

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

UNITED STATES,	)	REPLY BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Specialist (E-4)	)	Crim. App. Dkt. No. 20100196
<b>JUSTIN P. SWIFT,</b>	)	
United States Army,	)	USCA Dkt. No. 16-0407/AR
Appellant	)	

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

Issues Presented

I.

WHETHER THE ARMY COURT DENIED APPELLANT HIS SUBSTANTIAL RIGHT TO AN ARTICLE 66(c) REVIEW BY AFFIRMING THE FINDINGS AND SENTENCE ON UNCHARGED MISCONDUCT PRESENTED AT TRIAL RATHER THAN THE CHARGED OFFENSES.

II.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING APPELLANT'S PRETRIAL STATEMENT WHERE THERE WAS NO INDEPENDENT EVIDENCE TO CORROBORATE THE ESSENTIAL FACTS ADMITTED.

III.

WHETHER THE EVIDENCE OF THE TWO CONVICTIONS OF INDECENT ACTS WITH A CHILD IS LEGALLY SUFFICIENT.

## Statement of the Case

On May 21, 2016, this Honorable Court granted appellant's petition for review. On June 23, 2016, appellant filed his final brief with this Court. The government responded on July 25, 2016. This is appellant's reply.

## Argument

**a. The government's variance argument fails to address the granted issue of whether the Army Court denied appellant his substantial right to an Article 66(c) review by affirming the findings and sentence based on uncharged misconduct presented at trial rather than the charged offenses.**

The government's variance argument is based on "KS's testimony and appellant's statement refer[ing] to the same indecent acts alleged in the charge sheet." (Appellee's Br. 10). This argument i) is counter to the government's theory presented at trial, ii) disregards the government's pretrial notices, and iii) ignores the specific facts in KS's testimony and appellant's statement. Ultimately, the government's argument mischaracterizes the granted issue and fails to address the Army Court's affirmance of the findings and sentence on uncharged misconduct.

i) Due process and the government's theory presented at trial preclude the government from arguing before this Court that KS's testimony and appellant's statement refer to the same acts.

The government's theory at trial was that appellant committed at least five separate acts of misconduct against KS: the two charged acts detailed in appellant's sworn statement to Special Agent JS, and in addition the three uncharged acts KS detailed on the stand. (JA 208-9). An appellate court may not

affirm a conviction on the basis of a theory not presented to the trier of fact. *United States v. Chiarella*, 445 U.S. 222, 236 (1980). “Though the CCA has significant factfinding powers under Article 66, UCMJ, the CCA is ‘not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.’” *United States v. Bennitt*, 74 M.J. 125, 128 (2015)(citing *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009))(quoting *United States v. Dunn*, 442 U.S. 100, 107 (1979)). “To do so ‘offends the most basic notions of due process,’ because it violates an accused’s ‘right to be heard on the specific charges of which he is accused.’” *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999)(quoting *Dunn*, 442 U.S. at 106).

The government contends appellant’s reliance on statements in pretrial motions and in presenting argument are misplaced because they were not evidence presented at trial. (Appellee’s Br. 12-13). While pretrial motions and argument are not evidence, they reveal the government’s theory in the merits phase of the trial. Here, the pretrial motions identified the government’s plan to present additional uncharged misconduct. (JA 258-265). Furthermore, the government’s closing and rebuttal detailed the government’s theory that the acts for which appellant was charged were those included in his sworn statement to Special Agent JS, and these two acts were separate and distinct from the three acts to which KS actually testified. (JA 208-9, 221-22).

While the government could have presented alternative theories of proof for the charged offenses, it did not do so. Rather, the government presented the theory that appellant admitted to the charged conduct in his pretrial statement and that these acts were in addition to the three acts that KS remembered. (JA 208-9). The Army Court was therefore limited to affirming appellant's convictions and sentence based on this theory presented at trial.

ii) The government disregards its Mil. R. Evid. 404(b) and 414 motion.

In alleging KS's testimony consisted of the same acts of misconduct described in appellant's sworn statement, the government implicitly asks this Court to disregard the government's pretrial Mil. R. Evid. 404(b) and 414 motion.

(Appellee's Br. 10). Prior to trial, the government specifically identified the Hawaii Van incident as uncharged misconduct under Mil. R. Evid. 404(b) and 414. (JA 262). Nothing in the record rescinded this notice and alerted defense that, through an evidentiary sleight of hand, appellant could now have his conviction affirmed on the very evidence the government previously identified as uncharged misconduct.

Similarly, the government garbles the record regarding the additional act of uncharged misconduct disclosed by KS prior to trial. The government states:

A full review of the record shows that appellant was on notice and not surprised by KS's testimony concerning the indecent acts in the van and in bed with her mother. As an initial matter, the government provided the defense with a verbal bill of particulars. (JA 013, 037). Although

this communication between the parties was not further detailed on the record, the defense never objected or otherwise asserted at trial that the government failed to provide notice of the charged offenses.

(Appellee's Br. 20). The pairing of these sentences suggests that the defense was provided a bill of particulars indicating that the Hawaii Van incident and the Texas Bedside incident were the charged misconduct. However, at no point does the record state that a verbal bill of particulars was actually given, let alone that the government identified the Hawaii Van incident and the Texas Bedside incident as charged conduct. (JA 13, 37). Further, such a bill of particulars would have directly contradicted the government's closing and rebuttal arguments.

While the government is correct that "the defense never objected or otherwise asserted at trial that the government failed to provide notice of the charged offenses," this completely misses the point. (Appellee's Br. 20). The government did provide notice of the charged offenses through the wording of the charge sheet, its pretrial notices and motions regarding uncharged misconduct, and ultimately its arguments at trial: appellant was charged with his own sworn statement -- which was separate and distinct from each of the acts described by KS. The due process violation did not occur at the trial level, but rather with the Army Court affirming the conviction and sentence based upon uncharged misconduct.

The entirety of the government's variance argument misconstrues the notion of notice of uncharged misconduct under the Military Rules of Evidence with the

notice requirements of due process. The government relies heavily on the circumstances of the indecent acts being at issue throughout the entire trial and the defense's failure to object to KS's testimony to support the contention that appellant was not surprised, was on notice, and had a full opportunity to present a defense. *See* (Appellee's Br. 16-19, 21-26). However, notice that evidence of uncharged misconduct will be presented at trial is not the same as notice of the charged offenses. It does not follow that contesting uncharged misconduct at trial without objecting to its admission is itself evidence the defense was on notice that previously identified uncharged conduct actually constituted the charged offenses.

Military Rules of Evidence 404(b) and 414 do not preclude the defense from contesting uncharged acts at trial. *See generally* Mil. R. Evid. 404(b) and 414.

Nor does the defense's choice to contest such uncharged misconduct through cross-examination or presentation of contrary evidence indicate that the defense had a full opportunity to be heard on such evidence as if it were charged.

Similarly, the failure of defense to object to the admission of evidence identified under the rules of evidence does not negate the government's prior notice that such acts are uncharged and absolve the government of its due process requirements.

iii) The government ignores the differences in the specific facts of KS's testimony and appellant's statement.

The government contends "the specifications alleged in the charge sheet, KS's testimony at trial, and appellant's statement admitted at trial all dovetail into the

same timeframe, same location, and describe the same indecent acts accomplished through the same method – appellant used his hand to massage or fondle KS’s vagina.” (Gov. Br. at 11). However, as the government argued at trial, KS’s testimony and appellant’s statements describe separate and distinct acts. It is the differences rather than the similarities that distinguish the events.

Appellant’s sworn statement details two specific instances of accidentally touching KS’s vagina. (JA 224-25). The first incident, the Hawaii Bedside incident, occurred in Hawaii in November or December 2003 in his bedroom when appellant crawled into his own bed and accidentally touched KS’s vagina believing he was touching his wife. (JA 224-25). The only instance KS described as having occurred in Hawaii was the uncharged Hawaii Van incident, which notably occurred in a van. (JA 34-36). While the locations of both instances can be described as having occurred in Hawaii, these acts do not dovetail in terms of circumstances and constitute separate events.

The second incident detailed in appellant’s sworn statement, the Old-Flame incident, described an instance in June 2007 at Fort Bliss, Texas where appellant had a dream about an old girlfriend. (JA 224-25). In this dream, appellant laid his head on his girlfriend’s chest and reached over to touch his girlfriend’s vagina only to wake up and find that he was performing it in real life with his daughter. (JA 224). Neither of the two acts described by KS as having occurred in Texas

involved these facts. KS described the uncharged Texas Pool incident as having occurred after she pushed her sister in the pool and appellant committed the act while chastising her for her behavior. (JA 36-38). KS described the uncharged Texas Bedside incident as having occurred in her parent's bed. (JA 39). She crawled into bed with her mother because she was having a nightmare. (JA 39). Her father came home, got in bed and started touching her vaginal area with his fingers. (JA 40). Notably, KS never described appellant laying his head on her chest during the Texas Bedside incident. Similarly, appellant never described his wife being present during the Texas Old-Flame incident. These differences distinguish the two and align with the government's theory at trial that the Texas Old-Flame incident and the Texas Bedside incident respectively constitute separate charged and uncharged events.

It is the differences rather than the similarities between KS's testimony and appellant's statements to Special Agent JS that distinguish them as separate events in accordance with the government's theory at trial. Just as importantly, the charge sheet itself specifically corresponds to appellant's pretrial statements rather than KS's testimony, providing notice that the government charged appellant with the acts contained in his statement to Special Agent JS. (Appellant's Br. 12). Indeed, the trial counsel argued, "He admitted to it. He is guilty of it." (JA 222).

**b. The government’s corroboration and legal sufficiency arguments are also erroneously premised on KS’s testimony and appellant’s statement referring to the same acts.**

The very same due process requirements that preclude an appellate court from affirming appellant’s convictions on a theory not presented to the trier of fact equally apply to corroboration and legal sufficiency. *Chiarella*, 445 U.S. at 236. The government’s pretrial motions, arguments, and the language of the specifications themselves detail the government’s theory at trial, limiting the lens through which an appellate court can evaluate the evidence.

The entirety of the government’s argument on corroboration is “the essential facts from appellant’s confession were corroborated by KS’s testimony, her prior consistent statements, and her statements for medical diagnosis and treatment.” (Appellee’s Br. 28). As previously detailed, KS’s testimony and appellant’s statement refer to distinctly separate acts. Thus, appellant’s case is unlike the facts in *Cottrill*, where the corroborating evidence included both a physician’s opinion regarding physical evidence of sexual abuse and the child’s statements referencing the very same acts with which the appellant in *Cottrill* was charged. *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997). Here, none of the statements made by KS can corroborate appellant’s admissions because they refer to completely separate uncharged misconduct. However, this case is exactly like the uncorroborated instances discussed in both *Rounds* and *Adams*, in that none of the

facts this Court has previously determined as essential were corroborated. *United States v. Rounds*, 30 M.J. 76, 80 (C.A.A.F. 1990); *United States v Adams*, 74 M.J. 137, 141 (C.A.A.F. 2015).

The government's arguments about legal sufficiency also erroneously rely on KS's testimony being the same acts contained in appellant's statements, rather than the separate uncharged misconduct argued at trial. (Appellee's Br. 34-38).

### Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and dismiss The Charge and its specifications.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing in the case of *United States v. Swift*, Army Dkt. No. 20100196, USCA Dkt. No. 16-0407/AR, was electronically filed brief with the Court and Government Appellate Division on August 4, 2016.

  
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