IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Private (E-2)	)	Crim. App. Dkt. No. 20140766
JEFFRY A. FELICIANO, JR.,	)	
United States Army,	)	USCA Dkt. No. 17-0035/AR
Appellant	)	

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

Issues Presented

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO INSTUCT THE PANEL ON THE DEFENSE OF VOLUNTARY ABANDONMENT, AND IF SO, WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

II.

WHETHER THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE PANEL THAT APPELLANT'S MISTAKE OF FACT AS TO CONSENT MUST BE BOTH HONEST AND REASONABLE, AND IF SO, WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10

U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On August 6, September 19 and 26, and October 1 and 5-8, 2014, a military judge sitting as a general court-martial tried and convicted Private Jeffry A. Feliciano, Jr., [hereinafter appellant] in accordance with his pleas, of disrespect toward a noncommissioned officer, disobeying a noncommissioned officer, wrongful use of marijuana (two specifications) and disorderly conduct, in violation of Articles 91, 112a, and 134, UCMJ, 10 U.S.C. § 891, 912a, 934 (2012). A panel with enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of attempted aggravated sexual assault in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2006). The panel sentenced appellant to reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge. The convening authority approved the sentence as adjudged.

On August 22, 2016, the Army Court *conditionally* dismissed Specification 1 of Charge I as an unreasonable multiplication of charges with Specification 2 of Charge I and affirmed only so much of the finding of guilty of Specification 2 of Charge I as related to the act of pulling down the pants of the victim, rather than pulling down her pants *and underwear*. (JA 5, 10). The Army Court affirmed the

remaining findings of guilty and affirmed the sentence as approved by the convening authority. (JA 10). Appellant was notified of the Army Court's decision and subsequently petitioned this Court for review on March 21, 2016. On December 5, 2016, this Honorable Court granted appellant's petition for review.

Statement of Facts

On January 22, 2011, appellant invited Mr. RS (then Specialist RS) to his barracks room for a few drinks. (JA 23). Later in the evening, appellant texted Ms. KLF (then PV2 KLF) and she joined them in appellant's room. (JA 24). All three went to a bar, where they continued drinking. They later agreed to return to the barracks. (JA 26).

Upon returning to post, they went to appellant's barracks room where they continued drinking, talking and smoking cigarettes. (JA 27, 37-39). Appellant was very drunk, stumbling, and slurring his speech. (JA 39). Ms. KLF then invited both appellant and Mr. RS to lie in appellant's bed. (JA 28). Ms. KLF "muscled" Mr. RS out of the bed. (JA 42). Mr. RS decided to sleep in appellant's chair with his back towards the bed. (JA 28-29). Mr. RS dozed off. (JA 44).

Mr. RS explained that he heard kissing noises. (JA 45). He turned around in the chair and saw appellant on top of Ms. KLF. (JA 29). Appellant was "kissing her on the neck and starting to pull his britches down." (JA 29). Mr. RS also noticed that Ms. KLF's pants were "around her knees," but did not see who pulled

Ms. KLF's pants down. (JA 29, 49). Mr. RS further testified that Ms. KLF said "no, no, no" when appellant was on top of Ms. KLF, but admitted on cross examination that he had not previously told investigators that Ms. KLF said "no" and that what was contained in his sworn statement to investigators was the whole truth. (JA 30, 46). Mr. RS further testified that when he initially turned around, Ms. KLF's eyes were not open and she was "passed out." (JA 31, 33).

Mr. RS testified that he then got appellant's attention. (JA 30, 51). He stated that he told appellant "that ain't right . . . that what [appellant] was doing was rape. [Mr. RS] told [appellant] that if he continued along that they would definitely get him for rape, and that will be 25 to life and that people would probably also rape him in jail." (JA 30). Mr. RS testified "[Appellant] looked at me and pretty much said that 'You know what? You're right.' And then, he got up off of her." (JA 31, 51). The two of them then walked into the common area and continued talking. (JA 31, 51). A couple of minutes later, Ms. KLF joined them in the kitchen. (JA 52). Ms. KLF appeared calm. (JA 52). Ms. KLF and Mr. RS eventually left and went back to Ms. KLF's barracks room where Mr. RS. spent the night in bed with Ms. KLF. (JA 54). Mr. RS did not report the alleged crime. (JA 54).

A CID investigator testified that appellant admitted that after going out for drinks appellant, Mr. RS and Ms. KLF returned back to appellant's barracks room where they continued drinking. (JA 65-67). Appellant admitted that all three of

them got in bed together. (JA 67). The agent testified appellant indicated that they were in bed together and Mr. RS asked appellant to come talk with him in the kitchen where Mr. RS informed appellant about sexual assault and that this could get appellant in trouble. (JA 68).

The investigator also testified that appellant denied having sexual intercourse with Ms. KLF, pulling her pants down, touching her breasts, pulling his own pants down to expose his penis, and attempting to insert his penis into Ms. KLF's vagina. (JA 71- 72). The agent testified that appellant stated that he did not really have feelings for Ms. KLF at that moment, but appellant did admit that he had a partial erection and that he thought Ms. KLF was sexy. (JA 69, 75-76).

The government called a sleep expert, Dr. Kwon, to testify that alcohol as a depressant complicates normal transitions from sleep into wakefulness. (JA 83). For example, it is possible (1) for an individual to experience external stimuli in deep, slow wave, sleep without waking them, to include removal of clothing and being touched; (2) for individuals to respond verbally while asleep; and (3) for an individual to engage in physical motions while asleep. (JA 83-85). On cross-examination, Dr. Kwon admitted that stimulants such as the nicotine in cigarettes make it more likely that one would stay awake. (JA 86). However, ongoing stimulation would make it unlikely that someone would go back to sleep. (JA 88).

Further, based on his review of the evidence, it was most likely that Ms. KLF was in a light sleep. (JA 91).

Ms. KLF did not testify during the government's case. Rather, the defense called Ms. KLF as a witness. (JA 100). Ms. KLF testified that she was not very intoxicated on the night of the alleged assault and later deserted the Army. (JA 101). The defense called several witnesses to suggest that Ms. KLF did not want to deploy and reported the alleged assault to get out of deploying. (JA 118-124).

The defense called Mr. RS's former company commander, platoon leader, direct supervisor in charge of the motor-pool where Mr. RS worked, platoon sergeant, and an additional Sergeant First Class who was a part of Mr. RS's platoon. (JA 104-117, 125-136). Each testified that Mr. RS was either untruthful or untrustworthy, but that they did not ever catch Mr. RS directly lying to them. (JA 104-117, 125-136). The defense also cross-examined the government's sleep expert who agreed that if Mr. RS had dozed off, he could have been disoriented the moments after he woke up and that disorientation could have affected his perception. (JA 95). The defense sought to show that Mr. RS had a penchant for being untrustworthy and exaggerating and portrayed himself as the hero of his own story, an individual who saved the day and got the girl in the end. (JA 155-156).

The defense did not request an instruction and the military judge did not instruct the panel on voluntary abandonment. The military judge informed the parties that

Obber, 66 M.J. 393, 405 (C.A.A.F. 2008)). When an affirmative defense is raised by the evidence, an instruction is required. *Id.* (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). An affirmative defense is raised by the evidence when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *Id.* (quoting *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). Waiver does not apply to "required instructions' such as . . . affirmative defenses[.]" *Id.* (citing *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (quoting *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988)).[1] The test for determining whether an error with respect to a required instruction was harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the defendant's conviction or sentence." *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005); *See also United States v. Dearing*, 63 M.J. 478, 484 (C.A.A.F. 2006). An error is not harmless beyond a reasonable doubt when "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *Id.* (citing *United States*

[1] Oral argument is pending in a petition this Court granted addressing: Whether the Army Court erred in refusing to apply de novo review for failure to instruct on an affirmative defense raised by the evidence, and instead found forfeiture and applied a plain error analysis, contrary to this court's precedent in *Taylor*, 26 M.J. 127; *Davis*, 53, M.J. 202; and *Stanley*, 71 M.J. 60. *See United States v. Davis,* 75 M.J. 296 (C.A.A.F. 2016).

v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Law and Argument

A. The military judge failed to instruct the panel on the defense of voluntary abandonment and this error was not harmless beyond a reasonable doubt.

Voluntary abandonment is an affirmative defense to a completed attempt offense. *United States v. Schoof, 37 M.J. 96, 103 (C.A.A.F. 1993)*; *United States v. Byrd, 24 M.J. 286, 290 (C.M.A. 1987)*. The President expressly recognized this affirmative defense in the Manual for Courts-Martial [*MCM*], stating:

> It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

MCM, Pt. IV, para. 4(c)(4). The defense is raised when the accused abandons his effort to commit a crime "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." *Schoof, 37 M.J. at 104* (citation omitted); *United States v. Rios, 33 M.J. 436, 440-41 (C.M.A. 1991)*. Because it is an affirmative defense, the burden rests on the prosecution, to rebut the defense beyond a reasonable doubt. R.C.M. 916(b)(1).

In *Davis*, this Court held the military judge in that case should have instructed the panel on two distinct theories of defense of property that were "in issue" because they were raised by some evidence that the members could have relied upon: defense of property in the context of an imminent threat to the property; and defense of property in the context of preventing a trespass or ejecting a trespasser from the property. 73 M.J. 268, 271 (C.A.A.F. 2014). Under the former theory, an accused must have had a reasonable belief that his property was in immediate danger and must have actually believed that the force used was necessary. *Id.* Under the latter theory, an accused may only use as much force as is reasonably necessary to remove an individual after requesting and allowing the individual a reasonable amount of time to leave. *Id.* at 272.

At trial, SGT Davis was convicted of one specification of simple assault with an unloaded firearm for brandishing a firearm on a fellow Soldier that was on his property. *Id.* at 229-70. This Court held:

> [SGT Davis's] testimony that he was worried about what would happen to his property if he got knocked out was "some evidence" that members could have relied upon to find that [SGT Davis] believed his property was in immediate danger. Similarly, [SGT Davis's] testimony that he wanted [the fellow soldier] to leave his property was "some evidence" that the members could have relied upon to find that [SGT Davis] sought to use force to remove a trespasser from his property.

Id. at 272-73.

This failure to give a defense of property instruction constituted error. *Id.* However, the Court held that the military judge's error was harmless beyond a reasonable doubt because there was no evidence to support SGT Davis' rational belief that his property was in immediate danger or that SGT Davis gave the victim a reasonable amount of time to leave before brandishing the firearm. *Id.* The Court also noted that the members rejected appellant's self-defense argument premised on proper instructions that were based on the same circumstances. *Id.*

Here, just as in *Davis*, the military judge erred in failing to instruct the members on an affirmative defense because there is "some evidence" of voluntary abandonment that the members could have relied upon. Mr. RS admitted appellant was pretty drunk that evening. (JA 39). Mr. RS testified that once Mr. RS got appellant's attention and highlighted that what appellant was about to do was not right and could get him in trouble for rape, appellant voluntarily got off of Ms. KLF on his own. (JA 31, 51). Just as in *Davis* where SGT Davis's testimony was enough for a panel to rely upon for a defense of property, the evidence in this case is also enough for the panel to have believed that, in his drunken state, appellant did not realize the full consequences of his actions, but upon talking with Mr. RS either had a complete change of heart or simply recognized his actions and completely abandoned any intended crime. In the words of Mr. RS "[Appellant]

he intended to give an instruction on consent as to mistake of fact as to Charge I. (JA 137). The military judge instructed the panel that in order to constitute a defense to specification 1 and 2 of Charge I that appellant's mistake of fact as to consent had to be both honest and reasonable and that if appellant's mistake was unreasonable the defense did not exist. (JA 147-148).

Summary of Argument

The military judge's failure to instruct on voluntary abandonment and incorrect instruction that appellant's mistake of fact as to consent needed to be both honest and reasonable constituted error. Mr. RS's testimony that appellant voluntarily agreed with him and got off of Ms. KLF on his own is "some evidence" on which the panel could have relied to find that appellant had voluntarily and completely abandoned the intended crime. Further, attempt requires the government to prove an accused has the specific intent to commit a crime. An honest mistake of fact as to consent negates this specific intent with respect to attempted aggravated sexual assault, and thus the mistake need only be honest, rather than honest and reasonable. Mr. RS's testimony that Ms. KLF invited appellant into bed with them and eventually "muscled" Mr. RS out of bed is "some evidence" on which the panel could have relied to find that appellant had an honest mistake of fact as to consent.

The military judge's incomplete and incorrect instructions were not harmless beyond a reasonable doubt as the government's case was not overwhelming. The government did not present any physical evidence and the Government's own witness raised both of these defenses. Further, the government's case relied solely on the testimony of Mr. RS who contradicted himself and was contradicted by Ms. KLF. He was a witness whose own testimony highlighted his penchant for exaggeration. The government cannot prove that the military judge's failure to properly instruct the panel on these two defenses did not contribute to the verdict.

Argument

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO INSTUCT THE PANEL ON THE DEFENSE OF VOLUNTARY ABANDONMENT, AND IF SO, WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

II.

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Standard of Review

Whether a panel is properly instructed is a question of law reviewed de novo. *United States v. Stanley*, 71 M.J. 60, 62 (C.A.A.F. 2012)(citing *United States v.*

looked at me and pretty much said that 'You know what? You're right.' And then he got up off of her." (JA 31). This evidence is enough for the panel to have attributed the cause and reason for appellant getting up off of Ms. KLF to be a complete and voluntary abandonment of the intended crime.

While the voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, such as fear of detection or inability to complete the crime, the reason behind the abandonment is a factual determination for the panel. Just as failure to give the instruction in *Davis* constituted error despite SGT Davis failing to present any evidence of either his reasonable belief that his property was in immediate danger or that SGT Davis gave the victim a reasonable amount of time to leave, so too is it error here to have failed to give the voluntary abandonment instruction despite evidence that the abandonment may have occurred because of other reasons. In both instances, "some evidence" is enough to require an instruction and failure to give the instruction is error.

Unlike *Davis*, the error here was not harmless beyond a reasonable doubt. In *Davis*, there was no evidence supporting the reasonableness of appellant's belief that his property was in immediate danger. There was no evidence that the victim damaged the property, threatened the property, or intended to damage the property. *Davis*, 73 M.J. at 273. Additionally, there was no evidence to support the

reasonableness of the amount of time SGT Davis afforded the victim after asking him to leave. *Id.* By SGT Davis' own testimony, he marched straight into his house to grab his gun without confirming that the victim heard his command to leave and immediately emerged pointing the gun at the victim. *Id.*

Here, appellant agreed with Mr. RS and voluntarily got off of Ms. KLF. Unlike *Davis*, where there was no evidence to support all of the requirements for a defense of property to be met, here the panel could have believed that the abandonment resulted solely because of appellant's belief that the intended crime was wrong. Mr. RS posed two different reasons for appellant to abandon the crime: it was wrong; and appellant would get caught. Even though the abandonment may have been attenuated by other circumstances to include appellant potentially getting caught, the panel still could have found that the reason appellant abandoned the crime was solely because it was wrong.

The government's case was not overwhelming. There was no physical evidence. Every aspect of the specifications was highly contested and the complete defense of voluntary abandonment was not mutually exclusive with any other defense. The government's case rested solely on a single witness, Mr. RS, whose own testimony highlighted his penchant for exaggeration. Indeed, the defense portrayed Mr. RS as an embellisher who made himself the hero of his own story. And, yet it was the government's key witness that provided the defense of

voluntary abandonment. A rational panel could have found that appellant voluntarily abandoned the intended crime solely because it was wrong. Therefore, the government cannot prove that the military judge's failure to instruct on this defense did not contribute to the verdict for both specifications of Charge I.

B. The military judge instructed the panel that appellant's mistake of fact must be both honest and reasonable and this error was not harmless beyond a reasonable doubt.

A mistake of fact need only be honest and exist in the mind of the accused, rather than both honest and reasonable, when the mistake concerns a fact which would preclude the existence of a required specific intent. *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001) (citing 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 5.1(b) at 577 (1986)). In *Binegar,* this Court held that the trial judge incorrectly instructed the panel that a mistake of fact needed to be both honest and reasonable to constitute a defense to the crime of larceny where the mistake concerned a military superior's permission to Senior Airman Binegar to dispose of government property. *Id.* at 6. The trial judge believed that this mistake only related generally to the offense of larceny and was not related to the element requiring a specific intent to permanently deprive the government of the property. *Id.* at 3-4. This Court held that a superior's permission to Senior Airman Binegar would preclude the existence of the required specific intent to steal, and thus the mistake need only be honest. *Id.* at 6. Further,

this Court held that the military judge's instructional error that the mistake needed to be both honest and reasonable was not harmless beyond a reasonable doubt because it lowered the government's burden to prove guilt. *Id.*

Here, the government charged appellant with attempted aggravated sexual assault. Thus, the government was required to prove that the substantial step was done with the specific intent to commit aggravated sexual assault. *MCM*, Pt. IV, para. 4(b)(2). A mistake of fact as to consent is a defense to aggravated sexual assault and goes directly toward whether a crime is being committed. *MCM*, Pt. IV, para. 45(a)(r). While the underlying offense of aggravated sexual assault may not have a specific intent, the crime with which appellant was charged required the government prove appellant actually intended to commit this crime. If appellant honestly believed that Ms. KLF consented, this negates his specific intent to commit the crime. Just as in *Binegar* where permission is a fact that negates the necessary specific intent of larceny, mistake of fact as to consent negates the specific intent of attempted aggravated sexual assault. Just as in *Binegar*, the military judge here erroneously instructed the panel that appellant's mistake of fact needed to be both honest and reasonable.

In this case, the military judge already made a determination that that a mistake of fact instruction was necessary. There was some evidence on which the panel could rely in order to find that appellant's mistake of fact as to consent was honest.

Appellant honestly believed that a woman he had invited to go out earlier in the evening who (1) voluntarily returned to his barracks room with him; (2) invited both Mr. RS and appellant to lie next to her in appellant's own bed; and (3) subsequently pushed Mr. RS out of the bed to go sleep somewhere else, consented to sexual conduct with appellant.

Just as in *Binegar*, the government cannot prove that the military judge's erroneous instruction was harmless beyond a reasonable doubt as it lowered the government's burden of proof. The erroneous instruction allowed the government to secure its conviction based on either facts disproving the honesty or the reasonableness of the mistake. The government's case was not overwhelming. There was no physical evidence. It relied on a single witness, Mr. RS, whose credibility regarding Ms. KLF's state was directly contradicted by Ms. KLF herself. The defense called Ms. KLF as its own witness and she stated she was not that intoxicated on the evening in question. In light of the government's shaky case, the panel could have believed that appellant had an honest mistake of fact as to consent negating the specific intent requirements for both Specifications 1 and 2 of Charge I. The government cannot, therefore, meet its burden to prove the incorrect instruction requiring appellant's mistake of fact as to consent to be both honest and reasonable before constituting a defense, did not contribute to appellant's conviction.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings of guilty to Specification 1 and 2 of Charge I and dismiss Charge I and its specifications.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Feliciano,* Army Dkt. No. 20140766, USCA Dkt. No. 17-0035/AR, was electronically filed brief with the Court and Government Appellate Division on January 4, 2017.

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