IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	Crim. App. Dkt. No. 201000289
v.	)	
	)	USCA Dkt. No. 11-0486/NA
Akeem A. WILKINS, Master-at-Arms Third Class (E-4) U.S. Navy Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issue Presented

WHETHER APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN HE WAS CONVICTED FOR ABUSIVE SEXUAL CONTACT AS A LESSER-INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant's approved sentence included a dishonorable discharge and eighteen months of confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact and one specification of forcible sodomy in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920 and 925 (2006). The conviction of abusive sexual contact came after the Military Judge entered a finding of not guilty to aggravated sexual assault, and instructed the Members on the elements of abusive sexual contact as a lesser included offense. The Members sentenced Appellant to eighteen months confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the discharge, ordered the sentence executed.

The lower court originally found that abusive sexual contact was not a lesser included offense of aggravated sexual assault but nonetheless affirmed the findings and sentence. *United States v. Wilkins*, No. 201000289, slip op. at *3 (N-M. Ct. Crim. App. Mar. 24, 2011). On July 27, 2011, this Court granted Appellant's petition for review, vacated the lower court's decision, and remanded the case to the lower court "for reconsideration in light of *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011); *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011); *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011); and *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010)."

After Appellant and the Government submitted briefs, the lower court again affirmed the findings and sentence, finding this time that abusive sexual contact was a lesser included offense of aggravated sexual assault. *United States v. Wilkins*, No. 201000289, slip op. at *7 (N-M. Ct. Crim. App. Nov. 29, 2011). On April 18, 2012, this Court granted review of the issue presented.

Statement of Facts

A. Appellant sexually assaulted MA3 L.

In June 2009, Appellant, Master-at-Arms Third Class (MA3) L, and several other Sailors from their command took leave from their duty station in Greece to visit the resort area of Malia,

Crete. (J.A. 48-49, 54.) The first night at the resort, the group went out to bars and clubs until they returned to the hotel at approximately 0400-0500. (J.A. 59-60.) MA3 L drank between eighteen and twenty-six alcoholic beverages that evening. (J.A. 57-59.) When they got back to the hotel, MA3 L vomited over the balcony of his hotel room approximately five times before another Sailor placed him in his bed, and MA3 L went to sleep. (J.A. 61.)

Later, MA3 L woke up when he felt something touching him; he felt a tugging at his shorts and as if someone was performing fellatio on him. (J.A. 61-62, 67.) MA3 L also felt pressure around his anus area from a finger or hand. (J.A. 62, 68.) He opened his eyes and saw Appellant's head near his penis, as Appellant was holding MA3 L's penis in his hand and looking at MA3 L. (J.A. 62.) MA3 L could not say anything or push Appellant away, but he made a grunting noise and Appellant pulled MA3 L's shorts up and went back to his bed. (J.A. 62.)

The next day, Appellant came into MA3 L's room and "said he was sorry." (J.A. 65.) MA3 L confronted Appellant about the incident and Appellant apologized a second time. (J.A. 65.) MA3 L then told some of the other members of the group what Appellant did, and reported the incident when they returned to their duty station. (J.A. 68, 71-72.)

Several days later, Appellant gave a statement to a Naval Criminal Investigative Service Special Agent. (J.A. 203.) Appellant told the Special Agent that MA3 L threw up before passing out on the bed. (J.A. 203.) Appellant said he was very intoxicated himself and claimed not to remember inserting his finger in MA3 L's anus, touching his penis, or performing felatio on him: "I'm positive I don't remember doing these things to [MA3 L], but I am not positive that I didn't do it. (J.A. 203-204.)

B. Specification 1 of Article 120 alleged that Appellant penetrated the victim's anus. Appellant's defense was that the Victim was not asleep and consented to the act.

The Government charged Appellant with two specifications under Article 120 and one specification under Article 125. The specification of Article 120 at issue alleged that Appellant

> did, in Malia, Crete, Greece, on or about 26 June 2009, engage in a sexual act, to wit: placing his fingers or another object in the anus of [MA3 L] when [MA3 L] was substantially incapable of declining participation in the sexual act or communicating unwillingness to engage in the sexual act because he was asleep.

(J.A. 25.)

At the Article 32 investigation, MA3 L testified that he felt pressure "towards his anus area," which he assumed was Appellant's finger or a foreign object. (J.A. 16.) The Defense

theory at the investigation was that the two engaged in consensual sexual acts. (J.A. 20.)

Specification 2 of the Charge, alleged that Appellant committed abusive sexual contact by touching MA3 L's penis. (J.A. 25.) At trial, Trial Defense Counsel successfully litigated a motion to have the specification dismissed as an unreasonable multiplication of charges because it was

> all part and parcel of the two main acts in this case, which are the alleged sodomy and the digital penetration——or the alleged digital penetration of the anus. Those are the two main charges in this case. Those are the two that the government should go to trial on.

(J.A. 27-28.) Trial Defense Counsel also presented the theme during his opening statement that the Government would not be able to prove that MA3 L was asleep when his anus was penetrated. (J.A. 39.) Trial Defense Counsel's cross-examination of the victim also focused on whether the victim was asleep when the acts occurred. (J.A. 110-13.)

At the close of the Government's case, Trial Defense Counsel raised an R.C.M. 917 motion to dismiss specification 1, arguing that the Government had not proved MA3 L was asleep when Appellant penetrated his anus. (J.A. 155-58.) Trial Defense Counsel argued that because MA3 L remembered being digitally penetrated in his anus, he was either awake or in a semi-conscious state; not asleep. (J.A. 158.) Trial Defense Counsel

argued, "[W]hen the government charges someone, they're putting the defense and the accused on notice for what charges and the theory of the case that the government is going to pursue." (J.A. 156.) He said, "And, because the government has, you know, charged it as 'because he was asleep,' this is what the defense has prepared for, in its cross-examination and its case." (J.A. 158.) The Military Judge denied the motion. (J.A. 161-63.)

C. The Military Judge realized the drafting error in the specification, and instructed the Members on the lesser included offense of abusive sexual contact.

The Military Judge realized the drafting error in Specification 1 of Charge I when he was preparing his instructions for the Members. (J.A. 165.) After the Military Judge prepared his instructions and gave them to the counsel for review, he stated that the parties had held a Mil. R. Evid. 802 conference to discuss the instructions:

> I will note for the record that, in my review of this, I've determined that the Specification under Charge I does not fit the facts. . . . Charge I alleges sexual acts, and the facts in this case do not fit the definition of sexual act, but rather it fits the definition of sexual——wrongful [sic] sexual contact. So, I am going to grant a finding of not guilty of any of the Specification for sexual act, but I'm going to allow it to go forward, the lesser included offense of wrongful sexual contact[1], to the members, under a violation of Article 120.

[1] Trial Counsel later clarified that the Military Judge simply misspoke and the lesser included offense was abusive sexual contact, not wrongful sexual contact. (J.A. 166.)

(J.A. 165-66.) The Military Judge instructed the Members on the elements of abusive sexual contact:

> One, that . . . the accused: (a) engaged in sexual contact, to wit: Placing his finger, fingers, or another object, in the anus of [MA3 L]. . . . Two, that the accused did so, when [MA3 L] was substantially incapacitated, incapable of apprising [sic] the nature of the sexual contact, incapable of declining participation in the sexual contact, or incapable of communicating unwillingness to engage in the sexual contact.

(J.A. 184-85.) Trial Defense Counsel did not object to the Military Judge's ruling to allow the offense of abusive sexual contact to go before the Members or to the instruction given. He argued during closing argument that "[w]hat we do know is that there was sexual activity, that there was oral sex, that there was penetration of the anus, and that [Appellant] was touching his penis," but that MA3 L was capable of understanding what occurred, and consented to it. (J.A. 176-83.)

Summary of Argument

Abusive sexual contact is a lesser included offense of aggravated sexual assault because it is impossible to prove a sexual act without also proving sexual contact. Therefore, alleging that Appellant penetrated a victim's anus, and the penetration was a sexual act, provides notice that the government would attempt to prove, at a minimum, that the penetration was a sexual contact. One could transplant the

essential facts from the charged specification——that Appellant placed his fingers or another object in the anus of MA3 L when MA3 L was asleep——into a legally sufficient specification for abusive sexual contact. Regardless, there was no material prejudice to Appellant because the Record shows he had notice of what he was defending against, and the sexual contact element was uncontroverted at trial.

Argument

ABUSIVE SEXUAL CONTACT IS A LESSER INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT BECAUSE IT IS IMPOSSIBLE TO PROVE THE GREATER OFFENSE WITHOUT ALSO PROVING THE LESSER. IN ANY EVENT, THERE WAS NO PREJUDICE TO APPELLANT BECAUSE THE ELEMENT OF SEXUAL CONTACT WAS UNCONTROVERTED AT TRIAL.

A. The standard of review is plain error.

"Whether an offense is a lesser included offense is a question of law we review *de novo.*" *United States v. Arriaga,* 70 M.J. 51, 54 (C.A.A.F. 2011) (citations omitted). "As there was no objection to the instruction at trial, we review for plain error." *Id.* "In the context of a plain error analysis, Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)(citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

B. Appellant cannot meet his burden to show error because abusive sexual contact is a lesser included offense of aggravated sexual assault.

1. Under the elements test, the elements of the lesser offense must be included in the elements of the charged offense.

"Article 79, UCMJ states that [a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." *Arriaga*, 70 M.J. at 54 (quoting Article 79, UCMJ, 10 U.S.C. § 879 (2006)). "This court applies the elements test to determine whether one offense is a lesser included offense of another." *Id.* (citations omitted). Under the elements test, one compares the elements of the offenses in the context of the charge at issue:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction [regarding a lesser included offense] is to be given.

United States v. Alston, 69 M.J. 214, 216 (C.A.A.F. 2010) (quoting *United States v. Schmuck*, 489 U.S. 705, 716 (1989)). This does not require that the relevant elements of the two offenses have identical statutory language; rather, the meaning of each element is determined by using the "normal principles of statutory construction." *United States v. Alston*, 69 M.J. 214,

216 (C.A.A.F. 2010) (quoting *Carter v. United States*, 530 U.S. 255, 263 (2000)).

2. All the elements of abusive sexual contact are included in the greater offense of aggravated sexual assault.

The greater offense of aggravated sexual assault, in the context of the charge at issue in this case, has two elements: (1) that the accused engaged in a sexual act with another person; and (2) that the other person was substantially incapable of declining participation in the sexual act or of communicating unwillingness to engage in the sexual act. Article 120(c), UCMJ. There is only one difference between this offense and abusive sexual contact, the offense Appellant was convicted of. Abusive sexual contact only requires that the accused "engages in or causes sexual contact" if to do so would constitute aggravated sexual assault, had the sexual contact been a sexual act. Article 120(h), UCMJ.

The statute further defines sexual act:

> contact between the penis and the vulva . . . or the penetration however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Article 120(t)(1), UCMJ. It also defines sexual contact:

> the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent

> to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

Article 120(t)(2), UCMJ.

These definitions show that every sexual act is, at a minimum, a sexual contact. One who penetrates the genital opening of another must also commit sexual contact. The reverse is obviously not true: many types of sexual contact are not sexual acts, including the type of sexual contact at issue here.

In *Bonner*, this Court held that assault consummated by battery is a lesser included offense of wrongful sexual contact, because every sexual contact would, at a minimum, be an offensive touching sufficient to constitute a battery. *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011). Obviously, the reverse is not true: not every battery is a sexual contact.

Likewise, aggravated sexual assault is a lesser included offense of rape by force because every act of force, at a minimum, includes an offensive touching that satisfies the bodily harm element of aggravated sexual assault. *Alston*, 69 M.J. at 216. Again, the reverse does not need to be true: not all bodily harm rises to the level of "force" as defined in Article 120(t)(5)(C).

Applying the common and ordinary understanding of the words in the statute, every sexual act described in Article 120(t)(1), at a minimum, includes an "intentional touching" that satisfies

the sexual contact element of abusive sexual contact defined in Article 120(t)(2). Consistent with *Bonner* and *Alston*, because it is impossible to prove a sexual act without also proving a sexual contact, abusive sexual contact is a lesser included offense of aggravated sexual assault. Just like in *Bonner*, "one could transplant the essential facts" from the specification into a legally sufficient specification alleging the lesser included offense. 70 M.J. at 3. The essential facts in Specification 1 were that Appellant placed his fingers or another object in the anus of MA3 L when MA3 L could not appraise the nature of the sexual conduct, or communicate unwillingness to engage in it. These essential facts allege all the elements of abusive sexual contact, so instructing on the lesser included offense was proper.

3. Alleging that Appellant penetrated the victim's anus, and that the penetration was a sexual act, provided notice that the Government would attempt to prove, at a minimum, that the penetration of the anus was a sexual contact.

The drafting error in the Specification is apparent: penetrating the anus is not a sexual act. But the specification provided notice that the Government would attempt to prove the less serious offense——that penetration of the anus was sexual contact——because every sexual act is, at a minimum, a sexual contact.

For example, in *Arriaga* this Court held that housebreaking is a lesser included offense of burglary because it is impossible to prove burglary without proving housebreaking and "the offense as charged in this case clearly alleges the elements of both offenses." 70 M.J. at 55. The only substantive difference between *Arriaga* and this case is that in this case, the offense as charged never properly alleged the elements of the greater offense. But the principles articulated in this Court's lesser included offense cases indicates an Appellant's right to notice is violated when he is convicted of a lesser included offense that has elements which are not included in the original charge. *See Girouard,* 70 M.J. 10; *United States v. Jones,* 68 M.J. 465, 467 (C.A.A.F. 2010). The same concern is not present when a specification includes the elements of the lesser offense, but mistakenly charges the greater offense.

Suppose that instead of the specification at issue in *Arriaga,* the government alleged a specification of burglary that read as follows:

> In that the accused did, on a certain date, in the nighttime, unlawfully break and enter the *dwelling house* of another, to wit: an *unoccupied government warehouse* located at a specific address, with intent to commit larceny therein.

The error in such a specification is apparent: an unoccupied government warehouse is not a dwelling house and the

specification never properly alleges a burglary. But the holding of *Arriaga* would not change. Housebreaking would still be a lesser included offense of burglary, because it is impossible to commit burglary without also committing housebreaking, and the specification contains every element of housebreaking. Every dwelling house is, at a minimum a "structure." So by alleging "dwelling house," the specification provides notice that the government would attempt to prove, at a minimum, that the warehouse was a structure. The same reasoning applies here. Alleging that Appellant committed a sexual act by penetrating the victim's anus provides notice that the government would attempt to prove that the penetration of the anus is, at a minimum, sexual contact.

Appellant's theory would turn principles of notice on their head. Appellant asserts that the proper lesser included offense here would be abusive sexual contact for touching the victim's penis. (Appellant's Br. at 13.) But the specification does not allege touching of the penis; it alleges penetration of the anus, and Appellant clearly understood this throughout the trial. (J.A. 27-28, 39, 110-13, 155-58, 176-83.) Similarly then, under Appellant's reasoning, in the hypothetical burglary example earlier, the accused could not be convicted of housebreaking for breaking into the very same government warehouse listed on the charge sheet——a warehouse is not a

dwelling house. But he could be convicted for breaking into a different dwelling house belonging to the government. This theory cannot be true.

Appellant also claims that this situation is similar to taking a specification charging "Larceny by unlawfully striking a victim" and changing the word "larceny" to "assault." (Appellant's Br. at 8.) Even in that case, there may not be any error requiring reversal, if the accused always understood he was defending against an assault, and did not object when the Military Judge fixed the mislabeled specification. But regardless, that situation is not the same as this case because changing "larceny" to "assault" might be a major change, while changing "sexual act" to "sexual contact" is a minor change.

"Minor changes in charges and specifications are any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are fairly likely to mislead the accused as to the offenses charged." R.C.M. 603(a). A change is minor when a charge is altered to allege a lesser included offense, and the amendment does not cause undue surprise. *United States v. Sullivan,* 42 M.J. 360, 365 (C.A.A.F. 1995).[2] Here, changing "sexual act" to

[2] Of course, the lesser included offense must not contain elements that the greater offense does not. The *Sullivan* court's application of this framework to Article 134, and reliance on

"sexual contact" on the specification would be a minor change because it simply changes the physical contact element required for both offenses to a less serious form.

Engaging in sexual activity with an incapacitated victim may be two offenses under Article 120: abusive sexual contact, if the sexual activity is sexual contact, or aggravated sexual assault, if the sexual contact is a particular type of sexual contact——penetration of a genital opening——which also meets the definition of a sexual act. Therefore, changing "sexual act" to "sexual contact" on the specification would not add any matter not fairly included in the original charge. It is similar to changing a charge alleging a premeditated murder to allege an intentional murder instead. The change also does not cause undue surprise because the acts alleged in the specification never changed. The Military Judge's ruling, which allowed the Government to proceed on a lesser included offense, had the same effect as making a minor change to the specification.

C. Any error did not materially prejudice a substantial right of Appellant.

Even if abusive sexual contact is not a lesser included offense of aggravated sexual assault, Appellant must still show material prejudice to a substantial right. *McMurrin*, 70 M.J. at 19-20. Any error here implicates Appellant's substantial right

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United States v. Foster, 40 M.J. 140 (C.M.A. 1994) is no longer viable.

to notice under the Fifth and Sixth Amendments. *United States v. Humphries*, No. 10-5004/AF, slip op. at *14-15 (C.A.A.F. Jun. 15, 2012). That is, the right at issue is Appellant's right to notice that he could be convicted of abusive sexual contact for the conduct alleged in the specification. The error itself, alleging "sexual act" instead of "sexual contact," is insufficient to show prejudice. *Id.* at *17. To determine if an error materially prejudiced Appellant's right to notice, this Court looks "to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id.* (quoting *United States v. Cotton*, 535 U.S. 625, 633 (2002)).

Here, the Record shows that Appellant always understood that he was defending against penetrating the victim's anus. (J.A. 16, 20, 27-28, 39, 110-13, 155-58). This distinguishes Appellant's case from *Jones*, *McMurrin*, and *Girouard*, where convictions of lesser included offenses rested in part on the government proving prejudice to good order and discipline or service discrediting conduct, and those elements did not appear anywhere on the charge sheet. Here, the original charge sheet provided Appellant notice of all the essential facts and elements at issue. Using the words "sexual act" notified him that the Government would attempt to prove, at a minimum, that the penetration of the anus was a sexual contact. But even if

this Court disagrees, Appellant still had notice that the Government would proceed with abusive sexual contact instead of aggravated sexual assault when the Military Judge noticed the drafting error before instructions. Appellant never objected. He was clearly not relying on the fact that the Government had erroneously charged this offense as a sexual act, since he did not raise the issue during his R.C.M. 917 motion to dismiss the charge following the conclusion of the Government's case. (J.A. 155-58.)

The element of sexual contact (penetration of the anus) was uncontroverted at trial. Appellant's theory throughout was that the victim was not asleep and consented to the acts. Trial Defense Counsel conceded during closing argument that Appellant penetrated the victim's anus. (J.A. 176.) Appellant's defense was that it was consensual and the victim was not asleep. Therefore, Appellant has not shown material prejudice, when the Record shows he had notice that he was defending against abusive sexual contact, and the sexual contact element was uncontroverted at trial.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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I certify that the foregoing was electronically filed with the Court and a copy electronically served on opposing counsel on June 18, 2012.

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