IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40397
	)	
Senior Airman (E-4)	)	USCA Dkt. No. 24-0206/AF
DENNIS A. GEORGE, JR.	)	
United States Air Force	)	14 November 2024
Appellant.	)	

BRIEF ON BEHALF OF THE UNITED STATES

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 37895

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34917

MATTHEW D. TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

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Senior Airman (E-4) **DENNIS A. GEORGE, JR.** United States Air Force *Appellant.*	)	USC Dkt. No. 24-0206/AF

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

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 (AFCCA) reviewed this case under Article 66(d), UCMJ, 10 U.S.C. §866(d)[1]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (M.R.E.) are to the Manual for Courts-Martial, United States (2019 ed.) [MCM], unless otherwise noted.

STATEMENT OF THE CASE

At a general court-martial convened at Joint Base Langley-Eustis, Virginia, Appellant elected trial by officer and enlisted members and entered pleas of not guilty. (Supp. JA at 132.) Contrary to his pleas, the panel found Appellant guilty of one charge and one specification of attempted sexual assault without consent, in violation of Article 80, UCMJ. (Id.) The members acquitted Appellant of one charge and one specification of abusive sexual contact without consent in violation of Article 120, UCMJ. (Id.) Both charges and their respective specifications involved the same victim, WMB. (JA at 1.) Appellant elected to be sentenced by military judge alone. (JA at 89.) The military judge sentenced Appellant to a reduction to the grade of E-1, five months confinement, and a dishonorable discharge. (Id.) The convening authority took no action on the findings, disapproved the reprimand, and approved the remainder of the sentence in Appellant's case. (JA at 89.)

STATEMENT OF THE FACTS

Convicted Offense

Appellant was convicted of attempted sexual assault in violation of Article 80, UCMJ, as charged in Specification 1 of Charge I:

> [Appellant] [d]id at or near Newport News, Virginia, on or about 4 July 2021, attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent.

(JA at 1.)

Circumstances Prior to the Attempted Act

Prior to the convicted conduct, Appellant and the victim, WMB, were co-workers. (JA at 12.) They had spent time working on the same shift together and were part of a mutual friend group. (JA at 13.) Prior to the night of 4 July 2021, WMB and Appellant had only spent time together outside of work when they were with their mutual friend group. (Id.)

On 3 July 2021, WMB and her friend group went out to a local bar. (JA at 14.) On the way to the bar, Appellant sat in the front passenger seat, because he was the tallest of the group. (JA at 17-18.) While at the bar, Appellant approached WMB while she was seated at a booth, positioned himself so he was standing close to WMB with his groin at her eye level, and asked her if she wanted to give him "head." (JA at 19-20.) WMB testified that she understood the term "head" to mean oral sex. (JA at 20.) WMB tried to laugh off Appellant's suggestion and said "no." (Id.) After she declined, Appellant again asked "[a]re you trying to give me head in the club?" (Id.) Appellant then attempted to push WMB further into the booth. (Id.) WMB put her hands up and physically resisted Appellant, at which point he backed away. (Id.)

After the encounter with Appellant, WMB approached another member of her friend group and suggested that it was time to leave the bar because Appellant was "getting kind of drunk." (JA at 21.)

The Attempt

WMB, Appellant, and the rest of their friend group left the bar in the early morning hours of 4 July. (Id.) On the way to the car, Appellant yelled at a member of the group and instructed her to sit in the front passenger seat. (JA at 61.) WMB sat in the middle of the backseat between a friend and Appellant. (JA at 22.) While in the car, Appellant put his arm around WMB and stated he really wanted her to give him "head." (JA at 23.) Appellant whispered in her ear and said, "I am being dead ass. I really want head." (Id.) WMB testified she understood Appellant saying "I am being dead ass" to mean that he was serious about his request for oral sex. (Id.) WMB repeatedly told Appellant "no." (Id.) After WMB refused Appellant, he pulled down her crop top, exposed her breasts, and began to grope her. (JA at 24.) After Appellant grabbed her breast, WMB once again affirmatively told Appellant "no." (JA at 25.) Appellant again told WMB that she should give him "head", and when she continued to refuse, Appellant grabbed the back of WMB's neck and forced her head towards his groin. (JA at 26.) WMB resisted and was able to push herself away, but before she could say anything to stop him, Appellant grabbed her again, and more forcefully pushed

her head towards his groin. (Id.) WMB felt Appellant's zipper press against her cheek, and she attempted to resist again, but was unsuccessful. (Id.)

WMB used her hand to alert the friend seated to her right. (JA at 27.) The friend testified that earlier in the car ride, he had heard WMB asking Appellant "why is [his] dick out" but at the time thought it was a joke. (JA at 71.) At some point he recalled hearing WMB in a panicked state telling Appellant to "get the fuck off" of her. (JA at 72.) At this point, the friend looked over and saw WMB resisting as Appellant with his hand on the back of her neck as he attempted to force her head down. (JA at 73.) The friend intervened and asked "what is going on back here?" (Id.) Appellant immediately released WMB, and she became irate and attempted to hit Appellant. (JA at 74.)

Due to the commotion in the back seat, the driver stopped the car at a convenience store and the group exited the vehicle. (JA at 75.) When Appellant got out of the vehicle, WMB and another member of the friend group noticed Appellant's pants were unzipped, and his underwear was visible. (JA at 29, 65.) There was no evidence presented during Appellant's trial that he ever actually penetrated WMB's mouth with his penis.

Military Judge's Instructions

Prior to providing findings instructions to the members, the military judge consulted with both trial and defense counsel and asked that they "specifically

affirm that the instructions are correct statements of the law to the best of [the parties'] understanding." (Supp. JA at 162.) Both counsel responded in the affirmative. (Id.) The military judge specifically asked if there were any objections to the findings instructions, to which both counsel answered, "no." (Id.)

The military judge provided the following instruction with regard to Charge I and its Specification, Attempted Sexual Assault:

> Charge I, Attempt, Sexual Assault without Consent. That, at or near Newport News, Virginia, on or about 4 July 2021, [Appellant] did a certain overt act, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent;
>
> That the act was done with specific intent to commit the offense of sexual assault without consent; That the act amounted to more than mere preparation, that is, it was substantial, excuse me, it was a substantial step and a direct movement toward the commission of the intended offense of sexual assault without consent, that is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for [WMB's] physical and or verbal protestation, which prevented completion of the offense.

(Supp. JA at 167.)

The military judge instructed on preparation as follows:

> Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that [Appellant] went beyond prepatory steps, and his act amounted to a

> substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.

(Supp. JA at 167-168.)

The military judge provided the elements of the underlying attempted offense as follows:

> That at or near Newport News, Virginia, on or about 4 July 2021, [Appellant] committed a sexual act upon [WMB], by penetrating her mouth with his penis; and that [Appellant] did so without the consent of WMD.
>
> The definitions of the attempted offense are: Sexual act means the penetration, however slight, of the penis into the vulva or anus or mouth.
>
> Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent.

(Supp. JA at 168.)

Government Trial Counsel's Closing Argument

During findings argument, trial counsel argued two specific acts that would meet the government's burden to prove an overt act: (1) the act of holding WMB's head down toward his lap and (2) the act of undoing his pants prior to holding WMB's head down toward his lap. (Supp. JA at 188.) Defense counsel did not object to trial counsel's assertion that these acts could satisfy the overt act requirement.

Defense Counsel's Closing Argument

In the defense's findings argument, the defense never argued that the government was required to prove Appellant had completed the predicate act of penetrating WMB's mouth with his penis, nor did they suggest the government had alleged a specific overt act in the specification. (Supp. JA at 200-225.) Instead, trial defense counsel attacked the credibility of the witnesses and WMB (Supp. JA at 202, 214) and attacked the plausibility of the two overt acts that government trial counsel had just argued. (Supp. JA at 204, 214-215, 218.) Regarding the evidence that Appellant forced WMB's head towards his crotch to the point that she felt the zipper, trial defense counsel argued it was "absurd" and that it was not physically possible based on the size of the vehicle. (Supp. JA at 204.) As to the evidence that Appellant had unzipped his pants prior to forcing WMB's head toward his crotch, trial defense counsel argued the evidence showed it did not happen and that Appellant's pants were not unzipped. (Supp. JA at 218.)

SUMMARY OF THE ARGUMENT

Although the granted issue is framed as one of legal sufficiency, the question before this Court boils down to how the specification is interpreted: does the language "by penetrating her mouth with his penis without her consent" allege the overt act of an attempt or does it describe the underlying predicate offense? For the first time on appeal, Appellant urges an interpretation of the specification that

no party advanced at trial: that the language identified an overt act, and the government was therefore required to prove that penetration occurred. Appellant is mistaken.

The words "by penetrating [WMB's] mouth with his penis without her consent" provided constitutionally required notice of the attempted offense, not an express allegation of an overt act. The specification challenged by Appellant strictly adhered to the guidance contained in the sample specifications for Article 80 and Article 120, UCMJ, contained in the MCM. The guidance provided in the sample specification for Article 80, UCMJ, directs the drafter to describe the underlying predicate offense with sufficient detail to include expressly or by necessary implication every element. MCM, pt. IV, para. 4.e. Given that the underlying predicate offense in this case was sexual assault, the government incorporated the guidance contained in the sample specification for Article 120, UCMJ, which indicates that the drafter should specifically articulate the sexual act alleged. MCM, pt. IV, para. 60.e.(3).(d). Here, the government alleged the sexual act that would have constituted sexual assault, had Appellant been successful in his attempt, as oral penetration of WMB with his penis without her consent. Thereby, the government ensured it provided Appellant sufficient notice of the underlying predicate offense.

Case law has long made clear that the government is not required to expressly allege an overt act when charging attempts under Article 80, UCMJ. United States v. Mobley, 31 M.J. 273, 278 (C.M.A. 1990) (citing United States v. Marshall, 40 C.M.R. 138, 142-43 (C.M.A. 1969). Instead, the government is required to ensure the charge and specification contain the elements of the offense charged—either expressly or impliedly—and that they fairly inform the accused of the charge against which he must defend and enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *See* United States v. Norwood, 71 M.J. 204, 205-206 (C.A.A.F. 2012) (citing Hamling v. United States, 418 U.S. 87, 117 (1974)). Here, given that the government did not expressly allege an overt act, its strict adherence to the guidance provided by the sample specifications in the MCM ensured the specification provided "sufficient detail to include expressly or by necessary implication every element" of sexual assault.

The government's interpretation of the specification is a reasonable construction of a valid Article 80, UCMJ, specification, whereas Appellant's is not. Appellant asserts that the language of the specification indicates the government was expressly alleging an overt act. (App. Br. at 8.) Following Appellant's reasoning would mean the government charged the completed offense of sexual assault as the overt act in a prosecution for attempt. Such an outcome is a logical absurdity and would effectively mean that the government failed to state an offense

altogether, because logically a person cannot attempt a crime he completed. Moreover, adopting Appellant's interpretation that the completed predicate offense was the overt act, would effectively mean that there is no underlying predicate offense. The specification would essentially state Appellant "attempted a sexual act," which is not an offense under the UCMJ. Since under Appellant's interpretation of the specification, the government would have failed to state an offense, this Court should use the standards set forth in United States v. Watkins, in evaluating the specification. 21 M.J. 208 (C.M.A. 1986). In doing so, this Court shall "liberally construe" the specification in favor of validity and view it with "maximum liberality." United States v. Turner, 79 M.J. 401, 406 (C.A.A.F. 2020) (citing Watkins, 21 M.J. at 210). Considering those analytical standards, Appellant's interpretation fails.

Contrary to Appellant's interpretation, the language "by penetrating . . ." modified the words "commit a sexual act," not the word "attempt." Appellant misapprehends the effect of the word "by" on the specification, by contending that it automatically signals the charged overt act. (App. Br. at 8.) Appellant is mistaken. The use of "by" in the specification describes how the predicate offense of sexual assault would have been committed had Appellant succeeded in his attempt. The cases cited by Appellant do not support his position. (App. Br. at 10-13.) In those cases, the specifications at issue made clear the government was

expressly alleging an overt act because the act described was an intermediate step towards completion of the ultimate offense. Here, where the specification describes a completed sexual assault, the government's intent to provide notice of the alleged predicate act, not allege an overt act, should be clear.

On appeal, Appellant is advocating an interpretation of the specification that no party at trial adopted and this Court should be unpersuaded by his attempts to muddy waters that were clear to all parties at trial. Appellant's counsel never filed a motion to challenge the specification, never made a motion under R.C.M. 917, nor did they argue that the government was required to prove the completed predicate act in order to prevail. Appellant's counsel never objected to the military judge's instruction to the members that "by penetrating" was part of the predicate offense. (Supp. JA at 168.) His trial defense counsel recognized that the government had introduced evidence of two unalleged overt acts, and his counsel spent much of their closing argument arguing that those overt acts did not occur. (Supp. JA at 204, 214-215, 218.) This indicates that, to the parties at trial, it was clear that the challenged language did not describe an expressly alleged overt act, but instead served to provide proper notice of the predicate offense. Thus, this Court should decline to adopt an interpretation of the specification on appeal that no party adopted at trial.

Finally, the government proved two overt acts at trial that were sufficient to sustain Appellant's conviction for attempted sexual assault in violation of Article 80, UCMJ. Here, the government established (1) Appellant unzipped his pants immediately prior to forcibly shoving WMB's head towards his penis and (2) Appellant twice attempted to shove WMB's head towards his penis, one time being so severe that WMB felt Appellant's zipper press against her cheek. Appellant's efforts to force WMB's head towards his penis only stopped when another individual in the vehicle intervened. A reasonable finder of fact could have found that either of those two overt acts supported a finding that Appellant attempted to sexually assault WMB by penetrating her mouth with his penis without her consent. This Court should reject Appellant's claim of legal insufficiency.

In sum, the government did not expressly allege an overt act in the specification--it provided constitutionally required notice to Appellant regarding the predicate offense to ensure he understood what act he was required to defend against at trial. The specification was proper, and a reasonable factfinder could have found that the government proved all the elements of the offense beyond a reasonable doubt. Therefore, this Court should find the conviction to be legally sufficient and affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

APPELLANT'S CONVICTION FOR ATTEMPTED SEXUAL ASSAULT IS LEGALLY SUFFICIENT. THE GOVERNMENT DID NOT EXPRESSLY ALLEGE AN OVERT ACT IN THE SPECIFICATION, NOR WAS IT REQUIRED TO PROVE THE COMPLETED UNDERLYING PREDICATE OFFENSE IN ORDER TO MEET THE OVERT ACT REQUIREMENT.

Standard of Review

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

Legal Sufficiency

The test for legal sufficiency is whether, "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, 297-298 (C.A.A.F. 2018). This test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weight the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). The legal sufficiency assessment "draw[s] *every* reasonable inference from the evidence of record in favor of the prosecution." Robinson, 77 M.J. at 297-298 (emphasis added) (quoting United

States v. Plant 74 M.J. 297, 301 (C.A.A.F. 2015)). Thus, "the standard for legal sufficiency involves a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted).

Attempt

Attempt in violation of Article 80, UCMJ, requires the following elements: (1) that the accused did a certain act; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended act. MCM, pt. IV, para. 4.b. The model specification in the MCM for violation of Article 80 provides:

> In that_____ (personal jurisdiction data) did, (at/on board-location), (subject-matter jurisdiction date, if required), on or about ____ 20__, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

Id. at para. 4.e.

In order to state the elements of an inchoate offense under Article 80, UCMJ, a specification is not required to expressly allege each element of the predicate offense. Norwood, 71 M.J. at 205. Instead, a charge and specification are sufficient if they first, contain the elements of the offense charged and fairly inform the accused of the charge against which he must defend, and second, enable

him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id. at 206 (citing Hamling, 418 U.S. at 117).

Military case law has long accepted the pleading of attempts under Article 80, UCMJ, that do not allege the overt act. Mobley, 31 M.J. at 278 (citing Marshall, 40 C.M.R. at 142-43). Nothing in the Manual for Courts-Martial requires—either implicitly or expressly—that the overt act be pleaded as part of the specification for an attempt offense. Id.

Sexual Assault

The model specification in the MCM for sexual assault without consent in violation of Article 120, UCMJ, in relevant part states:

> In that_____ (personal jurisdiction data) did, (at/on board-location), (subject-matter jurisdiction date, if required), on or about ____ 20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis]…without the consent of _____.

MCM, pt. IV, para. 60.e.(3).(d).

Analysis

Appellant contends his conviction for attempted sexual assault is legally insufficient because "the plain language of the specification alleg[ed] that [Appellant] committed a specific overt act—penetrating [WMB's] mouth without her consent," and the government ultimately failed to prove the specific overt act alleged. (App. Br. at 3.) Appellant is wrong for three reasons: (1) the challenged

language constituted the requisite specificity necessary for proper notice, not an express allegation of an overt act; (2) no party at the trial believed or asserted that the charging language alleged a specific overt act; and (3) the government proved (and argued) two distinct overt acts that a rational factfinder could have found sufficient to establish the overt act element beyond a reasonable doubt. Viewing all the evidence in the light most favorable to the government, a rational factfinder could find Appellant guilty of attempted sexual assault. This Court should find Appellant's conviction legally sufficient and affirm the findings in this case.

A. The words "by penetrating [WMB's] mouth with his penis without her consent" operated to provide constitutionally required notice of the attempted offense, not to expressly allege an overt act.

1. The government strictly adhered to the guidance provided in the model specifications for Article 80 and Article 120, UCMJ, and it is well-established that the government is not required to expressly allege an overt act.

Appellant asserts that Appellant's conviction is legally insufficient "because the government offered no evidence of the overt act that it charged." (App. Br. at 4.) Specifically, Appellant asserts the government was required to prove Appellant "penetrated [WMB's] mouth with his penis without her consent," because it constituted the overt act alleged. (App. Br. at 7.) However, Appellant misinterprets the charged language.

While the language in the specification cited by Appellant did identify a specific act, that act did not constitute an expressly alleged overt act the

government would have been obligated to prove. Instead, this language provided Appellant constitutionally required notice that he was accused of attempting sexual assault by oral penetration. *See* Hamling, 418 U.S. at 117-118 (stating that an indictment must include "such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.") This articulation of the underlying predicate act was required to ensure the Appellant was aware of what he had to defend against at trial and to prevent the risk of double jeopardy. *See* Turner, 79 M.J. at 403 (recognizing that a specification will be found constitutionally sufficient where the specification provides an accused notice and protects him against double jeopardy).

Moreover, the charged language is consistent with the guidance incorporated in the sample specifications for Article 80 and Article 120, UCMJ, contained in the MCM. The sample specification for Article 80, UCMJ, directs the drafter to allege that the accused did "attempt to (describe the predicate offense with sufficient detail to include expressly or by necessary implication every element)." MCM, pt. IV, para. 4.e. The sample specification for Article 120, UCMJ, advises the drafter that sexual assault without consent can be alleged as follows: the accused did "commit a sexual act upon [the victim] by [penetrating [the victim's] . . . (mouth) with [the accused's] penis] . . .without the consent of [the victim]." MCM, pt. IV, para. 60.e.(3).(d). Here, the government followed the sample specifications by

alleging that Appellant did "attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent." In this context, it becomes obvious that the phrase "by penetrating her mouth . . ." described the predicate offense of sexual assault, not an overt act of the alleged attempt.

Further, the drafting guidance from the sample specifications is in line with long standing case law regarding the pleading requirements for inchoate offenses. In Norwood, this Court held that "in order to state the elements of an inchoate offense" under Article 80, UCMJ, "a specification is not required to expressly allege each element of the predicate offense." 71 M.J. at 205 (citing United States v. Resendiz-Ponce, 549 U.S. 102, 127 (2007)). However, "sufficient specificity is required so that an accused is aware of the nature of the underlying predicate offense." Id. at 207. Here, the language "attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent" provided the requisite specificity required by this Court's jurisprudence. It properly placed Appellant on notice that he was accused of attempting to commit sexual assault via oral penetration of the victim with his penis without her consent. Absent this level of specificity, Appellant could have claimed that the specification was vague and did not provide adequate notice of the specific predicate offense at issue, nor was it specific enough to provide an adequate safeguard against double jeopardy. The inclusion of the challenged language was both consistent with the guidance

provided in the sample specifications in the MCM, and with long standing jurisprudence from both the Supreme Court and this Court. Therefore, this Court should find that the challenged language constituted constitutionally required notice, not an expressly alleged overt act.

2. Appellant's interpretation logically fails given the fact that if the government believed it could have proven the completed act, it would have charged the case under Article 120, UCMJ.

In support of his argument, Appellant asserts the specific wording of the specification demonstrates the government expressly alleged an overt act, and thereby created an obligation for the government to prove Appellant penetrated WMB's mouth with his penis. (App. Br. at 8.) Specifically, Appellant argues that the plain language reading of the specification, "common sense," and the use of the word "by" demonstrates that the government expressly alleged "penetration of WMB's mouth with [Appellant's] penis without her consent" as the overt act. (Id.) This Court should be unpersuaded.

Appellant's proffered interpretation is not a logical or reasonable construction of the specification. Attempt is an inchoate offense, meaning that by its very nature, attempt is an incomplete crime.[2] The overt act cannot, by definition, be the completed predicate offense. It must instead be some

[2] The Law Dictionary, *Inchoate*, https://thelawdictionary.org/inchoate/ (last visited 6 November 2024) (defining inchoate as "imperfect, unfinished; begun, but not completed).

intermediate point along a path that terminates at the completed offense. Here, if the government believed they could prove Appellant "penetrat[ed] [WMB's] mouth with his penis without her consent," the government would not have charged an attempt under Article 80, but logically would have charged Appellant under Article 120, UCMJ, with the completed underlying predicate offense. The impossibility of the completed act being the expressly alleged overt act demonstrates that the challenged language was included to provide notice to the accused of the predicate offense, not to aver a specific overt act.

3. Adopting Appellant's reading of the specification would render the specification invalid for failure to state an offense because just attempting to commit a sexual act is not a crime.

If this Court were to adopt Appellant's reasoning and find that the government alleged the completed predicate offense as the overt act, that would be tantamount to finding that the government failed to allege an offense at all. A person cannot attempt a completed crime. *See* United States v. Cade, 75 M.J. 923, 931 (A. Ct. Crim. App. 2016) (recognizing that an accused cannot be convicted of both an attempt and the completed offense). Under Appellant's interpretation where the language "by penetrating WMB's mouth with his penis without her consent" alleges an overt act, there would be no underlying predicate offense. The specification would functionally read did "attempt to commit a sexual act" as the underlying predicate offense, which is not an offense under the UCMJ. The sexual

act must be perpetrated without consent in order for it to be a crime. Appellant's interpretation must fail because it would effectively mean the specification failed to allege an offense and that the specification did not provide proper notice of the underlying predicate offense Appellant was alleged to have committed. This Court should decline Appellant's invitation to convert a legal sufficiency argument into a challenge to the validity of the specification itself.

Given that Appellant is raising this issue for the first time on appeal, this Court should follow its precedents and view the specification "with greater tolerance than one which was attacked before findings and sentence." Watkins, 21 M.J. at 209; *See also* Turner, 79 M.J. at 405. As discussed above, adopting Appellant's logic would be tantamount to finding that the specification failed to state an offense. While the granted issue is one of legal sufficiency, this Court should consider the impact of adopting Appellant's reasoning and evaluate this specification accordingly.

In evaluating specifications challenged for the first time on appeal, this Court has held that it shall "liberally construe" a specification in favor of validity and to view it with "*maximum* liberality." Turner, 79 M.J. at 406 (citing Watkins, 21 M.J. at 210) (emphasis in original). Further, in Watkins this Court's predecessor favorably cited the United States Court of Appeals for the Second Circuit case United States v. Thompson, 356 F.2d 216, 226 (2d Cir. 1965), which

states that when a failure to state an offense claim is "first raised after trial," the claim will fail "absent a clear showing that the indictment is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." Watkins, 21 M.J. at 209-10. Here, where the proper reading of the specification is that the challenged language provided constitutional notice, not an express allegation of an overt act, the specification is not "so obviously defective" that it cannot be said to charge attempt in violation of Article 80, UCMJ. This is particularly true where, as discussed below, the parties at trial adopted the government's interpretation of the specification, not the one Appellant now advances on appeal. Under these analytical standards, and considering the plain language and notice requirements discussed above, Appellant's claim must fail.

4. Appellant's assertion that the language "by penetrating" modified the attempt portion of the specification is unpersuasive.

Appellant's reliance on the government's use of the word "by" is unconvincing. Appellant claims that using the term "by" automatically denotes the charged overt act. (App. Br. at 8.) Appellant is correct that the Merriam-Webster Collegiate Dictionary "defines 'by' as 'through the agency of or instrumentality of.'" (Id.) It is Appellant's position that the prepositional phrase "by penetrating" describes how the attempt was executed. However, Appellant misapprehends the way in which the prepositional phrase operates. The correct reading of the

specification is that the prepositional phrase modified how the predicate offense--sexual assault--was to be committed—not how the attempt was committed. A prepositional phrase with an adverbial or adjectival function should be as close to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings. United States v. Nader, 542 F.3d 713, 717-718 (9th Cir. 2008) (citing William Strunk, Jr. & E.B. White, The Elements of Style 30 (4th ed. 2000)) ("Modifiers should come, if possible, next to the words they modify.") In this case, the prepositional phrase "by penetrating" is closest to "commit a sexual assault" rather than the word "attempt." The prepositional phrase is therefore designed to modify the way in which the sexual assault would have been committed had Appellant succeeded in the attempt. Put another way, the prepositional phrase operates to indicate that the government alleged: Appellant attempted to penetrate WMB's mouth with his penis without her consent, an act which had it been completed would have constituted the predicate offense of sexual assault. Appellant's plain language argument fails.

The case law cited by Appellant in support of his interpretation is equally unpersuasive. (App. Br. at 10-13.) Appellant argues they stand for the proposition that whenever the government uses the term "by" in an Article 80, UCMJ, attempt specification, it signals that the words that follow constitute an expressly alleged overt act. (Id.) However, Appellant's reliance on those cases is misplaced. In

each of those cases, the words following the term "by" were a clearly articulated intermediate step towards the completion of the ultimate crime. In those cases, it was clear that the government had specifically selected an intermediate step and intended to allege an overt act. For example, in Norwood the government alleged the appellant committed adultery "by trying to place his penis inside of her vagina and have sexual intercourse with her." 71 M.J. at 206. In Norwood, the language used makes clear that the government was charging an expressly alleged overt act, because the act described was an intermediate step to the completion of the ultimate offense. Here, where the phrase would describe a completed sexual assault, it is apparent that the government was providing specificity regarding the underlying predicate act, not describing an intermediate step on the way towards the ultimate completion of the predicate act. The same logic applies to the other cases cited by Appellant. *See also* United States v. Payne, 73 M.J. 19 (C.A.A.F. 2014); Turner, 79 M.J. 401; United States v. Wheeler, 76 M.J. 564 (A.F. Ct. Crim. App. 2017). Therefore, this Court should find Appellant's attempts to draw parallels to those cases unconvincing.

B. The parties at trial did not adopt Appellant's new reading of the specification on appeal.

While Appellant now asserts on appeal that the challenged language of the specification amounted to an express allegation of the overt act, the parties at trial never adopted Appellant's new reading of the specification. (App. Br. at 3.) Prior

to trial, Appellant never filed a motion for failure to state an offense. Appellant waived his right to an Article 32, UCMJ, preliminary hearing and with it, his right to challenge the specification and to attack the sufficiency of the government's evidence in that forum. (Supp. JA at 136-138.) Appellant did not make an R.C.M. 917 motion at the conclusion of the government's case when it was clear the government had not proved the completed predicate act. – penetration of WMB's mouth. These two points are telling, because the demonstrate that Appellant's trial defense counsel did not believe that the language "by penetrating [WMB's] mouth with his penis without her consent" constituted an alleged overt act. This Court should be unpersuaded by Appellant's attempts to muddy waters that were clear to the parties at trial.

Prior to the military judge providing findings instructions to the members, trial defense counsel never objected to the military judge's planned instructions nor did they request any instruction to the members indicating a specific overt act had been alleged. (Supp. JA at 162.) During his instructions to the members, the military judge instructed that "by penetrating" was part of the predicate offense. (Supp. JA at 168.) Perhaps more damning, when government trial counsel argued during closing that the government had proven two distinct overt acts: (1) Appellant's act of holding WMB's head down toward his lap and (2) Appellant's act of undoing his pants prior to forcing WMB's head down toward his lap, his

defense counsel did not object, nor did the military judge sua sponte correct trial counsel. (Id.) During their closing argument, trial defense counsel never argued that the government was obligated to prove penetration actually occurred based on the way the government had charged it, nor did they ever even suggest that the government had alleged a specific overt act in the specification. (Supp. JA at 200-225.) Instead, Appellant's trial defense counsel attacked the two overt acts argued by government trial counsel during their closing argument. (Supp. JA at 204, 214-215, 218.) In doing so, it appears that Appellant's trial defense counsel recognized that the government had not alleged a specific overt act and were thus defending against the unalleged overt acts that were presented on the merits at trial. Taken altogether, these facts indicate that the parties at the trial level all understood that the government had not alleged an overt act in the specification and was free to present evidence of any overt act that would satisfy the requirements for attempt. Moreso, the parties' conduct at trial established that the notice information included in the specification was sufficient for Appellant and his defense counsel to understand what they were required to defend against at trial. This Court should decline Appellant's invitation to use an interpretation of the specification on appeal that none of the parties at trial adopted.

C. The government met its burden to prove an overt act. Thus, Appellant's conviction is legally sufficient.

Appellant asserts that his conviction is legally insufficient because the government failed to prove the expressly alleged overt act. (App. Br. at 3.) As discussed above, the government did not expressly allege an overt act, nor was it required to. Mobley, 31 M.J. at 278. Thus, the government did not have to prove that Appellant actually penetrated WMB's mouth with his penis to obtain a conviction.

At trial, the government presented evidence of and argued two overt acts: (1) Appellant's act of forcing WMB's head down toward his penis and (2) Appellant's act of undoing his pants prior to forcing WMB's head down toward his penis. (Supp. JA at 168.) Specifically, WMB testified that after she denied Appellant's repeated requests for oral sex in the car, Appellant twice attempted to force her head towards his penis, once being so close she could feel the zipper pressed against her cheek. (JA at 23-26.) Further, WMB and another occupant of the car testified that when Appellant exited the vehicle, his zipper was down and his underwear were exposed. (JA at 29, 65.) Either of the two acts proven and argued at trial were sufficient to meet the overt act requirement to sustain a conviction for attempt in violation of Article 80, UCMJ.

Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find that Appellant committed either or both of the two

overt acts proven at trial. To conclude otherwise would require the factfinder to suspend disbelief and draw counterintuitive inferences instead of reasonable ones. But the legal sufficiency assessment permits no such thing. Drawing every reasonable inference in favor of the prosecution, Robinson, 77 M.J. at 297-298, any rational factfinder would conclude that Appellant's acts constituted an attempt to penetrate WMB's mouth with his penis without her consent. In other words, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. Accordingly, Appellant's conviction is legally sufficient, and he is unentitled to relief.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762

(240) 612-4800
Court Bar No. 37895

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35837

(240) 612-4800
Court Bar No. 34088

MATTHEW D. TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division by electronic means on 14 November 2024.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 37895

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because:

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/s/ Tyler L. Washburn, Capt, USAF

Attorney for the United States (Appellee)

Dated: 14 November 2024