IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. 38905
Captain (O-3) ROBERT L. HONEA III, USAF, *Appellant.*	)	USCA Dkt. No. 17-0347/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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10 August 2017

IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	Crim. App. No. 38905
Captain (O-3) ROBERT L. HONEA III, USAF, *Appellant.*	)	USCA Dkt. No. 17-0347/AF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

IMMEDIATELY BEFORE THE DEFENSE RESTED ITS CASE, THE MILITARY JUDGE INVITED THE PARTIES' ATTENTION TO R.C.M. 910, AND DIRECTED THE DEFENSE TO PROVIDE THE MILITARY JUDGE WITH A DRAFT SPECIFICATION OF ASSAULT CONSUMMATED BY A BATTERY. DID THE LOWER COURT ERR WHEN IT HELD THAT THE DEFENSE'S COMPLIANCE WITH THE MILITARY JUDGE'S DIRECTIVE CONSTITUTED A DE FACTO DEFENSE REQUEST TO MODIFY THE SPECIFICATION PURSUANT TO R.C.M. 603 WHERE THERE IS NO EVIDENCE THAT EITHER THE DEFENSE OR THE CONVENING AUTHORITY WERE AWARE THE CHARGE WAS BEING AMENDED PURSUANT TO R.C.M. 603?

II.

THE MILITARY JUDGE DISMISSED SPECIFICATION 2 OF CHARGE II, ABUSIVE SEXUAL CONTACT BY CAUSING BODILY HARM, FOR FAILURE TO STATE AN OFFENSE, BUT SHE ALLOWED THE GOVERNMENT TO PROCEED TO TRIAL ON THE PURPORTED LESSER INCLUDED OFFENSE OF ASSAULT CONSUMMATED BY A BATTERY. DID THE MILITARY JUDGE ERR?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this issue under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted.

STATEMENT OF FACTS

On 13 May 2014, Appellant was served with three charges and six specifications alleging several sexual offenses against two different women. (JA at 14-16.) Specifically, Appellant was charged with raping and forcibly sodomizing Ms. AJG, in violation of Articles 120 and 125, UCMJ. (JA at 14-16.) He was also charged with two specifications of attempted sexual assault of 1st Lt RVS, as well as two specifications of sexual assault of 1st Lt RVS, in violation of Articles 80

and 120, UCMJ. (JA at 14-16.) All charges and specifications alleged under Article 120, UCMJ fell under the 2007-2012 version of that statute. (JA at 14-16.)

Prior to referral, Specification 1 of Charge II read:

> In that CAPTAIN ROBERT L. HONEA III … did at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, engage in sexual contact, to wit: touching [1st Lt RVS's] vulva with his penis while she was substantially incapacitated.

(JA at 16.) Specification 2 of Charge II read:

> In that CAPTAIN ROBERT L. HONEA III … did at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, engage in sexual contact, to wit: touching [1st Lt RVS's] vulva with his penis, by causing bodily harm upon her, to wit: touching [1st Lt RVS's] vulva with his penis.

(JA at 16.)

During the Article 32, UCMJ hearing, 1st Lt RVS testified. (JA at 200-01.) According to 1st Lt RVS, after falling asleep in a friend's bed, she awoke to Appellant's arms wrapped around her. (JA at 201.) Appellant was naked, 1st Lt RVS's pants and underwear were off, and Appellant was thrusting his penis against her vaginal area. (JA at 201, 204-05, 220-21.) She responded "no, no" and Appellant "shushed her." (JA at 201.) After Appellant thrusted a few more times, 1st Lt RVS fell back asleep. (JA at 201.)

On cross-examination, defense counsel questioned 1st Lt RVS on what she meant by "vaginal area":

> Q. When you use the term "vaginal area" with regard to what was touched on you, was it anything between your legs or just on the front of your pelvis?
>
> A. On the front.
>
> Q. Would it be more accurately described as your pubic area, as opposed –
>
> A. Oh, yes.
>
> Q. -- to your vagina.
>
> A. Yes.

(JA at 204.)

In addressing 1st Lt RVS's testimony as to Specification 1 and 2 of Charge III, the Investigating Officer (hereinafter "IO") noted that 1st Lt RVS had, since her statement to AFOSI on October 23, 2013, "consistently described the anatomical location of [Appellant's] penis as her 'vaginal area.'" (JA at 205.) The IO determined that 1st Lt RVS's testimony did not contradict her previous statements, only that further questioning during the hearing revealed an ambiguity. (JA at 205.) The IO noted that the vulva was "not necessarily the same as the vaginal area," and that 1st Lt RVS has clarified that she was referring to a broader area on her body. (JA at 205.)

Based on 1st Lt RVS's testimony, the IO suggested that either the word "vulva" be replaced with a "broader description of the anatomical area," or that Specification 1 and 2 of Charge II not be referred to trial. (JA at 205-06.) The IO recommended that the government not refer Specifications 1 and 2 of Charge II, but instead present attempted abusive sexual contact as an LIO of the charged attempted aggravated sexual assault. (JA at 208.)

In the pretrial advice, the Staff Judge Advocate (hereinafter "SJA") recommended that Specifications 1 and 2 of Charge II be modified by replacing the word "vulva" with "pelvic region." (JA at 213.) On 18 August 2014, Specification 1 and 2 of Charge II were modified. (JA at 219.) After modification Specification 1 of Charge II read:

> In that CAPTAIN ROBERT L. HONEA III … did at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, engage in sexual contact, to wit: touching [1st Lt RVS's] ***pelvic region*** with his penis while she was substantially incapacitated.

(JA at 219) (emphasis added). Specification 2 of Charge II read:

> In that CAPTAIN ROBERT L. HONEA III … did at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, engage in sexual contact, to wit: touching [1st Lt RVS's] ***pelvic region*** with his penis, by causing bodily harm upon her, to wit: touching [1st Lt RVS's] vulva with his penis.

(JA at 219) (emphasis added).

Prior to trial, Appellant filed a written motion to dismiss Specifications 1 and 2 of Charge II. (JA at 185.) Appellant put forth three bases for dismissal. Appellant first argued that the modification from "vulva" to "pelvic region" was a major change because it constituted a "substantial matter not included in the preferral charge and its specification, which clearly alleges Capt Honea touched a very specific body part of [1st Lt RVS]." (JA at 188.) He argued that the modification changed the nature of the offense. (JA at 188.) Appellant contended that he had not received notice of the change until after the Article 32, UCMJ hearing. (JA at 188.)

Second, Appellant asserted that the SJA provided erroneous advice because modification of the word "vulva" to "pelvic region" was inconsistent with the IO's recommendation. (JA at 189.) Third, Appellant moved to dismiss Specifications 1 and 2 of Charge II for failure to state an offense. (JA at 189.) He argued that the specification failed to allege the offense of abusive sexual contact, as "pelvic region" was not contact included in the definition of sexual contact. (JA at 189.) He also argued that "pelvic region" was ambiguous, and that he had a right to be "placed on notice as to where the alleged sexual contact occurred." (JA at 189.)

In its response, the government argued that the modifications were minor changes because they did not change the nature of the offenses. (JA at 223-24.) The government identified that the modifications were made prior to trial, did not

change the identity of the victim, and the area of the touching remained generally the same. (JA at 224.) In addressing Appellant's second argument, the government asserted that the SJA's advice was not inconsistent with the IO's recommendation, as the IO had recommended that the word "vulva" be replaced with a more general description of the anatomical area. (JA at 224.) Finally, the government argued that "pelvic region" included the groin area, which was an enumerated body part under the definition of sexual contact. (JA at 224.) The government concluded by arguing that if the charges were found to be improper, that "pelvic region" be changed to "groin." (JA at 225.)

The parties provided further argument on Appellant's motion during an Article 39(a), UCMJ session held on 18 November 2014. (JA at 30-53.) As they did in the written motion, trial defense counsel argued that the modification was a major change, that the SJA provided faulty advice, and that the specifications as modified failed to state an offense. (JA at 31-35.) As it did in its written motion, the government argued any change was minor. (JA at 36-38.) The government also argued that the SJA did not provide erroneous advice, but correctly summarized what the IO recommended and provided the convening authority with the entire Article 32, UCMJ report. (JA at 43-44.) Finally, the government argued that the modified specifications alleged sexual contact because the pelvic region encompassed the groin. (JA at 45-46.) Alternatively, the government argued that

the modified specifications alleged sexual contact because Appellant caused 1st Lt RVS to touch his genitalia. (JA at 45-47.)

On 15 December 2014, the military judge issued a written ruling. (JA at 247.) Noting the specific anatomy identified in the definition of sexual contact, the military judge found that the "pelvic region" was not included, and was instead a "generalized area of anatomy." (JA at 251 at ¶22.) She found that the term pelvic region was "too ambiguous and therefore the offenses fail to allege sexual contact." (JA at 251 ¶22.)

When determining a remedy, the military judge dismissed Specification 1 of Charge II. (JA at 251 ¶23.) However, the military judge identified assault consummated by a battery as a lesser included offense (hereinafter "LIO") of the abusive sexual contact offense alleged in Specification 2 of Charge II. (JA at 251 ¶23.) The military judge reasoned that since "pelvic region" was narrowed to the touching of the "vulva," that Appellant was on sufficient notice of the LIO. (JA at 251 ¶23.) The military judge found that her ruling that Specifications 1 and 2 of Charge II failed to state offenses mooted the issues of whether the modifications of the specifications constituted major changes and whether the pre-trial advice was erroneous. (JA at 251 ¶24)

On 4 May 2015, the court-martial reconvened with a new military judge. *See* (JA at 54.) To ensure the record was clear, the new military judge addressed

the previous military judge's ruling in respect to Specifications 1 and 2 of Charge II. (JA at 54-55.) The following exchange took place:

> MJ: Looking to Charge II, it is my understanding Specification 1 of Charge II has been dismissed, and is no longer before this court, correct?
>
> DC: Yes, Your Honor.
>
> TC: Correct, Your Honor.
>
> MJ: Specification 2 had not been dismissed; however, the greater offense listed as Specification 2 has; however, the lesser included offense of assault consummated by a battery, in violation of Article 128, remains, is that correct?
>
> DC: Yes, Your Honor.
>
> TC: Yes, Your Honor.
>
> MJ: So, then, although the specification has not been dismissed, Specification 2, the lesser included offense of Specification 2 of Charge II remains and that is something that we will make sure . . . we'll do our best to make sure we're clear on the record when referencing Specification 2 as the lesser included offense of Specification 2, in accordance with the previous judge's ruling. That lesser included offense is assault consummated by battery, in violation of Article 128, UCMJ . . . are the parties in agreement?
>
> DC: Yes, Your Honor.
>
> TC: Yes, Your Honor.

(JA at 55.)

When entering his pleas Appellant pled "Not Guilty to the Lesser Included Offense of Aggravated . . . I'm sorry, Assault Consummated by a

Battery in violation of Article 128, Uniform Code of Military Justice…." (JA at 56.) The military judge then clarified with trial defense counsel:

> MJ: And then, just so we're clear, defense counsel, to Specification 2 of Charge II, pleading not guilty to the lesser included offense of assault consummated by a battery, correct?
>
> DC: In violation of Article 128, Your Honor, yes, sir.

(JA at 56.)

During findings, 1st Lt RVS testified to the charged assaults. (JA at 57-129.) 1st Lt RVS testified that in the spring of 2011, she attended a potluck at another Air Force officer's home on Dover Air Force Base. (JA at 61-63.) Appellant was among the group that attended the potluck. (JA at 63.) After the potluck, 1st Lt RVS and Appellant went to another friend's home, which was only a block away on Dover Air Force Base. (JA at 64.) After socializing and drinking, the group attempted to go to a pool hall, but it was either full or closed. (JA at 66.) 1st Lt RVS fell asleep on the way to the pool hall, and on the ride back to her friend's home. (JA at 66.)

Once the group returned home, everyone but 1st Lt RVS continued to drink alcohol. (JA at 67.) 1st Lt RVS testified that as the group stood in the kitchen she felt the effects of alcohol, but described herself as "not too drunk." (JA at 67.) The next thing 1st Lt RVS could recall was waking up with Appellant's arms

wrapped around her in bed, her arms pinned to her sides, and Appellant thrusting his penis into her vaginal area. (JA at 68.)

1st Lt RVS testified that she could feel Appellant's penis against her skin. (JA at 69.) Appellant was not wearing any pants. (JA at 69.) 1st Lt RVS was wearing her bra, shirt, and an elbow length jacket, but no underwear or pants. (JA at 69.) When she realized what was going on, 1st Lt RVS said "no, no." (JA at 69.) Appellant responded by shushing 1st Lt RVS, telling her it was okay, and continuing to thrust his flaccid penis into her vaginal area. (JA at 68-70.)

1st Lt RVS clarified what she meant by vaginal area. (JA at 71.) The following exchange took place during direct examination:

> Q. So, if . . .if you were standing up –
>
> A. Yes.
>
> Q. -- would the penis be contacting more on kind of on the front half of you or the underneath, more towards your vagina?
>
> A. The front, but like on the bottom of the front.
>
> Q. Okay. So . . . and, again, I don't want to put any words in your mouth.
>
> A. Uh-huh. [Affirmative response.]
>
> Q. Kind of where your body starts to curve?
>
> A. Yes, there.
>
> Q. And there's a pelvic bone there?

A. Uh-huh. [Affirmative response.]

(JA at 71.) At the time of the contact, 1st Lt RVS's legs were together and slightly bent. (JA at 72.) After the contact, 1st Lt RVS fell asleep. (JA at 72.)

During cross-examination civilian trial defense counsel questioned 1st Lt RVS about the contact. (JA at 106-07.) Civilian trial defense counsel first confirmed that 1st Lt RVS's legs were together at the time of the contact. (JA at 106.) He then questioned 1st Lt RVS regarding the site of the contact:

Q. And we talked about this during the Article 32 hearing, correct?

A. Yes.

Q. Because, at first, you described the area as your vaginal area, correct?

A. Yes.

Q. And would you agree with me, and I apologize for the somewhat graphic nature of this, but, the vaginal opening is something different than the pubic area, correct?

A. Correct.

Q. And we talked about that distinction during the Article 32 hearing, correct?

A. Yes.

Q. And, ultimately, during the Article 32 hearing, you described the area as the front of your pelvis where you were feeling this alleged thrusting, correct?

A. Yes, but I still consider it my vaginal area, which is why I even wrote it down in my statements as that.

> Q. Okay. So, you . . . in terms of how you define it, you believe your vaginal area includes the front of your pelvis and the pubic bone area?
>
> A. Yes.
>
> Q. And, to the best of your recollection and knowledge, there was no penetration or insertion of anything in your actual vaginal opening, correct?
>
> A. When I came to?
>
> Q. At any point –
>
> A. I don't know.
>
> Q. -- in this event?
>
> A. I don't know.

(JA at 106-07.)

Just prior to Appellant's resting his findings case, the military judge clarified the LIO for Specification 2 of Charge II. On the record, the military judge stated that during an R.C.M. 802 session, he had "informed or advised the parties to refer to Rule for Court-Martial 910 with respect to [Appellant's] plea to a lesser included offense of assault consummated by a battery, and that's a lesser included offense of Specification 2 of Charge II." (JA at 130.) In response, defense counsel provided the military judge a draft specification. (JA at 130.) The specification was entered in the record as Appellate Exhibit LXXXIX. (JA at 226.)

The military judge stated that he "wanted to make the record clear, that is what the specification of the lesser included offense would look like." (JA at 130.) The government concurred that the draft specification provided by defense counsel correctly represented the LIO of assault consummated by a battery for Specification 2 of Charge II. (JA at 130.) The specification as drafted by defense counsel stated:

> In that CAPTAIN ROBERT L. HONEA III … did, at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, unlawfully touch [1st Lt RVS] on the ***pelvic region*** with his penis.

(JA at LXXXIX) (emphasis added).

During closing argument, senior trial counsel summarized the evidence relating to 1st Lt RVS's allegations. (JA at 131-35.) Regarding the contact between Appellant and 1st Lt RVS, senior trial counsel argued,

> he enters that room and he pulls her pants and her underwear off together, not even bothering to unbutton them and he strips down naked himself and he climbs into that bed with her, and, in his drunken state, he tries to have sex. And grabbing [1st Lt RVS] and pulling her towards him as best he could on their sides, the starts thrusting away. The mind is willing, but the body isn't able. [1st Lt RVS] wakes up and she talks about what she felt when she woke up. It wasn't an erect penis, it was a flaccid penis; that she woke up on her side, he legs together, the accused trying to manage himself, trying to manage her, couldn't figure out a way to get her legs separated to get to her vulva, but, it certainly wasn't for a lack of trying.

(JA at 135.) He continued:

> She realizes that someone is thrusting into her; that a penis is slamming into her pelvic region she says. She knows that that person isn't wearing any pants because she can feel their skin on her skin. She can feel their penis on her pelvic region and in a confused and dazed state, she says, no, no, no.

(JA at 136.) Senior trial counsel also incorporated Appellant's admission to another Air Force officer that he had attempted to penetrate 1st Lt RVS:

> And then, you've got the conversation with his friend [C.R.], Captain [C.R.] And, in fact, it's probably the most detailed description of what went on that night allegedly, and he says how he gets in there and he gets his clothes off and tries to have sex with her, but he's too drunk and she's too small. Your Honor, how do you know something's too small? You've got to try and put it in there. So, by his own words, he was trying to have sex with her that night. He was trying to complete the act.

(JA at 141.)

In closing argument, civilian defense counsel argued that 1st Lt RVS consented to any contact. (JA at 152-63.) He asserted that a Facebook exchange the next day between 1st Lt RVS and Appellant demonstrated that 1st Lt RVS had engaged in an embarrassing "hook-up." (JA at 153, 155-56.) He argued that sexual assault briefings twisted 1st Lt RVS's understanding of the encounter from a consensual one to a nonconsensual one. (JA at 153, 155.) Civilian defense counsel argued, "But, if you focus on that morning after, there was no reported

sexual assault because there was no sexual assault. It was please don't tell anybody about the hook-up." (JA at 153.)

Civilian trial defense counsel also incorporated 1st Lt RVS's initial statement to OSI into his argument. (JA at 162.) He argued that 1st Lt RVS alleged initial description of Appellant sexually assaulting her from behind was an "anatomical impossibility. (JA at 162.) When addressing 1st Lt RVS's subsequent statement and testimony, civilian trial defense counsel argued,

> And, in May 2014, the story is that he was sexually assaulting her face-to-face, and he's doing it with a flaccid penis in her vaginal area. And, obviously, I have to get a little graphic in describing anatomy here, but we know where the vaginal opening is on a woman and we know how a hard penis works and a soft penis doesn't work and how the only way those two organs can couple, when two people are facing each other on their sides, is if the penis is hard and the woman is doing something with her legs and pelvis to present the opportunity for that penis to get into the vaginal opening. It is anatomically impossible for two people and a flaccid penis to be facing each other and the penis to be touching the vagina in the way she described with her legs closed. So, then, in the Article 32 hearing, she altered that again. So, we go from behind to in front, to touching the vagina, to now, at the ***Article 32 hearing, where it's well, it was my pelvic region that it was bouncing off of, but I still consider my pelvis or my pubic bone to be my vagina.*** Three inconsistent versions of the anatomy of how this 10 seconds that she says that she remembers took place, but the government says, we've proven it; believe her.

(JA at 162) (emphasis added).

In rebuttal, senior trial counsel addressed the defense argument that this incident was "just a hookup that [1st Lt RVS] regretted the next day." (JA at 174.) In doing so, he addressed civilian defense counsel's arguments concerning the facebook messages, 1st Lt RVS's internet search of sexual assault, and the alleged prior flirting between 1st Lt RVS and Appellant. (JA at 174-76.) He asked the military judge to find Appellant guilty of attempted aggravated sexual assault[1] of 1st Lt RVS. (JA at 183.)

The military judge found Appellant guilty of the LIO of Specification 2 of Charge II, assault consummated by a battery, in violation of Article 128, UCMJ. (JA at 184.) He found Appellant not guilty of the remaining charges and specifications. (JA at 184.) The military judge sentenced Appellant to a dismissal and confinement for one month. (JA at 2.)

On appeal, Appellant argued that the military judge erred when she determined that assault consummated by a battery was an LIO of abusive sexual contact by bodily harm. (JA at 2.) He also argued that the evidence was factually and legally insufficient. (JA at 2.)

In its opinion, a two-judge majority of the lower court found that Appellant did not waive the right to contest whether the military judge erred in finding

[1] Specification 1 and 2 of Charge I, which included attempted aggravated sexual assault, along with the lesser included offense of Specification 2 of Charge II, were charged in the alternative. (R. at 834.)

assault consummated by a battery an LIO of abusive sexual contact. (JA at 4.) The majority found that Appellant did not affirmatively request assault consummated by a battery as an LIO of Specification 2 of Charge II. (JA at 4.) Instead, it determined that Appellant "merely acquiesced without concession or discussion to the military judge's insistence that the assault consummated by a battery offense remained after the military judge determined that the offense, as alleged, did not state an offense of sexual assault." (JA at 4.) Instead of finding waiver, the two-judge majority found that Appellant forfeited the issue by failing to object. (JA at 4.) On the other hand, the chief judge determined in a concurring opinion that Appellant waived the issue through his plea to the LIO and by drafting the specification of the LIO. (JA at 13.)

When addressing the merits of Appellant's argument, the Court found that assault consummated by a battery was an LIO of abusive sexual contact by bodily harm. (JA at 4-8.) AFCCA found that bodily harm was an element of both assault consummated by a battery, and the originally charged abusive sexual contact. (JA at 5-6.) The Court identified that bodily harm is defined as "any offensive touching of another, however slight." (JA at 5.) Citing to United States v. Johnson, 54 M.J. 67, 69 (C.A.A.F. 2000), AFCCA identified that consent "can convert what might otherwise be an offensive touching into nonoffensive touching…." (JA at 5.)

Regarding, assault consummated by a battery, AFCCA recognized that this Court has held that lack of consent is an element of assault consummated by a battery, even though lack of consent is not listed in the MCM or the text of Article 128, UCMJ. (JA at 6) (citing United States v. Riggins, 75 M.J. 78, 83 (C.A.A.F. 2016)). AFCCA reasoned, "This does not mean that consent is a separate element, unrelated to the elements of bodily harm and unlawful force or violence, but rather that lack of consent is necessarily found within the other elements of assault consummated by a battery." (JA at 7.) Based on the above, AFCCA reasoned that "[t]o prove the offensive nature of the touching, the Government was required to prove that 1st Lt RVS did not, in fact, consent to the touching. Had she consented, the contact could not have been offensive." (JA at 7.)

Because the government charged abusive sexual contact by bodily harm, AFCCA found that "Appellant was on notice that consent was at issue from the moment charges were preferred." (JA at 7.) The Court found that "consent was litigated throughout the trial," and that Appellant's "primary theory at trial was that 1st Lt RVS consented to Appellant touching her that evening." (JA at 7.) Finally, since the greater offense required actual physical touching, the Court found this case distinguishable from Riggins. (JA at 7.) AFCCA ultimately concluded that the military judge did not err when she determined assault consummated by a

battery was an LIO of the charged abusive sexual contact by bodily harm. (JA at 8.)

When addressing Appellant's claims of legal and factual sufficiency, AFCCA recognized that Appellant had provided the military judge with a draft specification of assault consummated by a battery that alleged a touching of the "pelvic region." (JA at 9.) Given the government's concurrence with the specification as drafted by Appellant, AFCCA determined that Appellant was found guilty of touching 1st Lt RVS's "pelvic region." (JA at 8.) AFCCA found Appellant's actions constituted a request for a minor change, which was consented to by the government, and accepted by the military judge. (JA at 10.)

AFCCA reasoned that the change from "vulva" to "pelvic region" constituted a minor change because it did not increase the maximum punishment, change the nature or identity of the offense, and was not likely to mislead Appellant. (JA at 10.) AFCCA also determined that even if the modification was a major change, it still was permissible. (JA at 10.) The Court found that the modification was not done over the objection of Appellant, as he is the one who proposed it. (JA at 11.) Thus, even if it constituted a major change, the modification of "vulva" to "pelvic region" did not violate R.C.M. 603 as it was not accomplished over defense objection. (JA at 11.) After finding no error, determining that Appellant's conviction was factually and legally sufficient, and

deciding that Appellant's sentence was not inappropriately severe, AFCCA upheld the findings and sentence in the case. (JA at 12.)

SUMMARY OF THE ARGUMENT

This Court should reject Appellant's attempts to obtain relief based on a specification he drafted. By supplying the military judge a draft specification including the term "pelvic region," Appellant waived any challenge to the modification of the lesser included offense of assault consummated by a battery. Even if Appellant did not waive the granted issue, AFCCA correctly determined that the parties agreed to a minor change. Regardless of whether the modification amounted to a major change, relief is not warranted, as Appellant did not object to the modification of the specification. Even if this Court determines that Appellant's presentation of a draft specification to the military judge did not amount to a request for a change under R.C.M. 603, Appellant is still not entitled to relief, as no fatal variance occurred.

Likewise, Appellant waived any challenge to the consideration of assault consummated by a battery as an LIO in this case. Even if he did not waive the issue, the military judge did not err when she determined that assault consummated by a battery was an LIO of abusive sexual contact by bodily harm. Even if this Court were to assume that assault consummated by a battery was not an LIO in this case, Appellant is still not entitled to relief. Appellant cannot demonstrate a

material prejudice to his substantial right to notice, as Appellant was informed of the LIO six months prior to trial, and the issue of consent was thoroughly litigated throughout his court-martial.

ARGUMENT

I.

EVEN IF APPELLANT DID NOT WAIVE THIS ISSUE, AFCCA CORRECTLY DETERMINED THAT MODIFICATION OF THE LESSER INCLUDED OFFENSE OF ASSAULT CONSUMMATED BY A BATTERY STEMMED FROM A MINOR CHANGE REQUESTED BY APPELLANT. EVEN IF THE MODIFICATION AMOUNTED TO A MAJOR CHANGE, SUCH CHANGE WAS NOT DONE OVER THE OBJECTION OF APPELLANT, AND AS A RESULT, HE IS NOT ENTITLED TO RELIEF.

Standard of Review

Whether a modification of a charge or specification was a major or minor change is a question of law reviewed de novo. United States v. Reese, 76 M.J. 297, 300 (C.A.A.F. 2017) (citing United States v. Atchak, 75 M.J. 193, 195 (C.A.A.F. 2016)). Whether an appellant has waived an issue is a question of law reviewed de novo. United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017).

Law and Analysis

1) By supplying the military judge a draft specification including the term "pelvic region," Appellant waived any challenge to the modification of Specification 2 of Charge II.

When an appellant intentionally waives a challenge, it is extinguished and may not be raised on appeal. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Recently, this Court reaffirmed this principle when it held "[w]hen an error is waived . . . the result is that there is no error at all and an appellate court is without authority to reverse a conviction on that basis." United States v. Chin, 75 M.J. 220, 222 (C.A.A.F. 2016) (quoting United States v. Weathers, 186 F.3d 948, 955 (D.C. Cir. 1999)). Whereas forfeiture is a failure to assert a right in a timely fashion, waiver is "the 'intentional relinquishment or abandonment of a known right.'" Gladue, 67 M.J. at 313 (quoting United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

An appellant can waive issues that involve "many of the most fundamental protections afforded by the constitution." Gladue, 67 M.J. at 314 (quoting United States v. Mezzanatto, 513 U.S. 196, 201 (1995)). "No magic words are required to establish a waiver." United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999). Whether there was an intelligent waiver depends on the facts and circumstances of each case. United States v. Elespuru, 73 M.J. 326, 328 (C.A.A.F 2014). On multiple occasion, this Court has held that an accused's affirmative statement that he has "no objection" to a certain course of action constitutes waiver. Ahern, 76 M.J. at 198; *see also* United States v. Campos, 67 M.J. 330, 331-33 (C.A.A.F. 2009).

The facts and circumstances of this case support a finding of waiver. In his brief, Appellant correctly identifies that during pretrial litigation on his motion to dismiss, Appellant objected to modification of "vulva" to "pelvic region" as a major change. (JA at 31.) Despite this objection, subsequent circumstances demonstrate Appellant waived this issue.

First, this Court should not impute Appellant's objection to modification of "vulva" to "pelvic region" in the context of the greater offense of abusive sexual contact to the later modification of the LIO of assault consummated by a battery. During pretrial motion litigation, Appellant raised his objection only as to the greater offense. *See* (JA at 188, 185-90.) In fact, consideration of a possible LIO was not an issue litigated by the parties. (JA at 30-53, 185-89.) Thus, although Appellant may have objected as to modification of "vulva" to "pelvic region" in the context of the greater offense of abusive sexual contact, his objection cannot be imputed to the LIO of assault consummated by a battery. This becomes even more apparent when considering how this issue developed after the initial motion's hearing, which was held on 18 November 2014.

As the military judge issued her ruling upholding the LIO of assault consummated by a battery on 15 December 2014, Appellant had almost six months to raise issue with consideration of the LIO of assault consummated by battery and with the content of the specification. (JA at 54, 247.) Instead of objecting,

Appellant provided the military judge the specification with which he now raises issue. (JA at 130, 226.) Appellant attempts to minimize this fact, arguing that he merely acquiesced to the military judge's direction. (App. Br. at 17.) A review of the record reveals otherwise. The military judge did not direct Appellant to draft the specification, but "informed or advised" the parties to refer to R.C.M. 910. (JA at 130.)

Thus, under those circumstances, Appellant was free to object to the advised course of action, and to the modification of the specification. Even if this Court interprets the military judge's actions as a direction to Appellant to provide a draft specification, at no point was Appellant instructed as to the content of the specification. In other words, when informed of the opportunity to supply a draft specification, it was Appellant who voluntarily modified "vulva" to "pelvic region."

Although Appellant may have initially objected to modification of the greater offense of abusive sexual contact, as to any objection to a modification of the LIO of assault consummated by a battery, "counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied." Elespuru, 73 M.J. at 329 (quoting United States v. Mundy, 9 C.M.R. 130, 133 (C.M.A. 1953)). Appellant provided the military judge a draft specification including the term "pelvic region." This affirmative step on his part

constitutes waiver.

2) Even if Appellant did not waive the granted issue, Appellant is not entitled to relief as AFCCA correctly determined that the parties agreed to a minor change.

R.C.M. 603 governs modifications to charges and specifications. According to R.C.M. 603(a), minor changes are any changes "except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." Minor changes may be made prior to arraignment by "Any person forwarding, acting upon, or prosecuting charges on behalf of the United States except an investigating officer appointed under R.C.M. 405…." R.C.M. 603(b). After arraignment, minor changes are regulated by the military judge: "the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced." R.C.M. 603(c). A trial counsel making minor changes is not required to consult with the convening authority, but should consult with the convening authority "before making any changes which, even though minor, change the nature or seriousness of the offense." R.C.M. 603(b), Discussion.

The Discussion accompanying R.C.M. 603(a) notes that minor changes include modifications to correct "inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other

slight errors." R.C.M. 603(a), Discussion. They also include changes "which reduce the seriousness of an offense…." R.C.M. 603(a), Discussion. In certain circumstances, the government may modify a specification in order to conform the specification to proof presented at trial. *See* United States v. Moreno, 46 M.J. 216, 219 (C.A.A.F. 1997).

Unlike minor changes, major changes to charges or specifications "may not be made over the objection of the accused unless the charge or specification affected is preferred anew." R.C.M. 603(d). According to the Discussion accompanying R.C.M. 603(d), if a major change is made over the objection of the accused, a new referral is mandated. The Discussion also notes that in the case of a general court-martial, a new investigation under R.C.M. 405 will be necessary if the modification "was not covered in the prior investigation."

In this case, AFCCA found that Appellant's presentation of a draft specification to the military judge at trial constituted a request for a modification of the LIO of assault consummated by a battery. (JA at 10.) Although the ultimate question of whether the requested change was major or minor change is a question of law, AFCCA's conclusion as to the intent and purpose behind trial defense counsel's actions constitutes a finding of fact under the circumstances. Although Appellant disagrees with AFCCA's conclusion in this regard, a review of the record reveals that AFCCA's finding of fact in this regard is not clearly erroneous,

and is supported by the record. *See* United States v. McKinley, 48 M.J. 280 (C.A.A.F. 1998) (findings of fact of a CCA will not be disturbed by this court unless they are unsupported by the record or clearly erroneous).

As discussed above, the military judge advised the parties to review R.C.M. 910. (JA at 130.) In response, Appellant supplied the military judge a specification that included an offensive touching of the "pelvic region." (JA at 130.) There is nothing in the record that indicates that Appellant was directed in any way to include the term "pelvic region" instead of "vulva." Thus, Appellant suggested this modification on his own initiative. Further supporting AFCCA's conclusion that Appellant's actions amounted to a request for a change is that the military judge specifically asked whether the government concurred with Appellant's submission. (JA at 130.) Accordingly, AFCCA did not err when it determined that Appellant's submission of a draft specification amounted to a request for a change to the LIO of Specification 2 of Charge II,

Regarding the question of law before this Court, the requested modification in this case amounted a minor change, as it did not add a party, an offense, or a substantial matter not fairly included in the original offense. As AFCCA determined, "substituting 'pelvic region' for 'vulva' in an assault consummated by a battery specification neither increased the maximum punishment nor changed the nature or identity of the offense." (JA at 10.)

In asserting the modification to the specification in this case amounted to a major change, Appellant cites to Reese to argue the term "pelvic region" was not fairly included in the original specification. (App. Br. at 19.) However, a review of Reese, and other decisions finding major changes, actually demonstrate why the modification in this case did not add a substantial matter not fairly included in the original offense in this case.

In Reese, this Court held that modification of a specification alleging commission of a lewd act upon a child constituted a major change. Reese, 76 M.J. at 300-01. In that case, the government amended the charge from alleging that the appellant licked the penis of the victim with his tongue, to touching the victim's penis with his hand. Id. at 299. This Court found that the modification changed the means by which the crime was committed. Id. at 300. It found that sexual touching with a hand was not "fairly included in an offense akin (though not identical) to oral sodomy of a child." Id. at 300. This Court also noted that with the charge of touching with the hand, the defense could have argued that any such touching was accidental, which would not have been available with the original charge. Id. Ultimately, this Court found, "Given the different nature of the two offenses and the dissimilar defenses available for each, we are not persuaded the change was minor." Id.

In United States v. Murray, 43 M.J. 507, 510 (A.F. Ct. Crim. App. 1995),

the appellant was originally charged with committing aggravated assault by striking the victim with a loaded firearm. The government ultimately modified the specification, adding the allegation that the appellant pointed the loaded firearm at the victim's head. Murray, 43 M.J. at 510. AFCCA found that the additional language constituted a major change because it "alleged a new means by which the appellant committed the crime of aggravated assault," and increased the maximum punishment. Id. at 510-11.

In United States v. Longmire, 39 M.J. 536 (A.C.M.R. 1994), the government modified a charge of willful disobedience of a superior commissioned officer. The modification changed the identity of the officer issuing the order, as well as the mechanism used to deliver the order. Longmire, 39 M.J. at 537-38. In analyzing the issue, the Army Court noted potential defenses the appellant could have presented, such as lack of knowledge of the order, as well as an argument that the original written order was non-punitive. Id. at 539. The Court identified that such defenses would be directly tied to who issued the order, and in what manner. Id. Taking this into account, the Court found the modifications amounted to a major change. Id. at 539-40.

In United States v. Smith, 49 M.J. 269, 270 (C.A.A.F. 1998), the government added the phrase "military property" to multiple larceny specifications. This Court found that the addition of military property to the

specifications added a sentence escalator that increased the maximum possible punishment. Smith, 49 M.J. at 271. Accordingly, this Court determined that the modification was a substantial matter, and constituted a major change. Id.

Unlike the above cases, the modification in this case did not alter the identity of any individual named in the specification, change the means by which Appellant carried out the offense, or result in a more serious allegation. In this case, the manner in which Appellant carried out the offense stayed the same, namely touching 1st Lt RVS with his penis. Unlike the change from tongue to hand that occurred in Reese, the change to "pelvic region" in this case merely increased the scope of the area touched, and did so only by a matter of inches. Even more instructive, the pelvic region actually encompasses the vulva. Under these circumstances, the change as requested by Appellant cannot equate to a substantial matter not fairly included in the original offense in this case.

If anything, the modification in this case decreased the severity of the offense. It is therefore by definition, a minor change. *See* Discussion, R.C.M. 603(b) ("Minor changes also include those which reduce the seriousness of an offense….") It was the modification of "vulva" to "pelvic region" that resulted in reduction of Specification 2 of Charge II from abusive sexual contact to the LIO of assault consummated by a battery. From a more general standpoint, if decreasing the value of an item stolen reduces the serious of an offense, so too did the

modification in this case. *See* Discussion, R.C.M. 603(b). Simply put, the offensive touching of the pelvic region is a less serious offense than the direct touching of someone's vulva.

Accordingly, modifying "vulva" to "pelvic region" was a minor change that did not add a substantial matter not fairly included in the original offense. The minor change that occurred in this case did not mislead Appellant. It was trial defense counsel's cross-examination at the Article 32, UCMJ hearing that ultimately precipitated the government's attempt to modify "vulva" to "pelvic region" in the original greater offense of abusive sexual contact. *See* (JA at 204.)

Most importantly, it was Appellant who provided the draft specification including the term "pelvic region" to the military judge at trial. (JA at 130.) This is a definitive indicator that Appellant, and his defense counsel, were of the understanding that they were defending against contact of the "pelvic region." It is simply impossible to imagine under what circumstance Appellant would submit without objection a draft specification alleging contact for which he lacked notice.

As the modification to the specification in this case was a minor change that did not mislead Appellant, this Court should find uphold AFCCA's determination that what occurred was a minor change, and affirm the findings and sentence in this case.

3) Even if modification of the LIO constituted a major change, AFCCA correctly determined that Appellant did not object to the change.

Regardless of whether the modification of the specification in this case was a major change, Appellant is still not entitled to relief. As discussed above, AFCCA correctly found that it was Appellant who requested the change in this case. (JA at 10.) R.C.M. 603(d) only prohibits major changes when they are accomplished over the objection of the accused. As AFCCA determined, "Not only did Appellant fail to object to the change, he proposed it." (JA at 10.) Accordingly, even if the modification of the specification in this case constituted a major change, Appellant is not entitled to relief.

4) If this Court determines that Appellant's presentation of a draft specification to the military judge did not amount to a request for a change under R.C.M. 603, Appellant is still not entitled to relief, as no fatal variance occurred.

In addition to arguing a major change occurred, Appellant appears to suggest that AFCCA erred when it determined that a change to the specification was requested under R.C.M. 603. (App. Br. at 12.) As discussed at length above, AFCCA's determination that Appellant's actions at trial amounted to a request for a modification of the specification was a finding of fact supported by the record. Even assuming arguendo that Appellant's submission of a draft specification was not a request for a change under R.C.M. 603, Appellant is still not entitled to relief.

If the draft specification offered by Appellant and entered into the record did

not constitute a request for a change under R.C.M. 603, this issue is best analyzed under variance principles. Although the military judge did not enter findings by exceptions and substitutions the draft specification offered by Appellant and entered in the record reflects the specification of which the military judge ultimately convicted Appellant. (JA at 9-10.) Thus, if modification of the specification did not occur under R.C.M. 603, then the military judge's findings based on the specification would be analyzed under variance principles, as variance occurs "when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999).

Whether findings amounted to a fatal variance is a question of law reviewed de novo. United States v. Treat, 73 M.J. 331, 335 (C.A.A.F. 2014). A failure to object to a variance results in review of the findings for plain error. Id.

R.C.M. 918(a) allows a court-martial to return findings by exceptions and substitutions. However, such findings "may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it." R.C.M. 918(a)(1). "Minor variances that do not change the nature of the offense are not necessarily fatal." United States v. Lovett, 59 M.J. 230, 235 (C.A.A.F. 2004).

In order to prevail on a claim involving fatal variance, an appellant must

demonstrate "both that the variance was material and that he was substantially prejudiced thereby." Treat, 73 M.J. at 336 (quoting United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009)). A material variance "is one that, for instance, substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." United States v. Finch, 64 M.J. 118, 121 (C.A.A.F. 2006). "A variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge.'" United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009) (quoting United States v. Teffeau, 58 M.J. 62, 67 (C.A.A.F. 2003)).

First, the military judge's finding of "pelvic region" vice "vulva" would not amount to a material variance. A substitute finding of "pelvic region" would not amount to a substantial change in the nature of the offense. Nor would such a finding increase the seriousness of the offense or increase the punishment. The identity of the victim and the method in which Appellant contacted the victim remained the same. Anatomically, a finding of "pelvic region" would merely enlarge the scope of the potential area contacted by a matter of inches. Of course, the victim's pelvic region would encompass the vulva. Accordingly, such a minor alteration of the location of contact does not constitute a substantial change in the

nature of the offense. *See* United States v. Combs, 28 C.M.R. 866 (A.F.B.R. 1959) (although testimony established the striking of undisclosed locations on the victim's body rather than on the head as alleged, any such variance was immaterial); *see also* United States v. Finan, 30 M.J. 1161 (A.C.M.R. 1990) (finding no material variance despite modification of means of assault because "the victim, the time, the place, and the particular scuffle to which it related were all identical" and resulted in a less severe offense).

Even if such a finding could be considered material, it would not prejudice Appellant. The finding would not put him at risk of prosecution for the same conduct, as the identity of the victim, the incident charged, and Appellant's method of touching remained the same. At least as early as referral, Appellant was on notice that he potentially had to defend against specifications alleging contact with 1st Lt RVS's "pelvic region." Finally, such a finding did not deny Appellant the opportunity to defend against the charge, as Appellant's case focused on consent to defeat the allegations made by 1st Lt RVS. Thus, even if this Court were to assume arguendo that AFCCA erred in determining that Appellant's submission of a draft specification did not amount to a request for a change under R.C.M. 603, a variance analysis demonstrates Appellant is still not entitled to relief.

II.

EVEN IF APPELLANT DID NOT WAIVE THIS ISSUE, THE MILITARY JUDGE DID NOT ERR WHEN SHE DETERMINED THAT ASSAULT CONSUMMATED BY A BATTERY WAS A LESSER INCLUDED OFFENSE OF ABUSIVE SEXUAL CONTACT BY BODILY HARM.

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. 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).

Law and Analysis

According to Article 79, UCMJ, "An accused may be found guilty of an offense necessarily included in the offense charged…." To determine whether an offense is an LIO of a charged offense, courts utilize the elements test. Tunstall, 72 M.J. at 194. The elements test compares the two offenses in order to determine whether the elements of the LIO can be considered 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)). An offense is not

necessarily included in another if the lesser offense requires proof of an element not required for the greater offense. Alston, 69 M.J. at 216 (quoting Schmuck, 489 U.S. at 716).

The elements test "does not require that the two offenses at issue employ identical statutory language." Id. (quoting Carter v. United States, 530 U.S. 255, 263 (2000)). Courts may instead rely on the normal rules of statutory interpretation and construction to determine "whether the elements of the LIO would necessarily be proven by proving the elements of the greater offense." United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012).

When conducting the elements test, courts compare the language of the elements of the greater and lesser offenses as alleged. *See* United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011) (comparing the elements of burglary and housebreaking as charged at trial). In other words, "courts examine the offense 'in the context of the charge at issue." United States v. Riggins, 75 M.J. 78, 83 (C.A.A.F. 2016) (quoting Alston, 69 M.J. at 216). Furthermore, "[t]he fact that there may be an "alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense." Id. (quoting United States v. McCullough, 348 F.3d 620, 626 (7th Cir. 2004)).

1) Appellant waived any challenge to consideration of the LIO of assault consummated by a battery in this case.

As noted above, consideration of a possible LIO was not an issue litigated

by the parties when addressing Appellant's motion to dismiss Specifications 1 and 2 of Charge II. (JA at 30-53, 185-89.) Instead, the issue of the LIO of assault consummated by a battery first arose when the military judge issued her ruling on 15 December 2014. Appellant had almost six months to raise object to consideration of the LIO of assault consummated by battery and with the content of the specification. (JA at 54, 247.)

But Appellant did more than just fail to object in this case, which would merely implicate forfeiture. Appellant, through counsel, affirmatively recognized assault consummated by a battery as an appropriate LIO in this case. When the substitute judge was clarifying the original military judge's ruling with the parties, he asked the following:

> MJ: Specification 2 had not been dismissed; however, the greater offense listed as Specification 2 has; however, ***the lesser included offense of assault consummated by a battery, in violation of Article 128, remains***, is that correct?
>
> DC: Yes, Your Honor.
>
> TC: Yes, Your Honor.

(JA at 55) (emphasis added). He clarified the parties' positions a second time:

> MJ: So, then, although the specification has not been dismissed, Specification 2, the lesser included offense of Specification 2 of Charge II remains and that is something that we will make sure . . . we'll do our best to make sure we're clear on the record when referencing Specification 2 as the lesser included offense of Specification 2, in accordance with the previous judge's ruling. ***That lesser included offense is assault consummated by***

battery, in violation of Article 128, UCMJ . . . are the parties in agreement?

DC: Yes, Your Honor.

TC: Yes, Your Honor.

(JA at 55) (emphasis added).

Appellant ultimately provided the military judge a draft specification of assault consummated by a battery. (JA at 130.) Appellant plead not guilty to the LIO of assault consummated by a battery and acknowledged:

> MJ: And then, just so we're clear, defense counsel, to Specification 2 of Charge II, pleading not guilty to the lesser included offense of assault consummated by a battery, correct?
>
> DC: In violation of Article 128, Your Honor, yes, sir.

(JA at 393.)

As the above demonstrates, when asked on multiple occasions whether assault consummated by a battery was an LIO in this case, Appellant responded in the affirmative on multiple occasions. In the past this Court has found that a response of "no objection" amounts to waiver. Ahern, 76 M.J. at 198; Campos, 67 M.J. at 331-33. Appellant's actions in this case go beyond even that, and amount to affirmative agreement and acknowledgment of the proposition put forth by the military judge. Such waiver was knowledgeable, as this Court had held prior to Appellant's trial that lack of consent was an element of assault consummated by a

battery. Johnson, 64 M.J. at 69 n.3; *but see* Oliver, 76 M.J. at 273-74 (declining to find waiver because at the time of trial "courts were grappling with whether, and to what extent, lack of consent was an element for Article 120, UCMJ, violations"). Accordingly, Appellant waived this issue and is not entitled to relief.

2) Even if Appellant did not waive this issue, the military judge did not err when she found that assault consummated by a battery was an LIO of abusive sexual contact by bodily harm.

The offense of abusive sexual contact occurs when:

> Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

MCM, pt. IV, ¶ 45.a.(h) (2008 ed.). Aggravated sexual assault includes "any person subject to this chapter who … causes another person of any age to engage in a sexual act by … causing bodily harm." MCM, pt. IV, ¶ 45.a.(c) (2008 ed.). Sexual contact is defined as:

> the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, 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.

MCM, pt. IV, ¶ 45.a.(t)(2)(2008 ed.). Bodily harm is defined as "any offensive touching of another, however slight." MCM, pt. IV, ¶ 45.a.(t)(8)(2008 ed.).

The elements of abusive sexual contact by causing bodily are:

> 1. "That the accused engaged in sexual contact with another person"
>
> 2. "That the accused did so by causing bodily harm to another person."

MCM, pt. IV, ¶ 45.b.(8)(b) (2008 ed.). According to Article 120(r), UCMJ:

> Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

MCM, pt. IV, ¶ 54.a.(r) (2008 ed.)

According to Article 128, UCMJ, the offense of assault occurs when:

> Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

MCM, pt. IV, ¶ 54.b.(a) (2008 ed.). 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 with unlawful force or violence"

MCM, pt. IV, ¶ 54.b.(b)(2) (2008 ed.); *see also* Johnson, 54 M.J. at 69.

Bodily harm is defined as "any offensive touching of another, however slight." MCM, pt. IV, ¶ 54.c.(1)(a) (2008 ed.). This Court has identified that lack of consent is an element of assault consummated by a battery, as the "bodily harm . . . must be done . . . without the lawful consent of the person affected." Johnson, 54 M.J. at 69; *see also* Riggins, 75 M.J. at 78. Consent can also "convert what might otherwise be offensive touching into nonoffensive touching…." Johnson, 54 M.J. at 69 (quoting United States v. Greaves, 40 M.J. 432, 433 (CMA 1994)). "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." United States v. Bonner, 70 M.J. 1, 3 (C.A.A.F. 2011).

Appellant argues that AFCCA erred when it determined that consent was an element of abusive sexual contact. (App. Br. at 22.) Without analyzing the two cases, Appellant argues that Riggins and Oliver "leave no doubt the CCA erred when it concluded consent was an element of abusive sexual contact." (App. Br. at 22.) An actual review of Riggins and Oliver, and application of the elements test, demonstrate that AFCCA correctly determined that in this case, assault consummated by a battery was an LIO of abusive sexual contact.

In this case, the greater offense was charged as abusive sexual contact by bodily harm. (JA at 16.) Thus, to meet the elements of abusive sexual contact, the government was required to demonstrate that bodily harm occurred. MCM, pt. IV, ¶ 45.b.(8)(b) (2008 ed.). Likewise, to meet the elements of the lesser offense of assault consummated by a battery, the government was required to demonstrate that bodily harm occurred. MCM, pt. IV, ¶ 54.b.(b)(2) (2008 ed.) When this Court identified lack of consent as an element of assault consummated by a battery in Johnson, it did so because lack of consent is part and parcel of the definition of bodily harm. Johnson, 54 M.J. at 69. Thus, because the abusive sexual assault specification in the case was charged by bodily harm, the government was required to demonstrate a lack of consent. As such, assault consummated by a battery was an LIO in this case.

Riggins and Oliver support this conclusion. 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. Thus, this Court reasoned that as to the greater offenses charged by placing in fear, the government was required to prove a legal inability to consent, which is different from a lack of consent. Id. This Court also identified that by charging an Article 120, UCMJ offense by placing in fear, the government had removed "any issue of consent." Id. This Court was careful to specify 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 (emphasis added). This Court also identified that

> Our holding in this case does not foreclose the possibility that in other cases the Government may charge an accused with sexual assault and/or abusive sexual contact in such a manner that assault consummated by a battery may be a lesser included offense. A specification placing the accused on notice of fear of bodily harm and raising the issue of consent may well lead to a different result than the one here.

Id. at 85 n.7.

Similarly, in Oliver, the appellant was charged with abusive sexual contact by placing in fear. Oliver, 76 M.J. at 272. Relying on Riggins, this Court ultimately held that wrongful sexual contact was not an LIO of the charged offense. Oliver, 76 M.J. at 274.

Unlike in Oliver and Riggins, Appellant was originally charged with abusive sexual contact by bodily harm. Because of this, the greater offense in this case, unlike the greater offenses in Riggins and Oliver, raised the issue of consent. As such, the holdings in Riggins and Oliver do not undermine AFCCA's decision in this case that consent was an element of abusive sexual contact as charged. Accordingly, the military judge did not err when she determined that assault consummated by a battery was an LIO in this case.

3) Regardless of whether assault consummated by a battery was an LIO in this case, Appellant cannot demonstrate prejudice.

"An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." United States v. Wilkins, 71 M.J. 410, 413 (C.A.A.F. 2012) (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) (internal citation omitted).

As an initial point, this Court has routinely held that 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, 19 (C.A.A.F. 2011). This Court should reject Appellant's attempt to frame the alleged error in this case as automatically mandating relief. *See* (App. Br. at 17-18.) Despite Appellant's suggestion otherwise, the language of Article 59(b), UCMJ is inapplicable to this case. Article 59(b), UCMJ allows an appellate court to approve an LIO in the event it dismisses a finding of guilt due to an error at trial. United States v. Upham, 66 M.J. 83, 87-88 (C.A.A.F. 2008). The question in this case is the potential prejudicial impact of an offense erroneously considered at trial as an LIO. These are entirely separate principles.

Appellant's reliance on Reese is also flawed. In Reese this Court found that a major change made over the objection of an accused mandates reversal because the text of R.C.M. 603(d) prevents such changes unless charges are preferred anew. Reese, 76 M.J. at 300. There is no such limitation in the language of Article 79, UCMJ, which simply 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." Accordingly, the appropriate course of action is to test for prejudice under Article 59(a), UCMJ, as this Court has done in the past.

In this case, the lack of prejudice is apparent. Despite Appellant's selective presentation of the record, consent was at issue throughout the trial and was Appellant's primary defense to the allegations involving 1st Lt RVS. AFCCA appropriately identified:

> Here, the Defense was informed of the military judge's ruling identifying assault consummated by a battery as an LIO six months prior to trial. At trial, Appellant did not contest that there was a touching, but instead focused on whether the touching was consensual, whether it constituted a mistake of fact as to consent, and whether the victim was a credible witness. Appellant believed that he was defending himself against the LIO and fashioned his trial strategy accordingly.

(JA at 8.) A cursory review of civilian defense counsel's closing argument supports AFCCA's conclusion. That consent was at issue at trial is perhaps best

exemplified by civilian defense counsel describing Appellant's interactions with 1st Lt RVS as a "hook-up" approximately nine times in his closing argument. (JA at 173.) Thus, as in Oliver, "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." Oliver, 76 M.J. at 275.

In this case, Appellant cannot show that even if consideration of assault consummated by a battery as an LIO was error, that such error materially prejudiced his substantial right to notice. Accordingly, this Court should deny his claim for relief and affirm the findings and sentence in this case.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 10 August 2017.

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