Not Reported in M.J. Rptr., 2021
WL 824426 (Army Ct.Crim.App.)

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U.S. Army Court of Criminal Appeals.

UNITED STATES, Appellee

v.

Sergeant Juan R. COLONCORDERO

United States Army, Appellant

ARMY 20190303

03 March 2021

Headquarters, United States Army North (Fifth Army)

Douglas K. Watkins, Military Judge

Colonel Lance S. Hamilton, Staff Judge Advocate
For Appellant: Captain Alexander N. Hess, JA; Brian A. Pristera, Esquire (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig J. Schapira, JA; Captain A. Benjamin Spencer, JA (on brief).

Before ALDYKIEWICZ, EWING,[1] and WALKER, Appellate Military Judges

SUMMARY DISPOSITION

Per Curiam:

***1** Appellant's case was referred to trial in 2018 and tried in 2019. At trial, a military judge sitting as a general court-martial convicted appellant, contrary to his plea, of two specifications of sexual assault and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. Following the announcement of findings, and upon motion of trial counsel, the military judge conditionally dismissed the findings of guilty to Specifications 4, 5, and 6 of The Charge as those offenses were pleaded in the alternative with Specifications 1, 2, and 3 of The Charge. *See United States v. Hines*, 75 M.J. 734, 738 n.4 (Army Ct. Crim. App. 2016) (citing *United States v. Britton*, 47 M.J. 195, 203 (C.A.A.F. 1997) (Effron, J., concurring)). Following this, the military judge sua sponte raised the issue of unreasonable multiplication of charges [UMC] with respect to Specifications 1 and 3 of The Charge. With trial counsel's acquiescence, the military judge merged the conduct alleged in Specification 3 into Specification 1 and dismissed Specification 3. The convening authority approved the adjudged sentence of a dishonorable discharge and confinement for one year.

On appeal pursuant to Article 66, UCMJ, appellant raises two assignments of error. We briefly address appellant's claim, raised for the first time on appeal, that his convictions for Specifications 1 and 2 of The Charge constitute UMC.[2]

Despite not raising a UMC objection at trial, appellant claims he is entitled to relief because Specification 1 (the touching and penetration of the victim's vulva with his hand and finger) and Specification 2 (the touching of the victim's buttocks through her clothing with his hand) of The Charge constitute UMC. We conclude appellant waived this claim by failing to object prior to entering his plea. *See* Rule for Courts-Martial [R.C.M.] 905(b)(2), (e) (2016); *United States v. Hardy*, 77 M.J. 438, 441-42 (C.A.A.F. 2018). Even after the military judge sua sponte raised the UMC issue concerning Specifications 1 and 3 of The Charge, appellant remained silent, bypassing a natural opportunity to raise the UMC argument he presents to this court concerning Specifications 1 and 2 of The Charge. *See* R.C.M. 905(e) (stating that upon a showing of good cause a military judge may excuse the waiver from an accused's previous failure to raise appropriate motions for relief under R.C.M. 905(b)). Having found that appellant waived this issue at trial, there is no error for this court to correct on appeal. *See United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

***2** While a finding of waiver is sufficient to dispose of this assignment of error, the judgment in this case does not turn on the standard of review. Even if we chose to exercise our authority under Article 66, UCMJ, to review this waived issue for plain error, *see United States v. Conley*, 78 M.J. 747 (Army Ct. Crim, App. 2019), we find no error, plain or otherwise. A close review of appellant's video-recorded statement to law enforcement reveals that the charged acts were discrete and separate in time, albeit a very short amount of time. Appellant initially massaged the victim's buttocks and then, after some thought on his part and an opportunity to disengage all contact, decided to continue assaulting the victim in a different manner. Consequently, even assuming the issue was not waived, and having considered those factors

articulated by our superior court in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), we find the military judge committed no error, plain or otherwise, by not sua sponte merging or dismissing Specification 2 of The Charge.

The findings of guilty of Specifications 1 and 2 of The Charge and The Charge are AFFIRMED. The findings of guilty of Specifications 4, 5, and 6 of The Charge are conditionally SET ASIDE and conditionally DISMISSED. Our dismissal is conditional upon the affirmed findings of guilty surviving the completion of appellate review. *See* UCMJ art. 57(c). The sentence is AFFIRMED.

Footnotes

1 Judge Ewing decided this case while on active duty.

2 We have considered and reject appellant's second assignment of error that his convictions are factually insufficient. Additionally, we have given full and fair consideration to appellant's claim, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that his trial defense counsel provided ineffective assistance of counsel. We find this claim lacks merit and is worthy of neither discussion nor relief.

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