

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DAVID M. MARSHALL
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200900533
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 June 2009.

Military Judge: CDR Bethany Payton-O'Brien, JAGC, USN.

Convening Authority: Commanding General, Marine Corps
Recruit Depot/Western Recruiting Region, San Diego. CA.

Staff Judge Advocate's Recommendation: LtCol M.B.
Richardson, USMC.

For Appellant: Capt Michael Berry, USMC.

For Appellee: LT Brian Burgtorf, JAGC, USN.

12 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of aggravated sexual assault and an indecent act, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was also convicted, pursuant to his plea, of violating Article 92, UCMJ. The approved sentence included confinement for three years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

The appellant now raises three assignments of error. He argues that the offenses, for which he was convicted, aggravated

sexual assault and an indecent act, are multiplicitious or, in the alternative, are multiplicitious for sentencing. Lastly, he asserts that the evidence was legally and factually insufficient to support a guilty finding as to Specification 1 of Charge II, the aggravated sexual assault offense.¹

After examining the record of trial and the pleadings of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, a sergeant in the U.S. Marine Corps, was a recruiter stationed in Lubbock, TX. On 1 May 2008, he invited Private First Class (PFC) B, a 19-year-old female Marine who was working temporarily at the recruiting station, out for drinks, despite knowing she was not yet 21 years old. Record at 161. Over a four-hour period, they stopped at two restaurant/bars, where PFC B drank four mixed drinks and three margaritas that were purchased by the appellant. *Id.* at 161-64, 237. The appellant then drove PFC B to his house. *Id.* at 165.

Barely able to walk and feeling dizzy and sick, PFC B vomited in the toilet shortly after arriving at the appellant's house. *Id.* at 166. The appellant remained with her during this time. *Id.* After throwing up, PFC B passed out on the bathroom floor, and when she awoke her legs were in the air and the appellant was taking off her pants. *Id.* at 167-68. She then lost consciousness and awoke again to discover the appellant having sexual intercourse with her. *Id.* at 168. When PFC B realized what was happening, she began moving in an attempt to get him to stop. *Id.* At that point, the appellant withdrew his penis from her vagina. *Id.* He then began masturbating over top of her and ejaculated onto her hair, stomach and shirt. *Id.*

Analysis

The appellant first argues that Specifications 1 and 2 of Charge II are multiplicitious because the indecent act is a lesser included offense of the aggravated sexual assault. We disagree.

Convicting a defendant of both a primary offense and its lesser included offense violates the Fifth Amendment prohibition against double jeopardy. *United States v. Weymouth*, 40 M.J. 798, 802 (A.F.C.M.R. 1994) (citing *Brown v. Ohio*, 432 U.S. 161, 165-69 (1987), *Blockburger v. United States*, 284 U.S. 299 (1932), and *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993)), *aff'd*, 42 M.J. 54 (C.M.A. 1994). Absent a timely motion to dismiss at trial, however, charges must be facially duplicative (i.e.,

¹ This allegation of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

"factually the same") to give rise to appellate review for multiplicity; otherwise, the issue is waived absent plain error. *United States v. Hudson*, 59 M.J. 357, 358-59 (C.A.A.F. 2004) (citing *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)). Although the appellant made a motion at trial for unreasonable multiplication of charges, he made no motion to dismiss at trial for multiplicity. Accordingly, we review whether the charges were facially duplicative.

The test to determine whether two offenses are facially duplicative, known as the "elements test," requires us to consider whether each provision of each specification "requires proof of a fact which the other does not." *Hudson*, 59 M.J. at 359 (quoting *Blockberger*, 284 U.S. at 304).

Charge II, Specification 1, states that, on or about 1 May 2008, the appellant did, "engage in a sexual act, to wit: have sexual intercourse with PFC B, who was substantially incapacitated." Charge sheet. Specification 2 states that on or about 1 May 2008, the appellant did "wrongfully commit indecent conduct, to wit: masturbate and then ejaculate onto the body and hair of [PFC B.]" *Id.*

The elements of Article 120 (aggravated sexual assault) are: (1) that the accused engaged in a sexual act with another person, who is of any age; and (2) that the other person was substantially incapacitated. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 45b(3)(c).

The elements of Article 120 (indecent act) are: (1) that the accused engaged in certain conduct; and (2) that the conduct was indecent conduct. *MCM*, Part IV, ¶ 45b(11). "Indecent conduct" is defined as "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, Part IV, ¶ 45a(t)(12).

Although the two charged offenses occurred within a short time of each other, each provision of Specification 1 requires proof of facts not required by Specification 2, and vice versa. Specification 1 requires proof of sexual intercourse and incapacity. Specification 2 requires neither. Specification 2 requires proof of masturbation and ejaculation and proof that those actions were grossly vulgar, obscene, repugnant to common propriety, and tended to excite desire or deprave morals with respect to sexual relations. Specification 1 does not require such proof. Given these distinctions between the elements of the two specifications, we conclude that they are not multiplicitous.

The appellant next argues that the two offenses represent an unreasonable multiplication of charges. Applying the multi-pronged *Quiroz* test for unreasonable multiplication of charges, we find that no corrective action is necessary. *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001). Although the appellant

did object at trial, which weighs in his favor, we find his arguments regarding the other four prongs unpersuasive. We are convinced that the specifications were aimed at two distinctly separate criminal acts, each of which victimized PFC B. The charges did not exaggerate or misrepresent the appellant's criminality, nor did they unreasonably increase the appellant's punitive exposure. Finally, the appellant has shown no evidence of prosecutorial overreaching or abuse.

The appellant, citing *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), next argues that the finding of guilty to Specification 1 of Charge II was legally and factually insufficient. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact-finder could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also Art. 66(c), UCMJ.

Following a careful review of the record, we find PFC B's testimony at trial to be substantially detailed and consistent, and we note that it withstood a vigorous cross-examination. Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found all the elements of this specification beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art. 66(c), UCMJ.

Conclusion

The appellant's assignments of error are without merit. The findings and approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court