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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.A. WAGNER**

UNITED STATES

v.

John S. MANN
Chief Operations Specialist (E-7), U.S. Navy

NMCCA 200301265 Decided 15 November 2004

Sentence adjudged 22 October 2002. Military Judge: R.B. Wities. Hilton. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander Navy Region Southwest, San Diego, CA.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
CAPT THOMAS J. DEMAY, JAGC, USNR, Appellate Government Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of indecent assault, indecent acts, and indecent exposure, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 12 months, forfeiture of $1000.00 pay per month for 12 months, and reduction to pay grade E-3. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 5 months, all forfeitures, and reduction below pay grade E-5.

The appellant contends for the first time on appeal that the military judge committed plain error by not dismissing specification 3 of Charge II, indecent exposure, because it is multiplicious with specification 3 of Charge II, indecent acts. The appellant asks that we set aside the finding of guilty as to the indecent exposure offense and reassess the sentence, approving only a reduction to pay grade E-6. As an alternative basis for the requested relief, the appellant contends that the

two offenses constitute an unreasonable multiplication of charges. As a second alternative basis for the requested relief as to sentence, the appellant claims that the two offenses are multiplicious for sentencing purposes.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we agree with the appellant that the specifications of indecent acts and indecent exposure are multiplicious. We will take corrective action in our decretal paragraph. See Arts. 59(a) and 66(c).

Facts

The offenses result from the appellant's activity in the early morning hours of 18 October 2001 in the lobby of the Hale Koa Hotel in Honolulu, Hawaii. The appellant, in support of his guilty pleas, stated that he was unable, due to his intoxication, to remember these events. His actions, however, were captured on a hotel security surveillance tape admitted into evidence at trial. The appellant, during the providence inquiry, indicated that he had viewed the videotape, had read the statements of hotel security guards, and was satisfied that he was the person depicted on the tape. The appellant entered into a stipulation of fact in support of his guilty pleas that was admitted into evidence.

The appellant approached a female, KC, a stranger to him, sitting in a chair in the lobby of the Hale Koa. KC was obviously inebriated or otherwise incapacitated. The appellant sat in the chair beside KC and engaged her in conversation. During the course of this conversation, the appellant touched her breast and vaginal area, through her clothing. The appellant then tried to help her stand, but could not do so. The appellant went to the front desk and spoke with the clerk, then returned to KC. He once again sat beside her and unsuccessfully tried to get her to stand. Finally, the appellant stood in front of KC, unzipped his pants, and, stepping to one side of her, exposed his penis. He then masturbated in plain view while attempting to pull her head toward him. The appellant then moved back in front of KC, straddled her legs, and continued to masturbate, again trying to pull her head toward him. He then stopped his activity and tried once again to assist KC in standing, with no success. A hotel security guard approached at this time, apparently unaware of the appellant's previous activity, and spoke with the appellant. The appellant shook hands with the security guard and departed the area. The security guard and other hotel employees then assisted KC in standing and leaving the area.

Discussion

The appellant entered unconditional guilty pleas to the offenses. Absent a timely motion to dismiss, such unconditional

pleas waive any multiplicity claim unless there is plain error. *United States v. Hudson*, 59 M.J. 357, 358 (C.A.A.F. 2004)(citing *United States v. Heryford,* 52 M.J. 265, 266 (C.A.A.F. 2000)). The appellant, however, may establish plain error and overcome waiver by showing that the specifications are facially duplicative, that is, factually the same. *Hudson,* 59 M.J. at 359 (quoting *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001) and *United States v. Lloyd,* 46 M.J. 19, 23 (C.A.A.F. 1997)).

In a situation where two offenses are facially duplicative, and one of them carries a greater maximum sentence, the other is a lesser included offense to it. The Fifth Amendment guarantees that the appellant may not be convicted of both an offense and a lesser included offense. Art. 44(a), UCMJ. *See also Blockburger v. United States,* 284 U.S. 299 (1932); *United States v. Teters,* 37 M.J. 370 (C.M.A. 1993).

Whether an offense is a lesser included offense is a matter of law that we are required to review de novo. *United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002). We apply the "elements" test to determine whether an offense is factually the same as another offense and, therefore, lesser included in that offense. *United States v. Foster,* 40 M.J. 140, 142 (C.M.A. 1994). An offense is not factually the same as another where one requires proof of some fact or facts that the other does not. *Blockburger,* 284 U.S. at 304. Such a determination can be made by this court only "by lining up elements realistically and determining whether each element of the supposed 'lesser' offense is rationally derivative of one or more elements of the other offense - and vice versa." *Foster,* 40 M.J. at 146.

We look to both the facts alleged in the specifications and the appellant's answers to the military judge's questions during the providence inquiry. *Hudson,* 59 M.J. at 359 (citing *United States v. Harwood,* 46 M.J. 26, 28 (C.A.A.F. 1997) and *Lloyd,* 46 M.J. at 23).

The military judge described the elements of indecent acts as follows:

> First, that on or about 18 October 2001, you committed a certain wrongful act with [KC] by standing in front of [KC] and masturbating in the lobby of the Hale Koa Hotel in the presence of others;
>
> Second, that the act was indecent; and
>
> Third, that under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Record at 215. The military judge had the following exchange with the appellant as part of his inquiry regarding the plea of guilty to indecent acts:

> MJ: The primary offense indicated in specification 2 is that you stood in front of [KC] and masturbated in the lobby of the hotel. Is that correct?
> ACC: Yes, sir.
>
> ....
>
> MJ: Is this an area that's open to the general public?
> ACC: Yes, sir.
>
> MJ: And was the area that you were in, was this something that would be in view of the general public if they entered the hotel or went towards the elevators?
> ACC: For the most part, sir, yes, and probably some stanchions and things that would block the view from some areas of the lobby, but for the most part it's in general view.
>
> ....
>
> MJ: And in doing this, did you physically expose your penis and begin to masturbate in the lobby to commit this act?
> ACC: Yes, sir.

Record at 228-229.

The military judge described the elements of indecent exposure as follows:

> First, that at or near Honolulu, Hawaii, on or about 18 October 2001, while in the lobby of the Hale Koa Hotel, you exposed your penis to public view in an indecent manner;
>
> The second element is that this exposure was wrongful; and
>
> The third element is that under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Record at 216. The military judge had the following exchange with the appellant as part of his inquiry regarding the plea of guilty to indecent exposure:

MJ: I think you may have already given me all the information that I would need to have as a factual basis, but let's just review one or two things. In the course of masturbating, was your penis exposed to public view?
ACC: Yes, sir.

Record at 231.

Under the facts of this case, the offense of indecent exposure has the same factual predicate as the offense of indecent acts, with the elements of indecent exposure being a complete subset of the elements of the offense of indecent acts. The thrust of the indecent act offense was the appellant's actions in masturbating in front of KC. The evidence indicates that he exposed his penis for this purpose. The indecent exposure was completed when the appellant exposed himself to KC, regardless of the setting. In conducting the providence inquiry into the indecent exposure offense, the military judge relied heavily on the facts elicited from the appellant during providence regarding the indecent acts offense. The military judge very clearly considered the appellant's actions in exposing his penis and masturbating in front of KC as essential facts necessary to support the appellant's plea of guilty to indecent acts. Had the charges been contested, the military judge would have had to instruct the members that, if they found sufficient evidence that the accused had exposed his penis, but not sufficient evidence that he had masturbated to convict him of indecent acts, the members would have been able only to convict the appellant on the offense of indecent exposure.

Our superior court, in a similar case involving masturbation in front of children without physical contact, determined that the offense of indecent exposure under Article 134, UCMJ, was multiplicious with the offense of conduct unbecoming an officer under Article 133 for masturbating in the presence of the children. *United States v. Ramirez,* 21 M.J. 353, 355 (C.M.A. 1986).

The fact that the offenses in *Ramirez* occurred in a private dwelling and the offenses in the present case occurred in the public lobby of a hotel does not affect our holding in this case. The fact that the offenses in the present case took place in a public place rather than a private setting is not dispositive of the issue. The offense of indecent exposure relies on the exposure occurring in "public view." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 88. The term "public view" is not defined in the UCMJ and the courts have distinguished it from the term "public place." *United States v. Graham,* 56 M.J. 266, 268 (C.A.A.F. 2002). "Public view" includes not only the traditional public indecent display that occurs in a non-private setting where the general public either sees or is likely to see the display, but also includes an indecent display in a private

setting where one member of the general public becomes an "unsuspecting and uninterested" spectator. *Id.* We are dealing with the later scenario in the appellant's case.

The facts contained in the record do not clearly support the appellant's plea of guilty to indecent exposure simply by virtue of his exposing his penis in the lobby of the hotel. The appellant stated that, while the lobby was in general view, there were some objects blocking the view from certain areas of the lobby. Also, the videotape that the appellant relies on to admit his guilt to these offenses clearly shows the appellant looking around as if to ensure that nobody is watching as he commits the indecent acts. Without the presence of KC, the military judge would have needed to elicit additional information regarding the probability of public exposure in order to find the appellant's plea provident.

It is clear from the record that the offense of indecent exposure is a lesser included offense of the offense of indecent acts. As such, it is facially duplicative and the military judge committed plain error by not dismissing Specification 3 of Charge II.

Conclusion

Accordingly, the finding of guilty to Specification 3 of Charge II is set aside and that specification is dismissed. The remaining findings of guilty, as approved below, are affirmed.

As a result of our action on the findings, we will also reassess the sentence in accordance with the principles of *United States v. Cook,* 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples,* 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986). In light of our dismissal of 1 of the 3 offenses for which the appellant was sentenced, we affirm only so much of the sentence as provides for

confinement for 10 months, forfeiture of $1,000.00 pay per month for 10 months, and reduction to pay grade E-3.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court