

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist WILLIE R. RAWLS
United States Army, Appellant

ARMY 20120995

Headquarters, 3rd Infantry Division and Fort Stewart (convened)
Headquarters, Fort Stewart (action)
Tiernan Dolan, Military Judge
Colonel Randall J. Bagwell, Staff Judge Advocate

For Appellant: Captain Payum Doroodian, JA; Frank J. Spinner, Esquire (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie, III, JA; Captain Benjamin W. Hogan, JA (on brief).

24 February 2015

SUMMARY DISPOSITION

LIND, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of wrongful sexual contact, indecent act, indecent exposure, assault consummated by a battery, and unlawful entry in violation of Articles 120, 128, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 920, 928, 934 (2006 & Supp. IV 2011). The military judge convicted appellant, contrary to his pleas, of rape* and burglary in violation of Articles 120 and 129,

* Appellant was convicted of two specifications of rape (Specifications 1 and 2 of Charge I). However, after findings, the military judge found that “Specifications 1 and 2 of Charge I are one offense, both for sentencing and for findings,” and ordered that the two specifications “be combined into one specification and that Specification 2 be subsequently dismissed.”

UCMJ, 10 U.S.C. §§ 920, 929 (2006 & Supp. IV 2011). The military judge sentenced appellant to a dishonorable discharge, eleven years confinement, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for ten years and ten months, and reduction to the grade of E-1. The convening authority also credited appellant with 183 days against the sentence to confinement.

Appellant's case is before the court for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error. Two merit discussion and relief.

*Charging in the Alternative:
Burglary and Unlawful Entry*

Appellant pled guilty to an unlawful entry of Private (PVT) KT's dwelling on or about 20 November 2011 (Specification 2 of Charge IV). Appellant was also convicted, contrary to his pleas, of burglary of PVT KT's dwelling, with the intent to commit wrongful sexual contact therein, on or about 20 November 2011 (Specification 2 of Charge III). Appellant now argues the unlawful entry conviction should be set aside because it is a lesser-included offense of burglary.

Unlawful entry is not a lesser-included offense of burglary because it contains the additional terminal element of Article 134, UCMJ: conduct that is prejudicial to good order and discipline in the armed forces or service discrediting. *See Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶¶ 55.b, 111.b; *United States v. McMurrin*, 70 M.J. 15, 18 (C.A.A.F. 2011) (negligent homicide under Article 134, UCMJ, is not a lesser-included offense of involuntary manslaughter under Article 119, UCMJ); *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011) (negligent homicide under Article 134, UCMJ, is not a lesser-included offense of premeditated murder under Article 118, UCMJ); *United States v. Jones*, 68 M.J. 465, 473 (C.A.A.F. 2010) (indecent acts under Article 134, UCMJ, is not a lesser-included offense of rape under Article 120, UCMJ); *United States v. Miller*, 67 M.J. 385, 388-89 (C.A.A.F. 2009) (simple disorder under Article 134, UCMJ, is not a lesser-included offense of resisting apprehension under Article 95, UCMJ).

However, we nonetheless hold that the unlawful entry conviction should be set aside and dismissed because the government conceded at trial that it was charged as an alternative theory to the burglary. *See United States v. Elespuru*, 73 M.J. 326 (C.A.A.F. 2014).

Immediately after trial counsel announced the general nature of the charges, the military judge engaged in the following exchange with trial counsel:

MJ: [I]s Specification 2 [of Charge III] also referring to the same act as those alleged in . . . Specification 2 of Charge IV?

TC: Yes, Your Honor.

MJ: That's an alternate theory of charging?

TC: Yes, Your Honor.

When it is agreed upon at the trial level that two offenses are charged in the alternative and appellant is found guilty of both offenses, we must either consolidate or dismiss one of the offenses. *Id.* at 329-30. We will set aside and dismiss the unlawful entry conviction in our decretal paragraph.

*Multiplicity and Unreasonable Multiplication of Charges:
Indecent Act and Indecent Exposure*

Appellant pled guilty to an indecent act for exposing his penis and masturbating in the presence of PVT KT on or about 20 November 2011 (Specification 4 of Charge I). He also pled guilty to indecent exposure of his genitalia to PVT KT on or about 20 November 2011 (Specification 5 of Charge I). Appellant now argues the military judge should have dismissed either the indecent exposure offense or the indecent act offense after application of the doctrines of multiplicity or unreasonable multiplication of charges.

“[A]ppellate consideration of multiplicity claims is effectively waived by unconditional guilty pleas, except where the record shows that the challenged offenses are ‘facially duplicative.’” *United States v. St. John*, 72 M.J. 685, 687 (Army Ct. Crim. App. 2013) (quoting *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)) (alteration in original); *see also United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Our court and our superior court have interpreted this “waiver” to mean that, in the absence of an affirmative waiver, an unconditional guilty plea “forfeits” consideration of multiplicity issues on appeal absent plain error. *St. John*, 72 M.J. at 687 n.1; *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). An appellant may demonstrate plain error by proving the offenses are “facially duplicative.” *St. John*, 72 M.J. at 687 n.1.

“Facially duplicative” means the factual components of the charged offenses are the same. *Id.* at 687 (citing *Lloyd*, 46 M.J. at 23). “Two offenses are not facially duplicative if each ‘requires proof of a fact which the other does not.’” *Pauling*, 60 M.J. at 94 (quoting *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004)). This analysis does not solely involve a “‘literal application of the elements test,’” but rather requires a “realistic comparison of the two offenses to determine

whether one is rationally derivative of the other.” *Id.* (quoting *Hudson*, 59 M.J. at 359). It “turns on both the factual conduct alleged in each specification and the providence inquiry conducted by the military judge at trial.” *Id.* (quoting *Hudson*, 59 M.J. at 359) (internal quotation marks omitted). Consequently, where after examination of these factors, an offense is a lesser-included offense of another, the offenses are facially duplicative. *See St. John*, 72 M.J. at 688-89; *see also United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

We find these offenses as charged in this case are facially duplicative because the conduct alleged in the indecent exposure specification is factually the same as that alleged in the indecent act specification. The providence inquiry established that both offenses involved the same exposure of appellant’s penis in PVT KT’s barracks room in the presence of PVT KT and no one else on or about 20 November 2011. Under the facts of this case, the indecent exposure was a lesser-included offense of the indecent act and it was plain error for the military judge to allow both convictions to stand. *See St. John*, 72 M.J. at 688-89. We will set aside and dismiss the indecent exposure conviction in our decretal paragraph.

CONCLUSION

The finding of guilty of Specification 5 of Charge I is set aside. Specification 5 of Charge I is dismissed. The findings of guilty of Specification 2 of Charge IV and Charge IV are set aside. Specification 2 of Charge IV and Charge IV are dismissed. The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the military judge would have adjudged the same sentence absent the errors noted. The approved sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored.

Judge KRAUSS and Judge PENLAND concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court