IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20230263
Private First Class (E-3) **PATRICK A. FORD,** United States Army,	Appellant	Tried at Fort Bliss, Texas, on 23 January and 10 May 2023 before a general court-martial appointed by the Commander, 1st Armored Division, Colonel Robert Shuck, Colonel Adam Kazin, military judges, presiding.

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

Assignments of Error[1]

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO THE SPECIFICATION OF CHARGE III (DISRESPECT).

II. WHETHER APPELLANT'S FACIALLY DUPLICATIVE CONVICTIONS FOR DOMESTIC VIOLENCE IN SPECIFICATIONS 2, 3, AND 4 OF CHARGE II, ARE MULTIPLICIOUS.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF CHARGE V (VIOLATING ARMY REGULATION 608-99).

[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 the Appendix.

PANEL 2

Statement of the Case

On 23 May 2023, a military judge sitting as a general court-martial convicted appellant, Private First Class Patrick A. Ford, in accordance with his pleas, of one specification of absence without leave, one specification of disrespect toward a superior commissioned officer, three specifications of failure to obey a lawful order, one specification of communicating a threat, and three specifications of domestic violence, in violation of Articles 86, 89, 92, 115, and 128b, Uniform Code of Military Justice [UCMJ]. (R. at 91; Statement of Trial Results).[2] That same day, the judge sentenced appellant to reduction to the grade of E-1, confinement for sixteen months, and a bad-conduct discharge.[3] (R. at 190). The

[2] The first page for the Article 39(a) session held on 23 January 2023 states that the session was called to order pursuant to Court-Martial Convening Order (CMCO) Number 12, Headquarters, 1st Armored Division and Fort Bliss, Fort Bliss, Texas, dated 3 August 2023. This CMCO is actually dated 3 August 2022. (R. at 1-2.)

[3] The military judge sentenced appellant as follows:

Charge II, Specification 2	12 months
Charge II, Specification 3	14 months
Charge II, Specification 4	16 months
Charge III, The Specification	3 months
Charge IV, The Specification	No confinement
Charge V, Specification 1	3 months
Charge V, Specification 2	3 months
Charge V, Specification 3	3 months
Charge VI, The Specification	15 months

The military judge ordered all sentences to confinement to run concurrently. (R. at 190).

appellant was credited with 195 days of pretrial confinement credit and 29 days of judicially ordered credit, totaling 224 days. (R. 190; Statement of Trial Results).

On 2 June 2023, the convening authority approved the findings and sentence. (Convening Authority Action). On 14 June 2023, the military judge entered Judgment. (Judgment of the Court). This court docketed appellant's case on 19 September 2023. (Referral and Designation of Counsel).

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO THE SPECIFICATION OF CHARGE III (DISRESPECT).

Relevant Facts

On or about 3 September 2022, appellant had a private conversation in his apartment with two noncommissioned officers in his unit. (R. at 41-2). Appellant was complaining about the validity of orders he received from his platoon leader, Second Lieutenant (2LT) [redacted] (R. at 44-5).

Appellant said words to the effect of "Ya'll are fine, but [2LT [redacted] is problematic. I'm going to fuck LT up with JAG." (R. at 42). To appellant's knowledge, 2LT [redacted] was not around when he made this comment. (R. at 42).

During their colloquy, the military judge did not ask appellant what the actual order was. Additionally, the military judge did not ask appellant to elaborate on the manner in which he made the statement, whether he evinced an attitude, or to describe any of the attendant circumstances of the statement. (R. at 39-46).

Unbeknownst to appellant, 2LT [redacted] was just around the corner of his apartment while he made the statement. (R. at 41-42). But he did not believe that 2LT [redacted] heard him, as he never confronted appellant about the statement

Standard of Review

This court reviews a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014). In doing so, courts "apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea. *Id*.

Law

Generally speaking, all the circumstances of a case can be considered in determining whether disrespectful behavior in violation of Article 89, UCMJ, has occurred. *United States v. Govindasamy*, ARMY 20121038, 2015 CCA LEXIS 568, *5 (Army Ct. Crim. App. 16 Dec. 2015) (mem.op.) (citing *United States v. Goins*, 15 U.S.C.M.A. 175, 177 (1964). Ordinarily, one should not be held accountable under Article 89, UCMJ, "for what was said in a purely private conversation". Part IV, ¶15(c)(2)(c), MCM Article 89(c)(2)(c). The gravamen of

an Article 89 offense is not merely insult, but the undermining of lawful authority. *United States v. Van Beek*, 47 M.J. 98 (A.C.M.R. 1973).

In *United States v. Collier*, the accused was charged with violating Article 89 by – in the midst of an argument with his platoon leader – throwing his Kevlar helmet into the Tigris River. ARMY 20120554, 2014 CCA LEXIS 207, *3 (Army Ct. Crim. App. 31 Mar. 2014) (mem. op.). At trial, the platoon leader testified that he did not feel disrespected by appellant's angry outburst. *Id*. at *4. This Court found that the accused's conviction under Article 89 was factually insufficient as the platoon leader's testimony that he did not feel disrespected raised a reasonable doubt as to the requirement that the disrespectful language or act be directed at the officer. *Id*. at *7.

Argument

Appellant was convicted for complaining about his chain of command during a purely private conversation. Further, neither 2LT [redacted] nor anyone else in appellant's unit confronted appellant about the statement. For an obvious reason – the statement was not objectively disrespectful and did not undermine 2LT [redacted]'s lawful authority.

Just as in *Collier*, it is difficult to deem appellant's language disrespectful when 2LT [redacted] never confronted him about the statement. No one did. Moreover,

the military judge failed to elicit additional facts surrounding the statement, such as the volume of appellant's voice or whether he was wildly gesticulating.

These were words were made in a purely private setting, to other people not in 2LT [redacted] presence, in which appellant simply announced his desire to seek legal assistance. While presence is not required, these statements, while arguably containing a common profanity, are something appellant is entitled to do and punishing him for such may be deemed retaliatory under Army Regulation 600-20. It seems as though appellant was charged with being disrespectful for merely using profanity.

There were two sentences. Calling a leader "problematic" is not disrespectful under these circumstances. Indicating he would go to JAG to report an abuse, even if colorfully presented, should also not be punishable given both Army Regulation and the Whistleblower Protection Act.

II. WHETHER APPELLANT'S FACIALLY DUPLICATIVE CONVICTIONS FOR DOMESTIC VIOLENCE IN SPECIFICATIONS 2, 3, AND 4 OF CHARGE II, ARE MULTIPLICIOUS.

Facts Relevant to Assigned Error

The court convicted appellant of three specifications of domestic violence under Article 128b, UCMJ. These offenses stem from an argument appellant had with Ms. [redacted] his then-wife, on 24 July 2022 at their residence in El Paso, Texas. (R. at 31; Pros. Ex. 1, p. 2).

As the argument began, appellant grabbed Ms. [redacted] cellphone and smashed it on the ground with the intent to intimidate her. (Specification 3 of Charge II) (Pros. Ex. I, p. 2; R. at 32-5).

Ms. [redacted] fell to the ground as she walked outside of the residence to get away from appellant. (Pros. Ex. 1, p. 3). Appellant then grabbed her arm with his hand. (Specification 2 of Charge II) (R. at 35).

Appellant let go of Ms. [redacted] arm. (R. at 36). Almost immediately thereafter, Ms. [redacted] fell to the ground. (R. at 35-6). Appellant then grabbed her arm and drug her along the ground. (Specification 4 of Charge II) (R. at 35-6).

When asked by the military judge how much time separated each act, appellant replied it was "a short time." (R. at 36).

At trial, neither the parties nor the military judge raised the issues of multiplicity or unreasonable multiplication of charges. Appellant's plea agreement did not contain a "waive all waivable motions" provision. (App. Ex. IV). Before entering his plea, appellant's counsel did not expressly waive any motions. (R. at 16).

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). 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, n.1 (Army Ct. Crim. App. 2013)

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) resultant 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).

Whether two offenses are facially duplicative is a question of law this court reviews *de novo*. *United States v. Pulling*, 60 M.J. 91, 94 (C.A.A.F. 2004).

Law

A. Multiple convictions for physical assaults united in time, circumstance, and impulse are multiplicious.

"Multiplicity occurs when two offenses are facially duplicative." *United States v. Long*, ARMY 20150337, 2017 CCA LEXIS 131, at 3-4 (Army Ct. Crim. App. 28 Feb. 2017) (summ.disp.) 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).

This court, its sister courts, and its superior court have long held physical assaults "united in time, circumstance, and impulse" constitute a single crime. *United States v. Clarke*, 74 M.J. 627, 629 (Army Ct. Crim. App. 2015); *see also United States v. Morris*, 18 M.J. 450 (C.M.A. 1984) (consolidating convictions on constitutional grounds, as separate assault convictions occurred "on the same date

and in the same location[.]"); *United States v. Hernandez*, 78 M.J. 643, 647 (C.G. Crim. App. 2018) (finding convictions facially duplicative where appellant spat on, pushed, and choked wife on the same date, in the same location).[4]

The longstanding principle against charging assaults in a blow-by-blow fashion is a direct application of the Double Jeopardy Clause. *United States v. Forrester*, 76 M.J. 389, 394 (C.A.A.F. 2017). "There are distinct types of multiplicity with correspondingly distinct tests to evaluate them." *Hernandez*, 78 M.J. at 645. The first, a single act charged under multiple statutes, requires analyzing the elements of each crime. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

The second, at issue here, involves multiple violations of the same statute, where those violations are predicated on the same conduct. *See id*. ("[W]hen the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.")

[4] This longstanding principle was brought up in *United States v. Phillips* during an outreach argument. Despite this Court not selecting the multiplicity issue *Phillips* and only addressing Unreasonable Multiplication of Charges (UMC), the majority of caselaw discussed were multiplicity cases (not UMC) and the government counsel conceded during oral argument to a question from Senior Judge Penland that multiplicity was applicable. ARMY 20220233.

To determine whether multiple acts are multiplicious, the court must determine whether those acts fall within a single unit of prosecution. *Forrester*, 76 M.J. at 394. This is not "a literal application of the elements test," but rather, a "realistic comparison of the . . . offenses to determine whether one is rationally derivative of the other." *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Violent assaults are demarcated by "touchings united in time, circumstance, and impulse . . . as opposed to the specialized assaults under Article 120 or 134[.]" *Clarke*, 74 M.J. at 629; *see also Pauling*, 60 M.J. at 94 (appropriate unit of prosecution is "the number of overall beatings . . . rather than the number of individual blows suffered.").

In *United States v. Perez*, the accused pled guilty to four individual assault specifications. Within the span of a few seconds, the accused pushed a ten-month old child to the ground, dragged face down by her ankles along the ground, squeezed the child too hard, and pinched her on the arm. ARMY 20130368, 2015 CCA LEXIS 191, 5-6 (Army Ct. Crim. App. 7 Apr. 2015) (summ. disp.).

This court consolidated the four specifications into a single specification, as the accused committed these acts in a "single act" and "single impulse" despite the initial touching having a potential different intent (playing versus frustration). *Id*. at *6.

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, part 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); *United States v. Goundry*, ARMY 20220218, 2023 CCA LEXIS 204 (Army Ct. Crim. App. 2023) (summ. Disp.).

A 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

A. Appellant's convictions for domestic violence in Specifications 2, 3, and 4 of Charge II are facially duplicative.

The facts before this court show one continuous impulse united in time, place, and circumstance; not three. *Clarke*, 74 M.J. at 629. Smashing Ms. [redacted] phone, twice grabbing her arm, and then dragging her on the ground, it all fell within a continuous course of conduct by appellant in the early hours of 24 July 2022.

Only a "short time" separated the grabbings, which it seems, immediately followed appellant's throwing the phone on the ground. The series of events are akin to the "single act" or "single impulse" by the accused in *Perez*. However, even more "united" than in *Perez*, here there was no different impulse between the touchings – they were over the same argument.

Neither side defined the impulse, but everyone described these three offenses as occurring during the same argument. There is no evidence that appellant left the scene only to return newly motivated to assault his wife.

As the facts show three "assaults" united in time, circumstance, and impulse – the appropriate unit of prosecution for violent assaults – the Double Jeopardy Clause only permits one conviction. *Clarke*, 74 M.J. at 629; *Pauling*, 60 M.J. at 94. Further, as the facts necessary for making this determination are apparent from "the factual conduct alleged in each specification and the providence inquiry conducted by the military judge at trial[,]" these convictions are facially duplicative, and consequently, multiplicious. *Pauling*, 60 M.J. at 94.

By accepting a plea containing facially duplicative specifications, the military judge committed plain error. *Heryford*, 52 M.J. at 266. Accepting a guilty plea containing facially duplicative violent assault convictions abrogates long-standing case law consistent across all military courts. *See e.g., Morris*, 18 M.J. at 450; *Clarke*, 74 M.J. at 629; *Hernandez*, 78 M.J. at 647; *and Lombardi*, 2002 CCA LEXIS 138, at 2-5. Further, the simple fact that appellant received two additional convictions as unauthorized punishment is prejudicial as a matter of black letter law. *Savage*, 50 M.J. at 245.

B. These facially duplicative convictions merit consolidation and reassessment by this Court.

Appellant's convictions merit consolidating Specifications 2, 3, and 4 under Specification 4,[5] the gravamen offense. The principles articulated in *Winckelmann* favor this court reassessing appellant's sentence. Consolidating specifications 2, 3, and 4 does not dramatically change the penalty landscape or exposure, as all terms of confinement were to be served concurrently and appellant was sentenced to sixteen months of confinement for specification 4 of Charge II. Further, appellant chose to be sentence by military judge alone. Third, the nature of the proposed consolidated offenses captures the essence of each of the original offenses. Lastly, this court has significant experience assessing episodes of domestic violence.

[5] Proposed SPECIFICATION 4: In that Private First Class Patrick A. Ford, U.S. Army, did, at or near El Paso, Texas, on or about 24 July 2022, with the intent to intimidate the spouse of the accuse, commit an offense in violation of the UCMJ, to wit: willfully and wrongfully destroyed a cellular telephone, of a value of $500 or less, the property of Ms. [redacted]., by throwing it on the ground and commit a violent offense against Ms. [redacted]., to wit: unlawfully grab Mrs. [redacted]. on the arms with his hand and unlawfully drag her.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF CHARGE V (VIOLATING ARMY REGULATION 608-99).

Facts Relevant to Assigned Error

On 9 June 2022, CPT [redacted] ordered appellant to pay $939.00 every month to Ms. [redacted] in accordance with Army Regulation 608-99. [Pros. Ex. 1, page 9].[6] From on or about 24 July 2022 to on or about 24 August 2022, appellant was confined in a civilian facility after being arrested for assaulting Ms. [redacted] (R. at 54, 78, 97).[7]

Appellant failed to make the required payment to Ms. [redacted] from August to November 2022. (Pros. Ex. 1, page 9). With respect to appellant's non-payment, the following colloquy took place:

> Appellant: I wasn't paid – I didn't pay for August and September, sir.
> MJ: Okay.
> Appellant: And October and November, sir. When I received my backpay, sir – My pay had stopped, when I received it I didn't send the *back pay* for those monthly support.
> MJ: Okay. So had you had – were you having pay issues at this time?

[6] This order was also unlawful. Based on Appellant's rank of E-3, at the time, the required payment was under $939.00 (the E-4 rate) and the Army Regulation only allows for the payment of the BAH Diff rate for the appropriate rank. Likewise, the written order was to pay the specific amount, not to comply with Army Regulation 608-99 as charged. (Def. App. Ex. A).

[7] Throughout the transcript, all parties refer to appellant serving 29 days of civilian pretrial confinement. One can infer the approximate dates of confinement from appellant's explanation that he was counseled by his CO "after I got out of El Paso" county on 24 August 2022. (R. at 53-54).

> Appellant: In August and September, yes, sir.
> MJ: Okay. What were those pay issues? Was that because you had been in civilian confinement and they stopped your pay?
> Appellant: Yes, sir.

(R. at 62) (emphasis added).

Those facts require the military judge to go over the defense of inability. Rule for Courts-Martial [R.C.M.] 916(i). The military judge failed to elicit whether appellant had the ability to make the spousal support payment while he was in the civilian confinement facility. Additionally, he failed to elicit when appellant began to receive his pay again and when/how payments were made.[8]

Standard of Review

This court reviews a military judge's acceptance of a guilty plea for an abuse of discretion. *Inabinette*, 66 M.J. at 322. The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014). In doing so, courts "apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea. *Id*.

[8] An obvious error noted by the Government in their sentencing argument where they point out his inability to pay. (R. at 175).

Law

An appellant's inability to comply with the terms of an order is an absolute defense. R.C.M. 916(i).

Army Regulation 608-99 allows commanders to order their Soldiers to make family support payments in the future, but not to pay arrearages. (Army Regulation 608-99, para. 2-5b, 3-8).

A military judge must explain to an accused the defenses that an accused raises during a providence inquiry. (Article 45, UCMJ). Any inconsistencies and apparent defenses must be resolved by the military judge or the guilty pleas must be rejected. "Where an accused is misinformed as to possible defenses, a guilty plea must be set aside." *United States v. Zachary*, 63 M.J. 438, 444 (C.A.A.F. 2006).

Argument

Appellant's plea to Specification 1 of Charge V must be set aside as the military judge failed to inform appellant that the defense of physical or financial inability. Also, the military judge failed to inform appellant that his commander did not have the authority to order him to pay an arrearage or that the commander could not order the appellant to pay more than the BAH-Diff chart.

1. The military judge failed to inform appellant that physical inability is a complete defense.

In his colloquy, the military judge acknowledged that appellant's stint in civilian confinement impeded his ability to comply with CPT [redacted] financial support order. It is fair to guess that appellant would have difficulty in making any such payments while his liberties were so severely restricted. The military judge should have questioned appellant as to what his capabilities were in his time in civilian confinement. But more importantly, the military judge should have informed appellant that if he literally could not arrange for the payments to be made, then there may be an absolute defense to this specification.

2. The military judge failed to inform appellant that his commander could not order him to pay an arrearage or an amount higher than allowed for his rank.

While it was left undetermined when appellant began to receive pay, CPT [redacted] did not have the authority to order appellant to go back and compensate Ms. [redacted] for the previously missed financial support payments. Captain [redacted] authority was limited to merely order appellant to make payments in the future. Likewise, Captain [redacted], in the absence of a court order or written agreement, could not make appellant pay *more* than the E-3 rate. Here, Captain [redacted] ordered appellant to pay the E-4 rate. The military judge was obliged to inform appellant that the CPT [redacted] order, in both respects, may not have had any validity.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on February 12, 2024.

[redacted]
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