IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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

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) reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

On 29 March, 2 May, 16 June, and 27-29 July 2016, a military judge sitting as a general court-martial convicted Specialist (SPC) Luke D. English, contrary to

his pleas, of sixteen violations of the UCMJ, 10 U.S.C. § 877 et seq. (JA 12-16). Appellant was convicted of the following: four specifications of rape, one specification of sexual assault, six specifications of assault consummated by a battery,[1] one specification of attempted rape,[2] one specification of kidnapping, one specification of communicating a threat, and two violations of obstructing justice, in violation of Article 120(a), Article 120(b), Article 128, Article 80, and Article 134, UCMJ. (JA 12-16).

The military judge sentenced appellant to a dishonorable discharge, confinement for twenty-three years, and reduction to E-1. (JA 16). The convening authority approved the sentence as adjudged but credited appellant with 152 days of confinement against the sentence to confinement. (JA 16).

On 6 September 2018, in an Opinion of the Court, the Army Court dismissed four specifications of which appellant was convicted for violating Article 128, UCMJ, assault consummated by a battery, based on an improper evidentiary ruling by the military judge unrelated to the witness or issue granted by this Court. *United States v. English*, 78 M.J. 569, 576 (Army Ct. Crim. App.

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[1] The military judge found appellant not guilty of aggravated assault in Specifications 1 and 2 of Charge II and Specifications 1, 2, 3, and 4, of the Additional Charge 1, but found appellant guilty of the lesser included offense of assault consummated by a battery in every instance. (JA 13-14).

[2] The judge found appellant not guilty of rape in Specification 4 of Charge I, but found appellant guilty of the lesser included offense of attempted rape. (JA 12).

2018). The Army Court provided relief by reassessing and reducing appellant's sentence to twenty-two years. *Id*. at 577. The Army Court affirmed the remainder of appellant's sentence of reduction to E-1 and a dishonorable discharge. *Id*.

In its Opinion of the Court, the Army Court addressed appellant's claim of factual sufficiency pertaining to the issue granted by this Court. *Id*. at 576-77. Noting that the trier of fact saw and heard the relevant witness first hand, the Army Court credited the victim's version of events, affirming that her testimony was both very detailed and credible. *Id*. at 576. The Army Court found that the victim's testimony was supported by several witnesses, memorialized by a photograph appellant took when he committed violence against her, summarized by her immediate 911 call, and further corroborated by a forensic examination and evidence collected after the assault. *Id.*

The Army Court agreed with appellant's contention that there was no factual proof in the record of appellant "grabbing [the victim's] head with his hands." *Id*. However, the Army Court simultaneously affirmed "there was sufficient evidence to prove appellant committed the sexual act by unlawful force," which is the requirement under Article 120. *Id*. Therefore, the Army Court excepted the words "to wit: grabbing her head with his hands," and affirmed the remaining specification and finding of guilty. *Id*. at 577.

Appellant filed an initial Petition for Grant of Review on 2 November 2018 with a motion to file a supplement brief separately. Appellant filed a Supplement to Petition for Grant of Review on 26 November 2018 with a motion to file *Grostefon* matters separately. *Grostefon* matters were submitted 9 January 2019. This Court granted appellant's petition on 25 February 2019. Appellant requested an enlargement of time to submit the brief and joint appendix which was granted by this Court on 26 March 2019. Appellant's brief was filed on 29 March 2019.

STATEMENT OF FACTS

The specification at issue in this assignment of error (Charge I, Specification 6) occurred immediately after a particularly brutal physical assault coupled with simultaneous rapes of the victim. The government characterized appellant's actions with three words: power, manipulation, and violence. (JA 26, 117). Appellant's power and violence against DE is important to contextualize the conviction he challenges in the granted issue.

Background Leading up to The Assault

Appellant and his second wife, DE, decided to separate in August 2015 after a rocky marriage. (JA 42, 95). They stopped having any sort of sexual relationship but remained in the same house while DE worked on logistics to move

out. (JA 43, 94). Appellant even dated another woman at the time, JM, with DE's knowledge. (JA 44).[3]

Appellant believed that DE caused JM to break up with him. (JA 58). Consequently, he became angry with DE. (JA 58). On 18 September 2015, DE texted appellant's girlfriend, JM, without appellant's knowledge and told JM that she must ask permission from DE directly regarding anything JM did with DE's daughter because appellant could not be truthful.[4] (JA 44). Subsequently, JM broke up with appellant which angered him and he blamed DE. (JA 58).

Rape and Assault

When DE came home that same evening after talking with JM (18 September), she found appellant in his Army dress uniform. (JA 48). He had set their laptops on fire on a grill, had a crazy look on his face, and told DE "he was going to kill himself, but now that I'm home he could kill me." (JA 48-50).

Appellant grabbed DE and held her as she tried to fight and pull away from him. (JA 50). He grabbed her throat, choked her, pulled her into the hall, pushed her into a wall, made her fall down, and slammed her head into the floor. (JA 51-56).

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[3] DE and appellant's three-year-old biological daughter, and appellant's seven-year-old daughter (DE's step-daughter) also lived with them. (JA 41, 43, 52, 58).
[4] JM had fixed DE's daughter's hair for school pictures against DE's guidance as previously stated to appellant. (JA 44).

Appellant straddled DE and began duct taping her wrists. (JA 52-57). As DE screamed for help, appellant covered her mouth and face and choked her. (JA 56). He taped DE's shoulders and tried to duct tape her mouth and head but DE was able to pull that off with her fingers while her wrists were still taped together. (JA 55-57).

These entire events happened in the kitchen and hallway in front of their three-year-old daughter, who was grabbing DE's hands, "crying and telling her dad to stop." (JA 58). DE's step-daughter also came out of her room, and DE told her to go run for help but appellant ordered the child back into her bedroom. (JA 58-59). Appellant forced DE into their bedroom and locked the door. (JA 59).

Appellant pushed DE onto the bed and took a picture of her lying there duct taped. (JA 59, 168). She was only wearing a shirt, bra, and underwear because her shorts had fallen off in the struggle. (JA 60, 168). Appellant sent the photo to JM. (JA 103). Next, appellant ripped DE's shirt, removed his Army uniform, wrapped his Army tie around her neck, and raped her, again and again. (JA 61-64, 69, 72).

Appellant used his penis to penetrate DE's vagina. (JA 63). He used his fingers to penetrate her vagina. (JA 63). Appellant dumped lubrication all over DE and slapped lubrication over her face. (JA 62). He used two vibrators to penetrate DE vaginally and anally with them. (JA 64). He pushed the vibrator in her anus and tried to penetrate her vagina with his penis simultaneously. (JA 64).

Appellant choked DE and covered her mouth and nose to prevent her from screaming or breathing while he raped her. (JA 69).

The Challenged Specification

DE tried to think of ways to escape. (JA 65). She "was crying and screaming. I could hear my [three-year-old] daughter. I asked him if he would let me go to go see if she was okay, you know, multiple times. She was crying at the door and trying to get in." (JA 62). DE asked appellant if she could shower after he dumped lubrication all over her. (JA 62, 65). She told appellant she had to urinate. (JA 65). He told her just to pee in the bed. (JA 65).

Finally, appellant took DE to their bathroom co-located within the bedroom, but he followed her in. (JA 65, 169). While DE sat on the toilet, appellant forced his penis into her mouth. (JA 65). Her wrists remained duct taped the entire time. (JA 65-66). DE did not remember if appellant grabbed her, but testified he "just kind of shoved [his penis] in my mouth" when she was on the toilet. (JA 65).

Multiple times, appellant threatened DE that he was going to kill her. (JA 67-68). He said their daughter did not deserve them as parents; DE thought he was going to kill her and then kill himself. (JA 67). Appellant told DE he was going to kill her both before he forced her into the bedroom and while he was raping her. (JA 68). Eventually, appellant took DE back to the bedroom, cut off the duct tape, and ordered her to "stay." (JA 68, 71).

Even in that moment, DE did not leave because she still felt threatened. (JA 71). She did not think appellant would allow her to leave. (JA 71). Appellant told DE he was going to go smoke, told her to lay in the bed until he got back, and warned her that if he heard police sirens, he would kill her and himself, and walked outside. (JA 68, 71).

Escape and Reporting

When appellant left the room, DE grabbed some clothes, picked up her three-year-old daughter, and ran out of the back of the house. (JA 72). She knocked on two neighbors' doors, but nobody answered. (JA 72). In a panic, DE squatted down, held her daughter, hid behind trash cans on the street and called 911. (JA 72-73). She remained panicked and scared for her life until the police arrived. (JA 73, 78).

SUMMARY OF ARGUMENT

As an initial matter, appellant's framing of the issue misconstrues the problem. The Army Court never found appellant guilty based on a different theory of criminality not presented at trial. *See English*, 78 M.J. at 576 ("[T]here was sufficient evidence to prove appellant committed the sexual act by unlawful force.").

The theory of liability presented at trial corresponded to the elements required under the statute and always alleged that appellant committed a sexual act

against DE by unlawful force. (JA 19). This is precisely what the Army Court found. *Id.*

Here, the government added an unnecessary means in Specification 6 of Charge I, using "to wit." (JA 19). The "to wit: grabbing her head with his hands" was not required to convict the accused under Article 120(a)(1), UCMJ for rape. But, once that decision was made, the government was bound by its charging decision. *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2009) ("It is the Government's responsibility to determine what offense to bring against an accused.").

By affirming appellant's guilt by exception in its decretal paragraph, the Army Court did what the trier of fact could have, that is, conform a guilty finding to that which is supported by the record, so long as every essential element remained proven beyond a reasonable doubt. *See* Rule for Courts-Martial [hereinafter R.C.M.] 918 (a)(1) ("Exceptions and substitutions may not be used to substantially change the nature of the offense."). Here, the overwhelming evidence proved appellant penetrated DE's mouth with his penis by unlawful force, just not the specific type of force, grabbing his victim's head, which was alleged in the specification in question.

However, exceptions and substitutions, or findings by variance, are best left to the trier of fact, not to a Court of Criminal Appeals (CCA) on appeal. *United*

States v. Lubasky, 68 M.J. 260, 265 (C.A.A.F. 2010) (reiterating that the provision in R.C.M. 918 (a)(1) is directed at the *factfinder*) (emphasis in original). While the Army's Court's action did not amount to an error based on a different theory of liability, it does cause concern by creating a variance between the alleged charge and the conviction.

If this Court deems that variance to be material and fatal, then the remedy would be for this Court to set aside the specification at issue and remand to the Army Court to determine whether appellant may be convicted of a lesser included offense (LIO) under Article 59(b), UCMJ.

ISSUE

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.

STANDARD OF REVIEW

Questions of legal sufficiency are reviewed de novo. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). Whether a CCA can approve a finding of guilt based on a variance of sufficient evidence in a finding also appears to be reviewed de novo. *See Lubasky*, 68 M.J. at 261-64 (addressing the merits of the case in full). Similarly, whether a CCA affirmed a finding based upon a different theory of liability than that presented before the trier of fact is reviewed de novo.

See United States v. Riley, 50 M.J. 410, 411-15 (C.A.A.F. 1999) (analyzing the factual background at length before discussing the legal applications).

LAW AND ARGUMENT

A. THE GOVERNMENT'S THEORY OF LIABILITY WAS ALWAYS UNLAWFUL FORCE.

In order to prevail on the challenged specification in this case, the government had to prove that appellant committed a penetrative sexual act upon DE by using unlawful force against her. Article 120 (a)(1), UCMJ. In this context, the term unlawful force means "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person," done without legal justification or excuse. Article 120 (g)(4)-(5), UCMJ. Under the definition of "consent," submission from a victim resulting from the use of force, from the *threat of force*, or from *placing a person in fear* does not constitute consent. Article 120 (g)(8), UCMJ (emphasis added).

In Article 120 cases, force is judged under a totality of the circumstances as presented by the record. *United States v. Henderson*, 4 U.S.C.M.A. 268, 273, 15 C.M.R. 268, 273 (1954) ("We prefer to adhere to a concept which requires that we determine evidential sufficiency in the light of the totality of the circumstances presented by the record."). That is, whether appellant employed such physical strength or violence sufficient to overcome, restrain, or injure DE is determined upon the totality of evidence presented at trial, even including a history of his prior

interactions with DE before the incident. *United States v. Meguin*, ACM 37966, 2013 CCA LEXIS 666, at *9 (A.F. Ct. Crim. App. 26 June 2013), *rev. denied*, 2014 CAAF LEXIS 138 (C.A.A.F. 6 Jan. 2014). Furthermore, force may be found sufficient even if it is only constructive force. *Henderson*, 15 C.M.R. at 273.

1. The Government Charged A Modality Not Required By The Statute.

The model specification promulgated the President does not require the government to allege a specific modality of force. *Manual for Courts-Martial, United States* (2016 ed.) [hereinafter *MCM*], pt. IV, ¶ 45. f. (1)(a). Rather, the government only had to charge and prove that appellant committed a sexual act upon DE, causing penetration of her mouth with his penis, by using unlawful force.[5] *Id*. Here, the government added a modality on the charge sheet, that is, "to wit: grabbing her head with his hands" that was simply not required.[6] (JA 19). However, after charging a specific and particular act of force, the government

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[5] *Accord* R.C.M. 307 (c)(3) ("A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.").

[6] A likely explanation for the government's inclusion of a modality of specific force is the Military Judge's Benchbook sample specification. Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook [hereinafter Benchbook], para. 3-45-13 (10 Sept 2014). However, "the Benchbook is not binding as it is not a primary source of law, the Benchbook is intended to ensure compliance with existing law." *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013).

should have proven the modality of force as alleged, or the factfinder could have found unlawful force in another manner and found appellant guilty by exception. R.C.M. 918 (a)(1).

To be sure, the government proved beyond a reasonable doubt that appellant raped DE when he used unlawful force to penetrate her mouth with his penis, considering the totality of circumstances. (JA 50-65). The lone point the government did not prove was that appellant grabbed DE with his hands. (JA 65-66). The Army Court's affirmance of guilt by exception creates some dissidence between the Army Court's finding at the appellate level and the judge's finding at trial.

2. The Army Court Upheld Appellant's Conviction Based Upon A Finding of Unlawful Force Generally.

In this case, the government charged and proved that appellant penetrated DE's mouth with his penis by unlawful force. (JA 19, 65-66). The gravamen of the offense was that appellant restrained DE with duct tape, and overcame, restrained, and/or injured her enough to forcefully shove his penis in DE's mouth without her consent. (JA 19, 65-66). He also committed this crime against DE using threats of force, violence, and by placing her in fear. (JA 50, 67-68, 71).

Moreover, appellant committed the unlawful sexual act immediately after physically assaulting DE, binding her with duct tape, and raping her several times in the bedroom. (JA 50-64). Considering the context of the entire events

perpetrated against DE, one can easily find that she was overcome by appellant at the time he forced his penis inside her mouth. (JA 64-66).

Within the above discussed framework, considering the totality of the circumstances, the Army Court correctly found that there was sufficient evidence to prove appellant committed the sexual act against DE by unlawful force. *English*, 78 M.J. at 576. However, the Army Court simultaneously did not find that the government proved the modality by which it alleged appellant used, to wit: grabbing her head with his hands. *Id*. By logic, when the Army Court excepted out the specific force alleged, is approved a finding of guilty to a LIO, but under a broader and more general theory of force.

B. THE ARMY COURT'S OPINION ACKNOWLEDGED A FAILURE OF PROOF AT TRIAL, NOT A FINDING BASED UPON A DIFFERENT THEORY OF LIABILITY NOT PRESENTED TO THE TRIER OF FACT.

A court of criminal appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ. But, it does not necessarily follow that a court of appeals may find by exception and substitution. *See Morton*, 69 M.J. at 16 (overruling the practice under *United States v. Epps*[7] of affirming a conviction on a "closely related

[7] 25 M.J. 319 (C.M.A. 1987).

offense" because "[a]llowing an appellate court to affirm guilt based on an offense with which the accused has not been charged, which is not a lesser included offense . . . is inconsistent with the principle [of] . . . fair notice.").

Rather, guilty findings by exceptions and substitutions are contemplated as within the role of the trier of fact. *Lubasky*, 68 M.J. at 265 (emphasizing that "various possible findings as to a specification" under R.C.M. 918 (a)(1) are directed towards the *factfinder*) (emphasis in original).[8] Therefore, in this unique scenario, where the Army Court excepted out the lone modality specified in the charge sheet, a concern with fatal variance arises.

The Army Court's decision and the methodology to correct any error are addressed below.

1. There Is No Error Based Upon a Different Theory of Liability Not Presented to The Trier of Fact.

Appellant's argument misinterprets the Army Court's holding. Appellant argues that the Army Court's change to Specification 6 of Charge I excepting "by grabbing her head with his hands" created a new theory of criminality not previously before the fact finder. (Appellant's Br. 6-7). This assertion is incorrect.

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[8] *Cf. United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009) (internal citations omitted) (explaining that if neither the nature nor the identity of the offense changed as a result of a finding by exceptions and substitutions, an appellant cannot prove a fatal variance as his defense preparations would have been thus unaffected).

Changing a specification by exceptions and substitutions does not per se create a new theory of liability. *See generally id*. ("exceptions and substitutions may be made by the factfinder at the findings portion of the trial.").[9] It merely corrects a specification to align with the facts produced (or not produced) at trial. R.C.M. 918 (a)(1) ("General findings as to a specification may be . . . guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions . . . Exceptions and substitutions may not be used to substantially change the nature of the offense.").

In *United States v. Riley*,[10] in review on appeal, the CCA was not convinced beyond a reasonable doubt that the crime alleged occurred in the manner in which the prosecution charged.[11] It set aside the panel's guilty finding of unpremeditated murder and instead found the appellant guilty of a LIO, involuntary manslaughter by culpable negligence.[12] However, the CCA determined appellant's guilt through a wholly different means, one specifically disclaimed by the prosecution at trial.[13]

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[9] *Accord United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003) ("The Manual for Courts-Martial . . . anticipates the potential for a variance by authorizing findings by exceptions and substitutions.").
[10] 50 M.J. 410 (C.A.A.F. 1999).
[11] *Id*. at 415 ("We are not convinced, beyond a reasonable doubt, that [appellant] fractured her daughter's skull with the intent to kill or inflict great bodily harm.").
[12] *Id*.
[13] *Compare id*. at 414 (describing that the prosecution "never proceeded under the theory, and [did] not intend to argue, that [appellant's] culpability stems from failure to summon medical assistance"), *with id*. at 415 (finding appellant guilty by

In *Riley*, the CAAF found the CCA's action improper because while "[a]ppellate courts have authority to set aside a finding of guilty and affirm only a finding of a lesser-included offense . . . [t]hat authority, however, is not without limits." *Riley*, 50 M.J. at 415. The CAAF declared "[a]n appellate court may not affirm an included offense on a theory not presented to the trier of fact." *Id*. (internal quotations omitted) (citing *Chiarella v. United States*, 445 U.S. 222, 236 (1980)) (additional citations omitted).

Here, the theory of criminality on the charge sheet and the theory of liability presented in court was always that appellant raped DE by unlawful force. (JA 19, 28-30). The prosecution's theory never changed, even in the appellate court's finding.[14] Furthermore, the Army Court's finding that appellant committed a sexual act against DE by unlawful force fully comports with the government's theory charged, alleged at trial, and argued before the fact finder. (JA 19, 28-30, 59-71). Thus, there is no *Riley* error.

Appellant had sufficient notice of what he was charged with and what he had to defend against-unlawful force as against DE.[15] Whether or not the government

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refusing and impeding medical assistance in the delivery and care of her newborn child).

[14] *See English*, 78 M.J. at 576 ("[W]e find there was sufficient evidence to prove appellant committed the sexual act by unlawful force.").

[15] *Contra Teffeau*, 58 M.J. at 67 (finding a material variance when the factfinder found appellant guilty by exceptions because the variance "change[d] the very

charged the modality of grabbing DE's head with appellant's hands, the appellant always had to defend against the totality of circumstances regarding force.[16] Here, the Army Court merely affirmed appellant's guilt based upon the broader theory posed by the government-rape by unlawful force.

2. There Is A Possible Ambiguity That Could Be Read to Create a Variance Error.

Although the Army Court did not affirm appellant's conviction based on a new theory of criminality not presented at trial, it did affirm the finding based upon a different modality. That is, the Army Court found appellant raped DE by unlawful force in some other way, but not by grabbing her head with his hands. This change is more akin to variance, which a CCA is precluded from doing.

"A variance between pleadings and proof exists 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." *Lubasky*, 68 M.J. at 264 (citation omitted). However, "[v]ariance occurs at trial, not the appellate level." *Id*. at 261.

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nature of the offense in issue and impact[ed] upon an accused's ability to defend against the charge against him.").

[16] *See Henderson*, 15 C.M.R. at 273 (analyzing the totality of the circumstances to "determine evidential sufficiency" in an Article 120 case).

In *Lubasky*, the CAAF found there was nothing in the UCMJ nor the R.C.M. that suggested it could uphold a guilty finding by exceptions and substitutions at its level of appellate review. *Id*. at 265. Rather, the provisions in the UCMJ which allow findings by modification (exceptions and substitutions) are directed at the factfinder. *See id*. (referencing R.C.M. 918 (a)(1), UCMJ).

Here, the government alleged a specific force modality as opposed to relying on the totality of the circumstances to prove appellant's unlawful force as against DE. (JA 19). When the Army Court upheld appellant's conviction by excepting the words, "to wit: grabbing her head with his hands," it could be read as creating an ambiguity as to upon what theory appellant actually stands convicted. *English*, 78 M.J. at 576-77. Appellee can see how *Lubasky* could be interpreted to limit a CCA's ability to so do. However, if this Court does not find an ambiguity or fatal variance, appellant certainly was found guilty on a theory of unlawful force which was amply supported by the evidence presented at trial. (JA 50-67).

C. THE REMEDY AVAILABLE FOR THE ARMY COURT'S ACTION BASED UPON ITS FINDINGS IS FOR THIS COURT TO REMAND TO THE ACCA FOR A REVIEW OF A LESSER INCLUDED OFFENSE.

Article 59(b), UCMJ "describ[es] appellate power to affirm a lesser included offense (LIO) instead of a finding of guilty." *Lubasky*, 68 M.J. at 261. The government avers that if there is a failure of proof as to a specific modality alleged, a CCA may then look to a LIO, which would be appropriate in this case. *See*

Article 59(b), UCMJ ("Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.").

Because the Army Court did not find the same modality of force as alleged at trial, albeit unnecessary to the charge, the remedy is not wholesale dismissal. Rather, the Army Court should have addressed whether, based upon the facts and evidence in the record, appellant's conduct amounted to a LIO.

DE was unwavering in her testimony both on direct and cross detailing that appellant "shoved his penis into [her] mouth." (JA 65, 97). She testified he "forced" his penis into her mouth, and that he "shoved" his penis in her mouth, all while she was duct taped and bound. (JA 65-66). However, DE did not testify that appellant grabbed her head with his hands as alleged in the charge sheet. (JA 19, 97). DE testified she could not remember if appellant grabbed her. (JA 65).

All of the evidence adduced at trial described unlawful force appellant used against DE. The variance that the Army Court found was not based upon a different theory of liability, but instead as the result of a different modality. Based upon these facts, the Army Court could have reviewed whether appellant's conduct amounted to a LIO of the offense charged, such as sexual assault by bodily harm under Article 120 (b)(1), UCMJ.

CONCLUSION

The government's theory of criminality in this case was always that appellant committed a sexual act against DE by unlawful force. (JA 19). Under the Army Court's decision, there was never a finding based on a changed theory not presented to the trier of fact, but there was a finding based on a change in modality within the same underlying theory. *English*, 78 M.J. at 576-77.

Contrary to appellant's claim, the Army Court did not err based upon a finding via a different theory, as defined in *Riley*. But, when the Army Court affirmed the finding of guilt by exception, it created a variance as described in *Lubasky*. This discretion is best left to the trial court.

Wherefore, the United States respectfully requests that if this Honorable Court finds the variance to be fatal, it should set aside the finding of guilty as to Specification 6 of Charge I and remand to the Army Court to determine whether appellant may be found guilty of any LIOs consistent with Article 59(b), UCMJ. Accordingly, the Army Court should also reassess appellant's sentence as appropriate under *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013).

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CERTIFICATE OF COMPLIANCE WITH RULE 24(c)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 4,983 words and 470 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

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April 29, 2019

United States v. Meguin

United States Air Force Court of Criminal Appeals

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Reporter
2013 CCA LEXIS 666 *; 2013 WL 3972161

UNITED STATES v. Airman First Class JASON E. MEGUIN, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Review denied by *United States v. Meguin, 2014 CAAF LEXIS 138 (C.A.A.F., Jan. 6, 2014)*

Prior History: **[*1]** Sentence adjudged 09 March 2011 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Katherine Oler. Approved Sentence: Dishonorable discharge, confinement for 5 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Counsel: For the Appellant: Captain Christopher D. James; Captain Shane A. McCammon; and William E. Cassara (civilian counsel).

For the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Judges: Before ROAN, ORR, and HECKER, Appellate Military Judges.

Opinion by: HECKER

Opinion

OPINION OF THE COURT

HECKER, Judge:

At a general court-martial, the appellant was convicted, contrary to his pleas, of abusive sexual contact of a child and communicating a threat, in violation of Articles 120 and 134, UCMJ; *10 U.S.C. §§ 920*, *934*. Officer and enlisted members sentenced him to a dishonorable discharge, confinement for 5 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends the evidence is factually and legally insufficient to prove his guilt of both specifications and **[*2]** that his sentence is inappropriately severe. We also specified the issue of whether the threat specification brought under *Article 134, UCMJ*, fails to state an offense because it fails to allege the terminal element.

Background

In 2009, before he joined the Air Force, the appellant met JG, a 14-year-old boy from Georgia, while playing an on-line interactive game that allowed players to talk to each other and send messages. The appellant was 18 years old and living in New York. JG told the appellant that he was 14 years old. The two communicated through this game on a daily basis, often for 4-5 hours per day. The two talked about sports, games, and women. The appellant described some of his sexual encounters. He also bought JG items related to the Internet game.

After the appellant enlisted in the Air Force in 2009 and was assigned to an Air Force base near JG's home, the two met in person and spent time together for several months, with the knowledge of JG's divorced parents. The charges in this case stemmed from two incidents that occurred during the summer of 2010 while the appellant was with JG in his parents' homes.

Based on an allegation that the appellant had touched JG's penis, **[*3]** he was charged with aggravated sexual abuse of JG and abusive sexual contact with JG. These specifications were charged in the alternative and the appellant was ultimately convicted of the latter offense. He was also convicted of communicating a threat to JG.

Factual and Legal Sufficiency

We review issues of factual and legal sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The appellant contends the evidence is not factually and legally sufficient to sustain his conviction for engaging in sexual contact with JG because the conviction is based solely on the testimony of an untrustworthy witness who only caught a glimpse of the alleged misconduct.[1]

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)* **[*4]** (quoting *United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000))*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F 2002)* (quoting *Turner, 25 M.J. at 324*). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)*. Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

The elements of abusive sexual contact with a child are that, during the pertinent time frame: **[*5]** (1) the appellant engaged in sexual contact with JG by using his hand to touch JG's penis; and (2) JG had attained the age of 12 but had not yet attained the age of 16. *Manual for Courts-Martial*, *United States* (*MCM*), Part IV, ¶ 45.b.(9) (2008 ed.). In pertinent part, "sexual contact" is defined as "the intentional touching, either directly or through the clothing, of the genitalia . . . [or] groin . . . of another person . . . with an intent to . . . arouse or gratify the sexual desire of any person. *Id*. at ¶ 45.a.(t)(2).

During the pendency of their interactions, the appellant told JG he felt like JG was the his "little brother," frequently told JG he loved him, and sent him what JG felt were "love poems." JG believed the appellant wanted to be more than friends with him, but JG was not interested in anything besides friendship.

At some point prior to his enlistment in the Air Force, the appellant sent JG a nude photograph that showed him holding his penis. Telling JG he wanted to visit and would set him up on a date with a girl, the appellant asked JG to send a picture of his penis. JG sent the photograph to the appellant's phone but never agreed to the appellant's offer for an all-expenses-paid **[*6]** trip to New York. At one point, JG talked to the appellant about trying to "get laid" and the appellant told JG that if he was still a virgin when he turned 18, "you'll always have me, little buddy."

The appellant's first duty assignment was to Moody Air Force Base, Georgia, near where JG lived. JG moved between his divorced parents' homes on an alternating basis. During his first month in Georgia, the appellant stayed with JG in one of the homes almost every weekend. Refusing the offer of a guest bedroom, the appellant slept on the floor of JG's room and once asked to sleep in JG's bed, but the child refused. During these visits, the appellant and JG would spend almost the entire weekend together with the knowledge of JG's parents. The two would play games, go to the movies, bowl, or walk around the mall. The appellant subsidized all their activities.

In May 2010, the appellant was at JG's father's home with JG and his 14-year old cousin, TG. The appellant and children stayed up late playing video games in the living room. TG fell asleep on the couch. At around 0200-0300 hours, JG and the appellant lay down on separate mattresses on the floor near the couch where TG was sleeping.

JG **[*7]** fell asleep wearing shorts, underwear, and a T-shirt. He awoke sometime later to find the appellant had his arm around JG. JG then became aware he had ejaculated in his underwear while he was asleep, something he had not experienced before. (To explain this, the defense expert in pediatrics testified that males often experience nocturnal emissions without any

[1] The appellant also alleges the evidence is factually and legally insufficient to sustain his conviction for communicating a threat. Because we are setting aside that specification on other grounds, we do not address this issue.

stimulation and while staying asleep.)

TG testified that he awoke at some point in the night and saw the appellant's hand "resting on" JG under the blankets "around his waist area." He went back to sleep then got up later in the night to use the bathroom. Two semi-lit televisions shone some light into the room. When he left the bathroom, TG saw JG lying asleep on his back with the appellant close to him, lying on his side. The two were covered by a blanket and it appeared to TG that the appellant was masturbating JG with a "shallow" up and down motion. TG asked the appellant what he was doing, and the appellant giggled and pulled his arm back. TG laid on the couch for 10-15 minutes to make sure the appellant went to sleep before he did. TG testified that he did not wake JG up because he was afraid of the appellant and that he waited **[*8]** several weeks before telling JG what he had seen.

The defense counsel extensively cross-examined TG on several areas: what he claimed to have witnessed, several inconsistent and false statements he made to investigators and at the Article 32, UCMJ, *10 U.S.C. 832*, investigation, his role in selling prescription medication he stole from his mother, and falsely implicating a friend in that scheme. The defense aggressively cross-examined JG in a similar manner.

In addition to the two boys, the Government called a board-certified psychologist as an expert in sexual abuse. She testified that children react in a variety of ways when they have been subjected to sexual abuse, depending on their age, developmental level, and relationship with the abuser. According to the expert, children with a relationship with their abuser almost always delay reporting the abuse, children who report abuse often make piecemeal disclosures about the abuse, and boys generally disclose less than girls. She also described "grooming" behaviors where a perpetrator conditions a child to accept sexual contact, sometimes starting by giving a child attention and time in a way that bonds the child to the adult and decreases **[*9]** the likelihood the sexual contact will be reported.

Given the totality of the evidence presented at trial, including the history of the appellant's interactions with JG prior to the incident, and, after making allowances for the fact that we did not personally observe the witnesses (including JG and TG), we are convinced beyond a reasonable doubt that the appellant engaged in abusive sexual contact with JG. We find the evidence sufficient to convince us, and the reasonable fact finder, that the appellant did indeed engage in this conduct.

Failure to State an Offense

The appellant was charged under *Article 134, UCMJ*, of wrongfully threatening JG to "go outside or I will put you in the dirt" approximately a week after the sexual contact. The panel convicted the appellant of the following substituted threat: "If you say that again I will break your neck." The appellant alleges that the specification should be set side and dismissed because it failed to allege the *Article 134, UCMJ*, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2). We agree.

Whether a charge and specification state an offense and the remedy for such error **[*10]** are questions of law that we review de novo. *United States v. Ballan, 71 M.J. 28, 33 (C.A.A.F. 2012)*. "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006)* (citing *United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994)*); Rule for Courts-Martial 307(c)(3).

Because the appellant did not complain about the missing element at trial, we analyze this case for plain error and in doing so find that the failure to allege the terminal element was "plain and obvious error that was forfeited rather than waived." *United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2012)*. *See also United States v. Gaskins, 72 M.J. 225, 232 (C.A.A.F. 2013)*. In the context of a plain error analysis of defective indictments, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *Id. at 214* (citing *United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011))*. In the plain error context, "the **[*11]** defective specification alone is insufficient to constitute substantial prejudice to a material right." *Id. at 215* (citing *Puckett v. United States, 556 U.S. 129, 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)*; *United States v. Cotton, 535 U.S. 625, 631-32, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002))*.

Therefore, to find sufficient notice of the element and thus no prejudice, reviewing courts "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id. at 215-16*

(quoting *Cotton, 535 U.S. at 633*; *Johnson v. United States, 520 U.S. 461, 470, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)*). If so, the charging error is considered cured and material prejudice is not demonstrated. *Id. at 217*.

Our superior court has stated we cannot find sufficient notice of the terminal element on such bases as: (1) witness testimony describing the underlying conduct of the offense, even if it does so in a manner that would be legally sufficient to prove the terminal element; (2) the Government's theory of criminality being introduced during its closing argument or the findings instruction; (3) evidence of defense counsel's general awareness of the terminal element. *United States v. Goings, 72 M.J. 202, 208 (C.A.A.F. 2013)*. **[*12]** Without more, affirming on any or all of these bases is error under both *Fosler* and *Humphries* because these scenarios do not answer the relevant question of whether the accused was on notice as to which clause or clauses of the terminal element he needed to defend against. *Id. at 208*.

Here, the Specification as charged did not allege either terminal element. The *Article 32, UCMJ*, Investigating Officer's report lists both clauses of the terminal element as a requirement for the offense but contains no discussion of what evidence does or could support that element in this case. The trial counsel did not mention its theory of criminality in its opening statement and the first mention of the terminal element clauses occurred in the military judge's instructions.

Early in JG's mother's testimony, the trial counsel asked whether she felt uncomfortable about her son talking to the appellant. She responded affirmatively, saying she was concerned because of the appellant's age and because he did not know the appellant. When the defense objected on hearsay and relevancy grounds, the trial counsel responded that her testimony relates to how she felt about the two interacting with each other. Although **[*13]** the military judge sustained the hearsay objection and directed the trial counsel to move on, the trial counsel returned to the topic several minutes later, asking JG's mother why she let the appellant spend time with her son. JG's mother replied: "At first I was skeptical about it, but when I learned he went into the military—into security forces—I allowed him to come to the house."

After the military judge instructed the panel on the elements of the offenses, the trial counsel argued the following:

> [Element] five that under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces. The relevant commission [sic] here is of a nature to bring discredit upon the armed forces.
>
> We have an active duty member who is spending time with a child in this community. Her [sic] parent testified that part of the reason she felt safe letting him come over and spend time with her son was that he was in the Air Force. And how does he use that trust? He abuses that trust. He had access to this child, and threatened and now the parent, a member of the community has had to come and turn to **[*14]** the Air Force for protection. What the accused did in threatening [JG] was service discrediting conduct.

The record does not clearly demonstrate that the appellant was put on notice prior to findings argument that the Government intended to prove that his conduct was service discrediting or that the defense knew it was defending against that theory of criminality. *See Gaskins, 72 M.J. at 234*.

When considered in context, we do not find JG's mother's testimony to be sufficient direct evidence of the terminal element so as to notify the appellant of the Government's theory of criminality. To the contrary, the trial defense counsel's objection to this line of questioning indicated his belief that the mother's feelings about the appellant spending time with her son were irrelevant, the trial counsel's response to that objection did not notify the defense that this "fact" was going to be the proof of the Government's theory of criminality for the threat specification, and the military judge's sustaining of the defense's objection validated the trial defense counsel's belief that the evidence was not relevant to any issue that would be decided by the panel.[2] Furthermore, JG's mother did not **[*15]** testify

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[2] We recognize that, while questioning JG's mother during the sentencing phase of the trial, the civilian defense counsel elicited from her that she had told him during an interview the weekend before trial that her opinion of the Air Force had declined "not so much because of the offenses but because of the runaround [she felt] like the government's given [her]" and that her disenchantment with the Air Force "wasn't so much an effect of the offense" but "more of just feeling like the government had not handled this case very well." The government argues we should consider this exchange **[*16]** as proof the defense counsel was "well aware of direct evidence of 'service discrediting' conduct before trial and was

that she believed the appellant's conduct in communicating a threat to her son brought discredit to the armed forces, or that she even understood that the reputation of the Air Force was relevant to any offense in the case. Under the circumstances of this case, we decline to extrapolate from her testimony that she would also have testified that she believed the reputation of the Air Force had been discredited by the appellant's action.[3] *See* Gaskins, 72 M.J. at 233 (a claim that it is "intuitive that the bad act discredited the military runs contrary to long-established principles of fair notice").

In sum, we can find nothing in the record that reasonably placed the appellant on notice of the Government's theory as to which clause of the terminal element of *Article 134, UCMJ*, he violated. Given the mandate set out by our superior court in *Humphries* and *Gaskins*, we are compelled to set aside and dismiss the *Article 134, UCMJ*, Specification.[4]

Sentence Reassessment

Having found error regarding the threat specification, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, our Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1988)*. Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, *10 U.S.C. § 866(c)*. "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales, 22 M.J. at 307-08*. Under this standard, we have determined that we can discern the effect of the error and will reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*, to include the factors identified **[*18]** by Judge Baker in his concurring opinion in *Moffeit*.

Here, the members were informed that the maximum sentence for the appellant's offenses included 18years of confinement. Three years of that maximum sentence was attributable to the *Article 134, UMCJ*, Specification, so this is not a "dramatic change in the penalty landscape." *United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003)*. Under the circumstances of this case, we are convinced that, absent this error, the panel would have imposed and the convening authority would have approved a sentence no less than a dishonorable discharge, confinement for 4 years and 6 months, reduction to E-1 and forfeiture of all pay and allowances.

Additionally, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses of which he was convicted, his record of service, and all other matters properly before the panel in the sentencing phase of the court-martial. *See United States v. Snelling, 14 M.J. 267, 268 (C.M.A.A. 1982)*; *United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. Ap. 2006)*, *aff'd*, *65 M.J. 35, (C.A.A.F. 2007)*. We find that this reassessed sentence is appropriate in this case and **[*19]** is not inappropriately severe.

Conclusion

The finding of guilt as to Additional Charge II and its Specification is SET ASIDE AND DISMISSED. The remaining findings and sentence, as reassessed, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*.[5]

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prepared to address this issue." We decline to adopt that position. We note the record is not clear on the circumstances of this pretrial exchange between the witness and the defense counsel. We find this equivocal reference to a pretrial interview is, at most, evidence of the defense counsel's general awareness of the terminal element and, as such, is insufficient notice of the terminal element and cannot serve as a basis for affirmance of the finding of guilt. *United States v. Goings, 72 M.J. 202, 208 (C.A.A.F. 2013)*.

[3] *See supra* note 2.

[4] Because we are setting aside the communicating a threat specification, we do not address his contention that this specification is multiplicious with the assault specifications or constitutes **[*17]** an unreasonable multiplication of charges.

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*. Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id. at 135-36* (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo, 407 U.S. 514, 530, 92 S.*

Accordingly, the remaining findings and the sentence, as reassessed, are

AFFIRMED.

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Ct. 2182, 33 L. Ed. 2d 101 (1972). *See also* *United States v. Harvey, 64 M.J. 13, 24 (C.A.A.F. 2006)*; *United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002)*.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on appellate defense counsel, on April 29, 2019.

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