IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DENNIS A. GEORGE, JR.,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0206/AF

Crim. App. Dkt. No. 40397

BRIEF ON BEHALF OF APPELLANT

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Issue Presented

WHETHER APPELLANT'S CONVICTION FOR ATTEMPTED SEXUAL ASSAULT WAS LEGALLY INSUFFICIENT BECAUSE THE GOVERNMENT DID NOT PROVE THE ALLEGED OVERT ACT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On August 15-19, 2022, at Joint Base Langley-Eustis, Virginia, a general court-martial composed of officer and enlisted members convicted Appellant, Senior Airman (SrA) Dennis A. George, Jr., contrary to his pleas, of one specification of attempted sexual assault without consent, in violation of Article 80, UCMJ, 10 U.S.C. § 880. JA at 087. The military judge sentenced SrA George to a reprimand, reduction to the pay grade of E-1, confinement for five months, and a dishonorable discharge. R. at 779. The convening authority took no action on the findings. Convening Authority Decision on Action. The convening authority disapproved the reprimand and approved the remainder of the sentence. *Id*.

[1] All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) [*2019 MCM*].

Before the Air Force Court, SrA George asserted his conviction under Article 80, UCMJ, was legally insufficient because the Government specified an overt act in the specification and did not prove that overt act. JA at 096. The Air Force Court affirmed the findings and sentence. JA at 097.

Statement of Facts

The Specification at Issue

The specification SrA George was found guilty of alleged that he "did, at or near Newport News, Virginia, on or about 4 July 2021, attempt to commit a sexual act upon [WB] by penetrating her mouth with his penis without her consent." JA at 001.

The Conduct at Issue

SrA George has a neurobiological disorder called autism spectrum disorder or Asperger's syndrome. R. at 715, 722. He was diagnosed as a child and treated but never told that he suffered from this disorder. R. at 712-22, 741. As is typical of people with this disorder, SrA George largely avoided alcohol and had only recently begun to drink socially. R. at 744; Def. Ex. K.

SrA George was not planning on going out on July 3, 2021, but others, including WB, convinced him to join them at a club. JA at 034, 058, 068. When the group was leaving the club later that night, the designated driver observed that everyone in the group, including SrA George, was "drunk" and "rowdy." JA at 051.

SrA George got in the backseat of the car with WB and put his arm around her. JA at 022-23. According to WB, during the car ride SrA George grabbed the back of her neck with his left hand and pushed her head towards his crotch twice. JA at 026. The second time, WB claimed her cheek touched his crotch and she could feel his zipper. JA at 027.

WB told SrA George to "get off of me." JA at 027. When she did this, another passenger in the backseat asked what was going on and SrA George took his hand away. JA at 073. There was no evidence that SrA George penetrated WB's mouth.

Summary of the Argument

The Government must prove what it alleges. The plain language of the specification alleges that SrA George committed a specific overt act—penetrating WB's mouth without her consent. The Government offered no evidence that SrA George penetrated WB's mouth with his penis without her consent. Because the Government failed to prove the charged overt act, SrA George's conviction is legally insufficient. This Court should set aside the findings and sentence and dismiss the Charge and Specification.

Argument

APPELLANT'S CONVICTION FOR ATTEMPTED SEXUAL ASSAULT WAS LEGALLY INSUFFICIENT BECAUSE THE GOVERNMENT DID NOT PROVE THE ALLEGED OVERT ACT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. *United States v. Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *7 (C.A.A.F. 2022) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)).

Law and Analysis

No rational factfinder could conclude that the Government met its burden to prove SrA George's guilt beyond a reasonable doubt because the Government offered no evidence of the overt act that it charged. "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). Even under this very low threshold, this Court must find that the Government has proved every fact necessary to constitute the crime that it charged. *In re Winship*, 397 U.S. 358, 364 (1970) (holding "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *Davis v. United States*, 160 U.S.

469, 493 (1895) (holding "[n]o man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged").

In holding the Government to its constitutional burden to prove every fact necessary to constitute the crime it charged, this Court "cannot be concerned with whether the evidence proves the commission of some other crime." *Garner v. Louisiana*, 368 U.S. 157, 163-65 (1961). "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Jackson v. Virginia*, 443 U.S. 307, 323 (1979). Rightly, this Court looks only to whether the Government proved the offense that was charged. *Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *1-2, *17-18 (determining that the Government chose to charge that the appellant's misconduct was prejudicial to good order and discipline, when it could have plead in the alternative, and because the Government presented no evidence to establish this, "no reasonable factfinder could have found the essential elements of [the offenses] beyond a reasonable doubt").

When testing for legal sufficiency, this Court will affirm a conviction only if the Government has met its burden to prove every fact necessary to constitute the crime that it charged, ensuring the appellant's right to due process. In *United States v. Paul*, 73 M.J. 274, 276-77 (C.A.A.F. 2014), this Court analyzed whether the

appellant's conviction was legally sufficient. The Government charged that the appellant did "wrongfully use 3,4-methylenedioxymethamphetamine, a Schedule I controlled substance, commonly known as Ecstasy." *Id*. at 276. The Government proved that the appellant used Ecstasy, but it "did not offer evidence at trial that [a]ppellant used 3,4-methylenedioxymethamphetamine, that 3,4-methylenedioxymethamphetamine is a controlled substance, or that 3,4-methylenedioxymethamphetamine is commonly referred to as ecstasy." *Id*. at 277. Because the Government did not prove what it charged—that the appellant wrongfully used 3,4-methylenedioxymethamphetamine, a Schedule I controlled substance—the conviction was legally insufficient. *Id*.

Likewise, in *United States v. Williams*, 3 M.J. 155, 156-57 (C.M.A. 1977), this Court reviewed the legal sufficiency of an appellant's conviction for disobeying a general order (a U.S. Army regulation). This Court determined that where "the trial counsel neither introduced a copy of the regulation into evidence nor requested that the trial judge judicially notice it," the evidence was legally insufficient because the Government failed to prove "that the regulation in question existed at the date and time of the alleged violation, and that both the accused and his act(s) were within the proscription of the same regulation." *Id*. at 156.

Here, SrA George's conviction is also legally insufficient because the Government offered no evidence of the overt act that it charged.

A. The Government charged SrA George with committing a specific overt act.

The Government was required to prove that SrA George penetrated WB's mouth with his penis without her consent because the plain language of the specification said he did. This Court uses the plain language of the specification, as alleged, to determine what the Government has charged and therefore must prove. *See, e.g., Paul*, 73 M.J. at 276 (finding the Government was required to prove that the appellant wrongfully used 3,4-methylenedioxymethamphetamine, a Schedule I controlled substance); *Williams*, 3 M.J. at 156-57 (explaining the Government was required to prove that the appellant disobeyed "Army Regulation 600-50"); *United States v. Wells*, __ M.J. __, 2024 CAAF LEXIS 552, *4-5 (C.A.A.F. 2024) (recognizing "the Government was required to prove beyond a reasonable doubt that . . . under the circumstances, the conduct was of a nature to bring discredit upon the armed forces"); *Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *1-2 (reasoning the Government elected to charge and "was thus required to prove that [a]ppellant's misconduct was prejudicial to good order and discipline"); *United States v. Bennitt*, 72 M.J. 266, 268 (C.A.A.F. 2019) (determining the Government had charged and was required to prove "an 'offense . . . directly affecting the person'"); *Robinson*, 77 M.J. at 298 (finding the Government had alleged and therefore had to prove the "accused knew or reasonably should have known that the person could not consent due to the impairment by intoxicant").

The Government charged SrA George under Article 80, UCMJ. JA at 001. The Government was required to prove beyond a reasonable doubt that: (1) SrA George did a certain overt act; (2) the act was done with the specific intent to commit a certain offense under the UCMJ; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of the intended offense. *MCM*, pt. IV, ¶ 4.b; *see United States v. Hale*, 78 M.J. 268, 271 (C.A.A.F. 2019) (citing *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014)) (listing the elements of Article 80, UCMJ). While the Government did not have to expressly charge a specific overt act in the specification[2], it did. The Government expressly alleged the overt act of "penetrating [WB's] mouth with his penis without her consent." JA at 001. This overt act is expressly alleged because the word "by"—which comes just before "penetrating [WB's] mouth with his penis without her consent" in the specification—denotes the charged overt act. *Id*.

"By" denotes what SrA George allegedly did because the plain meaning of "by" and common-sense show that the words that follow "by" in a specification are the alleged overt act(s). The Merriam Webster Collegiate Dictionary defines "by" as "through the agency of or instrumentality of," for example, *by* force. *By*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020). The American

[2] Rule for Courts-Martial 307(c)(3) allows all offenses, except for Article 134, UCMJ, to allege all essential elements expressly or by necessary implication.

Heritage Dictionary similarly defines "by" as "[t]hrough the agency or action of." *By*, THE AMERICAN HERITAGE DICTIONARY (Margery S. Berube et. al. eds., 2d College Edition, 1991). It further explains that "*by*", "*through*", and "*with*" are prepositions that "indicate the agency or means by which something is accomplished." *Id*. Moreover, perhaps most telling is that when the word "by" is structured with a "-ing" verb, that structure describes how something is achieved, for example, a specific act taken. *By*, Cambridge Dictionary (online ed. 2024), available at URL: https://dictionary.cambridge.org/us/grammar/british-grammar/by.

The definition of "by" as defined above is also mirrored in the UCMJ. Congress used the same plain and ordinary meaning of "by" to express how an act was committed in Article 120b, UCMJ. 10 U.S.C. § 920b; MCM, pt. IV, ¶ 62.a.(a)(2) ("commits a sexual act upon a child who has attained the age of 12 years *by*—(a) using force against any person; (B) threatening or placing that child in fear; (C) rendering that child unconscious; (D) administering to that child a drug, intoxicant, or other similar substance") (emphasis added). The same plain and ordinary meaning of "by" can also be seen in Article 128b, UCMJ. 10 U.S.C. § 928b(5) ("assaults a spouse . . . by strangling or suffocating"). Moreover, the President has further mirrored this plain and ordinary understanding of "by" in sample specifications. For example, the sample specification for simple assault

under Article 128, UCMJ, uses the word "by" to denote the act taken to commit the charged offense: "assault _____ *by* (striking (him) (her) with a _____) (_____)." MCM, pt. IV, ¶ 77.e.(1) (emphasis added).

Understanding "by" as the indicator of a specific act taken is further supported by Article 80, UCMJ, cases. For example, in *United States v. Payne*, 73 M.J. at 21, the appellant was charged with "attempt to persuade a minor to create child pornography," under Article 80, UCMJ. In the Article 80, UCMJ, specification at issue, the alleged acts that followed "by" denoted how the appellant allegedly attempted to commit the target offense:

> [Did] wrongfully and knowingly attempt to persuade, induce, entice, . . . or coerce "Marley," someone he believed was a female 14 years of age, who was, in fact, Lillian Vedder, an Ulster County New York Sheriff's Office undercover detective, to create child pornography *by* requesting that "Marley" send nude photos of herself to the said STAFF SERGEANT ROBERT M. PAYNE, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

Id. at 24 (emphasis added). In *Payne*, the Government acknowledged that the clause that followed "by" was the overt act: "since the overt act in this attempt offense was the actual *request* transmitted to the recipient." *Id.* (emphasis added).

Likewise, in *United States v. Norwood*, the word "by" preceded the specific acts showing how the appellant attempted to commit adultery:

> In that [appellant], U.S. Marine Corps, a married man, on active duty, did, at Okinawa, Japan, on or about 17 April 2009, attempt to commit adultery with [the victim], U.S. Marine Corps, a woman not his wife, *by* trying to place his penis inside of her vagina and have sexual intercourse with her.

71 M.J. 204, 206 (C.A.A.F. 2012) (alterations in original) (emphasis added). This Court found that this specification expressly alleged each element of attempted adultery. *Id*. at 207. In doing so, this Court found the specification alleged that the appellant attempted to commit adultery and "he did so by trying to place his penis inside her." *Id*. Notably, unlike this case, the Government in *Norwood* inserted the words "trying to" after the word "by" denoting that the appellant was not charged with actually placing his penis inside her vagina. *See id*. at 206.

In *United States v. Turner*, the Government used the word "by" to allege how the appellant attempted to kill with premeditation:

> Specification: In that Specialist Malcolm R. Turner, U.S. Army, did, at or near Clarksville, Tennessee, on or about 1 January 2015, attempt to kill with premeditation Specialist [C.S.G.] *by* means of shooting her with a loaded firearm, causing grievous bodily harm.

79 M.J. 401, 404 (C.A.A.F. 2020) (emphasis added). Specialist Turner had shot Specialist C.S.G. from less than ten feet away with three .40 caliber hollow points, hitting her arm, back, and head. *Id*. at 403. This Court recognized the overt act alleged in this specification, underscoring a separate conspiracy specification

"detailed the same overt act." *Id*. at 407 (citing *United States v. Turner*, No. ARMY 20160131, 2018 CCA LEXIS 593, at *26-27 (A. Ct. Crim. App. Nov. 30, 2018)).

Further, in *United States v. Wheeler*, an Article 80, UCMJ, specification alleged:

> In that [appellant] . . . did, . . . attempt to commit a lewd act upon "Gaby," a person [appellant] believed to be a child who had not yet attained the age of 16 years, *by* intentionally communicating to "Gaby" indecent language, to wit: stating the accused liked to "jack his dick," stating "Gaby" "can finally touch a dick" and asking whether "Gaby" likes to masturbate, or words to that effect, with an intent to arouse or gratify the sexual desire of [appellant].

76 M.J. 564, 567-68 (A.F. Ct. Crim. App. 2017) (alterations in original) (emphasis added). The alleged acts that follow "by" were how the appellant allegedly attempted to commit a lewd act: he intentionally communicated indecent language. *See id*. The Air Force Court also recognized that intentionally communicating indecent language was the overt act, explaining:

> Appellant, on his own and without improper inducement, attempted to commit a lewd act upon "Gaby," a person he believed to be a child under the age of 16 years, by intentionally communicating to "Gaby" indecent language. Specifically, we find that Appellant did tell "Gaby" that he liked to "jack his dick," that she "can finally touch a dick," and asked whether "Gaby" liked to masturbate, or words to that effect, with an intent to arouse or gratify his own sexual desire.

Id. at 575.

The plain and common-sense understanding of "by"—as defining the scope of the overt act—has been understood for decades. In *United States v. Silvas*, the

Navy-Marine Court of Military Review examined an Article 80 specification, which alleged:

> Specification 1: In that Lance Corporal Steve SILVAS, . . . , did, at Marine Corps Base Camp Pendleton, California, on or about 17 May 1979, violate a lawful general regulation, to wit: Article 1151, U.S. Navy Regulations, dated 26 February 1973, *by* attempting to possess 0.399 grams, more or less, of methamphetamine, an offense cognizable by military court-martial in that it occurred on board Marine Corps Base, Camp Pendleton, California, a situs over which the U.S. Marine Corps exercises exclusive jurisdiction.

11 M.J. 510, 512-13 (N-M.C.M.R. 1981) (emphasis added). The Navy-Marine Court of Military Review determined that the Government specifically alleged that the appellant attempted to violate a lawful general regulation by "attempting to possess 0.399 grams, more or less, of methamphetamine aboard Camp Pendleton on or about 17 May 1979." *Id*. at 513, n.1.

These cases are just some of the myriad examples that show the plain meaning of "by" in similar contexts. Ultimately, the plain and ordinary meaning of "by" and common-sense show that the words that follow "by" are the alleged overt acts. Here, the Government's chosen specification charged SrA George with "attempt to commit a sexual act upon [WB] *by* penetrating her mouth with his penis without her consent," which expressly alleges SrA George committed the overt act of "penetrating her mouth with his penis without her consent." JA at 001 (emphasis added).

B. The Government did not prove the overt act it chose to charge.

When the Government expressly alleges an overt act, as it did here, it must prove it beyond a reasonable doubt. *Winship*, 397 U.S. at 364. Despite choosing this specification, the Government offered no evidence that SrA George penetrated WB's mouth with his penis without her consent. SrA George was convicted of an offense that was not proven and his conviction is legally insufficient.

The Government has "complete discretion" over how to charge an accused and "accept[s] the risk" that an appellant may not be criminally liable based on how the charging scheme connects with the evidence. *United States v. Mader*, 81 M.J. 105, 109 (C.A.A.F. 2021). This Court has repeatedly recognized that the Government controls the charge sheet and the specifications within it. *United States v. Smith*, __ M.J. __, 2024 CAAF LEXIS 527, at *8 (C.A.A.F. 2024) (reasoning the Government chose how to charge the appellant and could have made other choices); *Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, at *2, n.1 (explaining nothing prevented the Government from charging the appellant differently); *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022) ("[I]t is the government that controls the charge sheet from the inception of the charges through the court-martial itself"; "it is the government that has both the opportunity *and the responsibility* to ensure that the . . . specifications align with the facts of the case.") (emphasis in original)); *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017) ("[T]here is no dispute

that the government controls the charge sheet."); *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) ("It is the Government's responsibility to determine what offense to bring against an accused."). Here, the Government chose how to charge SrA George and in doing so, accepted the risk of proving what it charged.

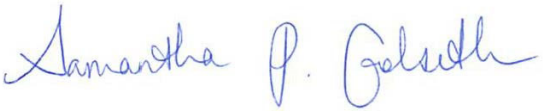
The Government failed to prove every fact necessary to constitute the crime it alleged when it did not prove that SrA George penetrated WB's mouth with his penis without her consent. *Winship*, 397 U.S. at 364; *see United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (holding when the Government made the charging decision to allege a particular type of force was used, "i.e., that Appellant committed [the] particular offense 'by grabbing her head with his hands,'" it was required to prove the facts it alleged and the lower court had already determined that there was no evidence of the particular force alleged); *United States v. Morrow*, No. ACM 39634, 2020 CCA LEXIS 361, at *32-34, *36 (A.F. Ct. Crim. App. Oct. 1, 2020) (finding the appellant's conviction was legally insufficient because the Government alleged the appellant "absented himself from Building 7233 on Dyess Air Force Base" but offered no evidence regarding Building 7233); *United States v. Johnson*, ARMY 20131075, 2016 CCA LEXIS 215, at *14 (A.C.C.A. Mar. 31, 2016) (finding the evidence at trial did not match "the manner in which [the] appellant was charged [with] committing the offense" and the appellant's conviction was legally insufficient when the appellant was charged with assaulting another person by

pointing a loaded firearm at them but there was "no evidence in the record that the appellant *pointed* a loaded firearm") (emphasis in original)).

Like *Richard*, *Paul*, *Williams*, *English*, *Morrow*, and *Johnson*, where the Government failed to prove what it charged, the Government here failed to prove the overt act that it charged. The Government charged that SrA George committed the overt act of "penetrating [WB's] mouth with his penis without her consent," but there was no evidence of penetration. JA at 001, 026-27. Viewing the evidence "in the light most favorable to the prosecution," no "rational trier of fact" could have found beyond a reasonable doubt that SrA George penetrated WB's mouth with his penis without her consent. *Robinson*, 77 M.J. at 297-98) (quoting *Rosario*, 76 M.J. at 117). Because the Government failed to prove the essential elements of the crime it alleged, SrA George's conviction is legally insufficient.

WHEREFORE, SrA George respectfully requests that this Honorable Court set aside the findings and sentence and dismiss the Charge and Specification.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and the Air Force Government Trial and Appellate Operations Division on October 8, 2024.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 3,788 words.

This brief complies with the typeface and type style requirements of Rule 37.

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