# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, EWING, and PARKER
Appellate Military Judges

**UNITED STATES, Appellee**
**v.**
**Private First Class AUSTIN C. HAMILTON**
**United States Army, Appellant**

ARMY 20200347

Headquarters, 7th Infantry Division
Joseph A. Keeler, Military Judge
Colonel Rebecca K. Connally, Staff Judge Advocate

For Appellant: Major Jodie L. Grimm, JA; Catherine M. Cherkasky, Esquire (on brief); Captain Andrew R. Britt, JA; Catherine M. Cherkasky, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Lieutenant Colonel Jaired D. Stallard, JA (on brief).

22 February 2022

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OPINION OF THE COURT

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PARKER, Judge:

"[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018). In short, words have meaning. In this case, the government chose to charge appellant with an aggravated sexual contact in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ], for touching "the *chest* of [the victim] with [appellant's] mouth with an intent to arouse, or gratify the sexual desire of any person by using unlawful force." (emphasis added). Appellant argues this charge fails to state an offense because

"chest" is not one of the enumerated body parts listed in the definition of "sexual contact."[1] We agree and provide relief in our decretal paragraph.[2]

## BACKGROUND

On 31 March 2019, appellant and a group of soldiers attended a barbeque at Joint Base Lewis-McChord to memorialize the passing of a friend. One of the soldiers present was Specialist (SPC) [redacted] (victim), who arrived at the barbeque with her female friend, SPC SR. Victim and her friend socialized with several individuals at the barbeque, including appellant.

Approximately ten minutes after introducing herself to appellant, victim became uncomfortable with appellant's behavior toward her. Appellant claimed to have met victim previously on several occasions, but victim did not recall meeting appellant before. At one point, appellant told victim she "would be waking up in his bed" and "would fall for him." Later, victim saw appellant next to the women's bathroom where appellant tried to kiss her on the mouth after grabbing her. Victim turned her head and appellant kissed the side of her face. Victim then walked away from appellant and expressed her concerns about appellant's behavior to her friend. Victim's friend told her she would "take care of it." Victim's friend pulled appellant aside to address his behavior.

Appellant later approached victim and asked her if she would go with him to his room to get more beer for the barbeque. Victim agreed to go with appellant because she was "the only sober one at the time" and appellant promised her "nothing would happen."

After arriving at his room, appellant cornered victim against the common room door and prevented her from moving away. When the door swung inward into

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[1] A panel with enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of rape and one specification of aggravated sexual contact, in violation of Article 120, UCMJ. Appellant was acquitted of two specifications of rape, one specification of aggravated sexual contact, one specification of abusive sexual contact, and one specification of assault consummated by a battery. The military judge sentenced appellant to a dishonorable discharge, confinement for eight years, and reduction to E-1.

[2] We have given full and fair consideration to appellant's other assignments of error, to include matters submitted personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they lack merit and warrant neither discussion nor relief.

appellant's common room, victim stumbled backward inside before she turned around and noticed there was no beer. Appellant then pinned victim against the closed door facing the inside of the common room and began kissing her forcefully. Victim tried to push appellant off but was unsuccessful due to his body weight. Appellant then started kissing victim's neck and chest area and continued despite victim's plea for him to stop. Appellant then forced victim into his bedroom and began raping her. Victim freed one of her legs during the rape and kicked appellant in the chest—sending him backwards—which allowed her to pull up her pants, grab her phone, and flee appellant's room.

Once victim ran out of appellant's room, she went straight to her room and called her best friend and roommate. From there, she returned to the barbeque—distraught and crying—and proceeded to tell several other people what transpired with appellant. Eventually the military police were called and victim went to the hospital and had a Sexual Assault Forensic Examination (SAFE) performed.

*Argument and Evidence at Trial Relevant to the Aggravated Sexual Contact*

From the start of trial, the theory of the government was clear: appellant was guilty of aggravated sexual contact for touching the victim's *chest* with his mouth. During his opening statement, trial counsel asserted "[Appellant] pulled her shirt to the side and he sucked on her *chest*. This is the evidentiary basis for Charge I, Specification 5." (emphasis added). Victim testified that appellant "started kissing my chest and I had told him to stop." The trial counsel ("TC") then asked victim to clarify:

> TC: When you say he was kissing your chest, where was he kissing you on your chest?
>
> Victim: Uh, around my breast area, ma'am.
>
> TC: Can you point on your body where he kissed you?
>
> Victim: Yes, ma'am, around here.
>
> TC: Let the record reflect that the witness used her right hand and gestured up on near her left *chest area* as if she was being kissed there.

The government offered two photographs into evidence showing a mark appellant made on victim's chest as Prosecution Exhibit 19. Later in the trial, the Sexual Assault Nurse Examiner (SANE) was asked about her findings during her examination of victim. The SANE testified there were two injuries she took note of, one being "a suction injury on the chest. . . ."

During closing argument, trial counsel stated, "From there he moved down to her chest as she was pinned to that door. Against her will, with his hands and her body weight. That is Specification 5 of Charge I, the aggravated sexual contact."

## LAW AND DISCUSSION

We conclude Specification 5 of Charge I is legally insufficient because it fails to state the offense of aggravated sexual contact in violation of Article 120, UCMJ.

### *A. Standard of Review and Applicable Law*

"The question of whether a specification fails to state an offense is a question of law which this Court reviews de novo." *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)) (citation omitted). "The lens through which this Court evaluates the sufficiency of a specification differs depending on when counsel first raised the issue. . . . [A] flawed specification first challenged *after trial* . . . is viewed with . . . 'maximum liberality.'" *Id.* at 403 (citing *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)) (cleaned up). In other words, challenges after trial will be "liberally construe[d] in favor of validity." *Id.* at 405 (cleaned up). Additionally, "where defects in a specification are raised for the first time on appeal," following a contested trial, "dismissal of the affected charges or specifications will depend on whether there is plain error – which, in most cases, will turn on the question of prejudice." *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012) (cleaned up). "In the context of a plain error analysis, 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." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).[3]

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[3] Our analysis is in concert with our decision last year in *United States v. Sanchez*, 81 M.J. 501 (Army Ct. Crim. App. 2021). In *Sanchez* we applied waiver to a "failure to state an offense" claim that the appellant there raised for the first time on appeal, whereas here we review Hamilton's claim for plain error. The distinction is that Sanchez pleaded guilty to the same offense that he later claimed failed to state an offense, while Hamilton contested the charge he now challenges. This distinction is important, because when an accused pleads guilty he is "'not simply stating that he did the discrete acts described' in the specification, but also that he is guilty of the 'substantive crime' set forth in the specification." *Sanchez*, 81 M.J. at 502 (quoting *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018)). Thus, Sanchez waived his claim, and Hamilton did not. *See Sanchez*, 81 M.J. at 506 (where a defendant contests a charge and is found guilty, a claim that the charge fails to state

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The Fifth Amendment states no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. Additionally, the Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI. Put simply, an accused has a substantial right to fair notice of the charge against him. "[W]hen an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, 'either expressly or by necessary implication,' 'every element' of the offense, 'so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy.'" *Id.* (cleaned up).[4]

*B. Elements of Aggravated Sexual Contact*

As a threshold matter, we must determine whether the aggravated sexual contact specification alleges, either expressly or by necessary implication, every element of the offense. The aggravated sexual contact specification in appellant's case reads as follows:

> In that [appellant], U.S. Army, did, at or near Joint Base Lewis McChord, Washington, on or about 31 March 2019, touch the chest of [victim] with [appellant's] mouth with an intent to arouse, or gratify the sexual desire of any person by using unlawful force.

The elements for aggravated sexual contact by force are: (i) that the accused committed *sexual contact* upon or by another person; and (ii) that the accused did so with unlawful force. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 60.b.(3)(a)(i)–(ii) (emphasis added). Sexual contact that occurs on or after 1 January 2019 is defined as:

> [T]ouching. . . either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

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an offense "would not be barred by R.C.M. 905(e)(2) or our holding" in *Sanchez*, "even if raised after adjournment").

[4] See also Rule for Courts-Martial 307(c)(3).

*MCM*, 60.b.(g)(2); 10 U.S.C. § 920(g)(2) (2018). Absent in this definition is the word "chest."[5] We therefore find the specification fails to expressly allege every element of the offense.

In determining whether the specification alleges an offense by necessary implication, we must view the specification with maximum liberality. As the word "chest" does not appear in the definition of sexual contact, the specification can only state an offense of aggravated sexual contact if the word "chest" implies the element of "breast" taken from the statutory definition of sexual contact in Article 120, UCMJ.

Appellee argues that the definition of "chest" is synonymous with that of "breast." We disagree. *Merriam Webster's Dictionary* defines the word "breast" in females as: "either of the pair of mammary glands extending from the front of the chest in pubescent and adult human females and some other mammals."[6] The definition of "chest" specifically mentions the word "breast," but only in the context of "the fore or ventral part of the body between the neck and the abdomen."[7] Were we to accept the government's position that the word "chest" can simply be exchanged with the word "breast" then any touching outside the actual breasts, to arguably include just below the collar bone, could be criminalized as an aggravated sexual contact. As we stated at the beginning of the opinion, we must carefully attend to the words Congress chose to include in the statutory definition of sexual contact. In this case, Congress listed a specific set of body parts that could constitute sexual contact, and the word "chest" was not among them.

However, as we are not only confined to the text of the specification, we next look to the record to see if the specification's wording of "chest" necessarily implied the word "breast" and therefore gave appellant sufficient notice of the offense he must defend himself against. After examining the record, we find the government did not allege the offense of aggravated sexual contact, because they specifically sought to criminalize the touching of the "chest" as opposed to the actual "breast."

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[5] Under the canon of construction known as *expressio unius est exclusio alterius* (to express or include one thing implies the exclusion of the other), we must presume that the exclusion of areas of the body beyond those specifically listed in the definition was intentional. *See United States v. McPherson*, 81 M.J. 372, 386 (C.A.A.F. 2021).

[6] *See* Merriam-Webster Online Dictionary, at https://merriam webster.com/dictionary/chest (last visited 11 Jan. 2022).

[7] *See* Merriam-Webster Online Dictionary, at https://merriam-webster.com/dictionary/chest (last visited 11 Jan. 2022).

Although the "breast" extends out from the front of the chest, the evidence and argument presented at trial focused on appellant touching the victim's chest area above her breasts. When the victim mentioned appellant had in fact kissed her "breast area" the trial counsel did not attempt to prove the touching occurred on the victim's breast. Instead, the trial counsel asked the victim to point to where the actual touching occurred, stating "the witness used her right hand and gestured up on near her left *chest area* as if she was being kissed there." Additionally, the photographs in Prosecution Exhibit 19 show a marking that appears to be in the chest area above the breasts. Finally, the SANE testified the victim suffered a "suction injury to her chest," which was not specific to her breast.

*C. The Aggravated Sexual Contact Specification Fails to State an Offense*

For the reasons discussed above, even when viewing the specification through the lens of maximum liberality, we find the specification is legally insufficient because it fails to state an offense.

Although we cannot know the reasons why the government chose to write a specification that did not meet the applicable definition of sexual contact, we note that the word "chest" could have constituted an aggravated sexual contact had it occurred prior to the Military Justice Act of 2016 [MJA 2016] coming into effect on 1 January 2019. *See* National Defense Authorization Act for Fiscal Year 2017, Public Law No. 114-328, § 5430(b)(2), 130 Stat. 2000, 2950 (2016) (codified as 10 U.S.C. § 920) (amending the definition to a more specific list of potential sexual contact areas). Prior to the MJA 2016, the definition of sexual contact included the following additional language:

> [A]ny touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

10 U.S.C. § 920(g)(2)(A)–(B) (2006 and Supp. V; 2012 and Supp. V). Appellant's conduct of forcibly kissing victim's "chest" occurred on 31 March 2019, after this language was intentionally removed by Congress.[8]

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[8] Practitioners can find the current version of the UCMJ, along with any relevant supplements at the Office of the Law Revision Counsel's [OLRC] website: http://uscode.house.gov. After typing in title "10" and the relevant section (in this case "920") and hitting "enter", another window will appear with the text of the UCMJ article. On this page there is an additional drop down menu at the top that contains the current version of the United States Code, as well as previous editions

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*D. Appellant was Prejudiced*

We find the government's failure in stating an offense in Specification 5 of Charge I to be a plain and obvious error. We further find appellant was prejudiced by this error because he was convicted of aggravated sexual contact—an offense he did not commit. We therefore find dismissal of this conviction to be the appropriate remedy in this case.

*E. Sentence Reassessment*

In light of our conclusion that the aggravated sexual contact offense is legally insufficient, we now address whether we are able to reassess appellant's sentence. Having considered the entire record, we conclude we are able to reassess the sentence and do so in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). Further, due to the sentencing changes brought on by the Military Justice Act of 2016, we have the certainty of knowing from the record that the military judge in this case sentenced appellant to confinement for one year for the aggravated sexual contact, to run concurrently with appellant's eight-year confinement for the rape.

We also find the totality of the *Winckelmann* factors to favor reassessment by this court. 73 M.J. at 14–15. First, we find no dramatic changes in the penalty landscape and exposure, as appellant still faces a maximum punishment of confinement for life without eligibility for parole for the rape conviction under Article 120, UCMJ. Second, appellant chose sentencing by a military judge as opposed to members, which favors reassessment. *Id.* Third, we find the remaining offense of rape captures the gravamen of criminal conduct in this case. Finally, we find the fourth *Winckelmann* factor—which allows us to reliably determine the sentence that would have been imposed had appellant not been convicted of the aggravated sexual contact based on our experiences as judges on this court—to be inapplicable because we know the military judge sentenced appellant to one year of confinement for the offense of aggravated sexual contact, to run concurrently with appellant's sentence of eight years' confinement for the offense of rape.

Having conducted this reassessment, we affirm appellant's sentence for a dishonorable discharge, confinement for eight years, and reduction to E-1. Recognizing the error in this case was one of constitutional magnitude, we further

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and supplements. Practitioners can also find the effective dates of any amendments here to ensure they are using the correct language when drafting charges.

note that we are "persuaded beyond a reasonable doubt that [our] reassessment has rendered harmless any error affecting the sentence adjudged at trial." *Sales*, 22 M.J. at 307.

**CONCLUSION**

The findings of guilty of Specification 5 of Charge I are SET ASIDE and DISMISSED. The remaining finding of guilty is AFFIRMED. We AFFIRM the sentence which provides for a dishonorable discharge, confinement for eight years, and reduction to E-1. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by this decision are ordered restored.

Senior Judge BROOKHART and Judge EWING concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court