UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BILLY W. HOXEY II
United States Air Force

ACM 35090

28 June 2004

Sentence adjudged 25 January 2002 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Linda S. Murnane.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Andrew S. Williams and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Jennifer R. Rider, and Major James K. Floyd.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

A general court-martial found the appellant guilty, in accordance with his pleas, of two specifications of assault and battery, one specification of simple assault, and one specification of breach of the peace, in violation of Articles 128 and 116, UCMJ, 10 U.S.C. §§ 928, 916. He was also convicted, contrary to his pleas, of failure to obey a lawful order, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The appellant was found not guilty of disorderly conduct. His adjudged and approved sentence was a bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to the grade of E-1. On appeal, the appellant asserts that the assault and breach

of the peace charges are multiplicious, and that his sentence is inappropriately severe. We disagree and affirm.

I. Multiplicity

A. Background

The appellant pled guilty to Charge III. It was comprised of three specifications of assault under Article 128, UCMJ. The first assault involved a woman in a parking lot. During the providence inquiry, the appellant explained why he believed he committed a simple assault against the woman. He said:

> [O]n the 29th of April, 2000, I was in Cambridge, England. I walked up to two people standing in the parking lot. My friends were videotaping me. I was trying to be funny for the camera. I began to urinate in front of these two people. Having watched the tape, I believe my actions were culpably negligent and that it was foreseeable that the woman in the video would have reasonably believed that my urine might touch her.

The appellant also admitted that the woman was a stranger to him. She was in the company of a man. They were about four or five feet away and facing the appellant when he began to urinate.

The second and third assaults involved two men who were also strangers to the appellant. During the providence inquiry, the appellant admitted that in Cambridge, on the same night, he "hit an individual with my hand. After I hit him, his friend came toward me and I hit him as well." The appellant admitted that when his fist struck each of these gentlemen, the contact was made with unlawful force and violence. The appellant also said the touching was offensive to these men and it caused them bodily harm.

The appellant pled guilty to Charge II. The specification of this charge alleged a breach of the peace:

> In that AIRMAN FIRST CLASS BILLY W. HOXLEY II, United States Air Force, did, at or near Cambridge, United Kingdom, on or about 29 April 2000, participate in a breach of the peace by wrongfully assembling with . . .[eight airmen] for the purpose of assaulting passers-by, and in furtherance of said purpose did assault three certain persons, to wit: an unknown adult male in a dark short-sleeved shirt and dark pants, an unknown adult male wearing a dark shirt and light-colored pants, and an unknown adult female wearing a dark jacket.

During the providence inquiry the appellant explained why he was guilty of breaching the peace. He said:

> [I]n the early morning on the 29th of April 2000, I wrongfully assembled with . . .[eight airmen] and assaulted three individuals. By assaulting these three individuals named in Charge III, in front of my friends and in open public, I believe I caused an unlawful disturbance of the peace and therefore breached it.

Although he did not raise the issue at trial, the appellant now asserts that the assault and breach of peace charges are multiplicious. He asks that we set aside one of the charges.

B. Analysis

Rule for Courts-Martial 907(b)(3) provides, in part, "A specification may be dismissed upon timely motion by the accused if: . . . (B) The specification is multiplicious with another specification . . . ." The non-binding Discussion to the Rule explains, "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other."

Multiplicity is a concept derived from the Double Jeopardy Clause of the Constitution, prohibiting individuals from being punished twice for a single offense. *Albernaz v. United States*, 450 U.S. 333, 344, (1981); *United States v. Erby*, 46 M.J. 649 (A.F. Ct. Crim. App. 1997), *aff'd in part and modified in part*, 49 M.J. 134 (C.A.A.F. 1998). Of course, the legislature is free to define crimes so that a single act may constitute several offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question for the court in such cases is whether Congress intended the offenses to be separate for punishment purposes. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). Congressional intent may be expressed in the language of the statute. It may also be inferred from the elements of the statute or the legislative history of the statute. *Teters*, 37 M.J. at 376-77.

The elements test requires a textual comparison of criminal statutes. *Schmuck v. United States*, 489 U.S. 705, 720 (1989). In the military, the elements include those elements required to be alleged in the specification, along with the statutory elements. *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995).

Where two offenses each require proof of separate elements, the offenses are not multiplicious. *Schmuck*, 489 U.S. at 720. This is true even where one offense is the means by which the other offense is committed. *United States v. Oatney*, 45 M.J. 185, 188-89 (C.A.A.F. 1996).

It is well established that a conviction for both a greater offense and a lesser included offense violates the Double Jeopardy Clause. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989). A lesser included offense is one whose elements are a subset of the elements of another charged offense. *Schmuck*, 489 U.S. at 716. But where the greater offense could not possibly be committed without committing the lesser offense, our superior court has applied a "pragmatic or realistic approach" that involves not only a quantitative, but a "qualitative" examination of the elements of each offense. In *Oatney*, our superior court stated that the "qualitative," or "pragmatic or realistic," comparison doctrine requires, at the very least, a conclusion that the greater offense could not possibly be committed without committing the lesser offense.

Our superior court applied the pragmatic approach to the elements test in *United States v. Foster*, 40 M.J. 140, 146 (C.M.A. 1994). It found that the offense of committing an indecent act is a lesser included offense of forcible sodomy because one could not commit sodomy without committing an indecent act. By contrast, in *Oatney*, our superior court, found no "sine qua non" relationship existed between the offenses of obstruction of justice and communicating a threat. In that case, a marine threatened to hurt a witness if the witness talked to investigators about having observed a crime. Our superior court held that the two offenses were not multiplicious. It reasoned that wrongfully intimidating a witness is but one example of many ways of committing obstruction of justice. *Oatney*, 45 M.J. at 189.

Failure to make a timely motion to dismiss waives double jeopardy claims, including claims founded on multiplicity, unless they rise to the level of "plain error." *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). To demonstrate plain error, the appellant must show there is error, the error is clear or obvious, and the error materially prejudiced a substantial right. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). For multiplicity issues, an appellant may demonstrate "plain error" by showing that the specifications are "facially duplicative." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (quoting *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)). In order to determine whether specifications are facially duplicative, we must review the language of the specifications and the "facts apparent on the face of the record." *Id.* (quoting *Lloyd*, 46 M.J. at 24).

Whether offenses are multiplicious is a question of law we review de novo. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

The appellant did not raise multiplicity at trial. He waived consideration of this issue unless he can demonstrate the challenged charges and specifications are facially duplicative. He has not done so.

Congress defined the offenses of breach of the peace, Article 116, UCMJ, and assault, Article 128, UCMJ, in such a way that they allege offenses against two different sets of victims. There are two elements for breach of the peace as it was charged in the case before us:

> (a) That the accused caused or participated in a certain act of a violent or turbulent nature; and
>
> (b) That the peace was thereby unlawfully disturbed.[1]

A breach of the peace is an offense against the public at large.[2] When we examine the record of the appellant's guilty plea, we find evidence that members of the public were indeed present during the violent and turbulent acts by the appellant. A gentleman observed the appellant urinating near the woman who was the victim of the simple assault. And each of the two victims of assault and battery were members of the public when they observed the appellant strike the other victim. Clearly, at least three members of the public were victims of the breach of the peace specification.

By contrast, the elements of simple assault are:

> (a) That the accused attempted or offered to do bodily harm to a certain person; and
>
> (b) That the attempt or offer was done with unlawful force or violence.[3]

Assault consummated by a battery also contains two elements:

> (a) That the accused did bodily harm to a certain person; and
>
> (b) That the bodily harm was done with unlawful force or violence.[4]

The record makes it clear that the assaults did not involve the public at large, but instead each of the three specified victims. Because each statutory offense includes an element not included in the other, we conclude that Congress intended each offense to be separate for purposes of conviction and punishment. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Finally, applying the

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[1] *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 41(b)(2) (2000 ed.). This provision remains unchanged in the 2002 edition.
[2] *See generally*, 12 Am. Jur. 2d *Breach of the Peace and Disorderly Conduct* § 5 (2003); *MCM*, Part IV, ¶ 41(c)(2). This provision remains unchanged in the 2002 edition.
[3] *MCM*, Part IV, ¶ 54. This provision remains unchanged in the 2002 edition.
[4] *Id.*

principles of *Oatney*, we must also observe that it is possible to commit each of these offenses without committing the other.

The charges and specifications in question are not facially duplicative. We find that the appellant has not demonstrated plain error. We hold that the challenged charges and specifications are not multiplicious.

II. Sentence Appropriateness

The appellant next alleges that his sentence is inappropriately severe.[5] He invites us to compare his sentence with those of five airmen who were also found guilty of breach of the peace. We are not persuaded that the appellant's sentence is inappropriately severe.

This Court exercises broad discretion in determining sentence appropriateness. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). Sentence appropriateness is determined by examining the nature of the offense and "the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Assessing sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). Sentence comparison is just one aspect of sentence appropriateness. *Snelling*, 14 M.J. at 268. When we compare sentences, we are guided by principles outlined by our superior court:

> (1) whether the cases are "closely related" (*e.g.*, coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared); (2) whether the cases resulted in "highly disparate" sentences; and (3) if the requested relief is not granted in a closely related case involving a highly disparate sentence, whether there is a rational basis for the differences between or among the cases.

Lacy, 50 M.J. at 288.

Even if these criteria are not satisfied, we may consider sentence comparison in the exercise of our broad discretion to consider and compare other courts-martial sentences when reviewing a case for sentence appropriateness. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001).

[5] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We closely examined the information provided by the appellant concerning the offenses and sentences of five other airmen. We find that the appellant's offenses had nothing in common with those of Airman First Class (A1C) Johnny Downs and A1C Jason Sylve. Their offenses occurred on 1 July 2000. There is no evidence that the appellant was involved in these offenses in any way. We also note that A1C Downs and A1C Sylve were found guilty of far fewer offenses than the appellant.

The remaining three airmen mentioned by the appellant, A1C Emerson Hurd, A1C Jarvis Brown, and Airman (Amn) Profit were involved in the breach of the peace on 29 April 2000. Amn Profit was tried before a summary court-martial. A1C Brown was tried before a special court-martial consisting of a judge alone. And A1C Hurd was tried before a general court-martial.

When we examined the videotape viewed by the members of the court in the case before us, we observed that only the appellant urinated in public. He also was the only member of the group who announced beforehand that he intended to knock someone out. Moreover, his assaults upon the two men prompted other airmen to menace the victims and others in their party. We find the appellant's leadership role in the breach of the peace and assaults provides a rational basis for the appellant's more severe sentence. Having done so, we hold that his sentence is not inappropriately severe.

III. Conclusion

The 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator