

**IN THE UNITED STATES COAST GUARD  
COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	21 JUNE 2018
Appellee	)	
	)	REPLY BRIEF
	)	
v.	)	Dkt. 1460
	)	Case No. CGCMSP 24962
	)	Before McClelland, Judge, Brubaker
	)	
Francisco J. Pacheco	)	Tried at Alameda, CA by a special court-
Machinery Technician First Class	)	martial convened by Commander, Coast Guard
U. S. Coast Guard,	)	Pacific Area, on 31 July – 04 August 2017.
Appellant	)	

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
COAST GUARD COURT OF CRIMINAL APPEALS**

COMES NOW the Appellant, through undersigned appellate defense counsel, pursuant to Rule 23 of the Court of Criminal Appeals Rules of Practice and Procedure, provides the following Reply to the Government’s Answer.

**I.**

**WHETHER THE EVIDENCE IS FACTUALLY AND  
LEGALLY SUFFICIENT TO SUPPORT A CONVICTION  
FOR THE SOLE CHARGE AND SPECIFICATION OF  
ABUSIVE SEXUAL CONTACT.**

**A. The evidence pointed to in the government’s brief is not sufficient to prove all the elements of the alleged offense beyond a reasonable doubt.**

The government relies on two misguided claims to convince this Court of the factual sufficiency of MK1 Pacheco’s conviction. These misguided claims are: (1) the alleged victim’s testimony is reliable evidence of how she was touched and that MK1 Pacheco was the individual who touched her and (2) corroborated, weak circumstantial evidence is sufficient to prove MK1 Pacheco committed the alleged offense. The government’s claims ignored the uncorroborated

evidence on the elements of the alleged offense. As a result of the government's flawed reliance on uncorroborated and weak circumstantial evidence, MK1 Pacheco's conviction is legally and factually insufficient.

**1. The government's claims rely on non-credible and uncorroborated testimony of the alleged victim.**

The government's proof of the alleged contact relies mainly on the alleged victim's testimony. But this testimony is fatally flawed by the alleged victim's numerous inconsistent statements, made both in and out of court, concerning how MK1 Pacheco allegedly touched her. Her in-court testimony was so inconsistent the Military Judge noted on the record that there was "ambiguity associated with the in-court testimony vis-a-vis what was touched and how it has been described."<sup>1</sup> These inconsistent statements demonstrate GM3 J.D. was not a credible witness. Yet the government relied heavily on her untrustworthy testimony to argue that MK1 Pacheco was guilty beyond a reasonable doubt of the alleged offense. In its brief, the government asked this Court to affirm MK1 Pacheco's conviction without addressing GM3 J.D.'s lack of credibility. Unlike the government, however, this Court cannot ignore GM3 J.D.'s lack of credibility.<sup>2</sup>

The government's claims are also misguided as they assume the alleged victim properly identified MK1 Pacheco as the individual who touched her. But GM3 J.D. did not see MK1 Pacheco's hand in her pants.<sup>3</sup> And while the government argued "there [was] no requirement

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<sup>1</sup> R. at 665

<sup>2</sup> In conducting its legal and factual sufficiency review, this Court "may weigh the evidence, judge the credibility of the witnesses, and determine controverted questions of fact." *United States v. Cole*, 31 M.J. 270, 272 (C.A.A.F. 1990) (quoting 10 U.S.C. § 866). "This awesome, plenary, *de novo* power of review grants [this Court the] authority to, indeed, 'substitute its judgment' for that of the military judge . . . and that of the court members." *Id.*

<sup>3</sup> R. at 509.

that the victim...observe an assailant touch them in order for the contact to have occurred,” such argument misses the point.<sup>4</sup> There is a requirement for the government to prove the identity of the accused as the assailant.<sup>5</sup> Despite this having occurred in a crowded bar and amongst acquaintances, no one—not even GM3 J.D.— saw the touching take place. There were several people in the area able to have committed the touching, and none of the witnesses testified they saw MK1 Pacheco commit the alleged offense.<sup>6</sup> The government’s argument that GM3 J.D. was “best situated” to describe MK1 Pacheco’s alleged actions is dubious because GM3 J.D. had her back to MK1 Pacheco and could not see him.<sup>7</sup>

Despite the fact that GM3 J.D. was unable to see MK1 Pacheco when the alleged contact occurred, the government nevertheless argued that “GM3 J.D. was able to identify [MK1 Pacheco] as the perpetrator of the touch as she immediately turned around and observed [MK1 Pacheco] standing a foot or two behind her and smiling.”<sup>8</sup> The government’s logic was that MK1 Pacheco’s smile and proximity were sufficient to prove, beyond a reasonable doubt, that he was, in fact, the assailant. In support of this misguided logic the government tried to corroborate GM3 J.D.’s testimony with video footage from the time of the touching. However, the video footage was blurry and did not show MK1 Pacheco smiling. MK1 Pacheco was not facing the video at the time of the alleged contact and a monitor at the bar obscured MK1 Pacheco’s lower

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<sup>4</sup> Appellate Brief at 5.

<sup>5</sup> See, e.g., *United States v. Lopez*, No. 880346, 1989 CMR LEXIS 231, at \*3 (N.M.C.M.R. Mar. 27, 1989) (setting aside Appellant’s convictions after finding that the evidence did not “prove[] the appellant’s identity as the assailant beyond a reasonable doubt”).

<sup>6</sup> R. at 746, 800, 823, 910, 1033, 1091.

<sup>7</sup> Appellee’s Brief at 5; PE 3 at 10:32:55

<sup>8</sup> Appellee’s Brief at 5.

face. Below, the Court can see screen captures of Prosecution Exhibit 3 showing the seconds following the alleged contact.<sup>9</sup>



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<sup>9</sup> Note: The screen captures of PE 3 include circles entered by Appellant Counsel. The circles were added in order to assist the Court in identifying the Appellant and alleged victim. The Appellant is surrounded with a solid, white circle. The alleged victim is circled by white dashes.



Based on these blurred images, the government has asked this Court to believe that MK1 Pacheco was smiling and that his smile confirms, beyond a reasonable doubt, that he committed a sexual contact. This assertion is both unreasonable and unsupported.

**2. The government's claims relied on video surveillance evidence to corroborate weak circumstantial evidence and ignored uncorroborated evidence that addresses the elements of the alleged offense.**

The government's argument relied on GM3 J.D.'s testimony and cited the video surveillance as corroboration of her version of events. However, the video surveillance merely corroborates a series of events before and after the alleged contact occurred. The Military Judge did not convict MK1 Pacheco of the events surrounding the alleged contact. The conviction is of an alleged abusive sexual contact, and that contact is not corroborated by either video surveillance footage or witness testimony.

**a. The government's claims placed misguided reliance on the video surveillance to corroborate weak circumstantial evidence.**

The government refers to the video to show MK1 Pacheco was "drinking by himself in the moments leading up to the incident,...sitting in arm's length of GM3 J.D."<sup>10</sup> At this point, the government fails to mention the many other individuals also sitting, standing or dancing in arm's length around GM3 J.D. One of those individuals is dancing just to GM3 J.D.s right and was in a prime position to also touch GM3 J.D. or see the alleged contact occur. The government further refers to the video surveillance to show that "GM3 J.D. return[s] to her seat at the bar and pay[s] before then departing the bar."<sup>11</sup> While the video surveillance corroborates this weak circumstantial evidence, it does not corroborate testimony on the alleged offense. That is why the government does not reference a moment in the video footage in which one can see

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<sup>10</sup> Appellee's Brief at 5.

<sup>11</sup> Id.

MK1 Pacheco commit the alleged offense. The government focuses on all the events surrounding the alleged contact because the video surveillance does not capture the alleged offense.

The government conceded this point. The “footage could not capture Appellant’s touch of GM3 J.D.’s buttocks because it was below her waistline and therefore out of the camera’s perspective.”<sup>12</sup> But then the government used its concession to make a logically flawed argument that the camera’s inability to capture the alleged contact “does not mean the touch did not happen.”<sup>13</sup> While true, such an argument does not help the government meet its burden of proof. “The lack of evidence is not evidence . . . of wrongdoing.”<sup>14</sup> To the contrary, it is speculation. It is equally true that the camera’s inability to capture the alleged contact means the touch did not happen. And speculating that the absence of evidence demonstrates MK1 Pacheco’s guilt does not provide this Court with evidence beyond a reasonable doubt of his guilt.

b. The government’s claims ignored the uncorroborated evidence introduced to prove the elements of the alleged offense.

While the footage does not show MK1 Pacheco touching GM3 J.D., it does capture the alleged time frame in which the alleged contact occurred. The government contends that MK1 Pacheco placed his hand between GM3 J.D.’s “underwear briefs, thermal ‘long’ underwear, [and] jeans” in order to touch her buttocks.<sup>15</sup> Based on the evidence offered by the government, MK1 Pacheco apparently completed this maneuver in a span of two seconds.<sup>16</sup> Applying

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<sup>12</sup> *Id.*.

<sup>13</sup> *Id.*

<sup>14</sup> *Wheatley v. Marietta Coll.*, 48 N.E. 3d 587, 614 (Ohio Ct. App. Feb. 16, 2016).

<sup>15</sup> Appellee’s Brief at 2.

<sup>16</sup> *Id.* PE 3 at 10:32:53 - 10:32:55

common sense, however, such a maneuver is practically impossible to complete in that timeframe.

The government failed to see the video for what it was and ascribed meaning to it in a way that would bolster GM3 J.D.'s incredible story. For example, consider the statements GM3 J.D. testified that she made to MK1 Pacheco. The video surveillance has no audio. It is not capable of corroborating any words that GM3 J.D. stated to MK1 Pacheco.<sup>17</sup> Moreover, no bystanders heard any statements that she made.<sup>18</sup>

The government argues that there is no requirement to corroborate GM3 J.D.'s testimony in order to prove the charged offense beyond a reasonable doubt.<sup>19</sup> However, while that may be true in principle, the lack of any direct or corroborative evidence of the actual charge is what creates reasonable doubt and makes the conviction factually insufficient.<sup>20</sup>

When this Court reviews the video, it will not be able to find beyond a reasonable doubt that MK1 Pacheco directly touched GM3 J.D.'s buttocks.

**B. There is reasonable doubt as to whether MK1 Pacheco is guilty of the charged offense.**

This Court can only approve MK1 Pacheco's conviction if it finds, beyond a reasonable doubt, that MK1 Pacheco directly touched GM3 J.D.s buttocks.<sup>21</sup> The below chart shows that this Court, upon reviewing the evidence, cannot be satisfied of his guilt beyond a reasonable doubt. The chart outlines the elements of the offense with which MK1 Pacheco was charged, the government's theory of proof, and the proof offered by the government to do so. The chart

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<sup>17</sup> Prosecution Exhibit (PE) 3.

<sup>18</sup> R. at 511, 853, 887, 977.

<sup>19</sup> Appellee's Brief at 6.

<sup>20</sup> *Id.*.

<sup>21</sup> *United States v. Miller*, 62 M.J. 471, 472 (C.A.A.F. 2006).

shows that the proof offered by the government does not support a finding of guilty beyond a reasonable doubt.

<b>Elements of the Offense</b>	<b>Theory of Proof</b>	<b>Offered By Government</b>
Sexual Contact – MK1 Pacheco touched, directly, the buttocks of GM3 J.D.	MK1 Pacheco as assailant	<ul style="list-style-type: none"> <li>• No eye-witness.</li> <li>• Victim did not see MK1 Pacheco commit offense.</li> <li>• No video surveillance.</li> </ul>
	MK1 Pacheco touched GM3 J.D.	<ul style="list-style-type: none"> <li>• Alleged victim’s testimony.</li> <li>• No eye-witness.</li> <li>• No video surveillance.</li> </ul>
	MK1 Pacheco directly touched GM3 J.D.’s buttocks – through jeans, thermal underwear and briefs within 2 seconds	<ul style="list-style-type: none"> <li>• Alleged victim’s testimony.</li> <li>• No eye-witness or video surveillance.</li> </ul>
Offensive touching	GM3 J.D. yelling at MK1 Pacheco	<ul style="list-style-type: none"> <li>• Alleged victim’s testimony.</li> <li>• Not heard by any witness.</li> <li>• Not heard on video surveillance</li> </ul>
Intent – to arouse or gratify his sexual desire	MK1 Pacheco’s smile	<ul style="list-style-type: none"> <li>• Alleged victim’s testimony.</li> <li>• Smile not clearly captured on video surveillance.</li> </ul>

### **Conclusion**

The conviction against MK1 Pacheco is not factually or legally sufficient because of the reasonable doubt prevalent throughout the government’s case. The alleged victim lacked credibility and neither audio-visual evidence nor witness testimony corroborated her testimony. The government’s case against MK1 Pacheco essentially pivots on his smile. And on the basis of a smile, this Court cannot be convinced beyond a reasonable doubt that MK1 Pacheco is the assailant or that his smile was indicative of his intent to arouse himself. Furthermore, it would have been practically impossible for MK1 Pacheco to directly touch GM3 J.D.’s buttocks in the timeframe the government alleged. Considering the evidence, this Court cannot be convinced that MK1 Pacheco is guilty beyond a reasonable doubt.

WHEREFORE, MK1 Pacheco respectfully requests this Court set aside the finding of guilty to the sole Charge and Specification.

DATE: 21 June 2018

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#### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via email on 21 June 2018.

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