IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

ANNE C. HSIEH
Major, Judge Advocate
Branch Chief,
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
Phone: (703) 693-0773
U.S.C.A.A.F. Bar No. 36446

CASSANDRA M. RESPOSO
Captain, Judge Advocate
Appellate Counsel,
Government Appellate Division
U.S.C.A.A.F. Bar No. 36802

A.G. COURIE III
Lieutenant Colonel, JA
Deputy Chief,
Government Appellate Division
U.S.C.A.A.F. Bar No. 36422

MARK H. SYDENHAM
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 34432

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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 INSTRUCT 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 United States Army Court of Criminal Appeals [hereinafter the Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2015). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2015).

Statement of the Case

A military judge, sitting as a general court-martial, convicted Appellant, pursuant to his pleas, of disrespect toward a noncommissioned officer, disobeying a noncommissioned officer, wrongful use of marijuana, and disorderly conduct, in violation of Articles 91, 112a, and 134, UCMJ, 10 U.S.C. §§ 891, 912a, and 934 (2012). A panel composed of officer and enlisted members, 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, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880 (2006 and Supp. IV 2011). The panel sentenced Appellant to confinement for one year, reduction to the grade of E-1, total forfeitures 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 and affirmed only so much of the finding of guilty of Specification 2 of Charge I to wit: pull down the pants of Private KF, as opposed to pants and underwear. (JA 10). The Army Court affirmed the remaining findings of guilty and the sentence as approved by the convening authority. (JA 10).

On March 21, 2016, Appellant petitioned this court for review. On December 5, 2016, this Court granted Appellant's petition for review.

Statement of Facts

On January 22, 2011, appellant, Mr. (then Specialist) Robert Schwartz, and Private (PV2) KF went to a local bar. (JA 26). After all three of them had a few drinks, Mr. Schwartz drove back to post. (JA 25-26). They were stopped by the police on the way and all three of them were subjected to a breathalyzer. (JA 26-27). Although Mr. Schwartz had a 0.77 blood alcohol content, the police officer determined he was the most sober person and directed him to drive the others

straight to post. (JA 26-27). Once they returned to Appellant's barracks room, Appellant and PV2 KF continued drinking. (JA 27). Eventually PV2 KF laid down on the bed and asked Mr. Schwartz to lay down with her; he complied. (JA 27). A few minutes later, appellant laid down around PV2 KF's feet. (JA 28). Private KF "was pretty groggy and passed out" at this point, and due to the lack of space on the bed, Mr. Schwartz decided to get up and leave. (JA 28). However, he felt uneasy leaving PV2 KF alone with Appellant, based on Appellant's behavior and previous comment that night "about us both having sex with her," and decided to sleep in the chair instead of leave the room entirely. (JA 28-29).

When Mr. Schwartz moved to the chair, PV2 KF was still fully clothed and asleep on the bed. (JA 29). Once he situated himself in the chair, facing away from Appellant and PV2 KF, Mr. Schwartz began to fall asleep. (JA 44). Between 5 and 20 minutes later, he woke up to sounds of kissing and PV2 KF saying, "No." (JA 44). Mr. Schwartz turned around and saw Appellant "kissing on [PV2 KF's] neck and starting to pull his britches down." (JA 29). Appellant was in a "three-point stance" over KF and that his "hand was on his britches . . . in the motion of pulling them down." (JA 29, 50). Private KF looked like she was "passed out" in a "state of unconsciousness," or at least "very, very groggy and definitely not in the right state of mind to consent," with her hands "sprawled out" and her pants "around her knees." (JA 29-32). Private KF was saying, "No, no, no," while

Appellant continued to kiss her and pull down his pants. (JA 30). At that point, Mr. Schwartz "got [Appellant's] attention," and told him, ". . . that ain't right. I told him that what he was doing was rape. I told him 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).

After Mr. Schwartz talked to Appellant, Appellant replied, "You know what? You're right." (JA 31). Appellant then "got up off of [PV2 KF]" and followed Mr. Schwartz to the adjoining common area, where they continued the conversation. (JA 31, 51). Mr. Schwartz talked to Appellant for a few minutes, until PV2 KF walked into the kitchen and asked, "What's up?" (JA 52). Private KF then pushed Mr. Schwartz into the bathroom, asked him what happened, and started crying. (JA 53). Mr. Schwartz told her "it was going to be alright," at which point Appellant tried to burst into the bathroom "to figure out what was going on." (JA 53). Mr. Schwartz told Appellant to "chill out" and then escorted PV2 KF back to her bedroom and drove back to his own barracks. (JA 53). When Mr. Schwartz got to his barracks, he received a text from PV2 KF asking him if he would come back and stay in her room with her. (JA 54). Mr. Schwartz agreed and returned to sleep in her room "fully clothed and at least a foot away from her in that little bed." (JA 54). The next morning, Mr. Schwartz told PV2 KF that he "would agree to whatever she decided that she was going to do because I have

heard how traumatizing it can be to put people's business out on the street like that so I didn't want to be the person that did it." (JA 54).

At an Article 39(a) session prior to findings, the military judge stated the instructions he intended to provide to the panel, which included the affirmative defense of mistake of fact as to consent, but did not include voluntary abandonment. (JA 137-38). Neither party objected nor did they request any additional instructions. (JA 138).

In regards to mistake of fact as to consent, the military judge instructed the panel as follows:

> The evidence has raised the issue of mistake on the part of the accused, whether Private E-2 [KF] consented to the acts concerning the offenses of attempted aggravated sexual assault, as alleged in specifications 1 and 2 of Charge 1 [sic]. Mistake of fact as to consent is a defense to that charged offense.
>
> "Mistake of fact" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the conduct consented. The ignorance or mistake must have existed in the mind of the accused, and must have been reasonable under all circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover true facts.
>
> "Negligence" is the absence of due care.
>
> "Due care" is what a reasonably careful person would do under the same or similar circumstances. The prosecution

> has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt; at the time of the charged attempted aggravated sexual assault; the accused was not under a mistaken belief that the alleged victim consented to the sexual acts; the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the acts; if you are convinced beyond a reasonable doubt that at the time of the charged attempted aggravated sexual assault; the accused's mistake was unreasonable the defense would not exist.

(JA 146-48).

Summary of the Argument

First, the military judge did not err in failing to provide an instruction on voluntary abandonment because the defense was not reasonably raised in this case. Even if reasonably raised, there is no possibility that the lack of voluntary abandonment instruction contributed to the verdict. Second, the military judge's mistake of fact instruction in this case was also proper because it comports with the statutory language and legislative intent of Article 120. Even if the military judge should have instructed as to only an honest mistake of fact, the error was harmless beyond a reasonable doubt.

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. Obber*, 66 M.J. 393, 405 (C.A.A.F. 2008)). "Where there is no objection

to an instruction at trial, [this Court] reviews for plain error." *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). "Under a plain error analysis, the [Appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [Appellant].'" *Id.* at 32 (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). Appellant bears the burden of demonstrating he meets all three prongs of the plain error test. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

If Appellant meets his burden, then the government must demonstrate that the instructional error as to the elements of the offense was harmless beyond a reasonable doubt. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008). The test for determining whether an error with respect to a required instruction was harmless is whether it appears "beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (citing *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." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). "To say that an error did not

contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *United States v. Othuru*, 63 M.J. 375, 377 (C.A.A.F. 2007). This court looks at the record as a whole to determine whether the error was harmless beyond a reasonable doubt. *Id.*

Argument

I. The military judge did not err when he declined to provide an instruction on voluntary abandonment because the defense was not reasonably raised by the evidence in this case.

When an affirmative defense is raised by the evidence, an instruction is required. *Stanley*, 71 M.J. at 62 (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). A military judge is only required to instruct when there is "some evidence in the record, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012) (citing *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011)); *Stanley*, 71 M.J. at 62 (citing *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)).

Voluntary abandonment 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." *Manual for Courts-Martial, United States* (2005 ed.) [hereinafter *MCM*], pt. IV, ¶

4c(4). "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, ¶ 4(c)(4); *see also United States v. Byrd,* 24 M.J. 286, 292 (C.M.A. 1987). This "change of heart'" is reflected in the "circumstances manifesting a complete and voluntary renunciation of criminal purpose." *United States v. Schoof,* 37 M.J. 96, 104 (C.M.A. 1993) (quoting *United States v. Rios*, 33 M.J. 436, 440 (C.M.A. 1991)). Criminal offenses after an aborted attempt, especially when the subsequent conduct is in pursuit of "precisely the same crime" as the attempt, reflect that an accused has not completely renounced his criminal purpose. *See Schoof*, 37 M.J. at 104 (finding defense of voluntary abandonment not raised when appellant intended to sell classified documents to the Soviet Union, changed his mind en route, but later solicited a stranger's help to further his criminal pursuit); *Rios*, 33 M.J. at 440-4 (finding defense of voluntary abandonment not raised where appellant attempted to rob a fast-food restaurant, abandoned his scheme prior to completion of the robbery, but shortly after proceeded to rob a nearby convenience store).

In this case, the defense of voluntary abandonment was not raised because there was no evidence on the record that Appellant completely and voluntarily

abandoned his criminal purpose. Instead, the evidence showed that Appellant's sexual assault of KF was frustrated only by Mr. Schwartz's external and unanticipated intervention. Appellant began his sexual assault of KF after Mr. Schwartz went to sleep in a chair across the room, and only stopped when Mr. Schwartz woke up, turned around, caught him mid-act, and lectured Appellant on the criminality of actions. That Appellant agreed to stop his sexual assault in response to Mr. Schwartz' insistence in no way indicates that he had a "change of heart" and abandoned the sexual assault of his own volition. If anything, the record indicates that appellant's abandonment of his criminal purpose was not only involuntary, but also incomplete. In this case, the government presented evidence that, some years after his attempted sexual assault of PV2 KF, Appellant sexually assaulted another friend and fellow soldier (SPC SE) under similar circumstances. As in *Schoof* and *Rios*, evidence of subsequent similar criminal activity supports the inference that appellant had not completely renounced his criminal purpose when he aborted his attempt.

In *United States v. Smauley,* the Court of Appeals for the Armed Forces (CAAF) affirmed the lower court's decision that the defense of voluntary abandonment was not raised based on a "'substantial-harm'-to-the-victim restriction on this defense where the 'attempted offense against the person has progressed into its last stages.'" 42 M.J. 449, 451 (C.A.A.F. 1995). Smauley was

convicted of attempted carnal knowledge when he asked his stepdaughter to undress, undressed himself, fondled her breasts and vaginal area, placed his erect penis against her vaginal area, attempted to inserted his penis in her, and then "withdrew from the attempt" because he "suddenly changed his mind." *Id.* at 451. This Court found that "appellant committed a serious indecent assault on his stepdaughter before desisting in his attempt to commit carnal knowledge upon her" and thus his "subsequent asserted act of conscience did not raise a substantial inconsistency with his pleas of guilty to attempted carnal knowledge." *Id.* at 452.

In this case, the evidence shows that appellant had already committed at least an assault consummated by battery when he laid on top of her, kissed her, and pulled her pants and underwear down while she was nearly "passed out" and tried to protest his advances. (JA 29-33). As in *Smauley*, the assault that appellant had already committed on PV2 KF prior to Mr. Schwartz's intervention further foreclosed the possibility of a defense of voluntary abandonment in this case.

If this court finds that the evidence at trial reasonably raised the defense of voluntary abandonment and the absence of the instruction constituted plain error, such error was harmless beyond a reasonable doubt considering the evidence in this case. Here, Appellant attempted to sexually assault PV2 KF by pulling her pants down while she was heavily intoxicated, nearly passed out on his bed, and murmuring "no" in response to his advances. Further, he was undeterred by the

presence of Mr. Schwartz sleeping in a chair nearby, and in fact did not stop until Mr. Schwartz woke up and verbally chided him for his actions. (JA 30). His criminal sexual intent towards PV2 KF was supported by the earlier statement he made to Mr. Schwartz about intending to have sex with PV2 KF, as well as his admissions later that he thought PV2 KF was sexy and that he had a semi-erect penis when he dismounted her. (JA 28-29, 75, 76). Based on the circumstances, it is reasonable to believe that Appellant would not have stopped sexually assaulting PV2 KF without the intervention of Mr. Schwartz. Thus, even if the military judge had given a voluntary abandonment instruction, the panel would not have found that the defense gave rise to a reasonable doubt as to appellant's guilt, given the evidence in this case.

II. The mistake of fact instruction given by the military judge was appropriate in this case, but if this Court finds error, the instruction was harmless beyond a reasonable doubt.

In general, "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." Rule for Court-Martial 916(j)(1). If the mistake relates to an element requiring specific intent, it must be "honest" in that it need only "have existed in the mind of the accused" to constitute a defense. *Id.* However, if the mistake relates to an element requiring general intent, the mistake "must have

existed in the mind of the accused and must have been reasonable under all the circumstances." *Id.* Thus, whether appellant's mistake of fact as to consent in an attempted aggravated sexual assault must be merely honest, or both honest and reasonable, hinges on whether the mistake goes to an element requiring specific or general intent.

As appellant concedes, if he had completed his underlying offense of aggravated sexual assault here, no specific intent would be required, and any mistake of fact as to consent would have to be both honest and reasonable to constitute a defense to his crime. (Appellant's Br. 16). However, the question here is whether an *attempt* to commit an aggravated sexual assault imposes a heightened *mens rea* of specific intent regarding the fact of consent. Contrary to appellant's suggestion, this issue is not simply resolved by a hasty claim that "mistake of fact as to consent negates the specific intent of attempted aggravated sexual assault." (Appellant's Br. 16). Rather, a closer analysis is required of both the offense of attempt under military law and the offense of aggravated sexual assault under the applicable version of Article 120, UCMJ, in this case. *See* W. LaFave and A. Scott, Jr., *Handbook on Criminal Law* 429 (1972) ("the crime of attempt does not exist in the abstract, but rather exists only in relation to other offenses; a defendant must be charged with an attempt to commit a specifically

designated crime, and it is to that crime one must look in identifying the kind of intent required.").

In Specification 2 of Charge I, appellant was convicted of a violation of attempt under Article 80, which has four elements: (1) an overt act; (2) done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.[1] *MCM*, pt. VI, para. 4.b. The substantive crime of which appellant was convicted of attempting was aggravated sexual assault by causing bodily harm in violation of Article 120, 10 U.S.C. § 920 (2006), which has two elements: (1) causing another person to engage in a sexual act (2) by causing bodily harm. *MCM*, pt. VI, para. 45.b.

Because attempt requires a "specific intent to commit an offense," it may be tempting to assume that specific intent is required for every element and fact necessary to prove the offense. This however is not always the case. First,

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[1] The charge states that appellant "attempt[ed] to commit the offense of aggravated sexual assault, to wit: penetrating [PV2 KF's] vulva with his penis, by causing bodily harm to her, to wit: pulling down the pants . . . of the said [PV2 KF] with the specific intent to engage in a sexual act with [PV2 KF] and that the accused's actions would have resulted in the commission of the offense but for the intervention of Specialist (E-4) Robert Schwartz." (JA 10, 11). Although appellant was charged with "the specific intent to engage in a sexual act," the government's burden was to prove the "specific intent to commit the offense of aggravated sexual assault," which is what the military judge instructed.

labeling a crime a "specific intent offense" does not always mean that every element of the offense requires a specific intent. In fact, "specific intent offenses" often entail a number of elements requiring different types of mens rea. *See Liparota v. United States*, 471 U.S. 419 n. 5 (1985) (citations omitted) ("The required mental state may of course be different for different elements of a crime."); *see e.g., United States v. Petersen*, 47 M.J. 231, 234-35 (C.A.A.F. 1997) (describing indecent assault as a "specific-intent" offense in that "one element require[es] specific intent (that is, that the offensive touching was committed to satisfy the lust or sexual desires of the accused)," whereas "the consent element of consent in this offense is a general-intent element. Accordingly, a mistake-of-fact defense on this element would require both a subjective belief of consent and a belief that was reasonable under all the circumstances.")

Second, while an accused must have a specific intent to commit the underlying crime in an attempt, this does not necessarily mean that he must hold a specific intent as to every attendant fact and circumstance of the substantive offense. Rather, the "specific intent" in an attempt under Article 80, UCMJ, "is the intent to commit the *proscribed act*." *United States v. Foster*, 14 M.J. 246, 249 (C.M.A. 1982) (holding that in prosecuting an attempt to violate a lawful general regulation, the government need not prove that the accused knew that his actions "violated any particular clause of any particular regulation"). In other words, for

an accused to be guilty of an attempted crime, he must specifically intend to commit at least the *actus reus* elements of the underlying crime, but with regard to elements involving the "circumstances under which the crime is committed," he generally need hold only the culpability that is required for the commission of the crime.

A useful explanation of this principle can be found in the American Legal Institute's Model Penal Code [MPC], which exemplifies the "advanced and modern position" toward which "the law of attempts in military jurisprudence has tended." *United States v. Thomas*, 13 U.S.C.M.A. 278, 286, 32 C.M.R. 278, 286 (1962). Under the MPC, "[a] person is guilty of an attempt to commit a crime if, *acting with the kind of culpability otherwise required for commission of the crime*, he . . . purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." ALI Model Penal Code § 5.01(1) (emphasis added). Thus, the mens rea in a criminal attempt is "purpose," but with "two exceptions: *with respect to the circumstances under which a crime must be committed, the culpability otherwise required for commission of the crime is also applicable to the attempt*; and with respect to offenses where causing a result is an element, a belief that the result will occur without further conduct on the actor's part will suffice." ALI Model Penal Code §

5.01, Commentary (emphasis added). Because a victim's lack of consent is a circumstantial fact that requires only general intent in a sexual assault, this same fact should only require general intent in an attempted sexual assault.

Earlier military cases (that predate the significant changes to Article 120 germane to this case) may suggest that a mistake of fact as to consent in an attempt to commit aggravated sexual assault need only be honest to constitute a defense. In *United States v. Langley*, this Court held that, "in a prosecution for assault with intent to commit rape . . . the accused must have had the specific intent to commit each element of rape." 33 M.J. 278, 282 (C.M.A. 1991). Thus, it found that the lower court "erred in affirming the military judge's ruling that appellant's claimed mistake of fact as to his victim's consent must have been both honest and reasonable, instead of just honest." *Id.* In *United States v. Apilado*, the Army Court interpreted *Langley* to extend to the offense of attempted rape, but "respectfully urge[d] [this Court] to restrict the holding in *Langley*" and to adopt the concurrence's rationale as to why an honest and reasonable mistake of fact should be the "appropriate instructional standard . . . in an attempted rape case." 34 M.J. 773 (A.C.M.R. 1992). In *United States v. Jones*, this Court cursorily stated that "attempted rape is a specific-intent offense requiring proof of an *honest* mistake of fact," before concluding that "there was no evidence 'whatsoever'"

raising a mistake of fact as to consent in that case. *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998).

However, since *Langley* and *Jones*, Congress has substantially changed Article 120 in such a way that these cases are no longer necessarily dispositive of the issue at hand. Of significance, Congress (1) deliberately removed the element "lack of consent" from Article 120 and (2) enacted a specific definition of mistake of fact as to consent for Article 120 offenses that required the mistake to be "reasonable under all the circumstances." UCMJ, art. 120(t)(15), 10 U.S.C. 920(t)(15) (2006). The first change is significant because, insofar as *Langley/Jones* may be read to require specific intent as to every element of the crime attempted, a victim's "lack of consent" is no longer a necessary element to which the specific intent of an attempted aggravated sexual assault must attach.

Of course, consent (or lack thereof) may still remain relevant to the offense despite not being an explicit element of the attempted crime. For one, consent is relevant as a "potential subsidiary fact" to the element of bodily harm. *See United States v. Neal*, 68 M.J. at 300 (interpreting provisions of Article 120 (2006) to allow "treating evidence of consent as a subsidiary fact potentially relevant to a broader issue in the case, such as the element of force."). In many (if not most) cases of aggravated sexual assault by bodily harm, the government proves that the touching constituting bodily harm was offensive by evidence that the victim did

not consent to it, which in turn makes her lack of consent a necessary fact of the crime. Secondly, consent--and mistake of fact as to consent--also remain relevant as affirmative defenses to the crime of aggravated sexual assault. Article 120(r), UCMJ, 10 U.S.C. § 920(r) (2006); *see also United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting *United States v. Greaves*, 40 M.J. 432, 433 (C.M.A. 1994)) ("As a general matter, consent 'can convert what might otherwise be offensive touching into nonoffensive touching.'").

In its 2006 amendment to Article 120, Congress provided the following definition of "mistake of fact as to consent":

> the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at any time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

UCMJ, art. 120(t)(15), 10 U.S.C. § 920(t)(15) (2006). The plain language of this definition evinces a clear legislative intent to impose a reasonableness standard to

any mistake of fact as to consent in regards to sexual assault offenses. If appellant had completed his offense of an aggravated sexual assault in this case, his mistake of fact as to the victim's consent would have be both honest and reasonable to constitute a defense. It seems only logical that the same standard should apply when the sexual assault is attempted, but does not reach completion due to an intervening circumstance, as occurred here.

To find otherwise could lead to absurd results that appear antithetical to the intent of Congress in amending Article 120. Let us presume, *arguendo*, that a perpetrator has the requisite general intent—as well as an honest, but unreasonable, mistake of fact—as to his victim's consent when he begins to sexually assault her. However, he is prevented from consummating his crime because a third party physically stops him. Clearly, he could not be prosecuted for a sexual assault because his crime was never completed. That he should also escape liability for an attempted sexual assault--merely because of his honest yet drastically unreasonable mistake of fact as to the victim's consent--seems entirely contrary to legislative intent, given the statutory language and history of Article 120 (as amended in 2006).

Where Congress has spoken in defining an applicable defense to a statutory offense, this Court must defer absent some constitutional infirmity. *See United States v. Bailey*, 444 U.S. 394, 406 (1980) (stating "courts obviously must follow

Congress' intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates."); *see also United States v. Neal*, 68 M.J. 289, 298 (C.A.A.F. 2010) (citing *Patterson v. New York*, 432 U.S. 197, 215 (1977)) ("A legislature may redefine elements of an offense and require the defense to bear the burden of proving an affirmative defense, subject to due process restrictions on impermissible presumptions of guilty."). That is because "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota*, 471 U.S. at 424 (1985). Given that Congress intended that mistake of fact as to consent must be both honest and reasonable, the military judge's instruction in this case was proper. In fact, the military judge's instruction matched nearly verbatim the statutory definition of mistake of fact as to consent.

If this Court holds that the applicable mistake of fact defense requires only an honest mistake, such a defense was not raised by the evidence in this case. As in *Jones*, there was "no evidence whatsoever that appellant actually believed that [the victim] was consenting to sexual intercourse with him." 49 M.J. at 91; *see also United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (holding no mistake of fact instruction warranted where the evidence "tended to show objective circumstances upon which a reasonable person might rely to infer consent" but

"provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances."). To the contrary, this was a case in which appellant's subjective criminal intent to sexually assault PV2 KF without her consent was evidenced by both his statements to Mr. Schwartz prior to the assault, and his actions to effectuate the crime, which were halted only by Mr. Schwartz's aggressive intervention. As the evidence did not reasonably raise any honest mistake of fact as to consent, the military judge actually did not need to give the instruction at all; this error providing one, however, actually inured to the benefit of Appellant. Because the instruction was superfluous, and in light of the uncontroverted evidence in this case as to appellant's guilt, any error was harmless beyond a reasonable doubt. *See Behenna*, 71 M.J. at 236 ("superfluous, exculpatory instructions that do not impermissibly shift burdens are generally harmless beyond a reasonable doubt, even if the instructions are otherwise erroneous.").

Conclusion

WHEREFORE, the Government prays this Honorable Court affirm the Army Court's decision and the findings and sentence in this case.

ANNIE C. HSIEH
Major, JA
Branch Chief
United States Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
Phone: (703) 693-0771
U.S.C.A.A.F. Bar No. 36446

CASSANDRA M. RESPOSO
Captain, Judge Advocate
Appellate Counsel,
Government Appellate Division
U.S.C.A.A.F. Bar No. 36802

A.G. COURIE III
Lieutenant Colonel, JA
Deputy Chief,
Government Appellate Division
U.S.C.A.A.F. Bar No. 36422

MARK H. SYDENHAM
Colonel, JA
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 34432

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on February 1, 2017.

DANIEL L. MANN
Lead Paralegal Specialist
Office of The Judge Advocate
General, United States Army
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822