IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Captain (O-3) **JOSEPH R. ARMSTRONG** United States Army, Appellant	)	Crim. App. Dkt. No. 20150424
	)	USCA Dkt. No. 17-0556/AR

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Granted Issue:

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

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

Granted Issue

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

An officer panel, sitting as a general court-martial, convicted Captain Joseph R. Armstrong (appellant), contrary to his pleas, of one specification of assault

consummated by a battery and one specification of conduct unbecoming of an officer in violation of Articles 128 and 133, UCMJ (2012). (JA 82-83). The panel found appellant guilty of assault as a lesser included offense of the charged specification of abusive sexual contact in violation of Article 120, UCMJ. After findings, the military judge found the specifications were an unreasonable multiplication of charges and dismissed the Article 133, UCMJ, offense. (JA 6-7). The adjudicated sentence was dismissal. (JA 7). The convening authority approved the adjudged sentence. (JA 7).

On June 23, 2017, the Army Court summarily affirmed the findings and sentence. (JA 1). On August 21, 2017, appellant petitioned this Court for review, and this Court granted appellant's petition on October 12, 2017.

Statement of Facts

In 2014, Mrs. BG and her husband, First Lieutenant (1LT) BG, attended a Halloween party hosted by appellant. (JA 16, 17). Mrs. BG consumed one beer, two Jell-O shots, one shot of alcohol, two rum-based mixed beverages, and potentially one vodka-based mixed beverage. (JA 28-29). While everyone was still drinking, 1LT BG excused himself from the party to lie down in a different room. (JA 18). Mrs. BG stopped drinking alcohol so she could watch over 1LT BG and her intoxicated friend, Mrs. Shelly Nogueira. (JA 19). Approximately an hour and a half after 1LT BG went to lie down, Mrs. BG lay down on a couch in

the living room and waited to leave for Mrs. Noqueira's house, as previously planned. (JA 19-20).

Prior to waking up, Mrs. BG felt as though her leg was falling off of the couch; however, when she woke up, her legs were draped over appellant and he had one hand on one of her legs and his other hand between her thighs rubbing her vagina. (JA 21). Once appellant realized Mrs. BG was awake, he took her legs off of him and told her, "Sshh." (JA 22). Mrs. BG immediately woke up her husband and told him they needed to leave. (JA 22-23).

Two days after the incident, appellant made a statement to Criminal Investigation Command (CID); that video-recorded interview was introduced into evidence. (Pros. Ex. 7).[1] During the interview, appellant stated that Mrs. BG was asleep and passed out and that she did not respond when he shook her. (Pros. Ex. 7). When he touched Mrs. BG on the thigh, she did not move, so he picked her feet up and then sat on the couch. (Pros. Ex. 7). At first, he stated that if he placed his hand between her thighs it was because it was cold and he did not have a blanket. (Pros. Ex. 7). However, further into the interview, appellant stated that he knew it was wrong to put his hand between her thighs, both before and after doing so. (Pros. Ex. 7). In regard to telling Mrs. BG "sshh," appellant asserted that if

[1] Prosecution Exhibit 7, a video recording found in the original record of trial, is hereby incorporated by reference.

that is what she heard, he was just indicating to her, "No, no, it's okay. We're just laying here," and not, "No, it's okay, I'm just being weird and creepy." (Pros. Ex. 7).

On 8 June 2015, the day before presentation of the evidence on the merits, defense counsel filed proposed panel instructions, wherein defense asked for

> Mistake of fact instruction with regard to battery, the lesser included offense; *see United States v. Johnson,* 54 M.J. 67 (C.A.A.F. 2000) (discussing mistake of fact within context of assault and battery cases).

(SJA 88). Defense counsel further requested special instructions,

> 8. *"Unlawful touching must be the result of an intentional or culpably negligen[t] act. A culpably negligen[t] act requires a negligent act/omission coupled with a culpable disregard for the foreseeable consequences to others." See United States v. Turner,* 11 M.J. 784 (A.C.M.R. 1981); *see also United States v. Mayo,* 50 M.J. 473 (C.A.A.F. 1999) (discussing case involving accident with young child)[.]
>
> 9. *"With regard to the lesser included offense of battery[,] the actor need not actually intend or foresee those consequences; it is only necessary a reasonable person in such circumstances would have realized substantial and unjustified danger created by his act." United States v. Baker,* 24 M.J. 354, 356 (C.M.A. 1987).

(SJA 88).

In anticipation of instruction preparation, the government stated that Article 128, UCMJ, was a lesser included offense (LIO) of Article 120, UCMJ. (JA 78). When the military judge asked for defense's position, defense counsel replied,

"Taking no position on it, judge." (JA 78). The military judge then stated he agreed with government; however, he invited both counsel to provide case law regarding the LIO during the break. (JA 78).

Summary of Argument

This court should affirm the findings and sentence because assault consummated by a battery is an LIO of abusive sexual contact, as charged. However, even if this court finds error, the appellant failed to demonstrate a material prejudice to a substantial right, and the findings and sentence should be affirmed.

Standard of Review

Whether one offense is an LIO of another is a question of law reviewed de novo. *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013) (citation omitted); *United States v. Riggins,* 75 M.J. 78, 82 (C.A.A.F. 2016). Failure to object at trial to the military judge's consideration of an LIO forfeits the issue, absent plain error. *United States v. Oliver*, 76 M.J. 271, 274-75 (C.A.A.F. 2017). Under plain error review, appellant has the burden of demonstrating "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation omitted).

Law and Analysis

The military judge correctly found that assault consummated by a battery is a lesser included offense of abusive sexual contact as charged in this case. Even if assault consummated by a battery was not an LIO of abusive sexual contact, appellant failed to demonstrate prejudice.

A. The military judge did not err when he determined that assault consummated by a battery was a lesser included offense of abusive sexual contact as charged.

In order to determine if an offense is considered an LIO, both offenses must be compared using an elements test to determine 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).

> The test does not require that the "offenses at issue employ identical statutory language." *Alston*, 69 M.J. at 216. Rather, after applying normal rules of statutory interpretation and construction, [courts] will determine whether the elements of the LIO would necessarily be proven by proving the elements of the greater offense. *Id.*

United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012).

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

United States v. Jones, 68 M.J. 465, 470 (C.A.A.F. 2010). Courts examine the offense "in the context of the charge at issue." *Alston*, 69 M.J. at 216. The

elements test provides "notice to [an accused] that he may be convicted" of the greater offense or the LIO. *Schmuck v. United States*, 489 U.S. 705, 718 (1989). "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, 26-27 (C.A.A.F. 2008)).

The elements of assault consummated by a battery are, "(a) That the accused did bodily harm to a certain person; and (b) That the bodily harm was done with unlawful force or violence." *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 54.b.(2) [hereinafter *MCM*]; *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011). The "bodily harm . . . must be done . . . without the lawful consent of the person affected [and is defined as] any offensive touching of another, however slight." *MCM* at pt. IV, ¶ 54.c.(1)(a). "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 (citing *United States v. Johnson,* 54 M.J. 67, 69 (C.A.A.F. 2000) ("recognizing that legal excuses or justifications, such as consent, may negate the offensiveness of the touching")).

The elements of abusive sexual contact, as charged, are (a) that the accused committed sexual contact upon another person; and (b) that the accused did so by

causing bodily harm. UCMJ art. 120(b)(1)(B), (d). Sexual contact is defined as the intentional touching of certain erogenous areas of another with the "intent to abuse, humiliate or degrade," or touching any part of another person with the intent "to arouse or gratify the sexual desire." UCMJ art. 120(g). Subsection (g)(8) defines consent as "a freely given agreement to the conduct at issue by a competent person." UCMJ art. 120(g)(8). It further highlights that "[a] sleeping, unconscious, or incompetent person cannot consent." UCMJ art. 120(g)(8)(3). Similar to Article 128, subsection (g)(3) of Article 120 defines bodily harm as, "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." UCMJ art. 120(g)(3).

This Court's most recent cases addressing this issue, *United States v. Riggins* and *United States v. Oliver,* are instructive. 75 M.J. 78; 76 M.J. 271. In *Riggins*, the greater offenses of sexual assault and abusive sexual contact were charged not by bodily harm, but by placing the victim in fear. *Riggins*, 75 M.J. at 84. Therefore, convictions for the offenses of assault consummated by a battery changed the theory of criminality from legal inability to consent by placing a person in fear to lack of consent. *Id.* This Court held that "assault consummated by a battery is not a lesser included offense of sexual assault or abusive sexual contact as charged in this case." *Id.* at 85. However, a specification placing the accused on notice of fear of bodily harm and raising the issue of consent may lead

to a different result. *Id.* at 85 n.7. Similarly, in *Oliver*, the appellant was charged with abusive sexual contact by placing the victim in fear. 76 M.J. at 272. Relying on *Riggins*, this Court held that wrongful sexual contact was not an LIO of the charged offense. *Id.* at 274.

Unlike in *Oliver* and *Riggins*, appellant was originally charged with abusive sexual contact by bodily harm. Here, the original specification charged alleged that appellant "commit[ed] sexual contact upon Mrs. BG, to wit: touching through the clothing the genitalia of the said Mrs. BG, by causing bodily harm to the said Mrs. BG, to wit: wedging his hands in between her thighs." (JA 2). After exceptions and substitutions, appellant was convicted of unlawfully touch[ing] Mrs. BG, to wit: wedging his hands in between her thighs. (JA 82-83).

Here, proof of the elements of abusive sexual contact by bodily harm necessarily required proof of the elements for assault consummated by a battery. To prove the offensive nature of the touching, the government was required to prove that Mrs. BG did not, in fact, consent to appellant wedging his hands between her thighs. Had she consented, the contact could not have been offensive. Because of this, the greater offense in this case, unlike the greater offenses in *Riggins* and *Oliver*, raised the issue of lack of consent instead of inability to consent due to fear.

Further, this case is distinguishable from *Riggins* in that "abusive sexual contact by placing a victim in fear required proof of a mental state," whereas abusive sexual contact by bodily harm requires physical contact. *See United States v. Honea,* ACM 38905, 2017 CCA LEXIS 174, at *12 (A.F. Ct. Crim. App. 15 Feb. 2017). As such, the same concerns this Court had in *Riggins* are not present here.

Therefore, the appellant was placed on notice of the nonconsensual nature and physical contact required by both abusive sexual contact and its LIO of assault consummated by a battery since the time of preferral. Accordingly, the military judge did not err when he determined that assault consummated by a battery was an LIO in this case.

B. Even if this Court finds that assault consummated by a battery is not a lesser included offense of abusive sexual contact by bodily harm, appellant failed to show that he was prejudiced.

Erroneous consideration of an alleged LIO at trial is tested for prejudice. *See Oliver*, 76 M.J. at 275; *United States v. McMurrin*, 70 M.J. 15, 20 (C.A.A.F. 2011). However, appellant asserts that "convicting an appellant based on an erroneous theory of a lesser included offense is functionally the same as allowing a major change after arraignment." (Appellant's Br. 11). Appellant does so by misapplying this Court's holding in *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017), arguing that this Court expressly overruled the need for a showing of

prejudice. (Appellant's Br. 17). In *Reese*, the military judge granted government's motion, over defense objection, to change the language in the lewd act specification from "licking the penis" of the victim to "touching the penis" of the victim with the accused's hand. *Reese,* 76 M.J. at 299. This Court found that a major change made over the objection of an accused mandates reversal because Rule for Courts-Martial 603(d) explicitly prevents such changes unless charges are preferred anew. *Id.* at 300. Therefore, absent a new preferral and referral, "there is no charge to which jurisdiction can attach, and Article 59(a), UCMJ [], is not, in fact, implicated." *Id.* at 302. However, Article 79, UCMJ, which is applicable here, 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." Since jurisdiction was never lost, and Article 79, UCMJ, does not require a new preferral, Article 59(a), UCMJ applies. Article 59(a) states that, "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

"An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." *Wilkins*, 71 M.J. at 413 (citing *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012)). Where an appellant does not object at trial to the consideration of an LIO at trial, he bears the burden of

demonstrating prejudice on appeal. *Id.* Under such circumstances, the appellant must show "that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice." *Id.* (quoting *Humphries*, 71 M.J. at 215) (alterations in original).

In *Oliver,* the government argued constructive force; however, the government addressed consent during trial and closing. 76 M.J. at 275. Defense then elicited testimony of the joking, laughing, and informal nature of the appellant and victim's relationship to counter consent. *Id.* Thus, this Court held that "the manner in which the case was contested diminishes any argument that Appellant was not on notice as to what he had to defend against." *Id.*

Appellant asserts that government presented a new theory of liability and that the new theory would have prompted appellant to present additional evidence—essentially, by choosing to have appellant testify. (Appellant's Br. 12). Appellant does not state how the theory of liability changed, only that defense counsel's approach would be different. (Appellant's Br. 12). However, appellant is simply second-guessing the actions of his trial defense counsel under the guise of a changed theory of liability.

Since preferral, defense was on notice that the government's theory of criminality was that appellant placed his hands between Mrs. BG's thighs in order to effectuate the sexual contact of touching Mrs. BG's genitalia.

During the merits phase, defense counsel questioned Mrs. BG regarding the amount of alcohol she consumed to undermine her ability to perceive events that evening. (JA 31). Defense counsel then attempted to show that CID coerced a confession from appellant and that the lack of physical evidence on Mrs. BG's pants indicated that there was no sexual contact. (JA 34). Regarding the bodily harm element, appellant elicited some evidence of the affirmative defense of accident through appellant's wife. She testified that appellant told her that appellant's hands were near her legs, but that he was sleeping at the time. (JA 70-71, 75). Subsequently, the military judge provided defense counsel's requested instruction of the defense of accident for application for both abusive sexual contact and assault consummated by a battery; specifically, that it was a defense for the sexual contact or bodily harm. (SJA 85-86).

Arguably, defense's tactic was based on appellant's statements to his wife and admission to CID that he placed his hands between Mrs. BG's thighs for warmth. However, this does not negate that appellant knew what he had to defend against. The clearest indication that appellant was on notice of government's theory are the defense's proposed panel instructions that were submitted the day

before panel selection. (SJA 87-90). Within the request, defense counsel requests three instructions indicating that he was aware battery was an LIO and requesting battery-specific defenses including mistake of fact and an accident instruction. (SJA 88). In *Oliver,* this Court stated that "the manner in which the case was contested diminishes any argument that Appellant was not on notice as to what he had to defend against." 76 M.J. at 275. Here, the manner in which defense counsel attempted to frame the offense and his request for LIO-specific instructions diminishes any argument that appellant was not on notice as to what he had to defend against. Accordingly, appellant's most recent assertion that he would have potentially chosen to testify had he been aware of this theory of criminality is disingenious, and appellant has failed to show any prejudice.

Therefore, this Court should affirm the findings and sentence because appellant failed to show that there was plain or obvious error that materially prejudiced a substantial right.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the Army Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 8th day of December, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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