

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RYAN G. DESIERTO
HOSPITALMAN (E-3), U.S. NAVY**

**NMCCA 201200046
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 October 2011.

Military Judge: CAPT Kevin R. O'Neil, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

For Appellant: LT Kevin S. Quencer, JAGC, USN.

For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

24 October 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of abusive sexual contact,¹ one

¹ The Government's brief and the convening authority's action refer to both specifications under Article 120, UCMJ, as "aggravated sexual assault," but Specification 1 of Charge I states the offense of abusive sexual contact. All parties at trial understood the distinction, Record at 26-27, and the

specification of aggravated sexual assault, one specification of forcible sodomy, and one specification of assault consummated by a battery, in violation of Articles 120, 125, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 928. On 7 October 2011, the members sentenced the appellant to confinement for 3 months and a bad-conduct discharge. On 25 January 2012, the convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant assigns one error: that the specification under Article 128 failed to state an offense because it alleged assault consummated by a battery, not assault by attempt or offer. According to the appellant, attempt and offer are the two forms of assault criminalized by Congress, and assault consummated by a battery is a distinct offense not found in the text of Article 128.

After carefully considering the record of trial² and the pleadings of the parties, we conclude that the sole specification of Charge III states the offense of assault consummated by a battery under Article 128. The findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was a hospital corpsman assigned to the Naval Medical Center, San Diego, where he met Lance Corporal (LCpl) G, a ligament surgery patient. A platonic relationship developed in advance of the surgery. On the day of the surgery, which involved anesthesia and left LCpl G in a cast and sling and taking Percocet for pain, the appellant visited her in her barracks room sometime after 1830. She told him that she was tired, turned on some music, and laid down in her bed and quickly fell asleep.

LCpl G's next memory was waking up in a different physical position with her skirt up and her underwear missing. The

military judge properly referred to Specification 1 of Charge I as abusive sexual contact in his instructions, Record at 774.

² We note that the record is missing Appellate Exhibit LXII, described in the case index as a draft of the military judge's instructions on findings. The record does contain those instructions in their final form in AE LXIII. There is no issue or claim of prejudice surrounding this exhibit at the trial or on appeal, and we do not find this to be a substantial omission. *United States v. Allende*, 66 M.J. 142, 143-44 (C.A.A.F. 2008).

appellant was near her bed, and LCpl G believed that he had sexually assaulted her. She screamed at the appellant to leave, but he began looking for his wallet, so she tried to run out of the room ahead of him. In response, the appellant grabbed LCpl G's wrist and tried to pull her back into the room. In a statement to the Naval Criminal Investigative Service, the appellant admitted penetrating LCpl G's vagina with his fingers and tongue, and touching her vagina with the tip of his penis. His admissions were corroborated by DNA evidence.

Failure to State an Offense under Article 128

The appellant argues that the sole specification of Charge III fails to state an offense because it alleges assault consummated by a battery, an offense not named in the text of Article 128. The legal sufficiency of a specification is a question of law, which we review *de novo*. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). We hold that the specification does state an offense. The appellant committed an attempt-type assault when he reached out to grab LCpl G, which he then consummated by actually grabbing her.

In *United States v. Weller*, No. 201100043, 2012 CCA LEXIS 154, unpublished op. (N.M.Ct.Crim.App. 30 Apr 2012), *rev. denied*, ___ M.J. ___, 2012 CAAF LEXIS 937 (C.A.A.F. Aug. 10, 2012), we addressed whether "assault by battery" is a theory of assault under Article 128, and we concluded that it was. The Court of Military Appeals affirmed a conviction under this theory at least as early as 1963 in an assault with a dangerous weapon case, *see United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963), and our appellate courts have done so repeatedly since then. *See, e.g., United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993).

The fact that the appellant committed a battery did not convert his conduct into a distinct offense requiring its own article. Instead, the battery consummated the attempt just made. *See id.* at 395 ("[O]ne means of proving an assault is to prove a battery."); *cf.* Art. 80(c), UCMJ ("Any person . . . may be convicted of an attempt . . . although it appears on the trial that the offense was consummated."). The appellant's "grab," described in the specification, began with an attempt and ended with a battery.³

³ An attempt theory of assault also requires proof of the appellant's "specific intent to inflict bodily harm". *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 54(c)(1)(b)(i). LCpl G testified that once the appellant grabbed her, he tried to pull her back into the room, Record at

The text of Article 128 supports our conclusion that the statute criminalizes assaults consummated by a battery. Subparagraph (a) does not use the word "battery," but it states that an assault is complete "*whether or not the attempt or offer is consummated.*" Art. 128(a), UCMJ (emphasis added). "Whether or not" plainly comprehends both assaults that result in batteries, and those that do not.

Both sets of assaults are still assaults; the battery distinguishes them at sentencing. The President imposed a higher maximum punishment for consummated assaults, and his choice to do so is given considerable persuasive authority. *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010). That authority does not extend to the creation of new criminal offenses, but the President has not done that here. Instead, he made the logical choice to prescribe higher punishment in cases of actual physical harm.

The President's explanatory paragraphs concerning battery simply "offer[] guidance to judge advocates under his command regarding potential violations of the article." *Id.* at 472. Here, the Government followed that guidance by drafting a specification that alleged the assault and the battery as a factor in aggravation of the assault. RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The explanatory paragraphs simply defined terms;⁴ they did not create a new offense.

Conclusion

The Government alleged and proved that the appellant assaulted LCpl G by grabbing her wrist. We are not persuaded by the appellant's contention that only offers and attempts are crimes, whereas offers or attempts consummated by a battery are not crimes. The findings and the sentence are affirmed. The supplemental court-martial order shall properly reflect that Specification 1 under Charge I states the offense of abusive sexual contact.

For the Court

390, which any reasonable fact-finder could find demonstrates his intent to touch her.

⁴ The terms "attempt" and "offer" are themselves defined in the President's explanatory paragraphs. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 54(c)(1)(b).

R.H. TROIDL
Clerk of Court