12 November 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

NICHOLAS R. ELESPURU,
Airman First Class (E-3), USAF,
Appellant.

Crim. App. Dkt. No. 38055
USCA Dkt. No. 14-0012/AF

BRIEF IN SUPPORT OF PETITION GRANTED

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	)	**PETITION GRANTED**
Appellee,	)	
	)	USCA Dkt. No. 14-0012/AF
v.	)	
	)	Crim. App. Dkt. No. 38055
	)	
NICHOLAS R. ELESPURU,	)	
Airman First Class (E-3),	)	
United States Air Force,	)	
	)	
Appellant.	)	

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Granted

WHETHER SPECIFICATIONS 2 AND 3 OF CHARGE I ARE MULTIPLICIOUS.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(b)(1), Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 866(b)(1). This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. 867(a)(3).

Statement of the Case

On 14 July 2011 a general court-martial of officer and enlisted members convicted Appellant, contrary to his pleas, of divers abusive sexual contact upon a substantially incapacitated person in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2007); divers wrongful sexual contact in violation of Article

120, UCMJ, 10 U.S.C. § 920 (2007); and assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. J.A. 12, 60. He was sentenced to a reduction to E-1, 36 months of confinement, and a dishonorable discharge. J.A. 96. On 16 November 2011, the convening authority approved the findings and sentence. J.A. 5-8. On 9 July 2013, the Air Force Court affirmed. J.A. 1-4. A copy of that decision was mailed to Appellant on 10 July 2013.

On 6 September 2013, Appellant filed a Petition for Grant of Review and a Supplement with this Court. On 9 September 2013, the Government entered a general opposition. Review of the above-stated issue was granted on 15 October 2013.

Statement of Facts

The misconduct underlying the two specifications at issue here consisted of Appellant touching AEL's breasts and vagina as she was sleeping in his residence at Kadena Air Base, Japan. J.A. 23. The touching occurred over four separate incidents. During each incident, AEL awoke to Appellant touching her breasts and her vagina with his hands. AEL would tell Appellant to stop, and he would. AEL would fall back to sleep and be awoken again by the Appellant touching her. J.A. 25-27.

Specifications 2 and 3 of Charge I read as follows:

> Specification 2: In that AIRMAN FIRST CLASS NICHOLAS R. ELESPURU . . . did, at or near Kadena Air Base,

> Okinawa, Japan, on or about 21 August 2010, on divers occasions engage in sexual contact, to wit: touching with his hands the genitalia and the breast, of AIRMAN FIRST CLASS [AEL], while she was substantially in capable of declining participation in the sexual contact or communicating unwillingness to engage in the sexual contact.
>
> Specification 3: In that AIRMAN FIRST CLASS NICHOLAS R. ELESPURU . . . did, at or near Kadena Air Base, Okinawa, Japan, on or about 21 August 2010, on divers occasions engage in sexual contact with AIRMAN FIRST CLASS [AEL], to wit: touching with his hands her genitalia and breast, and such contact was without legal justification or lawful authorization and without the permission of AIRMAN FIRST CLASS [AEL].

J.A. 12.

Specification 2 of Charge I is an offense under Article 120, UCMJ, called *abusive sexual contact by engaging in a sexual act with a person substantially incapacitated*[.] MANUAL FOR COURTS-MARTIAL UNITED STATES (2012 ed.) ("MCM") app. 23, ¶¶ 45.a.(h), 45.b.(8)(c), and 45.g.(8)(c). The elements of that offense are:

> (i)(a) That the accused engaged in sexual contact with another person; or
>
> (b) That the accused caused sexual contact with or by another person; and [either];
>
> (ii) That the other person was substantially incapacitated;
>
> (iii) That the other person was substantially incapable of appraising the nature of the sexual contact;
>
> (iv) That the other person was substantially incapable of declining participation in the sexual contact; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual contact.

MCM app. 23, ¶ 45.b.(8)(c).

Specification 3 of Charge I is an offense under Article 120, UCMJ, called *wrongful sexual contact*. *See* MCM app. 23, ¶¶ 45.a.(m), 45.b.(13), and 45.g.(13). The elements are:

(a) That the accused had sexual contact with another person;

(b) That the accused did so without that other person's permission; and

(c) That the accused had no legal justification or lawful authorization for that sexual contact.

MCM app. 23, ¶ 45.b.(13).

In findings, the military judge instructed as if both allegations were separate offenses. J.A. 38-40. In findings argument, both trial and defense counsel argued as if the offenses were separate. J.A. 53-59. The two specifications were merged for purposes of calculating the maximum imposable punishment. J.A. 61-62, 84. However, the members were not instructed that the Appellant could not be punished for both offenses. J.A. 22, 83-92. Rather, the military judge instructed the members, orally and in writing, that "[a] single sentence shall be adjudged for all offenses of which the accused has been found guilty." J.A. 84, 118. Neither trial counsel nor defense counsel requested a merger instruction or objected

to the lack thereof. J.A. 92. Neither counsel mentioned merger during their sentencing arguments. J.A. 64-79.

At trial, defense counsel filed a motion alleging unreasonable multiplication of charges for findings and "multiplicity for sentencing" under Rules for Courts-Martial (R.C.M.) 307(c)(4) and 1003(c)(1)(C), respectively. J.A. 15-20, 111-15. Trial defense counsel did not assert unconstitutional multiplicity. *Id*. Trial defense counsel stated "[t]he elements test is not met in this case" and that wrongful sexual contact was not a lesser included offense of abusive sexual contact. J.A. 16. Government trial counsel conceded "what we did is we charged a reasonable offense that looks a lot like an LIO, wrongful sexual contact, which we don't have to prove that someone was substantially incapacitated by someone who was substantially incapacitated." J.A. 18. The military judge purported to find that wrongful sexual contact was not a lesser included offense of abusive sexual contact. J.A. 21. However, the judge paradoxically also opined that "arguably [the defense] can make a motion [that the specifications are] duplicitous [sic] and [the government] could multiply [the charges] out." J.A. 22. The military judge then ruled at J.A. 22:

> [The specifications are] not automatically to be combined or instructed on the members that way; I'm not going to grant any relief at this point. I'm also not going to grant any relief post findings – or pre-

> findings based on the state of the evidence, because although the convening authority may not have considered the appeal, it is reasonable that if there's a conviction on both, both should go up to the Appellate Court to deal with ...

Summary of Argument

Under *Blockburger* elements test, Specification 3 of Charge I, alleging wrongful sexual contact, is a lesser included offense of Specification 2 of Charge I, alleging abusive sexual contact. As such, Specification 3 of Charge I must be dismissed as it is facially duplicative. Further, because the members sentenced Appellant as if these were two separate offenses, a sentence reassessment or rehearing is required.

Argument

SPECIFICATIONS 2 AND 3 OF CHARGE I ARE MULTIPLICIOUS.

Standard of Review

This Court "conduct[s] a de novo review of multiplicity claims." *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006); *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004); *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

Law

This issue was not waived. "[E]ven in cases in which an appellant failed to raise multiplicity at trial, he would be entitled to relief if the specifications were facially duplicative." *United States v. Gladue*, 67 M.J. 311, 314

(C.A.A.F. 2009). Only "express waiver or voluntary consent" precludes review of multiplicity claims. *Id*. Additionally, a waiver of multiplicity issues must be "knowing and intelligent." *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997).

Trial defense counsel purported to concede that Specifications 2 and 3 of Charge I were not multiplicious because the elements test was not met. J.A. 16. However, those statements are a result of counsel's confusion regarding the application of the elements test for multiplicity, not an express and knowing and intelligent waiver by Appellant. Additionally, despite the purported concession, trial defense counsel simultaneously filed a "multiplicity for sentencing" motion. J.A. 15-20, 111-15. "As a matter of logic and law, if an offense is multiplicious for sentencing it must necessarily be multiplicious for findings as well." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). "[T]here is only one form of multiplicity[.]" *Id*. Perhaps for that reason, this Court has previously found, in *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997), that an objection on the basis of multiplicity for sentencing is sufficient to preserve appellate review of a multiplicity claim.

Further, trial defense counsel made clear on the record, at J.A. 16, that he withheld fully objecting on multiplicity

grounds only because he believed this Court's decision in *United States v. Jones,* 68 M.J. 465 (C.A.A.F. 2010) precluded finding that wrongful sexual contact was a lesser included offense of abusive sexual contact. The military judge concurred in that assessment, opining, "[g]iven Jones I think almost everything has become a non-LIO with a few exceptions." J.A. 16.

Trial defense counsel and the military judge were both incorrect. *Jones* does stand for the proposition that one offense being "inherently related to" or "fairly embraced by" another greater offense does not a lesser-included offense make. *Jones*, 68 M.J. at 470. However, *Jones*, 68 M.J. at 470, fully adopted the Supreme Court's jurisprudence in *Schmuck v. United States,* 489 U.S. 705, 717 (1989). *Schmuck* permits finding an offense to be "necessarily included in the offense charged," even when the elements as enumerated for each offense are not duplicated verbatim. 489 U.S. at 716-17. This is permissible so long as "the comparison is appropriately conducted by reference to the statutory elements of the offenses in question, and not . . . by reference to conduct proved at trial regardless of the statutory definitions. *Id*. Thus, *Schmuck* and *Jones* do not dictate an elements test that is nothing more than a wooden verbatim comparison between elements. Trial defense counsel and the military judge failed to recognize that, instead, the

elements test requires a careful comparison of the statutory elements for each offense to determine whether the elements of one offense are necessarily included in the other. The failure of both the military judge and trial defense counsel to recognize the true nature of the elements test militates against finding intelligent and knowing waiver by this lay Appellant.

Unconstitutional multiplicity exists if allegations are "facially duplicative, that is, factually the same." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). Absent manifest Congressional intent otherwise, the "elements test" is used to determine whether specifications are facially duplicative. *Campbell*, 71 M.J. at 26; *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993); *United States v. Blockburger*, 284 U.S. 299, 304 (1932). Under the "elements test," offenses are duplicative unless "each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304; *Gladue*, 67 M.J. at 316. Necessarily, then, unconstitutional multiplicity exists, and cumulative punishment is prohibited, if one allegation is a lesser included offense of the other. *Brown v. Ohio*, 432 U.S. 161, 169 (1977); *Palagar*, 56 M.J. at 296; *United States v. Cherukuri*, 53 M.J. 68, 72 (C.A.A.F. 2000).

There is but one remedy for unconstitutional multiplicity: dismissal of the multiplied offense. *Campbell*, 71 M.J. at 23. To carry out that remedy this Court may order a remand to the Air Force Court and afford the government an opportunity to elect which conviction to retain. *Palagar*, 56 M.J. at 296; *United States v. Rodriquez,* 18 M.J. 363 (C.M.A. 1984); *United States v. Frelix-Vann*, 55 M.J. 329 (C.A.A.F. 2001). As an alternative, this Court may dismiss the lesser included offense and, absent prejudice, affirm the sentence. *Cherukuri,* 53 M.J. at 72; *Harwood,* 46 M.J. at 26.

Analysis

Applying the *Blockburger* elements test, Specification 3 of Charge I is the multiplicious lesser included offense of Specification 2 of Charge I. This is true because Specification 3, wrongful sexual contact, contains no elements which are not also present in Specification 2, abusive sexual contact, either explicitly or by necessary implication. The inverse is not true because this abusive sexual contact offense requires the additional fact of victim incapacitation.

Specifically, the first element of both specifications allege divers sexual contact with the same person, in the same manner, at the same time, at the same location. The last two elements of Specification 3, lack of consent and wrongfulness,

are necessarily included elements of Specification 2, even though not stated explicitly in the MCM. Thus, Specification 3 of Charge I is wholly subsumed into Specification 2 of the same.

Lack of consent and wrongfulness are implied and necessary elements of abusive sexual contact.

The military judge instructed that consent was a defense to abusive sexual contact. J.A. 39. This confirms that lack of consent is implicitly required for a conviction thereon. Further, concluding that lack of consent is not an implicit element of abusive sexual contact would permit perverse and illogical convictions. A conviction for abusive sexual contact could stand even if a finder of fact concluded that the victim consented. Such a finding would negate the element of the same offense requiring substantial incapacitation since a victim who has expressed consent *per se* was not incapacitated; making a conviction thereon logically impossible. Similarly, concluding that wrongfulness is not an element of abusive sexual contact would permit convictions to stand even if the fact finder found legal justification or excuse for the alleged sexual contact.

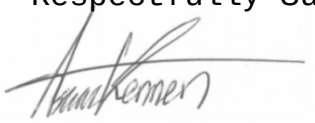
Conclusion

Article 120, UCMJ, may not be read in a way that would permit illogical and perverse convictions. Therefore, lack of consent and wrongfulness are implicit elements of abusive sexual contact allegations. Accordingly, Specification 3 of Charge I

must be dismissed as the facially duplicative lesser included offense of Specification 2 of the same Charge. Further, the sentence as adjudged may not be affirmed because doing so would violate Appellant's right to not suffer cumulative punishment for multiplicious offenses. *See Brown v. Ohio*, 432 U.S. at 169. The members were instructed that these were separate offenses and counsel argued them as such. Accordingly, the members punished Appellant twice for the same offense, necessitating either a sentence reassessment or rehearing.

WHEREFORE, this Court should dismiss Specification 3 of Charge I and remand for a sentence rehearing or reassessment.

Respectfully Submitted,



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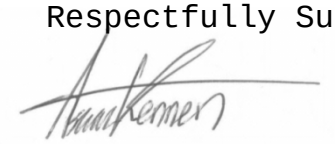
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 12 November 2013.

Respectfully Submitted,



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