UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist JONATHAN B. WAINIONPA
United States Army, Appellant

ARMY 20210436

Headquarters, 7th Infantry Division
Larry A. Babin, Jr., Military Judge
Lieutenant Colonel Robert A. Rodrigues, Staff Judge Advocate

For Appellant: Captain Sean Patrick Flynn, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Sean Patrick Flynn, JA (on brief); Lieutenant Colonel Dale C. McFeatters, JA; Jonathan F. Potter, Esquire; Major Bryan A. Osterhage, JA; Captain Sean Patrick Flynn, JA (on reply brief).

For Appellee: Captain Lisa Limb, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Pamela L. Jones, JA; Captain Lisa Limb, JA (on brief).

20 January 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BROOKHART, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of violating a lawful general regulation, one specification of communicating a threat, and one specification of committing a

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

hate crime[2] in violation of Articles 92, 115, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 915, and 934 [UCMJ]. The military judge sentenced appellant to a bad conduct discharge, reduction to the grade of E-1, and confinement for 180 days. The convening authority took no action on the adjudged findings or sentence.

BACKGROUND

Appellant was an infantryman assigned to Fort Lewis, Washington. In October of 2019, appellant and a fellow Soldier ("other Soldier") encountered a bird that had flown inside the barracks. Appellant captured and killed the bird. Then, with the other Soldier recording on his cellphone, appellant threw the bird carcass into the barracks room occupied by the victim, a fellow infantryman who was African American. After throwing the bird in the victim's room, appellant held the door shut so that the victim could not exit or dispose of the dead bird.

A few days later, appellant and the other Soldier entered the latrine in the barracks where they encountered the victim using the urinal. The victim had the bottoms of his duty uniform unbuttoned and slightly down. While the victim still had his pants down, appellant forced him into a nearby stall and made him squat in a stress position over the toilet. Appellant then took a knife that was holstered on the victim's uniform bottoms and placed it against the victim's throat. While holding the knife to the victim's throat, appellant asked, "what is the number one rule of a knife fight?" and then immediately answered his own question, "expect to be cut." Finally, before appellant released the victim, he forced him to refer to himself with a highly offensive racial slur. The other Soldier video recorded portions of the assault using the camera on his cellphone.

Following an investigation, appellant was charged with one specification of conspiring with the other Soldier to commit an assault with the intent to inflict grievous bodily harm, in violation of Article 81, UCMJ; one specification of violating Army Regulation 600-20, paragraph 4-19, which prohibits hazing, in violation of Article 92, UCMJ; one specification of communicating a threat to the victim, in violation of Article 115, UCMJ; one specification of assault with the intent to inflict grievous bodily harm, in violation of Article 128, UCMJ; and one specification of indecent visual recording for recording the victim with his pants partially down, in violation of Article 120c, UCMJ. Lastly, appellant was charged under Article 134, UCMJ, with committing a hate crime, in violation of The Revised Code of Washington Section 9A.36.080 as assimilated into Federal law by 18 U.S.C. § 13.

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[2] Section 9A.36.080 of the Revised Code of Washington, assimilated into federal law by 18 U.S.C. § 13.

Ultimately, appellant pled guilty only to communicating a threat, violating a lawful general regulation, and committing the assimilated Washington State hate crime in violation of Articles 92, 115, and 134, UCMJ. The other offenses were dismissed by the convening authority pursuant to appellant's plea agreement.

Appellant now challenges his plea to violating the Washington State hate law, codified in Section 9A.36.080 of the Revised Code of Washington, as assimilated into federal law by 18 U.S.C. § 13, arguing that the offense was improperly charged as an assimilated crime.[3] We disagree and affirm the findings and sentence.

LAW AND DISCUSSION

An improperly assimilated offense is "not cognizable by court-martial" and therefore deprives the court of subject matter jurisdiction. *United States v. Robbins,* 52 M.J. 159, 160 (C.A.A.F. 1999). Subject matter jurisdiction is not subject to waiver. *United States v Cotton*, 535 U.S. 625, 630 (2002) (subject matter jurisdiction can never be waived or forfeited). As such, pleading guilty to an improperly assimilated offense does not preclude appellate review.

Clause 3 of Article 134, UCMJ, allows non-capital federal offenses to be charged and tried at courts-martial. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 91.c(4). Additionally, under Clause 3, state offenses may be assimilated for trial by court-martial pursuant to the provisions of the Federal Assimilated Crimes Act (ACA).[4] *MCM*, pt. IV, ¶ 91.c.(4)(a)(1)(iii). However, Clause 3 is intended only to fill gaps in the criminal conduct covered by the UCMJ. *MCM*, pt. IV, ¶ 91.c(1). Accordingly, the provision cannot be used to assimilate either a state or federal offense if the underlying wrongful conduct has already been criminalized by some provision of the UCMJ. *MCM*, pt. IV, ¶ 91.c(5)(a); *United*

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[3] Appellant filed two additional assignments of error, alleging that his conviction for communicating a threat and committing a hate crime were an unreasonable multiplication of charges and that he is entitled to relief for dilatory post-trial processing. Having fully considered these claims, we find both assignments of error to be without merit. Finally, we have fully and fairly considered the one assignment of error submitted by appellant and find it to also be without merit. *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] The ACA provides as follows: Whoever . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. 18 U.S.C. § 13(a).

States v. Erickson, 61 M.J. 230, 233 (C.A.A.F. 2005) (citing to *MCM*, 2005, pt. IV, ¶ 60.c.(5)(a)) ("The military preemption doctrine limits the application of Article 134 with respect to conduct covered by the specific punitive articles.").

Consistent with its gap-filling purpose, the first question when assessing the propriety of an assimilated state offense under the ACA is whether the act or omission at issue is "made punishable by any enactment of Congress" to include the provisions of the UCMJ. *Lewis v. United States*, 523 U.S. 155, 164 (1998); *Robbins*, 52 M.J. at 161–62. If the answer is "no," then the inquiry is normally at an end and the state law was properly assimilated. If the answer is "yes," then this court must ask whether the federal statutes that might apply to the wrongful conduct preclude application of the state law because applying the state law would interfere with a federal policy objective, re-write a definition considered by Congress, or because Congress intended to occupy the field to the exclusion of the state laws. *Lewis*, 523 U.S. at 164.

In this case, the facts show the victim was threatened with violence while appellant held a knife close to the victim's neck without making contact. The facts also show that appellant's wrongful conduct was motivated by the victim's race. Based upon these facts, appellant's wrongful conduct could constitute either communication of a threat motivated by racial animus or an assault by offer motivated by racial animus. The assimilated Washington State statute specifically criminalizes racially motivated threats which place the victim in reasonable fear of physical harm or destruction of property.[5] Accordingly, we are satisfied that appellant's conduct violated the assimilated statute. The remaining question is whether application of the Washington State criminal statute was preempted by any UCMJ or federal offense prescribing substantially the same conduct.

Communicating a threat is a defined offense under the UCMJ. Article 115, UCMJ. However, that offense does not address the racial animus element found in the Washington State statute. The UCMJ's assault statute also criminalizes offers to do violence with dangerous weapons, such as a knife, but similarly fails to address the racial motivation. Article 128(b)(1), UCMJ. In fact, the UCMJ does not define any offense that might be described as a hate crime. *See* The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 2096 (1994) (A "'hate crime' means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the

[5] "A person is guilty of a hate crime offense if he . . . maliciously or intentionally commits one of the following acts because of his . . . perception of the victim's race, color . . . threatens a specific person . . . and places that person . . . in reasonable fear of harm to person or property. The fear must be a fear that a reasonable person would have under all the circumstances." Wash. Rev. Code § 9A.36.080(1)(c).

crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of any person."). Accordingly, we find that appellant's conduct was not covered by any of the offenses enumerated in Articles 80 through 132 of the UCMJ. *MCM*, pt. IV, ¶ 91.c(5)(a).

For its part, the federal criminal code does contain a hate crime statute. 18 U.S.C. § 249. However, as drafted and applied, that statute criminalizes only racially motivated assaults which attempt to cause or result in bodily injury to the victim. 18 U.S.C. § 249(a)(1).[6] The applicable definition of bodily injury requires an actual physical injury to the body. 18 U.S.C. § 1365(h)(4). Emotional and psychological harm are explicitly excluded from the definition of bodily injury. 18 U.S.C. § 249(c)(1). We find that these limitations work to prohibit application of the hate crimes statute to mere threats of violence or to offer-type assaults. Accordingly, based upon the plain language of the statutes in question, we are satisfied that no enactment of Congress criminalizes threats of violence motivated by racial animus.[7] *Robbins*, 52 M.J. at 161–63. Therefore, we hold that the conduct prohibited by the Washington State hate crime law was not covered by any enactment of Congress and was properly assimilated.[8]

Even if appellant's wrongful conduct was arguably made punishable by the UCMJ or the federal hate crimes statute, we would still find the Washington State statute properly assimilated, applying the second part of the test enunciated in *Lewis*. 523 U.S. at 164. Initially, we find no evidence that application of the Washington State statute constitutes a residuum of elements of any UCMJ or federal offense which eases the government's evidentiary burden. *United States v. Curry*, 35 M.J. 359, 360–61 (C.M.A. 1992)(citing *United States v. McGuinness*, 35 M.J. 149, 151–52 (C.M.A. 1992)); *Wheeler*, 77 M.J. at 293. With regard to the most closely related UCMJ offenses, assault with a deadly weapon and communicating a threat, the Washington State statute actually adds an element by requiring proof of racial motivation accompanying any threating words or actions, thereby increasing the government's burden.

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[6] "Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin or any person . . ." 18 U.S.C. § 249(a)(1)

[7] There is no evidence that appellant was attempting to injure the victim with his knife but failed to do so.

[8] Contrary to appellant's assertion, the sentencing factors in the Rules for Courts-Martial are not acts of Congress. Article 36, UCMJ.

With respect to the federal hate crime statute, we recognize that the Washington State law does not have an element requiring proof of bodily injury. That statute does, however, require a threat to a specific person placing that person in reasonable fear of harm to their person or property. Wash. Rev. Code § 9A.36.080(1)(c). While it might appear that issuing a mere threat is lesser wrongful conduct than inflicting actual injury, we find the elements of the Washington State statute are "aimed with precision at a particular type of intentional conduct" with an evidentiary burden distinct from the federal hate crime statute. *Wheeler*, 77 M.J. at 293 (citing *Curry*, 35 M.J. at 361 (C.M.A. 1992). As such, we conclude there is a substantial difference in the behavior made criminal by the two statutes, creating a gap for the state law to properly fill. *Robbins*, 62 M.J. at 162 (citing *Lewis*, 523 U.S. at 164–66).[9]

We further find that application of the Washington State statute neither countermands any federal policy nor encroaches on a field of criminality Congress intended to completely occupy. *Erickson,* 61 M.J. at 233 (C.A.A.F. 2005) (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)). To the contrary, Congress's enactment of the federal hate crime statute was premised on the Congressional finding that hate crimes are an intractable problem that federal law is inadequate to properly address. 30 U.S.C. § 30501(1), (4) & (10). Congress specifically acceded significant leeway to the states in devising their own laws to address the problem. 30 U.S.C. § 30501(3). These findings conclusively demonstrate that Congress did not intend the federal law to limit prosecution by the states, but rather to provide a backstop in limited circumstances. *United States v Avery*, 79 M.J. 263, 366 (C.A.A.F. 2020)(citing *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (finding a Congressional intent to preempt requires "direct legislative language or express legislative history")). Accordingly, we are satisfied that the Washington State statute was properly assimilated and appellant's conviction for violating it was legally and factually sufficient.

CONCLUSION

Appellant's claim of improper assimilation is denied. The findings and sentence are correct in law and fact and are AFFIRMED.

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[9] Appellant also avers that his conduct was covered by 18 U.S.C. §245, which criminalizes racially motivated interference by force, threat or intimidation with certain designated federal activities such as voting or seeking accommodations. 18 U.S.C. §245(b). However, that act too contains a unique element alleging a qualified protected activity. In this case, the victim was not engaging in any protected activities at the time of appellant's racially motivated assault.

Judge PENLAND and Judge ARGUELLES concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court