IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Staff Sergeant (E-6) **NORMAN R. STOUT**, United States Army, Appellant	) FINAL BRIEF ON BEHALF) OF APPELLEE))) Crim. App. Dkt. No. 20120592)) USCA Dkt. No. 18-0273/AR))

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Issue Presented

WHETHER THE GOVERNMENT MADE MAJOR CHANGES TO THE TIMEFRAME OF THREE OFFENSES, OVER DEFENSE OBJECTION, AND FAILED TO PREFER THEM ANEW IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 603.

Index of Brief

Table of Authorities

Court of Appeals for the Armed Forces

Army Court of Criminal Appeals

Uniform Code of Military Justice

Other Authorities

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

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Statement of Statutory Jurisdiction

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

Statement of the Case

On June 14, 2012, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas of abusive sexual contact with a child,

indecent liberties with a child, and possession of child pornography in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934 (2006 & Supp. I 2008). The military judge sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for eight years, and a bad-conduct discharge. *United States v. Stout*, ARMY 20120592, 2014 CCA LEXIS 469, *1 (Army Ct. Crim. App. 25 Jul. 2014)(mem. op.). The convening authority deferred adjudged and automatic forfeitures until action, and at action waived automatic forfeitures for six months, but approved the sentence as adjudged. *Id*. at *2.

On July 25, 2014, the Army Court reviewed the foregoing matter under Article 66, UCMJ. *Id*. The Army Court found appellant's pleas improvident, set aside the findings of guilt and the sentence, and authorized a rehearing. *Id*. at *19-20.

On September 16, 2015, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of abusive sexual contact with a child, two specifications of indecent liberties with a child, sodomy with a child, and assault with intent to commit rape in violation of Articles 120, 125, and 134, UCMJ. (JA 5). The military judge sentenced appellant to reduction to E-1, confinement for eighteen years, and a dishonorable discharge. (JA 5). The convening authority credited appellant with 779 days against the adjudged term of confinement and otherwise approved the sentence. (JA 5).

On April 9, 2018, the Army Court granted relief as to Specification 5 of Charge I based on a finding of unreasonable multiplication of charges, affirmed the remaining findings of guilty, reassessed, and ultimately affirmed the sentence. (JA 1-17). On August 6, 2018, this Honorable Court granted review.

Statement of Facts

I. Appellant's Misconduct.

Appellant became NL's stepfather when she was two years old. (R. at 203). Appellant and NL's family lived together on and off. (R. at 203-05). When NL was fourteen she, her little brother, and her mother moved to Watertown, New York to live with appellant. (R. at 205-06). Shortly after they moved in, appellant started "acting different, weird." (R. at 206). Under the guise of giving NL a "sex talk," appellant explained to NL that "the man's genitals were different from a woman's vagina." (R. at 207). Appellant proceeded to grab NL's wrist and made her touch the "undercarriage of his dick" and put his hand down NL's pants, touching her clitoris beneath her underwear. (R. at 207, 209-11, 225).

While living in Watertown, appellant woke NL early in the morning about once a week, took her clothes off, touched her vagina and breasts, and told NL that "he wanted to cum." (R. at 212-13). On more than one occasion during these early morning sexual encounters, appellant put his mouth on NL's vagina and used his tongue to play with her "clit." (R. at 216, 229, 253).

Additionally, appellant would frequently watch NL shower. (R. at 213). On one occasion, he joined NL in the shower and touched her vagina and breasts as he bathed her. (R. at 213-15). Both NL's mother, MG, and her uncle caught appellant watching NL shower with the curtain open. (R. at 215-216).

Appellant would also put NL "between his legs, sitting on the floor" and would make NL "watch the porn that was on his screen." (R. at 217). NL "could feel his erection" on her back. (R. at 218). NL recalled watching a video of a girl her age with a dog "humping her" and one where "this younger child had gotten dragged in by her hair." (R. at 218). The videos showed naked individuals having sex and NL saw "the dick entering the vagina." (R. at 251-52). Appellant asked NL if she "liked it." (R. at 218).

When NL was fifteen, appellant and NL were alone in a hotel after appellant had surgery. (R. at 221, 225). Appellant came out of the bathroom naked with an erection. (R. at 222). He shoved NL on the bed and started to unbutton her pants. (R. at 221-22). A phone call interrupted appellant and NL was able to leave the room. (R. at 222).

NL disclosed the sexual abuse to MG. (R. at 281). When confronted by MG about this, appellant responded, "I didn't do anything she didn't want me to do, and I didn't let her see anything she didn't want to see." (R. at 281). After that conversation, MG reported appellant to the state police. (R. at 283).

Appellant told a fellow church goer that he was in trouble for having conversations with NL. (R. at 303). Appellant explained the conversations, and the church goer testified at trial that "[i]t didn't sound like a birds and the bees' type conversation, it sounded like something different like he'd given her a lot of explicit information." (R. at 303-04).

In appellant's statement to Criminal Investigation Command (CID), he claimed NL caught him watching pornography one time and she was watching over his shoulder. (R. at 317; Pros. Ex. 1). He also admitted that they would lie on the couch together watching movies and he would sometimes put his arm around her abdomen area. (Pros. Ex. 1). Appellant admitted that NL sometimes sat on his lap in a reclining chair as well. (Pros. Ex. 1). Appellant admitted going into the bathroom to talk to NL while she was in the shower, but denied opening the curtain or going into the shower with NL. (Pros. Ex. 1). Appellant also admitted to lying in NL's bed with her and that, a few times, NL put her head on his shoulder, using it like a pillow. (Pros. Ex. 1). Appellant stated that he had dreams where he and NL engaged in sexual activity. (Pros. Ex. 1). Appellant also claimed that NL walked in on him while he was getting out of the shower once, and that it was "very possible" that he had an erection. (Pros. Ex. 1). Appellant admitted having the "sex talk" with NL while NL was "kinda straddling" him, facing him with MG in the room. (Pros. Ex. 1). Appellant claimed his comment that he "didn't do

anything [NL] didn't want" was "in reference to answering questions" related to the "sex talk." (Pros. Ex. 1). Appellant also recalled a time when they were on the couch and NL was "sort of grinding [her] buttocks into [his] pelvic area." (Pros. Ex. 1).

Appellant had a LimeWire "saved" folder on his computer under his user profile. (R. at 373). In this folder, twenty-eight files of suspected child pornography were found. (R. at 379). Twenty-four of the files were sent to the National Center for Missing and Exploited Children. (R. at 380). One video was of a known child. (R. at 380). That video and another video, both of children engaging in sexual activity, were entered into evidence. (R. at 387, 431; Pros. Ex. 11).

II. Procedural History.

On April 13, 2011, charges were preferred. (JA 22). On July 13, 2011, an Article 32 investigation occurred, at which NL testified that she could not remember the exact dates but that her mother, MG, would remember better. (JA 125). MG testified the family lived with appellant in New York from August 2008 to June 2009. (JA 125). The investigating officer made recommendations on July 21, 2011. (JA 125). Appellant pleaded guilty to three offenses in 2012. (JA 1). Changes to the dates were not made at that trial. (JA 125). The guilty plea was overturned in June 2014. (JA 125). On November 3, 2014, the government made

pen and ink changes to the charge sheet; and on November 17, 2014, the convening authority referred the charges to a general court-martial for re-trial. (JA 125). Arraignment occurred on 18 December 2014. (R. at 1).

At trial, the defense filed a motion to dismiss, objecting to the changes made to the charge sheet, claiming they were major changes barred by Rule for Courts-Martial 603 [hereinafter R.C.M.]. (JA 97-105). For Specification 7 of Charge I, the dates were changed from "between on or about 14 January 2009 and on or about 28 January 2009" to "between on or about 7 August 2008 and on or about 3 June 2009." (JA 126). For the Specification of Charge II, the dates were changed from "between on or about 14 February 2009 and on or about 22 March 2009" to "between on or about 7 August 2008 and on or about 3 June 2009." (JA 126). For the Specification of Charge III, the dates were changed from "between on or about 1 November 2009 to on or about 31 December 2009" to "between on or about 7 August 2008 and on or about 3 June 2009." (JA 126).

The military judge found that because the date changes "do not add a party, change the offenses, or add a substantial matter not fairly included in the previously-preferred Specifications," they were minor changes. (JA 127).

Standard of Review

"Whether a change made to a specification is minor is a matter of statutory interpretation and is reviewed de novo." *United States v. Reese*, 76 M.J. 297, 300

(C.A.A.F. 2017) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

Summary of Argument

The amendments to the charge sheet do not add a substantial matter not fairly included in the charges previously preferred. The date ranges as to these specifications are not the essence of the offense, but a definition of a time period when the offenses occurred. As such, changes to the date ranges are mere corrections to form intended to align the specifications with the evidence developed at the Article 32 hearing. The essential nature of the offense remained the same and preferral anew is not required. Also, the Army Court did not misapply this Court's holding in United States v. Reese where the court specifically based its decision on a finding that the changes were minor.

Argument

I. The Changes Are Minor And, Therefore, Do Not Require Preferral Anew Under R.C.M. 603(d).

Rule for Courts-Martial 603(a) provides "[m]inor changes in charges and specifications are any except those which add a party, offense, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." The government can make minor changes to a charge and specification before arraignment. R.C.M. 603(b). Major changes "may

not be made over the objection of the accused unless the charge or specification affected is preferred anew." R.C. M. 603(d). A change to the date range of a charge, without more, is not a major change for purposes of R.C.M. 603. The R.C.M. 603 analysis is not, as appellant suggests, concerned with the fact the government's change to the specifications added a particular number of days to the alleged timeframe.

> Two fundamental legal concepts underlie the limitations contained in R.C.M. 603 on making major changes. . . . One involves a basic principle of due process: an individual should not be made to face criminal charges without having been notified of what he must defend against and without having been protected against double jeopardy. The other concerns court-martial jurisdiction: a court-martial is without power to determine an individual's guilt or innocence of criminal charges unless those charges have been referred to trial by competent authority. R.C.M. 201(b)(3) and 601(a).

United States v. Longmire, 39 M.J. 536, 538 (A.C.M.R. 1994) (citing *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990); *United States v. Hopf*, 5 C.M.R. 12 (1952); *United States v. Sell*, 11 C.M.R. 202 (1953); *United States v. Vanderpool*, 16 C.M.R. 135 (1954)).

As an initial matter, the changes to the specifications here did not add a party, add an offense, nor mislead the accused as to the offense charged as contemplated by R.C.M. 603(a). Here, each of the specifications at issue alleged sexual misconduct against NL, and changes to the date range did nothing to alter

that fact. (JA 22-23). Specification 1 of Charge I alleged abusive sexual contact; Specification 6 of Charge I alleged indecent liberties with a child; The Specification of Charge II alleged forcible sodomy. (JA 22-23). Therefore, changes to the date ranges did not add an offense nor mislead the accused as to the offense against which he had to defend.

Also, changes to the date ranges here did not add a substantial matter not fairly included in the previously preferred charges and specifications for purposes of R.C.M. 603(d). Appellant offers that a substantial matter might be "one affecting the substance, i.e., the 'essence' or 'essential quality,' of an allegation." (Appellant's Br. 7)[1]. This Court's predecessor court in *United States v. Brown*, reasoned that:

> [W]here time is *not* of the essence, it is the general rule that an erroneous statement of the date of the offense constitutes a matter of mere form, and amendments are freely permitted where they do not operate to change the nature of the crime charged, and there is no showing that the defendant had been misled or prejudiced in his defense on the merits.

Brown, 16 C.M.R. 257, 261-262 (citations omitted). The charges and specifications here are akin to the attempted sodomy and lewd and lascivious conduct charges at issue in *Brown*. *Id*. at 258. The date ranges are not the essence of the charge, but a definition of a time period when the offenses occurred.

[1] Citing *Substance,* BLACK'S LAW DICTIONARY (9th ed. 2009).

Consequently, the "substance" of the offenses remained the same despite the change. The changes to the date range did not add a substantial matter and, therefore, did not require preferral anew.

In fact, the changes to the date ranges here correct the form of the specifications to align them with the facts developed during the Article 32 hearing in 2011. At the hearing, NL testified that she could not remember the exact dates but that her mother, MG, would remember better. (JA 125). MG testified the family lived with appellant in Watertown, New York from August 2008 to June 2009. (JA 125). Because appellant pleaded guilty to three offenses in 2012, changes to the dates were unnecessary and were never made. (JA 1, 125). Pursuant to R.C.M. 603(b), prior to arraignment the government properly made minor changes to the date range in order to correct "an inartfully drafted" specification. R.C.M. 603(a) Discussion.

Appellant argues the changes to the date range of the specifications at issue added a substantial matter because they limited possible alibi or other defenses. (Appellant's Br. 9). This is a prejudice argument and does nothing to further appellant's argument that the changes were major. An alibi defense was available despite being limited by the changes. In *Reese*, this Court specifically overruled the need for a prejudice analysis under these circumstances. 76 M.J. at 302. Nevertheless, that the changes to the date range may have made appellant's

defense more difficult is not the concern addressed by R.C.M. 603. "The evil to be avoided is denying the defendant notice of the charge against him, thereby hindering his defense preparation." *Id.* at 300 (citing *United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995) *overruled on other grounds by Reese*, 76 M.J. at 302. The fact that the types of defenses available to appellant were perhaps constrained does not establish that appellant was misled or unaware of the charges against him.[2]

In fact, appellant always had notice of the broad date range against which he would have to defend. NL and MG set the date range for the offenses at the Article 32 hearing in July 2011. (JA 125). Prior to the changes, six specifications on the charge sheet placed charged misconduct between on or about August 2008 and on or about June 2009. (JA 22-24). Also, the amended specifications contained "on or about" language. This put appellant on notice of a wide range of time against which he must defend. *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999). Even assuming that changes to the date range are a substantial matter, the amended dates were fairly included in the previously preferred charges and specifications.

[2] It is noteworthy that appellant did not allege in his "Defense Motion Objection to Major Change Per RCM 603" that he might have had an alibi for the original, more specific timeframes. (JA 97; App. Ex. VIII). The motion was filed and litigated pre-*Reese*, when a prejudice analysis was still required.

This case is distinguishable from *United States v. Smith*, 49 M.J. 269 (C.A.A.F. 1998), *overruled on other grounds by Reese*, 76 M.J. 297, and *Reese*. Appellant cites these cases as examples of changes that added a substantial matter not fairly included in previously preferred charges and specifications. (Appellant's Br. 7-8). In *Smith*, charges alleging larceny were amended to allege the taking of "military property." 49 M.J. at 270. The effect of the amendment was to increase the appellant's sentence exposure. *Id*. This Court found that the increase in confinement exposure was a substantial matter not previously contemplated by the offenses. Here, the amendments to the date range served only to expand the range of time during which the offenses might have occurred. In *Reese*, the government changed the means by which the appellant committed a lewd act upon a child days after the victim's testimony at trial.[3] 76 M.J. at 299. This Court found that the amendments added a substantial matter because the change in modality was not fairly included in original specification, and appellant was not on notice that he would need to defend against a touching charge, because it was not alleged. *Id*. at 301. Here, the nature of the means and nature of the offense remained the same and appellant had ample notice of the date range given NL's Article 32 testimony.

[3] The original charge alleged that the appellant committed the lewd act by licking the victim's penis with his tongue. The amended charge alleged that appellant touched the victim's penis with his hand. *Reese*, 786 M.J. at 299.

Appellant cites to several cases for the proposition that this Court has already recognized that large variations in time amount to major changes in the context of fatal variance. (Appellant's Br. 8). Appellant misinterprets the holdings in these cases. Appellant relies on *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2003), for a finding that a two year variance is fatal. (Appellant's Br. 8). However, that was not this Court's ruling. Rather, in *Parker*, the military judge at trial denied the government's pretrial motion to amend the charged dates from 1995 to 1993, citing R.C.M. 603. 59 M.J. at 201. This Court's ultimate holding in *Parker* was based on legal insufficiency of the evidence in that, proof of sexual misconduct in 1993 did not, without more, demonstrate sexual misconduct in 1995 as alleged in the pleadings. *Id.* at 200.

Appellant also cites to *United States v. Allen*, 50 M.J. 84 (C.A.A.F. 1999) and *United States v. Hunt*, 37 M.J. 344 (C.M.A. 1993) for the proposition that this court has not tolerated variances in time greater than a few weeks. (Appellant's Br. 8). Appellant misapprehends this Court's holdings in those cases. In *Allen*, appellant alleged that the proof at trial did not establish the dates of the alleged rapes with specificity and, therefore, constituted a variance. 50 M.J. at 85. This Court ultimately found "even assuming there was variance in this case, it was neither material nor prejudicial." *Id.* at 86. In *Hunt*, the appellant was charged with rape "on or about October 20, 1989." 37 M.J. at 347. The evidence

established that the offense occurred within three weeks of that date. *Id.* This court found "there was no material variance, as a matter of law, in this case" where the charge contained "on or about" language. *Id.* The holdings in these cases cannot be stretched to mean, as appellant asserts, that variances in time, which this Court found not to be fatal for purposes of R.C.M. 918, must be major changes for purposes of R.C.M. 603. The amendments to the specifications here did not add a substantial matter not fairly included in the previously preferred charges and specifications and appellant had sufficient notice of the broad date range against which he had to defend. The changes were minor as contemplated by R.C.M. 603(a).

II. The Army Court Did Not Misapply this Court's Holding in *United States v. Reese*.

The Army Court correctly found the changes at issue were minor. Appellant argues the Army Court "wholly misreads *Reese*" and makes a "specious distinction" between *Reese* and this case in that the changes here occurred prior to referral. (Appellant's Br. 10-11). Appellant misreads the Army Court's holding in this case. The Army Court acknowledged this Court's holding in *Reese* overruling the prejudice prong of the analysis. (JA 8); *United States v. Stout*, ARMY 20120592, 2018 CCA LEXIS 174, *14 (Army Ct. Crim. App. 9 Apr. 2018)(mem. op.). The Army Court held, "repreferral of these charges was not necessary because the change to the date ranges were minor." *Id.*; (JA 8). In dicta, the Army

Court makes a distinction between this case and *Reese*. The Army Court points to the fact that the charges as amended here were properly referred to trial whereas the amended charges in *Reese* were never referred to trial. *Id*. at *15; (JA 9). Based on that, the Army Court argued this case does not suffer from the same jurisdictional problem as *Reese*, and a prejudice analysis under Article 59(a) is still implicated. In the end, the Army Court reiterates its finding in accordance with the holding in *Reese*, writing "[i]n any event, as we find any changes were 'minor,' we need not decide the issue definitively." *Id*.; (JA 9). The Army Court did not inappropriately base its ruling on a finding of lack of prejudice.

Conclusion

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

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 3,811 words.

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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 October 24, 2018.

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