12 December 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 14-0012/AF
Airman First Class (E-3) NICHOLAS R. ELESPURU, USAF *Appellant.*	)	Crim. App. No. 38055

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUE GRANTED

WHETHER SPECIFICATIONS 2 AND 3 OF CHARGE I ARE MULTIPLICIOUS.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ. This Honorable Court has jurisdiction to review AFCCA's decision under Article 67, UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

The facts necessary for disposition of this case are set forth in the argument below.

SUMMARY OF ARGUMENT

Appellant expressly abandoned this issue at trial when he agreed that the charges did not meet the technical requirements of multiplicity; thus, he affirmatively and voluntarily waived this issue. Due to the fact that the specifications at issue are not

facially duplicative, Appellant is not entitled to relief and this Court should not entertain this issue.

Appellant's conduct involved attacks on his victim while she was incapacitated and while she was incapacitated. The United States would not have been able to capture Appellant's full criminal conduct in one specification. Further, the existence of remaining exigencies of proof necessarily required multiple specifications.

The United States is required to put an accused on adequate notice of the offense he would have to defend against at trial. Under the facts of this case, Specifications 2 and 3 of Charge I represent different legal bases of criminal liability, and it was necessary to charge both specifications to provide Appellant with adequate notice. The facts of this case do not present a situation where a lack of consent is "subsumed" into incapacitation, which makes a *per se* finding that wrongful sexual contact is always a lesser included offense of abusive sexual contact both logically inconsistent and inappropriate.

If any relief is deemed warranted in this case, the merger of these two specifications for sentencing precludes any chance that Appellant was punished twice for the same criminal conduct. Further, trial counsel did not argue that Appellant should receive extra punishment based upon the number of specifications. If there was preserved error, the proper remedy in this case would be

for this Honorable Court to dismiss the LIO and affirm Appellant's sentence.

ARGUMENT

APPELLANT'S CONVICTIONS FOR ABUSIVE SEXUAL CONTACT (SPECIFICATION 2, CHARGE I) AND WRONGFUL SEXUAL CONTACT (SPECIFICATION 3, CHARGE I) ARE NOT MULTIPLICIOUS

Standard of Review

Claims of multiplicity are reviewed de novo. United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (citing United States v. Roderick, 62 M.J. 425, 431 (C.A.A.F. 2006).

Law and Analysis

A. WAIVER

Prior to trial, Appellant submitted a written motion requesting that Specifications 2 and 3 of Charge I be consolidated "into a single violation of Article 120" or, in the alternative, "merge" the two specifications "for punishment purposes in sentencing" due to unreasonable multiplication of charges (J.A. at 111-15.) (emphasis added). In making this motion, trial defense counsel acknowledged that wrongful sexual contact was not a lesser included offense (LIO) of abusive sexual contact (J.A. at 16), and the motion attacked the specifications because "the same underlying conduct [serves] as a basis for both charges." (J.A. at 17.) Later, the military

judge readdressed the potential issue of multiplicity,[1] and trial defense counsel did not object to the military judge's characterization of the offenses as not being lesser included offenses. (J.A. at 21-22.)

In United States v. Lloyd, 46 M.J. 19, 23 (C.A.A.F. 1997), this honorable Court held that in cases where an appellant fails to raise multiplicity at trial, he or she would be entitled to relief only if the specifications were facially duplicative. In this case, the military judge instructed the members on the essential elements of all of the alleged offenses. (J.A. at 36.) To this end, he provided the following elements for Specifications 2 and 3 of Charge I:

Specification 2: Abusive Sexual Contact	**Specification 3: Wrongful Sexual Contact**
(1) That at or near Kadena Air Base, Okinawa, Japan, on or about 21 August 2010, the accused engaged in sexual contact, to wit: touching with his hands the genitalia and breast of [A1C A.L.]	(1) That at or near Kadena Air Base, Okinawa, Japan, [on or about 21 August 2010,] the accused engaged in sexual contact, to wit: touching with his hands her genitalia and breast, with [A1C A.L.]
(2) That the accused did so when [A1C A.L.] was substantially incapable of declining participation or was substantially incapable of communicating unwillingness to engage in sexual contact.	(2) That such sexual contact was without the permission of [A1C A.L.]
	(3) That such sexual contact was wrongful

[1] MJ: "both sides have conceded they're not LIOs." (J.A. at 22.)

(J.A. at 38-40.)[2] A review of these specifications demonstrates that they are not facially duplicative because they contain facially unique elements. These differences preclude relief.

"[E]xpress waiver or voluntary consent . . . will foreclose even this limited form of inquiry." Id. at 23. Appellant expressly and unequivocally abandoned this issue at trial when he agreed that the charges did not meet the technical requirements of multiplicity,[3] and he affirmatively and voluntarily waived this issue. *See* United States v. Spears, 39 M.J. 823, 824 (A.F.C.M.R. 1994)(issue not tested for plain error where defense counsel makes a knowing and intelligent waiver of a multiplicity . . . issue). Appellant cannot be allowed to intentionally waive a motion at trial and then raise the issue on appeal. Therefore, this Court should not entertain this issue and dismiss the previously granted petition.

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[2] These instructions are consistent with the Article 120 elements as provided by the Manual for Courts-Martial (MCM). See Appendix 28, ¶¶ 45b(8)(c) and (13) (2012) (Article 120, UCMJ).

[3] In his brief, Appellant argues that trial defense counsel was mistaken about United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010), and, therefore, there was no "intelligent and knowing waiver." (App. Br. at 8-9.) This argument is actually an ineffective assistance of counsel claim which Appellant never raised on appeal and not properly before this Court. It is apparent that Appellant wants to avoid any ineffective assistance of counsel analysis because the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984) will be satisfied by the merger of the specifications for sentencing. In fact, Appellant's concession at trial further supports the United States' waiver contention.

B. MULTIPLICITY

Although these two offenses are not facially duplicative, Appellant argues that they are multiplicious because "[t]he last two elements of Specification 3, lack of consent and wrongfulness, are necessarily included in elements of Specification 2." (App. Br. at 10-11.) Further, he contends that Specification 3 is "wholly subsumed into Specification 2." (Id. at 11.) This is not an accurate reading of the facts or charge sheet and ignores the fact the specifications provided him with notice of different exigencies of proof for the different actions he took in completing his crimes.

As determined by AFCCA, Appellant's conduct involved attacks on his victim while she was incapacitated and while she was not incapacitated, and the specifications reflected full notice of those differences:

> The charges clearly cover different criminal acts. One specification addresses assault while a victim is incapacitated, and the other specification addresses a lack of consent, whether incapacitated or not. Here the appellant faced both situations. He sexually assaulted her while she was passed out, but, by doing so, he awakened her enough so that she was able to manifest her lack of consent. Despite being told to stop, he returned again to assault her once more. Thus, he assaulted her while she was incapacitated and again after hearing her lack of consent.

(J.A. at 3.) Appellant's criminal actions reflect the paradox the prosecution faced in drafting charges in this case. The government recognized that it was important to charge both specifications because of the inherent difficulty in "proving someone's substantially incapacitated with the testimony of someone who's substantially incapacitated." (J.A. at 18.) Further, this method of charging is particularly appropriate in the current situation where Appellant allegedly touched the victim on four separate occasions and she "woke-up" after the inception of each act. [4] (J.A. at 25-31, 33-34, 97-98, 101, 103-07.) Appellant would hardly have been on notice of the government's theory if Appellant was merely charged with abusive sexual contact and relied on wrongful sexual contact as a LIO.[5] Moreover, the United States could not have captured Appellant's full criminal conduct in one specification. Appellant is effectively arguing that he should have a safe harbor after committing one crime against a victim that would allow him to

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[4] The members could have determined that the victim was substantially incapacitated the entire time, she was incapacitated for part of the time, or that she manifested a lack of consent the entire time. A single specification cannot capture all of these contingencies.

[5] It is quite clear that if Appellant is correct in his analysis of multiplicity then the military judge would have been required to instruct the members on wrongful sexual contact as an LIO. By making a motion for Unreasonable Multiplication of Charges, Appellant actually tried to create a situation where he could knock the "consent" specification off of charge sheet and then escape liability by attacking whether the victim was truly incapacitated. In failing to receive this windfall at trial, Appellant now seeks a windfall in the form of a second shot at an unwarranted lesser sentence (*see* further analysis below in Remedy section.)

commit as many crimes as he chooses against that same victim without fear that he will be held accountable for his distinct crimes.

"In some instances, there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law." United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010). A specification should not be dismissed "on grounds of multiplicity if any genuine issue exists as to adequacy of proof." United States v. White, 28 M.J. 530, 531 (A.F.C.M.R. 1989) (emphasis added). Here, the existence of remaining exigencies of proof (the changes in the victim's level of consciousness and ability to manifest a lack of consent), in addition to the fact they are not facially duplicative, ensures that the specifications were not multiplicious.

In United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010), this Court analyzed multiplicity in terms of whether the appellant's conviction for indecent acts as a LIO of rape could stand. This Honorable Court determined that "[t]he due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted; an LIO meets this notice requirement if 'it is a subset of the greater offense alleged.'" Id. at 468, *citing*

United States v. Medina, 66 M.J. 21, 26-27 (C.A.A.F. 2008). Therefore, in light of the fact that "the elements of rape do not include the all (or indeed *any*) of the elements of indecent acts. . . .," did not put him on adequate notice that he would have to defend against the purported LIO and his conviction was reversed. Jones, 68 M.J. at 473.

Since Jones, this Court has found several instances where LIOs do not meet this criteria. *See* United States v. Tunstall, 72 M.J. 191 (C.A.A.F. 2013)(indecent acts not a LIO of aggravated sexual assault); United States v. Nealy, 71 M.J. 73 (C.A.A.F. 2012)(provoking speech is not a LIO of communicating a threat); United States v. Girouard, 70 M.J. 5 (C.A.A.F. 2011)(negligent homicide is not a LIO of murder). This LIO protection is consistent with a range of other recent cases requiring notice to ensure an accused is informed of which theory or theories of criminality he needed to defense against. *See* United States v. Merritt, __ M.J. __ (C.A.A.F. 2013); United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012); United States v. Ballan, 71 M.J. 28 (C.A.A.F. 2012); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). In attacking his specifications in this case, Appellant ignores the notice the specifications provided him, and it appears as if this Appellant is actually complaining that he received too much notice.

Multiplicity is aimed at protecting an accused against double jeopardy as determined using the Blockburger/Teters analysis. United States v. Campbell, 71 M.J. 19, 23 (C.A.A.F. 2012) (citing Blockburger v. United States, 284 U.S. 299 (1932) and United States v. Teters, 37 M.J. 370 (C.A.A.F. 1993). In comparing the elements of abusive sexual contact and wrongful sexual contact, it is clear that each specification has unique elements not contained in the other. Abusive sexual contact has the unique element of substantial incapacitation and wrongful sexual contact has the unique elements of lack of permission and legal justification or lawful authorization. Although, a situation may arise where the issue of consent is raised merely to attack incapacity,[6] the fact-pattern in this case represents only one of a number of different scenarios in which a lack of consent is not "subsumed" into incapacitation. Therefore, a *per se* finding that wrongful sexual contact is a LIO of abusive sexual contact would not be logically consistent and would not provide an accused with the proper notice of criminality under all possible scenarios.[7] Therefore, Appellant's claim must fail.

[6] *See* United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011).

[7] *See* United States v. Wilkins, 71 M.J. 410, 413 (C.A.A.F. 2012)(Abusive sexual contact is an LIO or aggravated sexual assault in some instances)(emphasis added).

C. REMEDY

Assuming *arguendo* that the specifications are found to be multiplicious, Appellant acknowledges that this honorable Court may "dismiss the [LIO] and, absent prejudice, affirm the sentence" (App. Br. at 10), but argues that "the members punished Appellant twice for the same offense, necessitating either a sentence reassessment or rehearing." (Id. at 12.) This request is patently unreasonable in light of the fact that the two specifications were merged for the purposes of sentencing. (J.A. at 22, 61.) The premise of Appellant's remedy request that he was punished twice is entirely incorrect. In light of the trial judge's merging of the specifications, it was impossible for him to have been punished twice for the same offense. At no point during sentencing argument did trial counsel argue to the members that he should receive extra punishment because he was convicted of extra specifications, nor could he after the trial judge's ruling. (J.A. 64-70.) In fact, the main focus of trial counsel's argument centered on the victim's substantial incapacitation, victim impact, unit impact and good order and discipline. (Id.) Therefore, there is no reason to believe the members did not return a sentence that "best serve[d] the ends of good order and discipline, the needs of [Appellant] and the welfare of society" in light of Appellant's criminal actions and not based on the number of

specifications. (J.A. at 91.) Therefore, if there was preserved error, the proper remedy in this case would be for this Honorable Court to dismiss the LIO and affirm Appellant's sentence.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 December 2013 via electronic filing.

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