IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private First Class (E-3) **DEONTRAY D. COLEMAN** United States Army, Appellant	))))))))	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 20170013 USCA Dkt. No. 19-0087/AR

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

ISSUE PRESENTED

WHETHER SPECIFICATION 1 OF CHARGE VII IS MULTIPLICIOUS WITH SPECIFICATION 1 OF CHARGE I, AS THEY ARE PART OF THE SAME TRANSACTION.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3), which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has

granted a review." In a case reviewed under subsection (a)(3), "action need be taken only with respect to issues specified in the grant of review." UCMJ art. 67(c).

STATEMENT OF THE CASE

On August 11, 2016, October 6, 2016, and January 11-12, 2017, a military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of failure to go to his appointed place of duty, two specifications of disrespect toward a superior commissioned officer, insubordinate conduct toward a noncommissioned officer, and failure to obey an order, in violation of Articles 86, 89, 91, and 92, UCMJ, 10 U.S.C. §§ 886, 889, 891, 892 (2012). Contrary to his pleas, the military judge convicted Appellant of attempted murder, failure to obey an order, and two specifications of willfully discharging a firearm under circumstances to endanger human life, in violation of Articles 80, 92, and 134, UCMJ, 10 U.S.C. §§ 880, 892, and 934 (2012).[1] The military judge sentenced Appellant to ten years and eight months of confinement, reduction to the grade of E-1, and a dishonorable discharge. (JA 11). The convening authority approved the

[1] The military judge acquitted Appellant of three specifications of attempted murder, one specification of aggravated assault, one specification of assault consummated by a battery, and one specification of reckless endangerment in violation of Articles 80, 128, and 134, UCMJ. (JA 8-11)

sentence. (JA 7). Appellant was credited with 255 days against the sentence of confinement. (JA 2).

The Army Court of Criminal Appeals completed its review on October 5, 2018. The Army Court dismissed Specification 2 of Charge V and affirmed the other findings and sentence. Appellate defense counsel filed a Petition for Grant of Review on 4 December 2018. On February 13, 2019, this Court granted Appellant's petition for review. On March 15, 2019, Appellant filed his petition for review.

STATEMENT OF FACTS

Specialist (SPC) QB and Appellant were one-time friends who first met in September 2014. (JA 47). At some point prior to the events leading to this court-martial, SPC QB suspected Appellant of attempting to have sex with his fiancée and their friendship ended. (JA 62).

The relevant facts relevant to this appeal occurred on the night of September 7, 2015. (JA 47-48). Specialist QB was out with his then-fiancé, AB,[2] her sister, AW, AW's boyfriend, and Ms. AB's three year old daughter, YW. (JA 48). Around 2145-2200 hours, SPC QB, Ms. AB, and YW went to a gas station so SPC QB could get a "Black and Mild," a flavored cigarette. (JA 49). Ms. AB went into

[2] Ms. AB maiden initials are AW, and she testified under her maiden name during the court-martial. (JA 48).

the gas station while her daughter and SPC QB remained in the vehicle. (JA 49). While Ms. AB was in the gas station, her phone rang and SPC QB noticed the call came from a Baltimore area code that he associated with Appellant. (JA 49-50). Specialist QB attempted to call Appellant back on Ms. AB's phone as well as his own phone, but Appellant did not pick up. (JA 49-50). Appellant then sent a text message directing SPC QB to Baldwin Loop. (JA 51).

Specialist QB drove to Baldwin Loop with YW and Ms. AB in the vehicle. (JA 51, 99). When he got to Baldwin Loop, Appellant fired a weapon at the car, striking the front fender and driver's side door. (JA 52, 99-100). Specialist QB stopped his vehicle and got out approximately six feet from Appellant. (JA 52-53). Appellant was standing beside his vehicle. (JA 53). Specialist QB began walking towards Appellant and Appellant jumped into his car and left. (JA 55, 102-103).

Based on the events at Baldwin Loop, the government charged Appellant with three specifications of attempted murder and one specification of willfully discharging a firearm under circumstances to endanger human life, in violation of Articles 80 and 134, UCMJ. (JA 13-16). Of these charges, the court convicted Appellant of one specification of attempted murder of SPC QB and one specification of willfully discharging a firearm under circumstances to endanger human life. (JA 155-56). The court acquitted Appellant of the two specifications

of attempted murder that alleged he intended to kill Ms. AB and YW. (JA 155). The defense never raised multiplicity during the court-martial.

SUMMARY OF THE ARGUMENT

This court should deny Appellant relief. The government's charging decision did not violate the doctrine of multiplicity because attempted murder and willfully discharging a firearm under circumstances to endanger human life each require proof of a fact the other does not. Moreover, even if the specifications are multiplicious, Appellant cannot meet his burden to establish plain error.

STANDARD OF REVIEW

Multiplicity claims are reviewed de novo. *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006) (citing *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004), *United States v. Palager*, 56 M.J. 294, 296 (C.A.A.F. 2002)). Multiplicity is waived if it is not raised at trial, unless it rises to the level of plain error. *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). Under a plain error analysis, "Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

LAW AND ARGUMENT

WHETHER SPECIFICATION 1 OF CHARGE VII IS MULTIPLICIOUS WITH SPECIFICATION 1 OF CHARGE I, AS THEY ARE PART OF THE SAME TRANSACTION.

A. The specifications are not multiplicious.

Appellant challenges Specification 1 of Charge I and Specification 1 of Charge VII as multiplicious because the government charged a single transaction in two ways.[3] "'If a court, contrary to the intent of Congress, imposes multiple punishments under different statutes for the same act or course of conduct' the court violates the Double Jeopardy Clause of the Constitution." *Roderick*, 62 M.J. at 431 (quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). If the respective statutes are silent as to Congressional intent, the court uses the separate elements test established by *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Roderick*, 62 M.J. at 432. "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010) (quoting *Blockburger*, 284 U.S. at

[3] Appellant also claims Specifications 2 and 3 of Charge I are multiplicious with Specification 1 of Charge VII. The military judge acquitted Appellant Specifications 2 and 3 of Charge I, therefore those acquittals cannot constitute a multiplicity problem with Specification 1 of Charge VII. (JA 155-156).

304). “A charge is multiplicious if proof of such charge also proves every element of another charge.” Rule for Court-Martial (R.C.M.) 907(b)(3)(B).

Here, the government agrees with Appellant’s assertion that the respective statutes are silent as to congressional intent. Therefore, this court should determine whether each specification requires proof of a fact which the other does not. A comparison on the elements of each specification demonstrates that they are not multiplicious.

Charge I, Specification 1, attempted murder, has the following elements:

> (1) That the accused did a certain overt act [that is: shot a firearm at a vehicle containing SPC QB];
>
> (2) That the act was done with the specific intent to commit a certain offense under that code [that is: to kill SPC QB…without justification or excuse];
>
> (3) That the act amounted to more than mere preparation [that is, they were a substantial step and a direct movement toward the unlawful killing of SPC QB…]; and
>
> (4) That the act apparently tended to effect the commission of the intended offense [that is, the acts apparently would have resulted in the actual commission of the offense of unpremeditated murder if the shots had hit SPC QB].

Manual for Courts-Martial, United States (2016 ed.) [hereinafter *MCM*], pt. IV, ¶ 4.b; JA 181.

The elements of willful discharge of a firearm under circumstances to endanger human life follow:

> (1) That the accused discharged a firearm [the accused discharged a firearm, to wit: a Smith and Wesson .40 caliber handgun, at a vehicle containing SPC QB, Ms. AB, and YW];
>
> (2) That such discharge was willful and wrongful;
>
> (3) That this discharge was under circumstances such as to endanger human life; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

MCM, pt. IV, ¶ 81.b; JA 185.

The military judge excepted the words "to the prejudice of good order and discipline in the armed forces and" in his finding of guilty for Specification 1 of Charge VII. (JA 156).

Applying the *Blockburger* elements test, these offenses are not multiplicious. Specification 1 of Charge VII requires additional facts that are not required by Specification 1 of Charge I. Specifically, as to the terminal elements, the factfinder must find either that the conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit to the armed forces. Additionally, the specification requires proof that Appellant discharged a firearm at a vehicle containing SPC QB, Ms. AB, and TW, and that act was done under circumstances to endanger human life. These are facts that must be proven by the government in order to convict on Specification 1 of Charge VII. Proof that

Appellant attempted to murder SPC QB, as alleged in Specification 1 of Charge I, does not prove each fact required to convict Appellant of Specification 1 of Charge VII.

Specification 1 of Charge I also requires proof of a fact which is not required by Specification 1 of Charge VII. Specification 1 of Charge I requires proof of Appellant's specific intent to kill SPC QB without justification or excuse. A conviction for willful discharge of a firearm under circumstances to endanger human life does not prove Appellant had the specific intent to unlawfully kill SPC QB.

Appellant argues that the *actus reus* and the *mens rea* for the offenses are the same. In support of that argument, Appellant suggests that the *actus reus* of attempted murder is the same as the terminal element in the Article 134, UCMJ offense. Appellant's argument misreads this court's precedent and implicitly invites this court to override its decisions in *United States v. Miller,* 67 M.J. 385 (C.A.A.F. 2009), and its successor cases.

In *Miller*, this court overruled *United States v. Foster*, 40 M.J. 140 (C.A.A.F. 1994) and held that to the extent *Foster* and its progeny "support the proposition that clauses 1 and 2 of Article 134, UCMJ, are per se included in every enumerated offense, they are overruled." 67 M.J. 389. In later cases, this court reiterated that principle. Because the terminal element is not necessarily included

in the enumerated offense, this court has rejected the principle that an Article 134 offense is a lesser included offense of an enumerated offense. *See United States v. Jones*, 67 M.J. 465, 473 (C.A.A.F. 2010) (holding that the offense of rape did not include the elements of indecent acts); *Girouard*, 70 M.J. at 9 (holding that "negligent homicide contains additional elements that are not elements of premeditated murder: the terminal elements of Article 134, UCMJ, prejudice to good order or service discredit"). In *United States v. Fosler,* this court held that a military judge erred by not dismissing an Article 134 specification that failed to allege the terminal element. 70 M.J. 225, 233 (C.A.A.F. 2011). The court noted that the "Government must allege every element expressly or by necessary implication, including the terminal element." *Id*. at 232.

Appellant's argument that Charge I, Specification 1 is multiplicious with Charge VII, Specification 1 is without merit. The terminal element of the Article 134 offense is a separate element the government must prove. The specific intent required for attempted murder is a separate element the government must prove. This conclusion is supported by the plain language of each specification as charged, as written in the MCM, and as discussed by this court's precedent in *Miller*, *Girouard*, *Jones*, and *Fosler*. This court should deny Appellant's request for relief.

B. Appellant does not meet his burden to show plain error.

Even if this court finds the specifications multiplicious, it should only grant relief if the error is plain because Appellant failed to object during his trial. Failure to object to a multiplicious specification waives the issue unless there is plain error. *Britton*, 47 M.J. at 198. "Appellant has the burden of persuading this court there was plain error." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). "Appellant may show plain error . . . by showing that the specifications are 'facially duplicative,' that is, factually the same." *Id.* (*quoting Britton*, 47 M.J. at 198). This occurs when the "challenged specifications literally repeat each other as a matter of fact." *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997).

Here, Appellant has not met his burden to show plain error. It is Appellant's burden to show (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. "Appellant may show plain error and overcome forfeiture by showing that the specifications are facially duplicative." *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001). This court can determine whether the specifications are facially duplicative "by reviewing the language of the specifications and the 'facts apparent on the face of the record.'" *Id.* (*quoting United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997)). Here, where the government needed to prove different facts for each specification,

they are not duplicative on the face of the record. Therefore, any alleged error is not plain or obvious. Appellant cannot meet his burden and is therefore not entitled to relief.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court answer the granted issue in the negative and affirm the findings and sentence.

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I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April ____, 2019.

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