IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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 the Case

This Court granted review on this issue on October 12, 2017. The appellant filed his Brief on November 8, 2017. The government filed its Brief on Behalf of the Appellee on December 8, 2017. The appellant herein files his Reply.

Statement of Facts

The appellant relies on the facts presented in his opening brief and supplements them as necessary in the argument below.

Argument

Reply on the Issue of Error.

The appellant and the government agree that one offense is the lesser included of another only if "the elements of the lesser offense are a *subset* of the elements of the charged offense." *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)) (emphasis added). The parties diverge, however, on the issue of whether the element of assault consummated by a battery that the "the bodily harm was done with unlawful force or violence"[1] is a *subset* of either element of abusive sexual contact. 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. Article 120(b)(1)(B); Article 120(d).

Unlawful force or violence cannot be a *subset* of bodily harm itself, because that would render Article 128 redundant and collapse assault consummated by a battery into the single element of bodily harm. Such a redundant reading would violate the canon against surplusage. *See United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

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[1] The elements of assault consummated by a battery are: "(1) That the accused did bodily harm to a certain person; and (2) that the bodily harm was done was done with unlawful force or violence." *Manual for Courts Martial*, pt. IV, ¶ 54b(2) (2012 ed.).

Moreover, reading "unlawful force or violence" as a *subset* of bodily harm would flip the statutory scheme on its head and render every sexual assault by bodily harm a rape and every abusive sexual contact by bodily harm an aggravated sexual contact. This is true because a sexual act accomplished by "unlawful force" constitutes rape under Article 120(a)(1) whereas a sexual act accomplished by "bodily harm" constitutes sexual assault under Article 120(b)(1)(B). Aggravated sexual contact is defined the same as rape substituting sexual contact for a sexual act. Article 120(c). Similarly, abusive sexual contact is defined the same as sexual assault substituting sexual contact for a sexual act. Article 120(d).

Further, a close reading of this Court's holding in *Riggins* suggests this Court has already resolved in the negative the issue of whether unlawful force or violence is a subset of sexual contact. In *Riggins*, this Court held that abusive sexual contact by placing a victim in fear "did not include an element requiring that the bodily harm be done with unlawful force or violence." *United States v. Riggins*, 75 M.J. 78, 80, 84 (C.A.A.F. 2016). Sexual contact is an element of the offense of abusive sexual contact regardless of what renders the sexual contact abusive. Therefore, if unlawful force or violence is not a subset of abusive sexual contact as charged in *Riggins*, it cannot logically be a subset of the sexual contact element in any specification of abusive sexual contact because the element of "sexual contact" retains the same definition across charging theories.

Curiously, the government argues that non-consent is an element of abusive sexual contact. (Gov't Br. 9). This is contrary to the reasoning of *United States v. Neal*, 68 M.J. 289, 303 (C.A.A.F. 2010), and contrary to the discussion in *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017). Nevertheless, to the extent there is any remaining doubt as to whether non-consent is an element of abusive sexual contact as charged in this case, that doubt can be resolved by examining the very sections of the statute cited by the government on brief.

The government offers the definition from Article 120(g)(3) to suggest that non-consent is an element of the offense because the definition of "bodily harm" includes "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." (Gov't Br., p 8). In this case, however, the bodily harm was specifically alleged as "wedging his hands in between her thighs" and was not coextensive with sexual contact, which was "touching through the clothing the genitalia." (Charge Sheet). Although the government could have charged the bodily harm as nonconsensual sexual contact, it did not. The mere fact that the government could have charged the bodily harm in a way that injects the element of non-consent into the offense does not mean that it did, and in this case, it did not.

The government also cites the definition of consent found in Article 120(g)(8)(B) for the proposition that a "sleeping, unconscious, or incompetent

person cannot consent." (Gov't Br. 8). This, however, drives home the point that not every bodily harm is necessarily accomplished through unlawful force or violence. Although not charged as abusive sexual contact due to Mrs. BG being asleep, the factual basis for the government's case was that Mrs. BG was, in fact, asleep at the time of the alleged contact. (JA 20). The same section of Article 120 cited by the government for the proposition that a sleeping person cannot consent also states that a "person cannot consent while under threat or fear." Article 120(g)(8)(B). Threat or fear, however, was precisely the situation at issue in *Riggins*, 75 M.J. at 81, where this Court found the element of unlawful force or violence was not alleged. *Id*. at 80, 84.

While it may be possible to charge abusive sexual contact in a manner that includes assault consummated by a battery as a lesser included offense [LIO], the government did not do so in this case.

Reply on the Issue of Prejudice

The appellant argues that this Court's holding in *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017),[2] logically leads to the conclusion that a court-martial

[2] The appellant acknowledges that, prior to *Reese*, this Court required a showing of prejudice to warrant relief in cases where an appellant was convicted of an erroneously identified LIO. The appellant respectfully argues, however, that the logic of *Reese* extends to offenses that are not embraced by Article 79, and therefore urges this Court to apply that same logic in this case.

lacks jurisdiction over erroneously identified LIOs. The government disputes the appellant's theory by asserting Article 79 grants a court-martial jurisdiction over "an offense necessarily included in the offense charged." (Gov't Br. 11). The government's argument, however, begs the question.[3] Article 79 states: "An 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." This Article is the statutory basis for a court-martial to exercise jurisdiction over LIOs. *See, e.g.*, *United States v. Jones*, 68 M.J. 465, 469-71 (C.A.A.F. 2010). In fact, the very language from *Alston*, quoted at the start this reply for the proper definition of a lesser included offense is itself derived directly from Article 79. *Alston*, 69 M.J. at 215-16.

The fact that Article 79 is required to confer a court-martial jurisdiction over LIOs cuts in favor of the appellant's argument based on *Reese*. Due to the limited, statutory nature of court-martial jurisdiction, if Article 79 is necessary to confer a court-martial jurisdiction over LIOs, then offenses not explicitly referred to a court-martial and not embraced by Article 79 as LIOs of a referred offense are not

[3] Historically, "begs the question" does not mean "invites the question" as the term is commonly misused today. Rather, "begs the question" traditionally means that an argument assumes the answer which it seeks. Here, that is precisely what the government's argument has done.

properly before the court-martial, and the court-martial has no jurisdiction over them.

The appellant maintains that the logic of *Reese* should extend to the situation presented in this case where, at a minimum, the amendment of a charge to an offense not necessarily included in the original charge creates a "different offense" and constitutes a major change. On a more fundamental level, to the extent this Court finds a court-martial does not have jurisdiction over charges neither explicitly referred by the convening authority, nor embraced by Article 79, this Court should find the court-martial in this case had no jurisdiction over the charge of assault consummated by a battery.

Even if this Court declines to extend the rationale of *Reese* to the issue of erroneous LIOs, this Court should still find the appellant was prejudiced under the facts of this case.

Although the government appears to assume the appellant did not object to the consideration of assault consummated by a battery as an LIO, (Gov't Br. 11-12), the appellant's counsel explicitly answered, "No, Your Honor," when asked by the military judge, "Counsel, do you see any lesser included offenses that are in issue in this case?" (JA 78). The appellant's position is that this constituted a sufficient objection to preserve the issue. The government then stated that it saw Article 128

as an LIO of Article 120, and the military judge asked, "Defense, what say you?" and the defense counsel demurred, "Taking no position on it, judge." (JA 78).

Despite the defense counsel's failure to elaborate on his initial response that there was no LIO, the statement, "Taking no position on it, judge," appears, in context, to simply mean the defense counsel was not prepared to further argue the matter after asserting his client's objection to any LIO.

Even if this Court finds the issue was forfeited, it should find the appellant has met his burden of demonstrating material prejudice to a substantial right. While the government is correct that the request for panel instructions that included instructions on defenses to the possible LIO of battery suggests the defense counsel may have been aware of the possibility that an LIO would be asked for, it also may have been included simply as a failsafe for a worst-case scenario. When read in light of the defense counsel's assertion that there were no LIOs at trial, speculation on the significance of the proposed panel instructions is simply that – speculation.

What is not speculative is that the accused, not his defense counsel, ultimately exercised the choice whether to testify or not, and he made the choice not to testify prior to the military judge deciding whether to instruct the panel that assault consummated by a battery was an LIO of abusive sexual contact. (JA 78). Precisely because assault consummated by a battery requires proof of elements that abusive sexual contact does not – and vice versa – the appellant was deprived of a full and

fair opportunity to present his defense because the military judge agreed to instruct the panel on an erroneous lesser included offense after the close of evidence.

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 December 18, 2017.

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