UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant MICHAEL E. HARRIS
United States Air Force

ACM 35672

10 February 2006

Sentence adjudged 21 May 2003 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-4.

Appellate Counsel for Appellant: Frank J. Spinner, Esq. (argued), Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, Major Sandra K. Whittington, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Major Jin-Hwa L. Frazier (argued), Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, FINCHER, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

The appellant was tried by a military judge alone sitting as a general court-martial at Hickam Air Force Base (AFB), Hawaii. Pursuant to his pleas, he was found guilty of four specifications of committing indecent acts upon the body of MG, his stepdaughter, a child under 16 years of age; and two specifications of communicating indecent language to MG, a child under 16 years of age, in violation of Article 134, UCMJ, 10 U.S.C. § 934. At the time of the appellant's misconduct, MG was 11 and 12 years old. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 12 months,

and reduction to E-4. The convening authority approved the sentence as adjudged. The appellant has submitted two assignments of error: (1) Specification 1 (indecent act) and Specification 5 (indecent language), and Specification 2 (indecent act) and Specification 6 (indecent language) should have been treated as two offenses instead of four for sentencing purposes; and (2) The appellant's sentence to confinement for 12 months, in combination with a bad-conduct discharge, is inappropriately severe. He asks us to set aside his bad-conduct discharge.

We have examined the record of trial, the assignments of error, and the government's response thereto. We heard oral argument in this case on 26 January 2006. Finding no error, we affirm.

Background

The appellant, his wife, their son, and MG lived in base housing at Hickam AFB, Hawaii.[1] MG had lived with the appellant for approximately six years at the time of the incidents which led to the appellant's court-martial. On 17 December 2002, MG was doing her homework in her bedroom. She was dressed in her underwear and a T-shirt. The appellant came into MG's bedroom and sat next to her. As the two were reviewing MG's homework, the appellant placed his hand on MG's thigh.[2] The appellant saw MG's pubic hair protruding from her underwear. He then asked MG, "How does your vagina look?" or words to that effect. In response MG said, "no." The appellant apologized. On 19 December 2002, MG was in her bedroom. She was wearing a bra and underwear as she was standing, facing the mirror. The appellant walked up and hugged MG from behind, pressing his forearms up and against MG's bra. This caused the appellant's forearms to make contact with MG's breasts. The appellant then asked her, "How do your breasts look?" or words to that effect. MG became upset and said, "no." The appellant apologized.

Between 17 and 19 December 2002, the appellant was again in MG's bedroom. While there, he pulled down MG's shorts and underwear. He did this without warning, exposing MG's buttocks to the appellant. MG's genitals were also exposed but were facing away from the appellant. MG then bent over and pulled her clothes back up. At the time of this incident MG thought the appellant's conduct was a joke because the appellant was laughing. However, the appellant stipulated and admitted at trial that he pulled down MG's pants and underwear with the intent to gratify his sexual desires.

On 16 January 2003, the appellant was sitting in a recliner at his home playing with a computer. The appellant was having difficulty with the computer and a computer game. MG then came over to help fix the problem. As she was leaning over the recliner

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[1] MG was born on 30 December 1990.

[2] The appellant stipulated at trial that when he placed his hand on MG's thigh he had the intent to gratify his sexual desires.

the appellant placed his arm on MG's back. He then began to rub her back in a sweeping motion and purposely put his hand inside her pants and underwear and touched her buttocks. MG looked at the appellant and he pulled his hand out. However, only seconds later he again placed his hand inside her pants and underwear and touched her buttocks. Once again MG resisted. The appellant removed his hand. Finally, after the third time the appellant repeated this act, MG got up, went to her bedroom and cried until her mother came home. MG then told her mother what happened. When the appellant was asked why he did it he explained that he wanted MG to know this type of conduct was "normal." At trial, the appellant stipulated that he repeatedly touched MG's buttocks with the intent to gratify his sexual desires.

On 16 January 2003, MG told her mother about all the above incidents. On 18 January 2003, MG met with the appellant and her mother to discuss the situation. At that meeting the appellant told MG what he did was wrong and that he would not do it anymore. Additionally, the appellant and MG's mother determined that MG should not report the appellant's misconduct to anyone. MG's mother told MG that if she were to come home from school, and the appellant was in the house and her mother was not home, MG was to go to her room and stay there until her mother returned.[3] Contrary to the appellant's and his wife's wishes, a few days later MG reported the appellant's misconduct to school officials. They provided this information to Child Protective Services in Hawaii. At the time of the appellant's court-martial, he was not living with his wife, son, and MG.

Multiplicity

The appellant now argues his touching of MG's thigh (Specification 1 - indecent act) and his comment to her, "How does your vagina look," or words to that effect (Specification 5 - indecent language), should be considered one offense. He also contends that pressing his forearms up and against MG's bra and lifting it up, causing his forearms to make contact with MG's breasts (Specification 2 – indecent act) and then asking her, "How do your breasts look," or words to that effect (Specification 6 – indecent language), should be one offense. The appellant contends that the prosecution has taken what were, in essence, two offenses and charged and punished him for four offenses.

The appellant did not raise this issue at trial and unconditionally pled guilty to the events set forth above. "An unconditional guilty plea waives a multiplicity issue unless the offenses are 'facially duplicative,' that is, factually the same." *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (quoting *United States v. Lloyd,* 46 M.J. 19, 23 (C.A.A.F. 1997)). Whether offenses are facially duplicative is a question of law that we review de novo. *Pauling*, 60 M.J. at 94. "[O]ffenses are not facially duplicative if each

[3] MG's mother was not at home during the times of the appellant's misconduct.

'requires proof of a fact which the other does not.'" *Id.* (quoting *United States v. Hudson,* 59 M.J. 357, 359 (C.A.A.F. 2004)). In addition, determining whether two specifications are facially duplicative requires a realistic comparison of the offenses in an effort to determine whether one is rationally derivative of the other. *Pauling*, 60 M.J. at 94. This analysis relies on both the facts alleged in each specification and the "providence inquiry conducted by the military judge at trial." *Id.* (quoting *Hudson*, 59 M.J. at 359). We have carefully examined the factual conduct alleged in each of the four specifications, the providency inquiry, and the stipulation of fact. While the acts on 17 December 2002 and 19 December 2002 occurred within seconds of each other, all were distinct criminal acts. On each date the indecent language the appellant directed toward his stepdaughter was indecent by itself without the close-in-time indecent act. Conversely, on each occasion, the indecent act was indecent in and of itself without the close-in-time, indecent language. Under the facts and circumstances of this case, we find the specifications are not "facially duplicative," that is, factually the same. *See Pauling*, 60 M.J. at 94. Moreover, we hold that if the appellant had raised this matter at trial and argued that the aforementioned specifications were multiplicious for findings or sentencing purposes, the military judge would have been correct to find they were not multiplicious for either purpose. *See United States v. Teters,* 37 M.J. 370 (C.M.A. 1993); *United States v. Morrison*, 41 M.J. 482 (C.A.A.F. 1995).

Unreasonable Multiplication of Charges

The appellant also complains that charging him with four acts of misconduct, rather than two, for his behavior on 17 and 19 December 2002, constitutes an unreasonable multiplication of charges. *See* Rule for Courts-Martial (R.C.M.) 307(c)(4), Discussion. "Unreasonable multiplication of charges is reviewed for an abuse of discretion." *Pauling,* 60 M.J. at 95 (quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (Army Ct. Crim. App. 1999); *see also United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

We hold that the trial defense counsel's failure to raise the issue at trial waives any argument of an unreasonable multiplication of charges. *See United States v. Butcher,* 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 87, 93 (C.A.A.F. 2001); R.C.M. 905(e). Even if not waived, the specifications at issue do not misrepresent or exaggerate the appellant's criminality, nor do we find evidence of prosecutorial overreaching in the specifications. Considering all of the factors set forth in *Quiroz*, we hold that Specifications 1 and 5 and Specifications 2 and 6 do not constitute an unreasonable multiplication of charges. *See Quiroz*, 55 M.J. at 338.

Sentence Appropriateness

"Article 66(c), UCMJ, [10 U.S.C. § 866(c),] requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact

and determines should be approved." *United States v. Amador,* 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005). The determination of sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *Id*. at 626 (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)).

Sentence appropriateness is judged by individualized consideration of the particular appellant on the basis of the nature and seriousness of the offenses, the appellant's record of service, the character of the offender, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959); *Amador,* 61 M.J. at 626.

We do not find the appellant's sentence inappropriately severe. We acknowledge the appellant was an excellent duty performer for over 18 years who has accepted responsibility for his actions, expressed remorse, and received counseling/therapy. However, we also note the adverse impact of the appellant's actions upon the victim, MG. The appellant, a 40-year-old man, victimized his stepdaughter who was 11 and 12 years old at the time. Moreover, the appellant's misconduct progressed from an inappropriate touch on the victim's thigh and indecent language, to repeated and unwelcome touching of MG's buttocks in January 2003. In addition, when questioned by a Security Forces investigator, the appellant acknowledged that he would sometimes think of MG when he masturbated. Finally, we note that the appellant and MG's mother asked MG not to report the appellant's misconduct. Fortunately, she ignored their advice and reported the appellant to school officials.

We have given individualized consideration to this particular appellant and carefully reviewed all the facts and circumstances of this case. We are convinced the sentence approved is appropriate.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court