]** beyond a reasonable doubt. *Id at 403* (citing *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*). In reviewing factual sufficiency, we are limited to the facts introduced at trial. *United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007)* (citing *United States v. Duffy, 3 U.S.C.M.A. 20, 23, 11 C.M.R. 20, 23 (1953)*).[1]

The panel found appellant guilty of the following specification:

> In that [appellant], U.S. Army, did, at or near Fort Lee, Virginia, on or about 1 July 2020, commit a violent offense against [KK], the spouse of the accused, to wit: unlawfully kicking [KK] with his *feet* on her leg and body and grabbing and pinching her with his *hands* on her *abdomen and thighs*. (emphasis added).

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[1] We recognize that *Article 66(d)(1)(B)* was amended by the ***National Defense Authorization Act for Fiscal Year 2021***; but as the amendment applies only to courts-martial in which every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021, the amended language is not applicable to appellant's case. *See* ***Pub. L. No. 116-283, § 542(b), 134 Stat. 3612***.

Appellant insists the finding of guilty is not factually sufficient. To a very limited point, we agree, for the evidence sufficiently established a slightly more contained scenario of violent behavior. Testimonial and other evidence proved beyond a reasonable doubt that appellant used his *foot* to kick[2] his spouse and used his *hand* to pinch her *abdomen*.

CONCLUSION

On consideration of the entire record, we affirm only so much of the finding of guilty to Specification 5 of Charge I as provides:[3][4][5]

> In that [appellant], U.S. Army, did, at or near Fort Lee, Virginia, on or about 1 July 2020, commit a violent offense against [KK], the spouse of the accused, to wit: unlawfully kicking [KK] with **[*3]** his foot on her leg and body and pinching her with his hand on her abdomen.

The sentence is AFFIRMED.

Judge HAYES and Judge POND concur.

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[2] Appellant urges us to contrast the charged word, "kicking," with the repeated description of his "stomping" his spouse's leg. We decline for two reasons. First, his spouse also indicated he "kick[ed]" her. Second, under the circumstances of this case, the two words are synonymous.

[3] Based on this disposition, we perceive no need to reassess the sentence, for the nature and character of appellant's offense remain unchanged. Assuming arguendo that such reassessment is necessary, we would reassess and affirm the adjudged sentence under *United States v. Winckelmann, 73 M.J. 11 (C.A.A.F. 2013)*.

[4] The FINDING/DISPOSITION block of The Statement of Trial Results, as incorporated into the judgment of the Court, for Specification 3 of Charge I and The Specification of Charge III, are amended to read "Military Judge entered finding of not guilty."

[5] Block 32 of The Statement of Trial Results, as incorporated into the Judgment of the Court, is amended to reflect a response of "no."

CERTIFICATE OF SERVICE, U.S. v. MALONE (20230151)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 22nd day of February, 2024.

[redacted]

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