IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230151
Sergeant First Class (E-7) **MICHAEL S. MALONE,** United States Army, Appellant	Tried at Fort Bliss, Texas, on 22 March 2023, before a general court-martial appointed by Commander, 1st Armored Division, Lieutenant Colonel Jessica Conn, military judge, presiding.

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

Assignment of Error

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

Statement of the Case

On 10 November 2023, appellant filed his brief. On 22 February 2024, the government filed its brief. On 27 February 2024, this court granted appellant's extension motion to file a reply brief. This is appellant's reply brief.

Argument

The government's brief: (1) incorrectly asserts that this court should not apply plain error review; (2) claims the specifications involved separate incidents, despite the record's repeated and clear contrary language; and (3) applies the wrong test and implicates significant policy concerns in seeking to distinguish between assault and aggravated assault for multiplicity. As outlined below, this court should reject the government's arguments and grant the requested relief.

1. As in *Goundry* and *White*, the standard of review is plain error.

The government asserts appellant "waived multiplicity claims at trial," and thus appellant needs to demonstrate "cause and prejudice" for this court to review the issue under Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 66. (Gov't Br. at 7). This is incorrect.

As appellant explained, this court in *Goundry* recently applied plain error review to a similar multiplicity claim in a guilty plea involving domestic violence specifications. (Appellant's Br. at 9) (citing *United States v. Goundry*, ARMY 20220218, 2023 CCA LEXIS 204, *3-4 (Army Ct. Crim. App. 2023) (summ. disp.)). In doing so, this court stated, "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.'" *Id*. at *3 n.5.

Here, as in *Goundry*, the plea agreement did not contain a "waive all waivable motions" provision, nor did the defense expressly waive the issue of multiplicity. (App. Ex. II; R. at 12). The government did not cite, address, or distinguish *Goundry*, but instead asserted in a single-sentence footnote that it was "immaterial" that the plea agreement did not contain a waiver provision. (Gov't Br. at 7 n.4). The government also did not address how its own brief asserts "[a]n unconditional guilty plea waives multiplicity claims *when the offenses are not facially duplicative*," which is exactly what the *Goundry* court found. (Gov't Br. at 4) (emphasis added); *Goundry*, 2023 CCA LEXIS 204, at *3 ("We find plain error in this case in that the military judge accepted a guilty plea to two specifications that were facially duplicative.").

Finally, in a 28 February 2024 opinion, this court did not apply waiver to a multiplicity issue that was not raised at trial or on appeal. *United States v. White*, Army 20210676, ___ CCA LEXIS ___ (Army Ct. Crim. App. 28 February 2024) (summ. disp.). Instead, like *Goundry*, this court applied plain error. In sum, and consistent with this court's recent analyses, this court should apply plain error.[1]

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[1] As plain error review applies, this court need not assess whether the government erroneously expands *United States v. Steele*, ARMY 20170303, 2023 CCA LEXIS 488 (Army Ct. Crim. App. 13 Nov. 2023) (mem. op.). (Gov't Br. at 7). However, appellant firmly disputes any attempted expansion of *Steele II* to direct appeals (as opposed to "second or successive appeals"), and further notes that *Steele II* "decline[d] the CAAF's invitation to apply the cause and prejudice standard."

2. The government claims the specifications involve separate incidents, despite the record's repeated and clear contrary language.

The government claims "appellant's offenses were separated in time, were interrupted, and did not constitute one continuous course of conduct." (Gov't Br. at 9). This claim is repeatedly contradicted by the record.

Simply put, the record reflects *exactly* what appellant stated in his brief: "the providence inquiry and stipulation of fact conclusively establish that the three specifications resulted from a single uninterrupted altercation." (Appellant's Br. at 12-13). This includes multiple confirmations to the military judge that the successive blows were part of the "same event" and "same transaction," and that the incident was a continuous course of conduct. (R. at 32, 39-40). Indeed, one would be hard-pressed to find any clearer language than the following exchanges:

> 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).

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).

As appellant previously explained, the stipulation of fact is equally clear, and it even refers to the entire incident as "the assault." (Appellant's Br. at 5). Again, between the providence inquiry and stipulation of fact, the record is clear the specifications are from an uninterrupted altercation.

However, rather than conceding this point, the government seeks to artificially extend the timeline by combining the *argument* timeline with the *assault* timeline. (Gov't Br. at 10) ("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."). The first strike occurred after a verbal argument

and "several" canceled 911 calls. (R. at 21-22; Pros. Ex. 1, at 3-4). This issue is expressly addressed on a page the government cited:

> . . . The Accused and the Victim discussed infidelity and broken plans, re-prompting the argument. Both parties were yelling at each other, and violence seemed imminent. The Victim became fearful and tried to, once again, create space.
>
> *The Victim next grabbed her cell phone and attempted to dial 911 several times but failed to complete the call, resulting in several canceled calls.* See Prosecution Exhibit 4. *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.

(Pros. Ex. 1, at 3) (emphasis added)

In other words, the government cites canceled 911 calls *before* the argument turned physical to claim the specifications were separate incidents at separate times. The pre-assault calls are obviously inapt, and this court should reject any attempt to conjoin the argument timeline with the assault timeline.

As a final matter, the government asserts in a single sentence, with no citation, that the punching specifications "took place in two separate locations: the master bedroom and the master bathroom." (Gov't Br. at 9). The record establishes the first punch occurred "transitioning from the master bedroom into the master bathroom; right in that area," (R. at 27), appellant continued punching the victim and pushed her down (R. at 32, 39-40; Pros. Ex. 1, at 3-5), and then she locked herself in the bathroom. (R. at 34; Pros. Ex. 1, at 5). The record does not

support any meaningful location or temporal distinction between the punches. Moreover, and more importantly, the record does not support any argument that the punches were not part of a continuous course of conduct. Even assuming the punches crossed into another room, this is a meaningless distinction in the context of an uninterrupted and continuous assault.[2]

In sum, as outlined above, the record contradicts the government's claim that the "offenses were separated in time, were interrupted, and did not constitute one continuous course of conduct." (Gov't Br. at 9). Instead, as in *Goundry*, the specifications in this case "were contemporaneous in time and uninterrupted," "constitute one continuous course of conduct," and "form the basis of what should have been one charged offense." 2023 CCA LEXIS 204, at *4.

3. In seeking to distinguish between assault and aggravated assault, the government applies the wrong test and implicates significant policy concerns.

The government asserts that two of the domestic violence specifications (with the underlying violence offense of assault) cannot be multiplicious with the third specification (with the underlying violent offense of aggravated assault), as the latter "contains a unique element" of requiring "substantial bodily harm." (Gov't Br. at 8-9). This analysis is problematic as a matter of law and policy.

[2] Appellant notes the similar flaw in the government's attempt to argue that the "bodily harm" of the punches were different. (Gov't Br. at 10). Even if true, this is a meaningless distinction in an uninterrupted and continuous assault.

First, in making this argument, the government cites to cases referring to the elements test from *Blockburger v. United States*, 284 U.S. 299 (1932). (Gov't. Br. at 9) (citing *United States v. Teters*, 37 M.J. 370, 377-78 (C.M.A. 1993); *United States v. Coleman*, 79 M.J. 100, 103 (C.A.A.F. 2019)). This is the wrong test. (*See* Appellant's Br. at 7-11).

As outlined in appellant's brief, "when charges for multiple violations of the same statute are predicated on arguably the same criminal conduct," 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. *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017) (internal quotation marks and citation omitted) (emphasis omitted).[3] This court previously concluded that the "unit of prosecution" for an uninterrupted attack "charged under Article 128, UCMJ . . . is the number of overall beatings the victim endured rather than the number of individual blows suffered." *Clarke*, 74 M.J. at 628 (citation omitted). Sister courts have reached similar conclusions. (*See* Appellant's Br. at 9-11). Simply put, the government's reliance on the elements test is misplaced.

[3] The government cites this test in its brief, but only refers to *Teters*/*Coleman* in this section of its argument. (*See* Gov't Br. at 6, 8-9). Notably, the government does not claim that any specification involves a specialized assault or includes any broader specific intent. *See, e.g.*, *United States v. Clarke*, 74 M.J. 627, 628 (Army Ct. Crim. App. 2015) (stating the analysis is different for "the specialized assaults charged under Article 120 or 134.").

Second, apart from applying the wrong test, the government's argument presents significant policy concerns. Essentially, the government's position is that appellant would be subject to fewer convictions if his punches did more damage (i.e., if the punching specifications had also constituted aggravated assault). As a matter of logic and policy, this simply cannot be correct. A defendant should not be subject to more convictions for causing less damage.

Furthermore, if the government can claim, as it did here, that domestic violence by assault can never be multiplicious with domestic violence by aggravated assault, then it would incentivize intentionally undercharging at least one specification to ensure multiple convictions. Essentially, the government could elect to avoid trying to prove "substantial bodily harm" for one component of a continuous assault, and then assert that the two separate specifications cannot be multiplicious due to its charging decision.

In sum, in seeking to distinguish between assault and aggravated assault, the government applies the wrong test and implicates significant policy concerns. Under the facts of this case, this court should merge all three specifications into a single specification of domestic violence by aggravated assault. However, at a 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).

Conclusion

Wherefore, appellant respectfully asks this honorable court to grant the requested relief.[4]

[redacted]
CODY CHEEK
MAJ, JA, USAR
Appellate Defense Counsel
Defense Appellate Division

[redacted]
MITCHELL D. HERNIAK
MAJ, JA
Branch Chief
Defense Appellate Division

[redacted]
AUTUMN R. PORTER
LTC, JA
Deputy Chief
Defense Appellate Division

[redacted]
PHILIP STATEN
COL, JA
Chief
Defense Appellate Division

[4] Appellant provided proposed merged specifications in his initial brief. (Appellant's Br. at 14, n.5, 6).