

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KRIMBILL, BROOKHART, and ARGUELLES¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Captain JESUS M. PEREIRA
United States Army, Appellant

ARMY 20190704

Headquarters, U.S. Army South
Lanny J. Acosta, Jr., Military Judge
Colonel Javier E. Rivera, Staff Judge Advocate

For Appellant: Captain Roman W. Griffith, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig Schapira, JA; Major Joshua Banister, JA (on brief).

19 January 2021

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of two specifications of assault consummated by battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2016) [UCMJ]. The convening authority approved the adjudged sentence of a dismissal and confinement for thirty days.

¹ Chief Judge (IMA) Krimbill and Judge Arguelles decided this case while on active duty.

The case is before the court for review pursuant to Article 66, UCMJ. Appellant raises two assignments of error. For the reasons that follow, we affirm the findings and sentence.

BACKGROUND

The parties agreed to the central facts of this case as part of appellant's guilty plea. On the evening of 18 July 2018, appellant, who previously served as a victim advocate, attended his brother's bachelor party in (b) (6). During the party, appellant and approximately ten other males traveled from strip club to strip club in a limousine, and at some point arrived at the Déjà Vu Showgirls night club. Déjà Vu had a strict policy, of which appellant was aware, that patrons were not to touch the entertainers.

Using a false name, appellant initially sought out and approached Ms. (b) (6) who was working as a stripper that night. The two discussed the cost for a single dance, but when appellant also asked for a "hand job," Ms. (b) (6) declined. Later on appellant again approached Ms. (b) (6), and this time the two agreed to a single dance in which Ms. (b) (6) would remove her panties for a total of \$40.

Almost immediately after entering the private room, appellant knowingly violated the club's "hands off" policy by touching Ms. (b) (6) near her breast without her consent. In response, Ms. (b) (6) reminded him of the no touching rule, told him the bouncers would remove him if he did it again, and stated that he needed to "keep his hands by his side." Nevertheless, appellant again touched Ms. (b) (6), this time on her buttocks. Ms. (b) (6) again told him to remove his hand, which he did.

Ms. (b) (6) continued her dance and repositioned herself on an ottoman several feet from appellant, telling him to sit in his chair and keep his hands by his side. When Ms. (b) (6) bent over to remove her underwear, appellant moved his chair closer to her, reached forward, and touched her vulva. When Ms. (b) (6) rushed to the other side of the ottoman to get away, appellant offered her more money if she would stay silent. Refusing his offer, Ms. (b) (6) abruptly exited the private room and requested that security remove appellant and call the police.

While being escorted to the parking lot, appellant knowingly lied to the manager, claiming "all I did was touch her, I did not know I couldn't." Aware that club security called the police, appellant and the other revelers hurriedly attempted to leave the club. Their limousine, however, was stopped as it attempted to leave the parking lot. After some initial resistance, appellant exited and lied to the police officer, claiming "I didn't intentionally try to touch anything, Sir," and "I literally had my hands up."

The government initially charged appellant with three specifications of abusive sexual contact (alleging he touched Ms. (b) (6) breast, buttocks, and vulva), one specification of sexual assault (alleging he penetrated her vulva with his finger), and one specification of conduct unbecoming an officer, in violation of Articles 120 and 133, UCMJ. With the advice of his defense counsel, appellant knowingly and voluntarily entered into a plea agreement in which he agreed to admit to two specifications of assault consummated by battery for touching Ms. (b) (6) buttocks and vulva, in exchange for the dismissal of the remaining charged offenses. As part of his plea agreement appellant also agreed to serve up to a maximum of 121 days in custody, and acknowledged that he would be subject to any other lawful punishment, including but not limited to a dismissal from the service.

During sentencing, Ms. (b) (6) offered an unsworn statement, describing how appellant violated her body and how she felt angry, embarrassed, and in shock. She explained how appellant offered her money not to report him, and said that the assault changed her previously favorable opinion of the military.

As part of his sentencing case, appellant presented a Good Soldier Book, which consisted of his Officer Record Brief, thirty letters of support, information pertaining to his 2012–13 Afghanistan deployment, five Officer Evaluation Reports, and numerous awards, decorations, training certificates, and photos. The letters of support, and the seven witnesses who testified on his behalf, all extolled appellant’s professionalism, dedication to duty, leadership, and rehabilitative potential.

LAW AND DISCUSSION

A. Unreasonable Multiplication of Charges (UMC)

Notwithstanding that he entered into an unconditional plea agreement in which he expressly agreed to plead guilty to two separate specifications of assault consummated by a battery, and the fact that he raised no UMC objection below, appellant now contends that the two assault specifications were unreasonably multiplied. We disagree.

As appellant’s case was referred to trial after 1 January 2019, the President’s 2018 revision to R.C.M. 905(e)(1) directs us to treat the UMC issue as “forfeit[ed] . . . absent an affirmative waiver.” *See United States v. Hardy*, 77 M.J. 438, 439 n.2 (C.A.A.F. 2018). Although not asserted by the government, appellant did in fact affirmatively waive his UMC claim by failing to raise it prior to the entry of pleas and after being informed by the military judge that “any motion to dismiss or grant other appropriate relief should be made at this time.” *Cf. United States v. Rich*, 79 M.J. 472, 477 (C.A.A.F. 2020) (quoting *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020)) (alteration in original) (holding that by affirmatively declining to object and offering no additional instructions, the defense counsel “expressly and

unequivocally acquiesce[ed] to the military judge’s instructions,” and his actions constituted affirmative waiver).

Alternatively, even if appellant did not affirmatively waive his UMC claim, his failure to raise it at trial now subjects it to plain error review. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)). To prevail under this analysis, appellant bears the burden to show that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019) (citing *United States v. Sweeny*, 70 M.J. 296, 304 (C.A.A.F. 2011)). “As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim.” *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

Appellant concedes that the standard of review is plain error, but also asks us to exercise our discretion under Article 66, UCMJ, to remedy his UMC claim. *See Hardy*, 77 M.J. at 439 (noting that even when confronted with a forfeited or waived claim of UMC a court of criminal appeals may nonetheless exercise its Article 66, UCMJ, powers to notice the error and grant relief). In pertinent part Article 66(d)(1), UCMJ, provides that we “may affirm only such findings of guilty, and 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.”

In *United States v. Conley*, 78 M.J. 747 (Army Ct. Crim. App. 2019) we explained the interplay between Article 66, UCMJ, and plain error review. With respect to Article 66, UCMJ, we must determine whether the findings and sentence of a case are: (1) correct in law; (2) correct in fact; and (3) should be approved. *Id.* at 751. As to the first prong, if appellant cannot meet his burden to demonstrate plain error, the sentence is “correct in law.” *Id.* at 749 n.3 (stating when an appellant cannot meet his burden to demonstrate plain error, the case is “correct in law” under Article 66, UCMJ).

Moreover, in our Article 66, UCMJ, review we do not consider whether the findings and sentence “should be approved” unless we first determine that they are correct in law and fact. *Id.* at 751. Among other things, this allows us to avoid “muddy[ing] the scrutiny of our reasoning when we decide a case based on our unique Article 66 authority under circumstances where we would have reached the same result as a matter of law.” *Id.* In *Conley*, we also explained how Article 66’s broad “should be approved” authority “sits as a safety valve of last resort” that normally should be exercised only in “circumstances that are, at the source, born from uniquely military origins.” *Id.* at 752.

Turning first to the plain error review, R.C.M. 307(c)(4) provides that “[w]hat is substantially one transaction should not be made the basis for an unreasonable

multiplication of charges against one person.” In *United States v. Quiroz*, 55 M.J. 334, 338–39 (C.A.A.F. 2001), the Court of Appeals for the Armed Forces [CAAF] set forth five factors to guide lower courts in assessing UMC claims: (1) whether appellant objected at trial; (2) whether the offenses charged constitute distinctly separate criminal acts; (3) whether the number of charged offenses exaggerate an appellant’s criminality; (4) whether the number of charged offenses unreasonably increases an appellant’s punitive exposure; and (5) whether the record shows evidence of prosecutorial overreach. The CAAF has also held that these factors are not exhaustive and that one or more may be sufficient to warrant relief. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (citation omitted). Dismissal of unreasonably multiplied charges is an appropriate remedy. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006).

Appellant now concedes, as he must, that he did not raise a UMC objection at trial. Instead, he argues that because “there was no break in time between the two unlawful touches, the charges arose from substantially the same transaction,” such that all of the other *Quiroz* factors weigh in his favor. We have previously held that assault constituted 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. Clarke*, 74 M.J. 627, 628 (Army Ct. Crim. App. 2015) (quoting *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989)). Accordingly, in *Clarke* we held that because appellant brutally beat his wife with a metal stool in an “uninterrupted attack comprising touchings ‘united in time, circumstance, and impulse,’” it was improper to charge the blows to the head immediately followed by the blow to the arm as two separate specifications. *Id.*

Here, however, the two assaults to which appellant voluntarily admitted were separate and distinct actions, separated by time, a change in physical location, and different body parts. As noted above, after appellant first touched Ms. (b) (6) buttocks, she told him to remove his hand, which he did. Ms. (b) (6) then continued her dance, moved away from appellant to an ottoman, and told him to sit in his chair and keep his hands by his side. Ms. (b) (6) actions created a clear and distinct break between the two assaults. Indeed, it was only after Ms. (b) (6) bent over to remove her underwear that appellant chose to move his chair closer so that he could reach out and assault her a second time by touching her vulva. We agree with the government that because “this was not a case of one impulse succeeded by a series of blows or strikes all in furtherance of the same impulses, but two separate impulses accompanied by two separate offensive touches,” the two assault specifications at issue here constitute distinctly separate criminal acts. *Cf. United States v. Glasscock*, ARMY 20190227, 2020 CCA LEXIS 184, *4 (Army Ct. Crim. App. 27 May 2020) (summ. disp.) (holding that by kissing and licking the victim’s vulva the appellant committed two separate and distinct acts that were properly charged and punished separately).

As to the third and fourth *Quiroz* factors, given that the maximum confinement for each assault specification was only six months, for a total of twelve months, the offenses charged did not “exaggerate” appellant’s criminality or “unreasonably increase” his punitive exposure, especially since he was only sentenced to confinement for thirty days. Finally, given that appellant was originally charged with three specifications of abusive sexual contact and one specification of sexual assault, it can hardly be said that the government “overreached” by allowing him to plead guilty to two specifications of assault consummated by battery.

For all of the reasons set forth above, appellant has failed to meet his burden to show any error, much less a plain or obvious error. Turning to the first prong of our Article 66, UCMJ, review, the same reasons establish that the findings and sentence are “correct in law.” *See Conley*, 78 M.J. at 749 n.3. As the findings and sentence are also “correct in fact,” the only thing left for us to determine under Article 66, UCMJ, is whether they “should be approved.” We note that appellant entered into a negotiated disposition and received even more than the benefit of his bargain, as he was sentenced to less than one-quarter of his bargained-for confinement cap. Indeed, after reviewing the entire record and taking into account the nature and circumstances of appellant’s crimes, “we view the terms of the agreement to be generous rather than onerous.” *Id.* at 753. As such, this case does not merit relief under Article 66’s third “should be approved” test.

B. Sentence Severity

Appellant argues that given the nature and seriousness of the offenses and his impeccable service record, “the sentence to dismissal was so disproportionate that it cries out for relief from this Honorable Court.” We disagree.

We review sentence appropriateness de novo under Article 66, UCMJ. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We consider the sentence severity, the entire record of trial, appellant’s character and military service, and the nature, seriousness, facts, and circumstances of the criminal course of conduct. *United States v. Martinez*, 76 M.J. 837, 841–42 (Army Ct. Crim. App. 2017).² While it is within our discretion to find that even a “legally correct” sentence is nevertheless disproportionate, *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018), we are not authorized to award clemency. *Martinez*, 76 M.J. at 840 (citations omitted).

² Appellant makes several references to the fact that the military judge only deliberated for fourteen minutes. Given that our review is de novo, we fail to see the import of this fact.

Not surprisingly, appellant focuses almost entirely on his good character as evidenced by his record of service and the myriad of witnesses who testified and wrote letters of support on his behalf. While we agree that appellant appears to have been a very competent intelligence officer, we are also required to consider the specific facts and circumstances of his criminal course of conduct, which tell a different story. Appellant, a senior Army captain with prior service and training as a victim advocate, touched Ms. (b) (6) several times in the most private areas of her body, her buttocks and vulva. Likewise, the facts that he tried to buy Ms. (b) (6) silence, lied to the manager about the incident, tried to flee the scene before the police arrived, and then again lied to the police, do not reflect well on his character. As the government succinctly states in its brief, after appellant got caught he "tried to bribe, abscond, and lie to hide his offenses." Finally, it is worth reiterating that although he is now challenging his dismissal as unduly severe, appellant's plea agreement, which he knowingly and voluntarily entered into with the advice of defense counsel, authorized a sentence that included a dismissal from the service.

In sum, having considered all of the relevant factors, to include the entire record of trial, appellant's character and military service, and the nature of seriousness of his criminal conduct, we find that appellant's sentence of a dismissal and confinement for thirty days was not excessively severe. To the contrary, on balance we find that "justice [was] done and that the accused [got] the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge (IMA) KRIMBILL and Senior Judge BROOKHART concur.

FOR THE COURT:

(b) (6)

MALCOLM H. SQUIRES, JR.
Clerk of Court