

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
TOZZI, CAMPANELLA, and CELTNIIEKS  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Sergeant THEODORE H. KREMER**  
**United States Army, Appellant**

ARMY 20130592

Headquarters, Fort Leonard Wood  
Jeffery R. Nance and William L. Deneke, Military Judges  
Colonel Robert R. Resnick, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Yolanda D. McCray, JA;  
Captain Brian D. Andes, JA (on brief).

For Appellee: Major John K. Choike, JA; Major A.G. Courie, III, JA (on brief).

27 August 2015

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SUMMARY DISPOSITION  
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CAMPANELLA, Judge:

An enlisted panel, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of rape and one specification of aggravated sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2006 & Supp. V 2012) [hereinafter UCMJ]. The panel sentenced appellant to ten years confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. The military judge credited appellant with three days confinement credit. The convening authority approved the sentence as adjudged including three days confinement credit.

This case is before us for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error, one of which warrants discussion

and relief. We find the issues raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) are without merit.<sup>1</sup>

### BACKGROUND

Ms. LP and her boyfriend, JW, along with family and other friends, were vacationing at the Lake of the Ozarks, Missouri, during Memorial Day weekend in 2012. After a day of leisure and a short nap, Ms. LP and her friends gathered at the beach that evening. While at the beach, the group met appellant, who was at the resort for a marriage retreat with his wife. Appellant's wife, however, was not with him at that time. After interacting for a bit at the beach, appellant went back to Ms. LP's hotel suite with her and the group to mingle further.

After socializing for a short time, Ms. LP and JW retired to their bedroom in the hotel suite, leaving the rest of the group in the shared living room suite space.<sup>2</sup> Ms. LP and JW had sexual intercourse and fell asleep. A short time later, appellant awoke Ms. LP by moving on top of her, kissing her, and having vaginal intercourse with her. Ms. LP's first thought was that appellant was her boyfriend, with whom she had just been intimate. As such, she did not initially object and began to respond positively. As she awakened, however, she realized the smell and touch of the male on top of her were not that of her boyfriend. She opened her eyes to find appellant.

Ms. LP began to yell "no" and "stop" and tried to kick appellant and push him away. JW was in a deep sleep beside them on the other side of the bed. Ms. LP struggled to break free from appellant's grasp but felt helpless under his weight. Ms. LP finally grabbed her boyfriend's arm to wake him. Once roused from his sleep and realizing what was happening, JW struck appellant and shouted for appellant to "get the fuck out of here." Appellant got out of the bed, put on his shorts, grinned at the couple, and strolled out of the room. Responding to JW's questions, Ms. LP confirmed that appellant put his penis inside her vagina. JW quickly got dressed, chased and caught appellant who was wandering away. JW promptly pummeled appellant for a short time when he caught up to him and then held him until the police arrived.

At trial appellant was found guilty of: 1) rape by using strength sufficient that Ms. LP could not avoid or escape the sexual conduct and, 2) aggravated

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<sup>1</sup> As we grant relief in our decretal paragraph dismissing the aggravated sexual assault specification, appellant's assertions under *Grostefon* concerning panel instructions are rendered moot.

<sup>2</sup> The hotel suite the group was sharing had two bedrooms and a separate shared living room with a kitchen and dining area.

sexual assault, to wit: inserting his penis inside Ms. LP's vagina when she was substantially incapable of communicating her unwillingness to engage in the sexual act.

At trial the defense raised the issue of unreasonable multiplication of charges (UMC) before and after pleas. The military judge allowed the government to proceed on both theories, not knowing what evidence might come out during the court-martial. After the panel found appellant guilty of both specifications, the military judge held the two specifications were unreasonably multiplied for sentencing but not for findings. On appeal, appellant argues the two Article 120, UCMJ, specifications represent an unreasonable multiplication of charges for findings. We agree with appellant that the two specifications amount to an unreasonable multiplication of charges, but disagree as to which specification constitutes the gravamen of the offense.

### LAW AND DISCUSSION

We review claims of unreasonable multiplication of charges under an abuse of discretion standard. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)). “What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” Rule for Courts-Martial [hereinafter R.C.M.] 307(c)(4). We consider five factors to determine whether charges have been unreasonably multiplied:

- (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
- (2) Is each charge and specification aimed at distinctly separate criminal acts?
- (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
- (4) Does the number of charges and specifications [unreasonably] increase [the] appellant's punitive exposure?
- (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

*United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001) (internal citation and quotation marks omitted) (internal alteration reflects the holding in *Quiroz* that “unreasonably” will be utilized instead of “unfairly”).

Here, the *Quiroz* factors on balance weigh in favor of appellant. Appellant's initial act of penetrating Ms. LP while she slept could constitute aggravated sexual assault in that she was substantially incapable of communicating her unwillingness to engage in the sexual act. But when Ms. LP woke up and began to struggle and resist as appellant vaginally penetrated her, appellant's behavior converted into rape as he forcefully held her down. While the panel found appellant guilty of both charged specifications beyond a reasonable doubt, we cannot agree with the government that both should stand. Appellant's convictions for rape and aggravated sexual assault as charged are predicated upon the same continuing criminal act.

Because appellant objected at trial, the first *Quiroz* factor weighs in his favor. We find that the second factor weighs in favor of appellant since the two offenses are aimed at the same criminal act—namely the penetration of Ms. LP's vagina with appellant's penis. In this case, the two convictions unreasonably exaggerate appellant's criminality, especially when the government conceded at trial “[i]t was a single act.” Although the military judge's ruling prevented appellant from being unfairly subjected to an increase in punishment, appellant's additional conviction ultimately exaggerates his criminality under the third *Quiroz* factor.

The fourth factor weighs against appellant, as the military judge's remedy of “merging the offenses for sentencing” means appellant's punitive exposure was not increased from the additional conviction. We do not find evidence of prosecutorial overreaching or abuse in the drafting of the charges. The government may charge multiple theories of its case, contingent upon various exigencies of proof, as the government “has broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case.” *Ball v. United States*, 470 U.S. 856, 859 (1985).

Accordingly, we conclude there was an unreasonable multiplication of charges in this case. See *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (noting one or more factors may be sufficiently compelling, without more, to warrant relief). Once this court determines that specifications are an unreasonable multiplication of charges, this court should identify the gravamen offense and dismiss the other offense(s). See *United States v. Hinkle*, 54 M.J. 680 (N.M. Ct. Crim. App. 2000) (citing, *inter alia*, *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)).

Although we only affirm appellant's conviction for rape, this relief does not affect the sentence because the military judge instructed the panel to treat both offenses as one for sentencing purposes. The penalty landscape has not changed and the remaining factors announced in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), weigh in favor of reassessing and affirming the sentence.

## CONCLUSION

On consideration of the entire record, the matters submitted pursuant to *Grostefon*, and the assigned errors, the finding of guilty of Specification 2 of The Charge is set aside. Specification 2 of The Charge is DISMISSED. The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the error noted and the principles of *Winckelmann*, the 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.

Senior Judge TOZZI and Judge CELTNIIEKS concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr." in a cursive script.

MALCOLM H. SQUIRES, JR.  
Clerk of Court