IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **C.L. CARVER** **D.O. VOLLENWEIDER**

UNITED STATES

v.

Olwane B. DUNKLEY
Hospitalman (E-3), U. S. Navy

NMCCA 200500167 Decided 30 August 2006

Sentence adjudged 30 April 2004. Military Judge: J.G. Baker. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Force Service Support Group, Fleet Marine Forces Pacific, Okinawa, Japan.

LCDR JAMES GOLLADAY, JAGC, USN, Appellate Defense Counsel
LT JUSTIN E. DUNLAP, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

The appellant was convicted, contrary to his pleas, by officer and enlisted members, sitting as a general court-martial, of violation of a lawful general order and indecent assault, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to a dishonorable discharge, confinement for 6 months and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant claims that (1) the two specifications are multiplicious, (2) the two specifications are an unreasonable multiplication of charges, and (3) the trial counsel committed misconduct during argument. After carefully considering the record of trial, the appellant's assignments of error and the Government's response, we conclude that the findings and the sentence are correct in law and fact. We find that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Multiplicity and UMC

In his first and second assignments of error, the appellant contends that the two specifications are either multiplicious or an unreasonable multiplication of charges (UMC). We find otherwise and decline to grant relief.

The appellant was convicted of indecent assault and also of violating a lawful general order that prohibited sexual activity in the barracks between persons not married to each other. The appellant and the victim were friends, but not sexual partners. In fact, the appellant had previously told the victim that he found her attractive, but the victim replied that she was not interested since she had a boyfriend. On this occasion, the appellant was allowed into the victim's bachelor barracks room in order to use her computer. While he was on the computer, the victim took a shower and changed into her pajamas. When she returned to the room, the appellant came over to her and started tickling her. The victim did not object since he had done that in the past. Then, the appellant put his hand down her clothes and inserted a finger into her vagina. She yelled at him to stop. He refused. She repeatedly told him to stop, but he would not leave. She scratched and bit him, but could not overcome his superior strength. Finally, he left. Afterward, she did not report the offense until she was convinced by her friends to do so.

A. Multiplicity

An accused cannot be convicted of both an offense and a lesser included offense. *See* Article 44(a), UCMJ; *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). Charges reflecting both an offense and a lesser included offense are impermissibly multiplicious. *See Brown v. Ohio*, 432 U.S. 161, 165-66 (1977)(noting that offenses charged are multiplicious when they stand in the relationship of greater and lesser offenses). The test to determine whether an offense is factually the same as another offense is the "elements" test. *United States v. Foster*, 40 M.J. 140, 142 (C.M.A. 1994). Under this test, the court considers "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. *See United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004). Clearly the two offenses each contain elements not required by the other. Further, both offenses are aimed at different courses of conduct. Thus, we find that the offenses are not multiplicious.

B. UMC

Where, as here, the specifications were aimed at distinctly separate criminal acts, the separate specifications do not misrepresent or exaggerate the appellant's criminality, and, where no suggestion exists of prosecutorial overreaching, we find no unreasonable multiplication of charges. *See United States v.*

Quiroz, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

Assuming *arguendo*, however, that, under the facts of this case, the two offenses constitute UMC, we nonetheless find no material prejudice to the appellant. We are convinced that the appellant's sentence was not enhanced by this offense and that he would not have received any lighter sentence even if he had not been charged with violation of a lawful general order. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Prosecutorial Misconduct

In his third assignment of error, the appellant contends that the trial counsel committed prosecutorial misconduct on several occasions. We decline to grant relief.

A. Opening Statement

The appellant claims that the trial counsel impermissibly referred to the appellant's invocation of his right to remain silent and repeated the error when presenting evidence. During his opening statement, the trial counsel reviewed the facts as he saw them, including the appellant's statement made to a law enforcement agent after waiving his right to remain silent. He pointed out that the appellant changed his story after being confronted by the agent regarding various inconsistencies. Eventually, when being confronted again, the appellant invoked his rights and terminated the interview. Although the appellant did not object, the military judge advised the court members that the appellant has the absolute constitutional right to stop answering questions during an interview and that the court members must disregard that portion of the trial counsel's argument and not consider it for any purpose. The court members agreed that they could follow that instruction.

Later, the trial counsel presented the testimony of the law enforcement agent. During the early part of the testimony, the trial counsel asked, "What investigation steps did you take at that point?" Record at 226. The agent answered:

> We brought Lance Corporal [C] [the victim] up to our office. We got some specifics from her. Then we went over and picked up HN Dunkley. We interviewed him and interrogated him. After a short time, he invoked his right for legal counsel. We interviewed several people Lance Corporal [C] had indicated she had confided in.
>
> At one point, we got authorization to conduct a wire intercept and oral intercept. We conducted them as well.

Record at 227. Again, the appellant did not object. But the military judge interrupted the witness' narrative to advise the court members that the appellant had a constitutional right to seek legal counsel and that they must disregard the fact that he may or may not have invoked that right. The court members agreed that they could follow that instruction. The trial defense counsel agreed that the limiting instruction cured the error. *Id.* "In the absence of evidence to the contrary, the members are presumed to follow the military judge's instructions." *United States v. Holt,* 33 M.J. 400, 408 (C.M.A. 1991)(citing *United States v. Ricketts*, 1 M.J. 78 (C.M.A. 1975). Although the Government erred, we find that the military judge's limiting instructions sufficiently cured the errors and that the errors were harmless beyond a reasonable doubt.

B. Improper Argument

The appellant now claims for the first time on appeal that the trial counsel impermissibly argued both on findings and sentencing. By failing to object at trial, the appellant forfeits review of this issue absent plain error. RULE FOR COURTS-MARTIAL 1001(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). As explained below, we find no error at all, much less plain error. The appellant contends that the trial counsel improperly injected his personal beliefs into his closing argument on findings when he argued that:

> [I]t is time for you to take all of this that you have heard, all of this evidence, and go back into that deliberation room and apply the facts to the elements of the offenses and come back and convict Lance Corporal [sic] Dunkley of both these charges.

Record at 398. "Hospitalman Dunkley is guilty of both of the charges before you." *Id.* at 411. "[N]ow it is your duty to go into deliberations and convict Hospitalman Dunkley of both these crimes he's committed." *Id.* "Members, you cannot let Hospitalman Dunkley get away with what he's done to Lance Corporal C [victim]." *Id.* at 421. "You have a duty to go back there and convict Hospitalman Dunkley of both of the charges before the court." *Id.* The appellant also contends that the trial counsel committed misconduct in sentencing argument when he said, "Members, you must award a dishonorable discharge." Record at 444.

We can find no hint of prosecutorial misconduct in any of the quotes above. In fact, we find that the trial counsel was properly advocating for the Government.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Chief Judge ROLPH and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court