

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING¹, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant BRENDAN S. GOUNDRY
United States Army, Appellant

ARMY 20220218

Headquarters, 1st Armored Division and Fort Bliss
Robert L. Shuck, Military Judge
Colonel Andrew D. Flor, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Kevin T. Todorow, JA (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Captain Cynthia A. Hunter, JA; Captain A. Benjamin Spencer, JA (on brief).

6 April 2023

SUMMARY DISPOSITION

PARKER, Judge:

Appellant raises one assignment of error which merits discussion and relief. Appellant argues his convictions for domestic violence under Charge I, Specifications 1, 2, and 3, are multiplicitous. The government concedes Specifications 2 and 3 are multiplicitous. We agree that Specifications 2 and 3 of Charge I are multiplicitous and provide relief in our decretal paragraph.

BACKGROUND

Pursuant to his pleas, appellant was found guilty of six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 928b [UCMJ], which included one specification of strangulation and five

¹ Judge EWING decided this case while on active duty.

specifications of assault consummated by battery.² Pursuant to his pleas, appellant was also found guilty of one specification of failure to obey a lawful order and one specification of a violation of a lawful general regulation, both in violation of Article 92, UCMJ. Appellant was sentenced to a bad-conduct discharge, 340³ days of confinement, and reduction to the grade of E-1.

Appellant was a military police officer stationed at Fort Bliss, Texas. Appellant and Private First Class (PFC) [REDACTED] also a military police officer, began dating around March of 2021. During the course of their relationship there were three distinct date ranges that formed the basis of the domestic violence convictions. We will tailor our discussion to the 12 August 2021 offenses, since those convictions form the basis of Specifications 1, 2, and 3 of Charge I.

On 12 August 2021, appellant and PFC [REDACTED] were in a hotel room in El Paso, Texas. When PFC [REDACTED] attempted to leave the hotel room, appellant grabbed her body and threw her on the bed to prevent her from leaving, pulled her hair, and then strangled her by placing both of his hands around her throat and applying pressure, causing PFC [REDACTED] to plea for appellant to “stop” and that “[she] couldn’t breathe.”⁴ Hearing PFC DD’s plea, appellant stopped strangling her, apologized, and the two continued their dating relationship. Eventually another soldier who had witnessed bruises on PFC [REDACTED] reported appellant to her command and an investigation followed.

² Pursuant to his plea, appellant was found guilty by exceptions and substitutions to Specification 4 of Charge I. Additionally, per the plea agreement, appellant pled not guilty and the government dismissed, a seventh specification of domestic violence that formed the basis of Specification 7 of Charge I.

³ Appellant’s confinement was adjudged as follows: Specification 1 of Charge I: 100 days; Specification 2 of Charge I: 30 days; Specification 3 of Charge I: 30 days; Specification 4 of Charge I: 30 days; Specification 5 of Charge I: 30 days; Specification 6 of Charge I: 60 days; Specification 1 of Charge II: 30 days; Specification 2 of Charge II: 30 days, to be served consecutively.

⁴ Appellant argues that Specifications 1, 2, and 3 of Charge I are multiplicitous. We decline to discuss appellant’s argument as to Specification 1, except to highlight that Specification 1 involves a domestic violence conviction by strangulation. Specifications 2 and 3 involve domestic violence convictions by assault consummated by battery involving appellant grabbing PFC [REDACTED] and throwing her body with his hands, and by pulling PFC [REDACTED]’s hair with his hands, respectively.

LAW AND DISCUSSION

Given that appellant unconditionally pleaded guilty at trial, we consider appellant's claim that Specifications 2 and 3 of Charge I are multiplicitious under a plain error standard of review.⁵ *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, 687 n.1 (Army Ct. Crim. App. 2013) ("An unconditional guilty plea, without an affirmative waiver, results in a forfeiture of multiplicity issues absent plain error."). "Facially duplicative means the factual components of the charged offenses are the same. *Id.* (citing *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)) "Whether two offenses are facially duplicative is a question of law that we will review de novo." *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004).

We find plain error in this case in that the military judge accepted a guilty plea to two specifications that were facially duplicative. When PFC [REDACTED] attempted to leave the hotel room, appellant grabbed her and threw her on the bed, and then once on the bed, intentionally pulled her hair out of anger. These two separate offenses of domestic violence by assault consummated by battery were contemporaneous in time and uninterrupted, and constitute one continuous course of conduct, which the government concedes. Hence these two offenses have the same factual components and form the basis of what should have been one charged offense. In finding these two convictions multiplicitious, we merge them to remedy this error, and then reassess the sentence since appellant's conviction to both specifications each came with an adjudged thirty days of confinement to be served consecutively.

This court also has broad discretion when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). In this case we are in the unique position of knowing exactly what confinement punishment appellant received for each offense to run consecutively. Appellant was adjudged thirty days of confinement for Specification 2 of Charge I, and thirty days of confinement for Specification 3 of Charge I, to run consecutively. Since we find Specifications 2 and 3 of Charge I to be multiplicitious and merge them into one specification, we will also provide thirty days of confinement sentence relief. We are satisfied that the sentence adjudged for appellant's remaining offenses would have been at least a bad conduct discharge, 310 days of confinement, and reduction to the grade of E-1. *See*

⁵ 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."

United States v. Winckelmann, 73 M.J. 11, 15–16 (C.A.A.F. 2013); *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

CONCLUSION

On consideration of the entire record, Specification 3 of Charge I is merged into Specification 2⁶ of Charge I. The remaining findings of guilty are AFFIRMED. Only so much of the sentence that provides for a bad-conduct discharge, confinement for 310 days, and reduction to the grade of E-1 is AFFIRMED.

Senior Judge WALKER and Judge EWING concur.

FOR THE COURT:



✓ JAMES W. HERRING, JR.
Clerk of Court

⁶ Specification 2 of Charge I is hereby amended to read as follows: “In that Sergeant Brendan Goundry, U.S. Army, did, at or near El Paso, Texas, on or about 12 August 2021, commit a violent offense against Private First Class [REDACTED] to wit: grabbed and threw her body and pulled her hair with his hands, and at the time of the offense, Private First Class [REDACTED] was the intimate partner of the accused.”