UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 38905

UNITED STATES
Appellee

v.

Robert L. HONEA III
Captain (O-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 15 February 2017

Military Judge: Lynn Watkins (arraignment and motions) and Shaun S. Speranza (sitting alone).

Approved sentence: Dismissal and confinement for one month. Sentence adjudged 8 May 2015 by GCM convened at Tyndall Air Force Base, Florida.

For Appellant: Brian L. Mizer, Esquire (argued); Colonel Jeff G. Palomino, USAF; Major Isaac C. Kennen, USAF; and Major Lauren A. Shure, USAF.

For Appellee: Major Jeremy D. Gehman, USAF (argued) and Gerald R. Bruce, Esquire.

Before DREW, J. BROWN, and MINK, *Appellate Military Judges.*

Senior Judge J. BROWN delivered the opinion of the Court, in which Judge MINK joined. Chief Judge DREW issued a separate opinion concurring in the result.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

J. BROWN, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, contrary to his plea, of assault consummated by a battery, in

violation of Article 128, UCMJ, 10 U.S.C. § 928.[1] The adjudged and approved sentence was a dismissal and confinement for one month.

Appellant raises three assignments of error: (1) whether the military judge erred when she concluded that assault consummated by a battery was a lesser-included offense of a bodily-harm abusive sexual conduct; (2) whether the evidence is legally and factually sufficient to prove the assault consummated by a battery; and (3) whether the sentence to a dismissal was inappropriately severe. Finding no error materially prejudicial to a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

In pertinent part to this appeal, Appellant was charged with two specifications of abusive sexual contact of First Lieutenant (1st Lt) RVS, in violation of the 2007 version of Article 120(h). One specification alleged that Appellant touched 1st Lt RVS's vulva with his penis while she was substantially incapacitated; the other specification alleged that he touched 1st Lt RVS's vulva with his penis by causing bodily harm, to wit: touching 1st Lt RVS's vulva with his penis.

At the Article 32, UCMJ, 10 U.S.C. § 832, hearing, 1st Lt RVS testified that Appellant touched her "pelvic region" with his penis. Relying on this testimony, the investigating officer recommended that the abusive sexual contact specifications either not be referred to trial or be amended. Apparently following the investigating officer's recommendation, the Government amended the substantial incapacitation specification prior to referral by replacing the word "vulva" with the words "pelvic region." The Government similarly amended the bodily harm specification with regards to the location of the sexual contact, but failed to similarly amend the portion of the specification that described the bodily harm as "touching [1st Lt RVS]'s vulva with his penis."[2] These specifications, as modified, were referred to a general court-martial by the convening authority.

At a pretrial hearing, the military judge granted a Defense motion to dismiss the abusive sexual contact specifications for failure to state an offense

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[1] The military judge acquitted Appellant of attempted sexual assault of First Lieutenant (1st Lt) RVS and rape and forcible sodomy of a different woman, in violation of Articles 80, 120, and 125, UCMJ, 10 U.S.C. § 880, 920, 925.

[2] The amended specification reads as follows: "[D]id . . . engage in sexual contact, to wit: touching [1st Lt RVS]'s pelvic region with his penis, by causing bodily harm upon her, to wit: touching [1st Lt RVS]'s vulva with his penis."

because "pelvic region" was not specifically listed in Article 120(t)(2)'s definition of sexual contact.[3] Nevertheless, the military judge determined that assault consummated by battery was a lesser-included offense (LIO) of the specification alleging abusive sexual contact by bodily harm.

Trial resumed six months later. A different military judge was detailed to the case, and Appellant pleaded not guilty to the remaining charges and specifications. Prior to closing for deliberations, the military judge asked the Defense to provide the wording for the specification of the assault consummated by a battery offense to which Appellant had pleaded not guilty.[4] The Defense's draft specification alleged that Appellant unlawfully touched 1st Lt RVS on the pelvic region, rather than the vulva.

The Government concurred that this proposed specification was the specification that they were litigating. The military judge subsequently convicted Appellant of the LIO of assault consummated by a battery and acquitted him of the other alleged offenses.

II. DISCUSSION

A. Lesser-Included Offense

Appellant's first assignment of error is that the initially assigned military judge erred when she concluded that assault consummated by a battery was an LIO of abusive sexual contact. The Government argues that Appellant has waived, or at least forfeited, this issue.

1. Waiver and Forfeiture

Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 145, 156 (C.A.A.F. 2008). Waiver must be distinguished from forfeiture, which is "the failure to make the timely assertion of a right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). Because the rights at issue when determining whether one offense is an LIO of another are constitutional in nature, there is a presumption against waiver. *Girouard*, at 10.

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[3] The dismissed substantial incapacitation sexual contact offense is not relevant to this appeal.

[4] The military judge relied on Rule for Courts-Martial (R.C.M.) 910 in directing the Defense to draft specification of the lesser-included offense (LIO) to which Appellant had entered a plea of not guilty. R.C.M. 910 addresses situations where an accused pleads guilty to an LIO, not where an accused pleads not guilty. The Defense complied with the military judge's direction and provided the specification to which the Defense believed they were pleading not guilty.

While trial defense counsel entered a plea and provided a draft specification of the purported LIO, this did not amount to an intentional relinquishment of a known right. Appellant neither affirmatively asserted, nor requested, that the military judge consider assault consummated by a battery as an LIO of the greater offense. There was no discussion on the record about the impact of entering a plea to the LIO, nor was there a discussion about the impact of submitting a draft specification. At most, Appellant merely acquiesced without concession or discussion to the military judge's insistence that the assault consummated by a battery offense remained after the military judge determined that the offense, as alleged, did not state an offense of sexual assault. Consequently, Appellant did not intentionally relinquish a known right.[5]

Appellant did, however, forfeit the issue by failing to object. Because this issue was forfeited, we must determine if there was plain error. *See id.* at 11 (testing a military judge's instructions on an LIO for plain error when not objected to at trial); *United States v. Crews*, No. 20130766, 2016 CCA LEXIS 127 (Army Ct. Crim. App. 29 Feb 16) (unpub. op.) (finding waiver of an instruction on an LIO when the appellant failed to object, but also testing for plain error). "Under a plain error analysis, 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.'" *United States v. Tunstall*, 72 M.J. 191, 193–94 (C.A.A.F. 2013) (quoting *Girouard*, 70 M.J. at 11).

To determine if the military judge erred, and whether any error was plain or obvious, we must address whether assault consummated by a battery is an LIO of abusive sexual contact by bodily harm.

2. The Elements Test

Appellant argues that lack of consent is not an element of abusive sexual contact but is an element of assault consummated by a battery; therefore, assault consummated by a battery cannot be an LIO of abusive sexual contact.

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[5] Although the concurrence relies on *United States v. Smith*, 50 M.J. 451 (C.A.A.F. 1999) for the conclusion that Appellant's plea constitutes waiver, we find more persuasive the case of *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012) where our superior court instead applied a plain error analysis to whether an offense was an LIO. In *Wilkins*, as in the case before us, the military judge determined that the specification as alleged failed to state the charged offense because the alleged actions did not fit the statutory definition of "sexual contact." 71 M.J. 411, 412 (C.A.A.F. 2012). The military judge then erroneously held abusive sexual contact was an LIO of the alleged aggravated sexual contact. *Id.* The defense, however, did not object to the military judge's proposed LIO. *Id.* Our superior court applied plain error and ultimately concluded the appellant was not prejudiced by the error. *Id.* Recognizing that practitioners are still swimming in a sea of uncertainty regarding what constitutes an LIO for certain offenses, we elect to apply plain error here rather than waiver.

"We conduct a de novo review to determine whether one offense is a lesser included of another." *United States v. Riggins*, 75 M.J. 78, 82 (C.A.A.F. 2016).

"An accused may be found guilty of an offense necessarily included in the offense charged . . . ." Article 79, UCMJ, 10 U.S.C. § 879. We use the elements test to determine if one offense is an LIO of another offense. *Riggins*, 75 M.J. at 82–83. "Under the elements test, . . . [w]here the lesser offense requires an element not required for the greater offense, no instruction [regarding an LIO] is to be given.'" *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011) (quoting *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010)).

Our first task is to "determine the elements of the charged offense and the alleged LIO by applying the principles of statutory construction." *Id.* at 3. The elements in the *Manual for Courts-Martial* (*MCM*), while instructive, are not dispositive. Rather, the elements of an offense come from the wording of the statute as enacted by Congress. *See id.* at 3; *Alston*, 69 M.J. at 216. Moreover, the elements do not need to use identical language for one to be an LIO of another. *Alston*, 69 M.J. at 216. Instead, we apply the normal rules of statutory interpretation to "determine whether the elements of the [LIO] would necessarily be proven by proving the elements of the greater offense." *Riggins*, 75 M.J. at 83 (quoting *United States v. Gaskins*, 72 M.J. 225, 235 (C.A.A.F. 2013)).

a. Elements of Abusive Sexual Contact by Bodily Harm

The *MCM* lists the elements of abusive sexual contact by bodily harm as:

(1) That the accused engaged in sexual contact with another person; and

(2) That the accused did so by causing bodily harm to another person.

MCM, pt. IV, ¶ 45.b.(3)(b) (2008 ed.).

Sexual contact is "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." *Id.* at ¶ 45.a.(t)(2).

Bodily harm is "any offensive touching of another, however slight." *Id.* at ¶ 45.a.(t)(8). "[A]s a general matter, consent 'can convert what might otherwise be offensive touching into nonoffensive touching . . . .'" *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting *United States v. Greaves*, 40 M.J. 432, 433 (CMA 1994)).

Courts have wrestled with whether, and to what extent, lack of consent is an element under the 2007 version of Article 120. The statute states that consent and mistake of fact as to consent are "not an issue" but are an affirmative defense to abusive sexual contact. *MCM*, pt. IV, at ¶ 45.a.(r). In some contexts, courts have held that lack of consent is not an element. *See Riggins*, 75 M.J. at 83 (finding lack of consent was not an element of abusive sexual contact by

placing the victim in fear); *United States v. Neal*, 68 M.J. 289, 303 (C.A.A.F. 2010) (finding "without consent" was not an "implicit element" of aggravated sexual assault); *United States v. Barlow*, No. ACM 37981, 2014 CCA LEXIS 166, at 9 (A.F. Ct. Crim. App. 13 Mar. 2014) (unpub. op.) (finding lack of consent was not included in the elements of abusive sexual contact by placing the victim in fear). However, in other contexts, courts have held that the Government must prove a lack of consent beyond a reasonable doubt. *See United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011) (finding lack of consent was subsumed by the element of substantial incapacitation such that requiring the defense to prove lack of consent unconstitutionally shifted the Government's burden to prove substantial incapacitation to the defense).

The differences in these cases are the result of how the specific offenses are charged. While consent is not *necessarily* a part of the 2007 version of Article 120, the Government, by its charging decisions, may allege elements that necessarily encompass lack of consent. In such a situation, the Government, by proving all of the elements of the offense beyond a reasonable doubt, must necessarily also prove lack of consent beyond a reasonable doubt. Here, the Government charged abusive sexual contact under a bodily harm theory. Thus, we must determine whether proof of bodily harm necessarily results in lack of consent.

By charging abusive sexual contact under a bodily harm theory, the Government was required to prove that the touching was offensive. There is no situation where the Government could prove a touching was offensive without also proving the alleged victim did not consent to the touching. Stated differently, if an alleged victim consents to the touching, it can no longer be an offensive touching. *See Johnson*, 54 M.J. at 69. Thus, the Government was required to prove 1st Lt RVS's lack of consent to prove the abusive sexual contact.

b. Elements of Assault Consummated by a Battery

The *MCM* lists the elements of assault consummated by battery as follows:

(1) That the accused did bodily harm to a certain person; and

(2) That the bodily harm was done with unlawful force or violence.

MCM, pt. IV, at ¶ 54.b(2).

Bodily harm in this context is defined the same way it is defined for abusive sexual contact. *Bonner*, 70 M.J. at 3 (quoting *Johnson*, 54 M.J. at 69).

"Unlawful force or violence means that the accused wrongfully caused the contact, in that no legally cognizable reason existed that would excuse or justify the contact." *Id*.

Additionally, although not included in the text of Article 128 or listed as an element in the *MCM*, our superior court has held that "lack of consent is an

element of the offense of assault consummated by a battery." *Riggins*, 75 M.J. at 83 (citing *Johnson*, 54 M.J. at 69 n.3). This does not mean that consent is a separate element, unrelated to the elements of bodily harm and unlawful force or violence, but rather that lack of consent is necessarily found within the other elements of assault consummated by a battery.

c. Applying the Elements Test

As charged in this case, assault consummated by a battery was an LIO of abusive sexual contact. Proof of the elements for abusive sexual contact by bodily harm necessarily required proof of the elements for assault consummated by a battery. To prove the offensive nature of the touching, the Government was required to prove that 1st Lt RVS did not, in fact, consent to the touching. Had she consented, the contact could not have been offensive.

We find the instant case sufficiently distinguishable from *Riggins* on this point. In *Riggins*, the court distinguished proof of an alleged victim's *legal inability to consent due to fear* from proof that an alleged victim *did not, in fact, consent*. However, the court noted that this holding did not foreclose a case where assault consummated by a battery was an LIO when the abusive sexual contact specification placed "the accused on notice of fear of bodily harm and raising the issue of consent." *Riggins*, 75 M.J. at 85 n.7. The case before us presents that situation.

Appellant was on notice that consent was at issue from the moment charges were preferred. By charging the offense under a bodily harm theory, the Government alleged that the physical contact was offensive, bringing the issue of consent to the forefront. Appellant had several months to tailor his defense to the issue of consent and had even more time to tailor his defense to the LIO. The issue of consent was litigated throughout the trial. Appellant's primary theory at trial was that 1st Lt RVS consented to Appellant touching her that evening. In closing arguments, both parties argued her consent or lack thereof. Therefore, in this case, proof of bodily harm and lack of consent for the greater offense necessarily required proof of bodily harm and lack of consent for the lesser. Appellant was on notice that consent was at issue.

Riggins also expressed concern over whether proof of abusive sexual contact required proof that the touching was with unlawful force or violence. We find the case at hand is also distinguishable from *Riggins* on this point. In *Riggins*, the court concluded that abusive sexual contact by placing a victim in fear required proof of a mental state, whereas assault consummated by a battery required proof of unlawful force or violence—a physical contact. Here, both offenses required proof of a physical touching; thus, the concerns raised in *Riggins* are not present here.

In sum, the military judge did not err when she concluded that assault consummated by a battery was an LIO of abusive sexual contact as charged in this case. Because assault consummated by a battery was an LIO of abusive sexual contact as charged here, Appellant is not entitled to relief as to this issue.

d. Prejudice

Assuming, arguendo, that assault consummated by a battery was not an LIO of an offensive-touching abusive sexual contact, Appellant was not prejudiced by this error. This situation is similar to *United States v. Wilkins*, 71 M.J. at 414, where the court affirmed a conviction for an offense that was not an LIO when the appellant was on notice as to what he had to defend against at trial, was aware of the elements of the LIO, and when the defense counsel's trial strategy demonstrated that the appellant actually defended against all of the elements of the LIO. Here, the Defense was informed of the military judge's ruling identifying assault consummated by a battery as an LIO six months prior to trial. At trial, Appellant did not contest that there was a touching, but instead focused on whether the touching was consensual, whether it constituted a mistake of fact as to consent, and whether the victim was a credible witness. Appellant believed that he was defending himself against the LIO and fashioned his trial strategy accordingly. Consequently, regardless of whether assault consummated by a battery is an LIO, Appellant cannot prevail on appeal.

B. Sufficiency of the Evidence

Appellant argues that the evidence was factually and legally insufficient in two respects: (1) the evidence was insufficient to show that Appellant touched 1st Lt RVS's vulva (as opposed to her pelvic region); and (2) Appellant launches a more generalized attack on 1st Lt RVS's credibility. As to the former, we find that Appellant was found guilty of touching 1st Lt RVS's "pelvic region," and, as to the latter, we reject his attacks on 1st Lt RVS's credibility. We find Appellant's conviction both factually and legally sufficient.

We review issues of factual and legal sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of legal and factual sufficiency is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency 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 *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In applying this test, "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).

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." *Turner*, 25 M.J. at 325. In conducting this review, 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.

We must first determine the specific offense Appellant was convicted of before we can determine whether that offense was legally and factually sufficient. In doing so, we must determine, with specificity, what touching constituted the bodily harm as alleged in the greater offense.

In ruling on the Defense motion for failure to state an offense, the military judge concluded the term pelvic region included areas not encompassed by the statutory definition of sexual contact and so it did not state an offense of abusive sexual contact. However, she determined that although "pelvic region" was included in the portion of the specification alleging the sexual contact, the bodily harm was more narrowly alleged as Appellant touching his penis to her vulva. Thus, she concluded, "The Defense is placed on sufficient notice of the [LIO]." Though not specifically discussed on the record, the LIO of assault consummated by a battery is based upon the alleged bodily harm (in this case, vulva) rather than how the Government chose to define the sexual contact (in this case, the pelvic region). Consequently, the LIO of assault consummated by a battery, considering how the greater offense was alleged, was as follows:

> Appellant did, at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, unlawfully touch 1st Lt RVS's *vulva with his penis*.

Appellant's arguments before this court are premised on the assumption that this was the offense of which he was convicted. This assumption is misplaced because of what occurred at the subsequent trial regarding that LIO.

When trial resumed with a different military judge, Appellant pleaded not guilty to the LIO of assault consummated by a battery. At the direction of the military judge, the Defense provided a draft specification of the LIO that they pleaded not guilty to and that they were defending against:

> Appellant did, at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, unlawfully touch 1st Lt RVS *on the pelvic region with his penis*.

Although the language of the specification provided by the Defense differed from the actual LIO as alleged, the Government agreed with the Defense as to the specification that they were litigating. We therefore conclude that, when the military judge subsequently found Appellant guilty of an assault consummated by a battery, he was found guilty of the modified specification as presented by the Defense.

As we have concluded that the military judge, at the request of the Defense and with the concurrence of the Government, found Appellant guilty of a specification that differed slightly from that alleged, we must consider whether this was permissible. We conclude that the Defense's submission of the modified specification constituted a request for a minor change and, with the concurrence of the Government, it was permissible for the military judge to accept this change.

"The purpose of charges and specifications is to provide notice to an accused as to the matters against which he must defend and to protect him against double jeopardy." *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990). "[Rule for Courts-Martial (R.C.M.)] 603 provides that major '[c]hanges or amendments to charges or specifications . . . may not be made over the objection of the accused unless the charge or specification affected is preferred anew.'" *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012). Minor changes "are any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." R.C.M. 603.

Because the specification alleging assault consummated by battery by touching 1st Lt RVS's pelvic region was proposed by the Defense, we find that it was not likely to mislead Appellant. Furthermore, substituting "pelvic region" for "vulva" in an assault consummated by a battery specification neither increased the maximum punishment nor changed the nature or identity of the offense. *See, e.g.*, *United States v. Berry*, 16 C.M.R. 842 (A.F.B.R. 1954) (holding that substituting "charge and flail . . . with his hands" for "grasp . . . on the throat with his hand" was not a fatal variance). Thus, we find that the Defense's specification request constituted a minor change that was permitted by the military judge.

Even if we concluded this was a major change, the change would still be permissible. Not only did Appellant fail to object to the change, he proposed it. As R.C.M. 603 only prohibits major changes when done over the objection of

the accused, we find that this change, even if a major change, was permissible.[6] Although it would have been preferable for the military judge to ask Appellant, as opposed to his counsel, whether he consented to this change in the wording of the specification, under these circumstances we find that the change in the location of the battery from "vulva" to "pelvic region" was not done over the objection of Appellant.

Having concluded that the specification alleged a battery of 1st Lt RVS's pelvic region, we have no difficulty in finding it both factually and legally sufficient. We are not persuaded by Appellant's renewed attacks on 1st Lt RVS's memory, nor are we persuaded by his argument that the acquittal of attempted sexual contact was inconsistent with the conviction for assault consummated by a battery. Viewing the evidence in a light most favorable to the Government, we find that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt of each element of an assault consummated by a battery. Furthermore, after weighing all the evidence admitted at trial and making allowances for the fact that we did not see or hear the witnesses, we are convinced beyond a reasonable doubt that Appellant is guilty of this offense.

C. Sentence Appropriateness

Appellant also argues that a dismissal is an inappropriately severe sentence for a conviction of assault consummated by a battery.

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ.

In determining whether a sentence should be approved, our authority is "not legality alone, but legality limited by appropriateness." *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (quoting *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957)). This authority is "a sweeping congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)). This task requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*,

[6] The non-binding discussion following R.C.M. 603 indicates that a major change requires a new R.C.M. 405 investigation "if the charge as amended or changed was not covered in the prior investigation." Even if this was a major change made over the objection of the accused, the original R.C.M. 405 hearing thoroughly covered this issue.

27 C.M.R. 176, 180–81 (C.M.A. 1959)). While we have great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988).

Appellant renews the argument made at trial that a dismissal is not appropriate for this officer who had otherwise been a "model airman" during his sixteen-year career. Moreover, Appellant argues that the nature of the offense is not as aggravating when considering the arguments he raised while challenging the legal and factual sufficiency of the evidence.

We do not find the sentence to be inappropriately severe for the serious offense Appellant committed. Although this was not a sexual assault offense, it nevertheless involved the touching of another Air Force officer's intimate body part without her consent. She testified that this intrusion has caused her to be less trusting and decreased her view of Air Force officers. She credibly testified that this impact persisted through the four years from the assault until the trial.

We have considered this particular Appellant, the nature and seriousness of the offense, Appellant's record of service, and all other matters contained in the record of trial. We find that the approved sentence was within the discretion of the military judge and convening authority, was legally appropriate based on the facts and circumstances of this particular case, and was not inappropriately severe.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).[7] Accordingly, the approved findings and sentence are **AFFIRMED**.

DREW, Chief Judge, concurring in the result:

I write separately to indicate that, while I fully agree with the majority that the military judge did not err in determining the lesser included offense (LIO), I would hold that Appellant's actions—including his decision to specifically

[7] The court-martial promulgating order (CMO) notes that Appellant was convicted of the LIO of assault consummated by a battery, but there is no indication that the specification was amended to reflect the specification as modified by Appellant and with the consent of the Government. We order a corrected CMO to accurately reflect that Appellant was found guilty of assault consummated by a battery for touching 1st Lt RVS's pelvic region with his penis.

plead "not guilty to the lesser included offense of Assault consummated by a Battery" at trial and his further clarification by drafting the specific LIO specification to which he pleaded not guilty—constituted affirmative waiver (as opposed to forfeiture) of the issue of whether an LIO was reasonably raised. *See United States v. Smith*, 50 M.J. 451, 455-56 (C.A.A.F. 1999).

Unlike the appellant in *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012), who merely failed to object to the LIO determined by the military judge, Appellant here affirmatively authored each and every word of the specification of which on appeal he now complains. "No magic words are required to establish a waiver." *Smith*, 50 M.J. at 456. If error it be, it was invited error of Appellant's own making. *United States v. Wilson*, 7 U.S.C.M.A. 713, 716, 23 C.M.R. 177, 180 (1957). *Cf. United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016). Accordingly, I would not have tested for plain error.

I would also affirm the approved findings and sentence.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court