IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| U N I T E D S T A T E S,<br>Appellee<br><br>v.<br><br>Captain (O-3)<br>Joseph R. Armstrong,<br>United States Army,<br>Appellant | ) FINAL BRIEF ON BEHALF OF<br>) APPELLANT<br>)<br>) Crim. App. Dkt. No. 20150424<br>)<br>) USCA Dkt. No. 17-0556/AR<br>)<br>)<br>)<br>) |

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

## Issue Granted

**WHETHER ASSAULT CONSUMMATED BY A BATTERY IS A LESSER INCLUDED OFFENSE OF ABUSIVE SEXUAL CONTACT BY CAUSING BODILY HARM.**

## Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

## Statement of the Case

On April 1, May 18, and June 9-12, 2015, Captain (CPT) Joseph R. Armstrong, was tried at Joint Base Lewis-McChord, Washington, by an officer panel sitting as a general court-martial. Contrary to his plea, CPT Armstrong was

convicted of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2012), as a lesser included offense of abusive sexual contact in violation of Article 120(d), UCMJ, 10 U.S.C. § 920(d) (2012), of which the panel acquitted CPT Armstrong.[1] The panel sentenced the appellant to be dismissed from the service. The convening authority approved the adjudged sentence. (Action).

On June 23, 2017, the Army Court summarily affirmed the findings and sentence. The appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, through counsel, filed a Petition for Grant of Review on August 21, 2017. On October 12, 2017, this Court granted the appellant's petition for review on the issue briefed herein.

## Statement of Facts

General background facts.

Captain Armstrong and his wife hosted a Halloween party. (JA 65). Fellow officers and spouses were invited over for drinks, snacks, and games, and all guests were invited to sleep over. (JA 65). Ms. BG and First Lieutenant BG attended. (JA 66).

[1] The panel also found CPT Armstrong guilty of conduct unbecoming an officer and a gentleman. (JA 82-83). The military judge found the two charges represented an unreasonable multiplication of charges for findings and, at the Government's election, dismissed the charge of conduct unbecoming an officer and a gentleman after findings and before sentencing. (*See* JA 6).

First Lieutenant BG was feeling unwell and went to sleep before Ms. BG. (JA 18). Ms. BG decided to lie down on a couch in the living room until her friends were ready to leave. (JA 20-21). Ms. BG stated that she woke up with CPT Armstrong sitting next to her on the couch and his hand rubbing her genital area. (JA 21). Ms. BG's leggings, however, were not found to contain CPT Armstrong's DNA. (JA 44).

During an interrogation, a CID agent told CPT Armstrong that his DNA would be on the leggings. (JA 33). The CID agent admitted using the "Reid Technique" when interviewing the appellant. (JA 40). This technique includes offering a suspect alternate theories of what happened. (JA 41). In this case, the CID agent suggested to the appellant that he might have touched Mrs. BG by accident. (JA 41). Accordingly, the agent suggested to CPT Armstrong that his hands may have been on Ms. BG because of inadvertence or accident. (JA 43). Captain Armstrong stated that his hands may have been on Ms. BG's legs to warm them. (JA 50).

The appellant chose not to testify on his own behalf. (JA 78). After the close of evidence, the following exchange took place relating to panel instructions.

> [MJ:] Counsel, do you see any lesser included offenses that are in issue in this case?
>
> CDCl: No, Your Honor.
>
> MJ: Government?

> TC: Yes, sir, the lesser included offense of Article 128, assault, as the Article 120 Charge.
>
> MJ: Defense, what say you?
>
> CDCl: Taking no position on it, judge.
>
> MJ: Very well. I think I agree with the government on this one, that assault consummated by a battery would be a lesser included offense of The Specification of Charge I. If counsel for either side finds case law or some other contrary law on the subject, please provide it to me during this break.

(JA 78).

Ultimately, the military judge instructed the panel that assault consummated by a battery is a lesser included offense of abusive sexual contact as follows:

> The court is further advised that the offense of assault consummated by a battery is a lesser included offense of the offense set forth in The Specification of Charge I. When you vote, if you find the accused not guilty of the offense charged, that is abusive sexual contact, then you should consider the lesser included offense of assault consummated by a battery, in violation of Article 128, UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond reasonable doubt:
>
> One, that between on or about 31 October 2014 and on or about 1 November 2014, at or near Joint Base Lewis-McChord, Washington, the accused did bodily harm to Mrs. [BG];
>
> Two, that the accused did so by touching through the clothing, the genitalia of Mrs. [BG], and wedging his hands between her thighs; and

> Three, that the bodily harm was done with unlawful force or violence.

(JA 80-81).

The panel acquitted the appellant of abusive sexual contact but convicted him of assault consummated by a battery. The panel made the follow findings by exception and substitution:

> Guilty, except the word, [sic] "commit sexual contact upon," and "to wit: touching through the clothing the genitalia of the said Mrs. [BG], by causing bodily harm to the said Mrs. [BG]," substituting therefor the words, "unlawfully touch." Of the excerpted [sic]: Not guilty; Of the substituted words: Guilty.

(JA 82-83).

## Summary of Argument

The offense of assault consummated by a battery contains at least one element – lack of consent – not found in the offense of abusive sexual contact. Assault consummated by a battery is therefore not a lesser included offense of abusive sexual contact, and it was error to instruct the panel it was. This Court has held that lack of consent is an element of assault consummated by a battery. *Riggins*, 75, M.J. at 83. In contrast, lack of consent is generally not an element of the offense of abusive sexual contact, or the offense of sexual assault, on which the offense of abusive sexual contact is based. *See United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017) (*citing United States v. Neal*, 68 M.J. 289, 303 (C.A.A.F.

2010). Thus, lack of consent is an element of assault consummated by a battery, but not an element of abusive sexual contact, as charged in this case. This Court determines whether one offense is a lesser included of another based on the elements test. *Riggins*, 75 M.J. at 82-83. Because assault consummated by a battery contains at least one element that is absent from the charged offense of abusive sexual contact, this Court should find the former is not a lesser included offense of the latter.

Under *United States v. Reese, 76 M.J.* 297 (C.A.A.F. 2017), the consideration of a charge containing an element not referred to the court-martial deprived the court-martial of jurisdiction over the charge, and as a consequence, the appellant need not show prejudice to prevail. Even if this was not the case, appellant was nevertheless prejudiced by this error because it deprived him of fair notice of the charges against him and the ability to mount a defense to the charge of which he stands convicted.

## Argument

**WHETHER ASSAULT CONSUMMATED BY A BATTERY IS A LESSER INCLUDED OFFENSE OF ABUSIVE SEXUAL CONTACT BY CAUSING BODILY HARM.**

### Standard of Review

This Court conducts a de novo review to determine whether one offense is a lesser included of another. *Riggins*, 27 M.J. at 82. When an appellant is convicted of

a crime that was not charged, and is not a lesser included offense of a crime that was charged, this Court has held such a conviction violates the appellant's constitutional rights to notice and to not be convicted of a crime that was not charged. *Id* at 85. As a constitutional error, "the Government bears the burden of establishing that the error is harmless beyond a reasonable doubt." *Id.*

Recently, in *Reese*, this Court re-examined the question of whether an appellant must establish any prejudice to secure relief in the event of a major change over defense objection. This Court concluded that a major change after referral and over defense objection deprives the court-martial of jurisdiction because the charge, as changed, was never referred to the court-martial, and after the change, "there is no charge to which jurisdiction can attach." *Reese*, 76 M.J. at 302. To the extent this Court's prior holdings required a separate showing of prejudice in such cases, this Court expressly overruled such prior law. *Id*.

## Law and Argument

Analysis of the Error

This Court applies the elements test to determine whether one offense is a lesser included offense (LIO) of another. *Id.* Specifically:

> If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.

*United States v. Tunstall*, 72 M.J. 191, 194 (C.A.A.F. 2013) (quoting *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010)).

There is no requirement, however, that the two offenses use identical statutory language in order for one to be a lesser included of the other. *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011). Instead, this Court employs normal rules of statutory interpretation to determine whether all the elements of a possible lesser included offense are necessarily proven by proving all the elements of the greater offense. *Riggins*, 75 M.J. at 83 (quoting *United States v. Gaskins*, 72 M.J. 225, 235 (C.A.A.F. 2013) (quoting *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012))). Further, whether one offense is a lesser included of another is examined based on "the context of the charge at issue." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

The elements test ensures that charging a greater offense places an accused on notice to defend against a lesser included offense. *Riggins*, 75 M.J. at 83. This is necessary as the "due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted." *Jones*, 68 M.J. at 468 (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)).

The elements of assault consummated by a battery are: (1) the accused did bodily harm to a certain person; and (2) t the bodily harm was done with unlawful

force or violence. *Riggins*, 75 M.J. at 83. This Court has further explained, "Unlawful force or violence means that the accused wrongfully caused the contact, in that no legally cognizable reason existed that would excuse or justify the contact." *Bonner*, 70 M.J. at 3. Similarly, this Court has held that lack of consent is an element of assault consummated by a battery. *Riggins*, 75 M.J. at 83.

By contrast, the elements of abusive sexual contact, as charged in this case, are: (1) the accused engaged in sexual contact with another person; and (2) the accused did so by causing bodily harm to that other person. *See Riggins*, 75 M.J. at 83; Article 120(b)(1)(B), (d).[2] The element of unlawful force or violence, from which the element of lack of consent derives, is notably absent from the offense of abusive sexual contact.[3] *See generally Oliver*, 76 M.J. at 274.

Because assault consummated by a battery includes the elements of unlawful force or violence and non-consent, it is not a lesser included offense of abusive sexual contact, as charged in this case, which does not contain either of those

[2] Abusive sexual contact is defined as sexual contact under circumstances that would constitute sexual assault if the sexual contact had been a sexual act, as both terms are defined by Article 120(g), UCMJ.

[3] The exception to this general rule is when the government chooses to charge the bodily harm as a non-consensual sexual contact. See Article 120(g)(3). That charging theory would inject an element of non-consent into the offense, but while that charging theory is allowed, it was not employed in this case.

elements. The appellant was therefore improperly convicted of an offense with which he was not charged and of which he had inadequate notice.

Analysis of Prejudice

In light of *Reese*, which post-dates both *Riggins* and *Oliver*, this Court should reconsider whether the appellant need show any prejudice to prevail in a case where he was convicted under an erroneous theory of a lesser included offense. Although *Reese* was not a case about lesser included offenses, it logically extends to cases where, as here, an appellant was convicted of a crime that was not charged and is not the lesser included offense of any crime that was charged.

In *Reese*, this Court held that a major change to a charge, over defense objection, deprives the court-martial of jurisdiction because "there is no charge to which jurisdiction can attach." *Reese* 76 M.J. at 302. This is consistent with the general principle that a court-martial only has jurisdiction over charges referred to it by its convening authority. *See generally United States v. Williams*, 29 M.J. 421, 424 (C.A.A.F. 1990) (although referral is usually explicit, it may also be implicit in a pretrial agreement). In this case, the convening authority did not explicitly refer a charge of assault consummated by a battery, and he did not enter into any pretrial agreement with the appellant to implicitly refer such a charge.

Another way of analyzing this issue is to examine the language of Rule for Courts Martial (R.C.M.) 603. As *Reese* centered on the question of whether a

change to a charge was major or minor, R.C.M. 603 was crucial to that case. It is also informative of how this Court should approach the issue of prejudice in this case. Rule for Courts Martial 603(a) defines minor changes as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred. . . ." This Court has emphasized that a change is minor "so long as 'no additional or different offense is charged. . . .'" *Reese*, 76 37 at 300 (quoting *United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995) (internal quotation marks and citations omitted). By contrast, a change is major if an additional or *different* offense is charged. By definition, an offense that is not the lesser included of a charged offense is a *different* offense than that charged. Thus, convicting an appellant based on an erroneous theory of a lesser included offense is functionally the same as allowing a major change after arraignment.

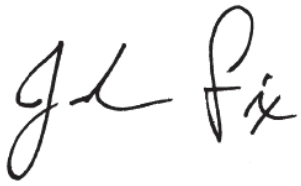
The same rationale this Court applied in *Reese*, should apply to the error in this case. The charge the appellant was convicted of simply was not referred to the court-martial at which he was convicted. Assault consummated by a battery constituted a different offense than those referred by the convening authority. This renders the charge jurisdictionally infirm, and this Court should hold that it need not assess prejudice once such jurisdictional infirmity is established.

Even if this Court determines that the rationale of *Reese* does not extend past the issue of major changes, it should find the appellant was prejudiced by the

consideration of assault consummated by a battery as a lesser included offense of abusive sexual contact. The appellant had a substantial right to adequate notice of the charge against him, *see Riggins*, 75 M.J. at 85, The appellant was deprived of that right when the government and the military judge allowed the panel to consider a theory of liability with which he was not charged. Further, the appellant was deprived of the ability to defend against this new charge because he was only notified of it after the close of evidence. If the appellant had proper notice of the new theory of liability, he could have presented a defense on the element of using *unlawful* force to touch the leg of the complaining witness. Had he received adequate notice, the appellant could also have presented a defense on the theory that any touching that may have occurred was implicitly consented to in the seating arrangement of two persons adjacent on a couch. Similarly, the appellant chose not to testify in his own defense; if he had been put on notice to defend against a charge of assault consummated by a battery, he could have testified to explain why the touching that took place was not unlawful, or why it appeared to be done with implicit consent. In short, adequate notice would have allowed the appellant to present a defense on the elements unique to assault consummated by a battery, but the inadequate notice deprived him of this ability.

## Conclusion

WHEREFORE, the appellant respectfully requests that this Honorable Court set aside and dismiss his conviction for assault consummated by a battery and set aside the sentence.



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# CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Armstrong*, Army Dkt. No. 20150424, USCA Dkt. No. 17-0556/AR, was electronically filed brief with the Court and Government Appellate Division on November 8, 2017.

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