IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	FINAL BRIEF ON BEHALF OF APPELLANT
v.	
Specialist (E-4) LUKE D. ENGLISH United States Army, Appellant	Crim. App. Dkt. No. 20160510 USCA Dkt. No. 19-0050/AR

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS CAN FIND THE UNLAWFUL FORCE, AS ALLEGED, FACTUALLY INSUFFICIENT AND STILL AFFIRM THE FINDING BASED ON A THEORY OF CRIMINALITY NOT PRESENTED AT TRIAL.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

On March 29, May 2, June 16, and July 27-29, 2016, a military judge sitting as a general court-martial convicted Specialist (SPC) Luke D. English, contrary to his pleas, of five specifications of sexual assault and rape, one specification of attempted rape, six specifications of assault consummated by battery, one specification of kidnapping, one specification of communicating a threat, and two specifications of obstruction of justice in violation of Articles 80, 120, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 920, 928, 934 (2012).[1] The military judge sentenced SPC English to be reduced to E-1, confined for 23 years, and dishonorably discharged from the service. (JA 16). The convening authority approved the sentence as adjudged. (JA 25).

On September 6, 2018, with regard to the Article 120 offense in Specification 6 of Charge I – committing a sexual act by penetrating DE's mouth with appellant's penis by unlawful force – the Army Court excepted the words "to wit: grabbing her head with his hands" and affirmed the remainder of the specification. *United States v. English*, 78 M.J. 569, 576 (A. Ct. Crim. App.

[1] The military judge found appellant not guilty of one specification of rape, but guilty of the lesser-included offense of attempted rape. (JA 12). The military judge also found appellant not guilty of every specification of aggravated assault, but guilty of the lesser-included assaults consummated by battery. (JA 12-16).

2018).[23] The Army Court reassessed the sentence, affirming only so much as provided for a dishonorable discharge, confinement for twenty-two years, and reduction to E-1. Specialist English was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, personally petitioned this honorable Court on November 2, 2018, to grant review of the lower court's decision. The Court granted appellant's petition for review on February 25, 2019, and specified the first issue presented.

STATEMENT OF FACTS

On appeal before the Army Court, appellant alleged that Specification 6 of Charge I was factually insufficient because the government failed to prove that appellant forced his penis into DE's mouth by unlawful force. The government specifically charged appellant used unlawful force by grabbing DE's head with his hands on September 18, 2015. (JA 19).

At one point during the events of September 18, appellant took DE to the bathroom. (JA 65). DE testified that, while her hands were duct taped, "he went in there with me and as I was sitting down to go to the bathroom he then forced

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[2] Specification 6 of Charge I read: "[In that appellant] [d]id on or about 18 September 2015, at or near Fort Bliss, Texas, commit a sexual act upon Ms. [D.E.], to wit: penetrating her mouth with his penis, by unlawful force, to wit: grabbing her head with his hands." (JA 12).

[3] Additionally, the Army Court set aside Additional Charge I and its specifications (Article 128 offenses).

himself, his penis into my mouth at that time." (JA 65). The assistant trial counsel asked her how appellant placed his penis into her mouth. (JA 65). DE replied that he "[j]ust kind of shoved it in my mouth honestly." (JA 65). When specifically asked whether appellant grabbed her, DE testified, "I can't remember the exact details." (JA 65).

Hours after the alleged incident, a sexual assault forensic examination was conducted by Ms. Herron. (JA 106, 175). According to the examination report that was admitted at trial, when Ms. Herron asked what occurred during the assault, DE stated, "he shoved his penis in my mouth so I could give him head." (JA 178). During Ms. Herron's testimony at trial, she described the process in collecting patient statements that are documented in the examination. (JA 106). Ms. Herron testified that as part of this process she has the patient read the statement and sign it. (JA 106). DE's signature is at the bottom of page 4. (JA 109, 175).

During opening statements, the government described Specification 6 of Charge I in the following manner to the court: "… [SPC English] followed [DE] into the bathroom and tried to force his flaccid penis into her mouth in order to get him sexually excited again." (JA 31). The defense counsel, however, attacked Specification 6 of Charge I and the entirety of the government's case as a failure of proof. (JA 37). The defense counsel summed up its position as inconsistencies

between physical and testimonial evidence as well as a lack of corroboration. (JA 37-38).

Prior to closing arguments, the government moved to dismiss some of the specifications and delete some wording from another specification. (JA 113-15). The government did not move to amend any language in Specification 6 of Charge I. Later, during closing argument, the prosecutor argued:

> And she goes in the bathroom, and she sits on the toilet, but he doesn't leave her alone. He follows her in, grabs her head, and forces his penis into her mouth.

(JA 124). When specifically discussing the charge at issue, the prosecutor (inaccurately) reiterated how appellant grabbed her head:

> And Your Honor, in Specification 6, he follows her into the bathroom. . . grabs her head, and puts his penis inside of her mouth, hands are still duct-taped.

(JA 133-34). In response to the government's argument, the defense counsel specifically argued to the Court that the government failed to meet its burden of proof:

> And I asked her, I said, "Well, did he grab your head? Did he pry your jaws open? And she says, 'No, he just put it in my mouth.' And that's actually not the way the government charged it either. They charged it that he grabbed her head and placed his penis in her mouth that way… [I]t's clear to the defense that there was some type of altercation that took place on the 18th September, but it didn't happen the way the government is alleging.

(JA 152-53).

At the Army Court of Criminal Appeals, appellant challenged Specification 6 of Charge I on factual sufficiency. *English*, 78 M.J. at 571. With regards to Specification 6 of Charge I, the Army Court found "[w]ith respect to some of the language . . . the record of trial is completely silent." *English*, 78 M.J. at 576. The Army Court held "there was sufficient evidence to prove appellant committed the sexual act by unlawful force, [but] there is no evidence that he did so by 'grabbing her head with his hands.'" *Id.* As a result, the Army Court struck the causal language, "grabbing her head with his hands" in their decretal paragraph but affirmed the conviction.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS CAN FIND THE UNLAWFUL FORCE, AS ALLEGED, FACTUALLY INSUFFICIENT AND STILL AFFIRM THE FINDING BASED ON A THEORY OF CRIMINALITY NOT PRESENTED AT TRIAL.

1. Summary of Argument

Because the government specifically alleged the force in Specification 6, and argued that specific theory of criminality at trial, the government limited itself to that theory on appeal. As a result, the Army Court cannot find the element of unlawful force, as alleged by the government, factually insufficient yet affirm the remainder of the specification. Doing so resulted in the Army Court affirming a conviction based on a theory of criminal liability not presented to the factfinder—

an affront to due process. *See United States v. Riley*, 50 M.J. 410, 416 (C.A.A.F. 1999).

At trial, the government charged a specific theory of criminality, elicited testimony from DE in support of that theory, and argued that appellant was guilty of the charged offense based upon that theory. When the Army Court reviewed this case pursuant to Article 66(c) and found that the record was factually insufficient to support a finding that appellant grabbed DE's head with his hands, which was the only theory or criminality advanced by the government at trial, no other theory of criminality remained upon which the Army Court could affirm the conviction of rape by unlawful force contained in Specification 6 of Charge I. In *Dunn* the government conceded, and the Supreme Court held, that an appellate court may not predicate its affirmance on a different theory than the one presented to the trier of fact. *Dunn v. United States*, 442 U.S. 100, 106 (1979). Forty years later, neither the Supreme Court's ruling, nor the government's appropriate concession in *Dunn*, has changed. The Army Court erred in affirming this Specification.

2. Standard of Review

Whether the service court affirmed on a theory not presented to the trier of fact is a question of law reviewed de novo. *See generally United States v. Bennitt*, 74 M.J. 125 (C.A.A.F. 2015).

3. Law and Argument

a. The Army Court's authority to affirm findings on appeal has limits.

The Army Court "may affirm only such findings of guilty . . . as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ. Article 59(b) permits appellate courts to affirm offenses that are expressly or inherently a lesser included offense. *United States v. McCracken*, 67 M.J. 467, 467-68 (C.A.A.F. 2009).

"To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn*, 442 U.S. at 106. Furthermore, "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107. In other words, appellate courts may not discern a crime was committed in a different manner than the finder of fact was instructed. Although this case was judge alone, the government clearly specified the manner in which this crime was allegedly committed, and the defense was only on notice of this specific theory.

While the Army Court has significant powers, they are not without limitation. Specifically, "an appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)(citing *Chiarella v. United States*, 445

U.S. 222, 236 (1980)); *see also United States v. Riley*, 50 M.J. 410, 415 (CAAF 1999)(stating "an appellate court may not affirm an included offense on a theory not presented to the trier of fact" (citations and internal quotations omitted); *see also Bennitt*, 74 M.J. at 128.

Here, the Army Court conducted its mandated factual sufficiency review and found the theory of force charged, "to wit: grabbing her head with his hands," factually insufficient. *English*, 78 M.J. at 576. The government charged a specific theory of force and it was the only theory argued during closing argument. The error, then, was to nevertheless affirm on a different, uncharged theory not argued by the government at trial.

As this Court has reiterated from *Dunn*: "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *See Ober*, 66 M.J. at 405 (C.A.A.F. 2008)(internal quotations omitted). In this case, the government charged a specific theory of criminality and relied on such during closing argument. (Charge Sheet; R. at 559).

This is not the situation in *Ober*, wherein the government charged appellant with "knowingly and wrongfully causing to be transported in interstate commerce. . . ." child pornography to an internet sharing system. *Id.* at 405. There, the government charged broadly and specifically argued two alternative theories at

trial. The theory relied upon by the CCA was presented in the charging document and through expert testimony. *Id*.

In the past, this Court has acknowledged that charging broadly, and arguing multiple theories at trial, may form the basis of an affirmance by the CCAs. *United States v. Nicola*, 78 M.J. 223 (C.A.A.F. 2019); *Ober*, 66 M.J. at 405. The opposite situation is present here, where the government alleged a specific theory in the charge sheet for which appellant was convicted at trial. The CCA correctly found that the charged theory was not supported by the facts in the record. However, the CCA incorrectly concluded that they could rely on some other unknown force, despite (1) the government specifically laying out its theory in the charge sheet, throughout trial, and on appeal; (2) the government controlling the charge sheet and never amending its theory of criminality; and (3) the government explicitly arguing the charged specific theory to the finder of fact during closing argument.

The Army Court, in this case, exceeded the limits of its significant and broad powers on appeal. In the present case, the Army Court revised the basis on which appellant was convicted based on a theory (1) not in the charge sheet; (2) not argued by the government at trial or on appeal to the CCA; and (3) never squarely defended against by appellant at trial.

b. The underlying principles relating to major and minor changes support that the "to wit" language matters as it describes the means of accomplishment.

The principles behind variance are helpful to this court as it underscores the importance of the charged language. In *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017), prior to trial, the government moved to amend the charge sheet from "'licking the penis of EV with [Reese]'s tongue' to 'touching the penis of [EV] with [Reese's] hand'" as a minor change. *Id.* at 299. This Court found that this amendment was a major change because the allegation of sexual touching with a hand was not fairly included in an offense akin to oral sodomy of a child. *Id.* at 301. The Court also rejected the government's argument that the defense was aware of the nature of EV's testimony prior to trial. *Id*. The Court found the "defense was entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *Id*. The remedy in *Reese* was not to strike the "to wit:" language; it was to dismiss the specification and require it to be preferred anew. *Id* at 301. The same of analysis should apply here.

As illustrated in its charge sheet, the government specifically described the unlawful force SPC English allegedly used to commit the offense of rape. (Charge Sheet). Despite DE's testimony contradicting the charged language in the specification, the government still argued that SPC English had grabbed DE's head with his hands during closing argument. (JA 124, 133-34). Therefore, the

government maintained the same theory referred to trial in the charge sheet, (JA 019), through direct examination of DE, (JA 65), and in closing argument (JA 124, 133-34).

Just as in *Reese*, the defense is entitled to rely on the notice provided by the charge sheet in this case. The charge sheet specifically alleged that appellant used unlawful force to cause the sexual act by grabbing DE's head with his hands. (JA 019). The Army Court agreed that did not happen. *English*, 78 M.J. at 576. If the charged conduct did not occur, then the evidence for the specification is factually insufficient and the result should be dismissal.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court dismiss Specification 6 of Charge I, consistent with the Army Court's finding that the charged language is factually insufficient.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 2857 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. English*, Army Dkt. No. 20160510, USCA Dkt. No. 19-0050/AR, was electronically filed brief with the Court and Government Appellate Division on March 29, 2019. The Joint Appendix was delivered via courier service.

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