IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20160339
Private First Class (E-3) **CEDRIC L. MCDONALD**, United States Army, Appellant	)	USCA Dkt. No. 18-0308/AR

SANDRA L. AHINGA
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0786
Sandra.l.ahinga.mil@mail.mil
U.S.C.A.A.F. Bar No. 36905

WAYNE H. WILLIAMS
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 31651

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING THE PANEL THAT A NEGLIGENT MENS REA WAS SUFFICIENT TO MAKE OTHERWISE LAWFUL CONDUCT CRIMINAL.

Index of Brief

Table of Authorities....................iii

Issue Presented....................1

Statement of Statutory Jurisdiction....................1

Statement of the Case....................1

Statement of Facts....................2

Standard of Review....................5

Summary of Argument....................7

Argument....................8

I. There is no error, whether plain or obvious, where the military judge gave the panel the standard benchbook instructions for Article 120(b)(1)(B) and the mistake of fact as to consent instruction....................8

A. The holdings in *Elonis v. United States* and *United States v. Gifford* are narrow....................9

B. Sexual Assault by bodily harm under Article 120(b)(1)(B) is a general intent crime....................10

C. General intent is the required *mens rea* for sexual assault by bodily harm....................11

D. History and Legislative Intent....................13

E. General intent is a sufficient *mens rea* for the offense of sexual assault by bodily harm, even in light of *Elonis v. United States*....................16

F. Rule for Courts-Martial 916(j) does not impermissibly shift the burden of proof to appellant....................19

G. Appellant's suggested consent instruction is contrary to legislative intent....................24

II. Any error was harmless beyond a reasonable doubt because appellant's conduct was at least reckless as to DJ's consent....................28

Conclusion....................31

Table of Authorities

United States Supreme Court

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002)....................17

Chapman v. California, 386, U.S. 18 (1967)....................11

Duncan v. Walker, 533 U.S. 167 (2001)....................33

Elonis v. United States, 135 S.Ct. 2001 (2015).................... passim

Kotteakos v. United States, 328 U.S. 750 (1946)....................11

Liparota v. United States, 471 U.S. 419 (1985)....................16

Martin v. Ohio, 480 U.S. 228 (1987)....................28

Parker v. Levy, 417 U.S. 733, 750 (1974)....................16

Patterson v. New York, 432 U.S. 197 (1977)....................26

Russello v. United States, 464 U.S. 16 (1983)....................18

TRW, Inc. v. Andrews, 534 U.S. 19 (2001)....................33

United States v. Lane, 474 U.S. 438 (1986)....................11

United States v. Texas, 507 U.S. 529 (1993)....................19

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).................... 14, 24

Court of Appeals for the Armed Forces

United States v. Allen, 10 C.M.R. 424 (A.B.R. 1953)....................21

United States v. Caldwell, 75 M.J. 276 (C.A.A.F. 2016) 22, 23

United States v. Haverty, 76 M.J. 199 (C.A.A.F. 2017)...................... 18, 19, 32, 35

United States v. Langley, 33 M.J. 278 (C.M.A. 1991) 19

United States v. Peterson, 47 M.J. 231 (C.A.A.F. 1997) 20, 21

United States v. Neal, 68 M.J. 286 (C.A.A.F. 2010) 16, 26, 28, 32

United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005).......................................11

United States v. Gifford, 75 M.J. 140, 142 (C.A.A.F. 2016)........................... 11, 15

United States v. Haverty, 76 M.J. 199 (C.A.A.F. 2017)...11

United States v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005)..12

United States v. Lewis, 65 M.J. 85 (C.A.A.F. 2007) 27

United States v. Maynard, 66 M.J. 242 (C.A.A.F. 2008) 11

United States v. McClour, 76 M.J. 23 (C.A.A.F. 2017) 12

United States v. Paige, 67 M.J. 442 (C.A.A.F. 2009) 11

United States v. Stanley, 71 M.J. 60 (C.A.A.F. 2012)..27

United States v. Wolford, 62 M.J. 418 (C.A.A.F. 2006)..12

Army Court of Criminal Appeals

United States v. Apilado, 34 M.J. 773 (A.C.M.R. 1992)................................. 20, 25

United States v. Rodriguez, ARMY 20160799, 2018 CCA LEXIS ___, *___ n. 4 (Army Ct. Crim. App. 19 Dec. 2018)(summ. dispo.) 24

United States v. Gutierrez, ARMY 20040596, 2007 CCA LEXIS 599 (Army Ct. Crim. App. 31 Oct. 2007)...21

United States v. McDonald, ARMY 20160339, 2018 CCA LEXIS 239, *9 (Army Ct. Crim. App. 16 May 2018)(mem. op.)..7

United States v. Tucker, No. 18-0254, 2018 CAAF LEXIS 756 (C.A.A.F. 2018)... 15, 34

Federal Circuit Courts

Russell v. United States, 698 A. 2d 1007, 1009 (D.C. Cir. 1997) 32

United States v. Clemons, 843 F.2d 741, 752 (3d Cir. 1988).................................26

United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972)...............................18

Constitutional Provisions

U.S. Const. art. 1, §8, cl. 14 16

Rules

R.C.M. 916(b)(1) 24
R.C.M. 916(j)(3) 25, 26, 31
R.C.M. 920(e) 27

Statutes

Article 120, UCMJ .... passim
Article 111c.(7), UCMJ 34
10 U.S.C. § 866 6,7
10 U.S.C. § 867 7
18 U.S.C. § 875(c) 14

Other Authorities

Black's Law Dictionary 1462 (10th ed. 2014) 32, 35

Mark Harvey, *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice* (2005), available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf 21

1 Wayne R. LaFave, *Substantive Criminal Law* §1.8(c), at 86 (2d ed. 2003).........26

Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-45-14, (10 Sep. 2014)...27

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	
v.	)	
	)	Crim. App. Dkt. No. 20160339
Private First Class (E-3) **CEDRIC L. MCDONALD**, United States Army, Appellant	)	USCA Dkt. No. 18-0308/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING THE PANEL THAT A NEGLIGENT MENS REA WAS SUFFICIENT TO MAKE OTHERWISE LAWFUL CONDUCT CRIMINAL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On May 13, 2016 at Fort Polk Louisiana, a panel with enlisted representation, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of conspiracy to commit sexual assault in violation

of Article 81, Uniform Code of Military Justice, 10 U.S.C. § 881 (2012) [hereinafter UCMJ], and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. §920 (2012).[1] The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for three years, and to be dishonorably discharged. The convening authority approved the adjudged sentence.

On May 16, 2018, the Army Court reviewed the foregoing matter under Article 66, UCMJ. The Army Court affirmed the findings and sentence. *United States v. McDonald*, ARMY 20160339, 2018 CCA LEXIS 239, *9 (Army Ct. Crim. App. 16 May 2018)(mem. op.). On July 9, 2018 appellant petitioned this Court for grant of review. On September 25, 2018, this Honorable Court granted appellant's petition.

Statement of Facts

In approximately June or July 2015, appellant's barracks roommate, Private (PV2) Quantavious Thomas met the victim, DJ, on a dating website called "Plenty of Fish." (JA 17). Private Thomas and DJ met in person on two occasions prior to the night of the sexual assault on August 31, 2015. (JA 17). Appellant was present on both of those occasions but never had a conversation with DJ. (JA 18).

[1] Appellant was acquitted of Specification I, Charge II, sexual assault by artifice, pretense, or concealment. (JA 9).

Early on August 31, 2015, DJ texted PV2 Thomas prior to arriving at his barracks to ask if she might visit him while DJ and her sister were on post. (Pros. Ex. 25). DJ also texted to ask PV2 Thomas whether anyone else was with him. (JA 19-21, 232). Private Thomas responded both times that no one else was in his barracks room. (JA 98; 232). DJ texted, "I'd come see u but you going wanna do something nd [sic] I don't," expressing the fact that she did not want to have sex. (JA 233). Private Thomas assured DJ, "Nawl um straight," meaning he did not want to have sex either. (JA 233). Private Thomas then encouraged DJ to visit him while she was on post. (JA 234-5). At trial, DJ testified that prior to arriving at PV2 Thomas' barracks room, she did not intend to have sex. (JA 19). At approximately 0100, DJ arrived at PV2 Thomas' barracks and texted him that she was outside. (JA 235). DJ's sister departed to visit with other friends on post. Private Thomas went downstairs to get DJ and escorted her up to his barracks room. (JA 19). DJ testified the room was dark, the lights were out, and she only saw the window and a wall to her right as she entered the room. (JA 21). Without turning on the lights, PV2 Thomas and DJ immediately lay down on PV2 Thomas' bed. (JA 21). Private Thomas and DJ talked and listened to music for a while before PV2 Thomas initiated sexual intercourse with DJ. (JA 22). DJ continued to be unaware of appellant's presence in the same room. (JA 23).

Private Thomas eventually asked DJ to bend over his bed so that he could

penetrate her vagina with his penis from behind. (JA 27). DJ testified that she put her head and chest on the mattress and her feet on the floor while PV2 Thomas stood behind her. (JA 27-8). After a while, DJ asked PV2 Thomas to move a chair that was in the way. (JA 28). Private Thomas removed his penis and moved the chair. (JA 28). At this point, appellant and PV2 Thomas took the opportunity to switch places in the dark. Without a word, appellant penetrated DJ's vagina with his penis from behind. (JA 28-9). Appellant and PV2 Thomas did not exchange words as they coordinated the switch in the dark. (JA 127). At the same time, PV2 Thomas told DJ to keep her head down on the mattress. (JA 29). DJ testified she kept her head on the mattress the entire time. (JA 29). Appellant did not speak. (JA 29). DJ testified appellant never identified himself to her, and she was never asked to consent to sex with appellant prior to being penetrated. (JA 29).

When the sex became too rough, DJ reached back to grab appellant's wrist and discovered a watch that PV2 Thomas was not wearing. (JA 29-30). DJ testified, "I reached back with my left arm and I found a watch, and I kind of freaked out and the person got scared and backed up." (JA 30). Private Thomas immediately instructed her to keep her head down. (JA 30). DJ testified that she could tell it was a different person because she noticed a condom that PV2 Thomas was not wearing, and she could perceive that appellant was taller and thinner than PV2 Thomas. (JA 30, 74). Appellant told Criminal Investigative Command (CID)

agents that he wore a condom while having sex with DJ. (JA 229). As appellant withdrew, PV2 Thomas immediately took appellant's place and penetrated DJ from behind. (JA 30).

Private Thomas then asked DJ to perform oral sex on him. (JA 32-3). DJ testified that while she performed oral sex on him, PV2 Thomas "…asked me if I would have sex with his friend that drive [sic] a truck," referring to appellant. (JA 34). When DJ responded that she would not, PV2 Thomas stated DJ "probably already [had]." (JA 34). DJ became uncomfortable and prepared to leave. (JA 34). As she was leaving, she saw a person lying on a bed wrapped in a blanket and made a derogatory comment about appellant's sexual prowess. (JA 35).

DJ testified she did not say anything at the time she discovered an unknown person was penetrating her because she was scared, nervous, did not know what was going on, and was not sure what would happen to her if she tried to leave or say something. (JA 31). However, DJ did report the sexual assault to civilian law enforcement on that same night. (JA 41).

Standard of Review

Determining what *mens rea* applies to an element is an issue of statutory construction and is reviewed de novo. *United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016). Where appellant failed to object to instructional error at trial, this court reviews panel instructions for plain error. *United States v. Haverty*, 76 M.J.

199, 208 (C.A.A.F. 2017). Under a plain error analysis, appellant has the burden of proving: "(1) an error was committed; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009) (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)). "Once appellant meets his burden of establishing plain error, the burden shifts to the Government to convince [the court] that this constitutional error was harmless beyond a reasonable doubt." *Paige*, 67 M.J. 449 (quoting *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005))[2]. Failure to establishing any of the prongs is fatal to appellant's claim. *United States v. McClour*, 76 M.J. 23, 25 (C.A.A.F. 2017). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005).

---

[2] The government is aware that this Court has granted review of the appropriate prejudice standard in this context in *United States v. Tovar-Chavez*, USCA Dkt. No. 18-0371/AR. Whether the standard is prejudice to a substantial right of the appellant or harmlessness beyond a reasonable doubt, the government nevertheless prevails in this case. The harmless beyond a reasonable doubt standard set forth for constitutional error by *Chapman v. California*, 386, U.S. 18, 24 (1967) is a more rigorous standard than that set forth for non-constitutional error adopted by *Kotteakos v. United States*, 328 U.S. 750 (1946). *See generally*, *United States v. Lane*, 474 U.S. 438, 447 n.9 (1986). As discussed below, the government can establish harmlessness beyond a reasonable doubt and, therefore, prevails on either standard.

Summary of Argument

There is no error, plain or otherwise, because the military judge properly instructed the panel in this case. The holdings in *Elonis v. United States* and *United States v. Gifford* are narrow and do not preclude the application of a general intent *mens rea* where Congress so intended. Based on statutory history and legislative intent, sexual assault by bodily harm under Article 120(b)(1)(B) is a general intent crime. Given the statutory scheme under Article 120, coupled with the availability of the affirmative defense of mistake of fact, general intent sufficiently separates innocent from wrongful conduct. This statutory scheme does not inappropriately shift the burden to the accused to disprove an element of the offense as the panel was appropriately instructed as to the elements, the affirmative defense of mistake of fact, and instructed several times that the burden of proof was on the government to establish the elements and disprove the defense beyond a reasonable doubt.

In the end, if there was error, it was harmless beyond a reasonable doubt because appellant's actions were at least reckless as to DJ's non-consent, if not entirely purposeful.

<u>Argument</u>

I. There is no error, whether plain or obvious, where the military judge gave the panel the standard benchbook instructions for Article 120(b)(1)(B) and the mistake of fact as to consent instruction.

A. The holdings in *Elonis v. United States* and *United States v. Gifford* are narrow.

Appellant's reliance on *Elonis v. United States* and *United States v. Gifford* is misplaced because their holdings are narrow. In *Elonis*, 135 S.Ct. 2001 (2014), the defendant made a number of aggressive "posts" on social media and was convicted under 18 U.S.C. § 875(c), which criminalizes the interstate communication of threats. The statute did not specify a *mens rea*. The Court found that in this context, negligence as to the threatening nature of the communication was an insufficient *mens rea* to separate legal innocence from wrongful conduct. *Id*. at 2011 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)). The Court declined to state what that mental state requirement should be and refused to answer whether recklessness would suffice. The Supreme Court emphasized that a court should "only [intuit] that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 2010 (internal quotation marks omitted) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

The court in *Elonis* did not hold that recklessness is the required *mens rea* to

separate innocent from wrongful conduct. Even in the narrow context of the criminal statute at issue, the majority acknowledged:

> [t]here was and is no circuit conflict over the question Justice Alito and Justice Thomas would have us decide - - whether recklessness suffices for liability under Section 875(c). No Court of Appeals has even addressed that question. We think that is more than sufficient 'justification' for us to decline to be the first appellate tribunal to do so.

135 S. Ct. at 2013 (internal citations omitted). A recklessness standard is not required by *Elonis*.

Appellant cites to this Court's opinion in *United States v. Gifford*, 75 M.J. 140, 147 (C.A.A.F. 2016), for the proposition that "[r]ecklessness is the lowest mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" (Appellant's Br. 14). Appellant's reading of *Gifford* is too broad and fails to recognize that this Court narrowly held "[u]nder the circumstances of this case, we conclude that a recklessness standard both comports with Supreme Court precedent and satisfies the command of the common law."[3] *Gifford* should not be read to conclude that recklessness is required in all circumstances. *Gifford* addressed a violation of a general order by providing alcohol to individuals under the age of twenty-one, and is distinguishable from

[3] This Court issued an equally narrow opinion in *United States v. Tucker*, No. 18-0254, 2018 CAAF LEXIS 756, *8 (C.A.A.F. 2018) (stating multiple times that recklessness is the proper mens rea for the Article 134, UCMJ, offense of providing alcohol to minors).

crimes of sexual assault by bodily harm where the bodily harm is the sexual act itself. The analysis in *Gifford* focused on the origin of the prohibition, the potential intent to create a public welfare offense, and the fact that the "history of alcohol offenses does not support a conclusion that the commander intended to create a public welfare offense." 75 M.J. at 144. As discussed below, Article 120 is built upon layers of legislation, public policy, and decisions by Congress to construct the statute in a particular way. As this Court recognized in *United States v. Neal*, "Congress has broad authority to define the elements of offenses under the constitutional power to make rules for the government and regulation of the armed forces." 68 M.J. 286, 300 (C.A.A.F. 2010) (citing U.S. Const. art. 1, §8, cl. 14). *See also*, *Parker v. Levy*, 417 U.S. 733, 750 (1974); *Liparota v. United States*, 471 U.S. 419, 424 (1985). Ultimately, the holdings in *Elonis* and *Gifford* should not be read to disturb any and all crimes requiring general intent or the application of an objective reasonable person standard in a criminal context.

B. Sexual Assault by bodily harm under Article 120(b)(1)(B) is a general intent crime.

Appellant was charged and convicted of sexual assault by bodily harm under Article 120, UCMJ, which generally has only two elements: (1) that the accused committed a sexual act; and (2) that the accused did so by causing bodily harm. When the offensive touching within the bodily harm element is charged as the

"nonconsensual sexual act," as in this case, the government must also prove beyond a reasonable doubt that the sexual act was nonconsensual.

General intent is sufficient *mens rea* to separate wrongful from innocent conduct in the context of sexual assault by bodily harm and thus adequately addresses the underlying concern enunciated by the U.S. Supreme Court in *Elonis*. General intent is already implicit in the elements and potential defenses for this offense. A separate *mens rea* as to consent is unnecessary; its absence does not constitute error.

C. General intent is the required *mens rea* for sexual assault by bodily harm.

The plain language, history, and legislative intent of Article 120, UCMJ, indicate that only general intent is required for sexual assault by bodily harm. "As in all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Under Article 120, UCMJ, "[a]ny person subject to this chapter who . . . commits a sexual act upon another person by . . . causing bodily harm to that other person" is guilty of sexual assault. UCMJ art. 120(b)(1)(B). This provision lacks express language as to the requisite mental state for the crime. When a statute is silent as to a required mental state, courts should interpret it to require "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Elonis*, 135 S. Ct.

at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)). In many cases, the "presumption in favor of scienter" requires only "proof of *general intent* -- that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime…." *Carter*, 530 U.S. at 268.

This presumption of general intent is supported when comparing various provisions of the Article 120 statutory scheme. In its definition of "sexual act," Congress attached a specific *mens rea* (the "intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person") when the sexual act is non-penetrative. UCMJ art. 120(g)(1)(B). Congress declined to specify a *mens rea* within the definition of "bodily harm." *See* UCMJ art. 120(g)(3). "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Consequently, the omission of a specific *mens rea* to the element of bodily harm appears intentional and indicates that Congress intended those particular elements of the offense to require only general intent.

When a court determines that Congress intended to purposefully omit a *mens rea*, the court must respect that legislative intent. *United States v. Haverty,* 76 M.J.

199, 204 (C.A.A.F. 2017) (citing *United States v. Gifford*, 75 M.J. 140, 143-44 (C.A.A.F. 2016)). "Similarly, if a court determines that Congress intended, either expressly or impliedly, to have a particular *mens rea* requirement apply to a certain criminal statute, then the court must construe that statute accordingly." *Id.*

D. History and Legislative Intent.

The historical backdrop for the offense, to include its statutory predecessor in Article 120, UCMJ, supports that only general intent is required for a commission of sexual assault by bodily harm. In determining what *mens rea* is sufficient for a statutory offense, "[w]e must assume Congress understood the background principles . . . regarding mens rea, statutory construction, and the different treatment of mens rea with respect to [the offense]. Put succinctly, 'Congress does not write upon a clean slate.'" *United States v. Wilson*, 66 M.J. 39, 46 (C.A.A.F. 2008) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). When Congress amended Article 120 to create a range of offenses that included sexual assault by bodily harm, it wrote upon that which had historically been treated as a general intent offense: rape. As this Honorable Court articulated, under that statute's language, because "[n]o specific intent is mentioned in the statute -- only general criminal *mens rea* is involved." *United States v. Langley*, 33 M.J. 278, 281 (C.M.A. 1991). Courts have stated only general intent is required for this offense

> even though the [penetrative] act . . . clearly involve[s] highly specific, volitional acts by the accused. For sound reasons of public policy, the mental state involved with the crime is categorized as "general intent," i.e., a general willingness to do a criminal act.

United States v. Apilado, 34 M.J. 773, 777 n.1 (A.C.M.R. 1992).

Moreover, the element of lack of consent for rape, as well as other offenses in the UCMJ, has always been measured from an objective perspective: "All the surrounding circumstances are to be considered in determining whether a victim gave consent . . . ." *Manual for Courts-Martial, United States* (2016) [hereinafter *MCM*, 2016], pt. VI, ¶ 45.a.(g)(8)(C). *See also United States v. Peterson*, 47 M.J. 231, 234 (C.A.A.F. 1997) ("While indecent assault entails one element requiring specific intent (that is, that the offensive touching was committed to satisfy the lust or sexual desires of the accused), the consent element [] in this offense is a general-intent element.").

In 2006, Congress made sweeping changes to Article 120, UCMJ, by replacing it with an entirely new statute generally modeled after the Title 18 sexual assault offenses. *MCM*, 2008, UCMJ art. 120 analysis at A23-14. Leading up to this enactment, Congress was provided a report from a subcommittee of the joint service committee on military justice (JSC) on various potential statutory changes

to Article 120.[4] Mark Harvey, *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice* (2005), available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf (last accessed December 26, 2019) [hereinafter JSC Report].

The changes to Article 120, UCMJ, included the addition of "aggravated sexual assault," defined as "caus[ing] another person . . . to engage in a sexual act by . . . causing bodily harm." UCMJ art. 120(c) (2007). The definition of bodily harm for this offense was drawn directly from, and was identical to, the definition of the same term used for assault consummated by battery, because the intent was to require "the same level of bodily harm as under Article 128, UCMJ for assault consummated by battery." JSC Report, p. 261. For assault consummated by battery, only general intent is required for the element of bodily harm. *See United States v. Peterson*, 47 M.J. 231, 234 (C.A.A.F. 1997); *See also United States v. Gutierrez*, ARMY 20040596, 2007 CCA LEXIS 599, at *17 (Army Ct. Crim. App.

---

[4] The National Defense Authorization Act for fiscal year 2005 required the Secretary of Defense to review the UCMJ "with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault" and to bring it "more closely to other Federal laws and regulations that address such issues." Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108–375, § 571, 118 Stat. 1811, 1920 (2004). In response, a subcommittee of the JSC conducted a thorough review as ordered and produced an 826-page report, which was due by 1 March 2005 to the Committee on Armed Services of the Senate and the Committee on the Armed Services of the House of Representatives.

31 Oct. 2007) (mem. op.), *rev'd on other grounds* 66 M.J. 329 (C.A.A.F. 2008) ("'Bodily harm' . . . requires only general intent."); *United States v. Allen*, 10 C.M.R. 424, 428 (A.B.R. 1953) (citations omitted) ("There need be no specific intent shown to sustain a conviction of either simple assault and battery or assault with a dangerous weapon. However . . . there must exist a general intent to do bodily harm, which may be inferred from the intentional doing of an act the probable consequences of which would be bodily harm to another.") (citations omitted). Because the element of bodily harm in Article 128, UCMJ, requires general intent, it necessarily follows that Congress intended to require general intent for the element of bodily harm for sexual assault as well.

E. General intent is a sufficient *mens rea* for the offense of sexual assault by bodily harm, even in light of *Elonis v. United States*.

The statutory scheme surrounding sexual assault by bodily harm obviates any need for a reckless *mens rea* to be read into the statute to protect against the criminalization of otherwise lawful conduct. General intent requires "knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. General intent requires that an accused engage in a voluntary act wherein he or she knows what they are doing and how they are doing it, but it does not require that the accused intend the social harm criminalized by the statute. *See United States v. Caldwell,* 75 M.J. 276, 281 (C.A.A.F. 2016). So long as appellant is aware of the

facts and circumstances underlying his act, and those facts and circumstances constitute a sexual act by causing bodily harm, the elements of the offense are met. Put another way, while appellant must know "the facts that make his conduct illegal," *United States v. Staples*, 511 U.S. 600, 619 (1994), "[t]his does not mean that an accused must know that his actions constitute criminal conduct." *Caldwell*, 75 M.J. at 280 n. 4. Here, it is enough that appellant intended the act of penetration and had knowledge of all of the circumstances that indicated that DJ did not consent.

For this particular offense under Article 120, UCMJ, *Elonis* and its progeny of cases do not render general intent an insufficient *mens rea* nor do they require a *mens rea* of knowledge or recklessness regarding the victim's lack of consent. The underlying concern in *Elonis*—that a heightened *mens rea* was required to separate a wrongful threat from otherwise innocent speech—is not evident when analyzing a sexual assault. An accused's criminality when considering the commission of a sexual assault is sufficiently addressed by general intent, which has been repeatedly held to "adequately separate[] lawful conduct from unlawful conduct." *See Caldwell*, 75 M.J. 276. Similarly, in *Elonis*, the Supreme Court recognized that "[i]n some cases, a general requirement that a defendant act knowingly is an adequate safeguard" for the *mens rea* separation of wrongful from innocent conduct. 135 S. Ct. at 2010.

This Court should analyze this provision not on its own, but as a comprehensive statutory approach including Article 120(f) and R.C.M. 916. The Army Court recently commented in a footnote in *United States v. Rodriguez*, its concern "that the 'bodily harm' necessary to commit sexual assault under Article 120, UCMJ, does not require the use of unlawful force or violence. Nor does the definition of 'bodily harm' under Article 120, UCMJ, require 'physical pain' or 'injury to the body' or other unequivocally wrongful conduct that might provide greater support for the conclusion that only a general intent is required to commit the offense. ARMY 20160799, 2018 CCA LEXIS ___, *___ n. 4 (Army Ct. Crim. App. 19 Dec. 2018)(summ. dispo.) (citations omitted). Nevertheless, sexual assault by bodily harm under Article 120(b)(1)(B) is a general intent crime and innocent actors are sufficiently protected by the staturoty scheme as a whole.

To the extent that this Court is, as was the court in *Elonis*[5], concerned with "separat[ing] innocent from wrongful conduct," an innocent actor is protected by the Article 120 statutory scheme in three ways: (1) the government must prove beyond a reasonable doubt that the accused intended to commit the sexual act; (2) the government must prove beyond a reasonable doubt that the victim did not

[5] 135 S. Ct. at 2011 (citing *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *X-Citement Video*, 513 U.S. at 72)).

consent to the sexual act[6]; and (3) if some evidence is presented that suggests a mistake of fact as to consent, the government must disprove beyond a reasonable doubt that the accused held an honest and reasonable mistake of fact as to the victim's non-consent[7]. A servicemember who engages in the "highly specific, volitional" act of penetrating the vulva of his victim with his penis, while aware of the facts that objectively make his act of penetration nonconsensual, has undoubtedly committed a crime. *See Apilado*, 34 M.J. at 779 (Johnson, J., concurring) (citation omitted) ("The law should be interpreted in such a way that it imposes a duty upon men to act reasonably before attempting to engage in sex, and to punish them when they violate that duty. This duty requires that men open their eyes and use their mind when viewing all the circumstances affecting the element that deals with force and lack of consent in the case of rape."). If the government can establish each of these requirements beyond a reasonable doubt no truly innocent actor remains unprotected.

F. Rule for Courts-Martial 916(j) does not impermissibly shift the burden of proof to appellant.

It is an affirmative defense to sexual assault if an accused purportedly

---

[6] Bodily harm is "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." *Manual for Courts Martial*, *United States* (2012 ed.), pt. IV ¶45.a.(g)(3). Where the same physical act is alleged as both the *actus reus* and the bodily harm for the charged sexual assault, non-consent is an element.
[7] R.C.M. 916(b)(1).

possessed an incorrect belief that the named victim consented to the sexual conduct. R.C.M. 916(j). The manual has long supported the application of a reasonable person standard when ascertaining whether a mistake was evident.

> [I]t 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 . . . . If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all of the circumstances.

R.C.M. 916(j)(1). For mistake of fact, Congress requires the fact-finder to apply an objective reasonable person standard. It is well-settled law that "a legislature may redefine the 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 guilt." *United States v. Neal*, 68 M.J. 289, 298-299 (C.A.A.F. 2010) (citing *Patterson v. New York*, 432 U.S. 197, 215 (1977). "A statute may place the burden on the accused to establish an affirmative defense even when the evidence pertinent to an affirmative defense also may raise a reasonable doubt about an element of the offense."[8] *Id*. Appellant argues that the

[8] The statutory scheme here does not present the concern identified in *United States v. Clemons*, 843 F.2d 741, 752 (3d Cir. 1988) or the dissent in *Neal*, 68 M.J. at 305 (Ryan, J. and Erdmann, J., concurring in part and dissenting in part). In the context of self-defense, the *Clemons* court wrote, "[m]erely labeling something an affirmative defense does not automatically give it the qualities necessary to pass constitutional muster." *Id*. (citing 1 Wayne R. LaFave, *Substantive*

mistake of fact defense under R.C.M. 916(j) improperly shifted the "government's burden to the appellant and forced him to prove a mistake-of-fact defense, and prove it to an improperly high standard of reasonable." (Appellant's Br. 16). Appellant's argument is mistaken, and the structure of the statute and available defenses is lawful.

First, appellant misapprehends the mechanics of the affirmative defense. "A military judge is required to instruct members on any affirmative defense that is 'in issue,' and a matter is considered 'in issue' when 'some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.'" *United States v. Stanley*, 71 M.J. 60, 61 (C.A.A.F. 2012) (quoting *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)); *see also* R.C.M. 920(e). Some evidence can be raised "by evidence presented by the defense, the prosecution, or the court-martial." R.C.M. 916(b) Discussion. Once some evidence of the mistake of fact defense is presented, R.C.M. 916(b) requires the

---

Criminal Law §1.8(c), at 86 (2d ed. 2003)). An accused may be required to bear the burden of persuasion with respect to defenses such as those showing justification or excuse, but not with respect to those that "negative guilt by cancelling out the existence of some required element of the crime." W. LaFave & A. Scott at 71, 75. Here, the mistake of fact as to consent defense does not require an accused to negate an element of the offense but only to present some evidence showing an honest and reasonable belief that the victim consented to the sexual act. Following such production, the government is required to disprove the defense beyond a reasonable doubt. Therefore, it is possible for the government to establish beyond a reasonable doubt that the victim did not consent to the sexual act and for the accused to successfully establish that he held an honest and reasonable mistake of fact as that consent based on all of the surrounding facts and circumstances.

government to prove beyond a reasonable doubt that the defense did not exist. Accordingly, the burden of proof beyond a reasonable doubt remains squarely on the government.

Second, the statutory scheme does not require appellant to disprove an element of the offense. This Court, in *United States v. Neal* explained, "[a]n overlap between the evidence pertinent to the affirmative defense and evidence negating the prosecution's case does not violate the *Due Process Clause* when instructions 'convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.'" 68 M.J. at 299 (brackets in original) (quoting *Martin v. Ohio*, 480 U.S. 228, 232-36 (1987)). The government in its case-in-chief presented "some evidence" that triggered the mistake of fact instruction. At trial, the government admitted Prosecution Exhibit 2, appellant's statement to CID wherein appellant stated both that he was not "100% sure" that DJ consented to sex with him and that he had gotten affirmative consent to sexual intercourse from DJ. (JA 230). Appellant was asked "Did you ask the girl if you could have sex with her?" Appellant responded, "Yes I did and she said yeah." (JA 230). Private Thomas was a witness in the government's case-in-chief. On direct examination, PV2 Thomas testified "I asked [DJ] is it cool for me and [appellant] to have sex with

her, and she said yes. And [appellant] came over after that, sir." (JA 107). Appellant's defense counsel argued mistake of fact as to consent in his closing argument. (JA 220). In light of this evidence, the military judge appropriately instructed the panel on the mistake of fact as to consent defense. The military judge did so for both specifications for Charge II. (JA 550, 554).

Moreover, "[i]f such evidence is introduced, the military judge must instruct the members to consider all of the evidence, including the evidence of consent, when determining whether the government has proven guilt beyond a reasonable doubt." *Martin*, 480 U.S. at 232-36. Prior to closing argument, the military judge instructed the panel eight separate times language to the effect that "the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense." (JA 175, 176, 177(twice), 178, 179, 184, 185). The panel heard instructions on the following: the elements necessary to establish sexual assault by bodily harm, including the element of non-consent (JA 176); the definition of consent and the fact that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent" (JA 177); and the mistake of fact as to consent defense, including the reasonable person standard. (JA 178). The statutory scheme establishing the affirmative defense and the instructions in this case satisfy

the analyses in *Neal*, *Patterson*, *Martin*, as well as *Elonis*. As such, there is no inappropriate burden shift and, therefore, no error.

G. Appellant's suggested consent instruction is contrary to legislative intent.

The instruction proposed by appellant would impermissibly require a victim to manifest her lack of consent. Appellant asks this Court to read the Supreme Court's holding in *Elonis* to require the following language to be included in the definition of consent under Article 120(g)(8)(C):

> Lack of consent may be inferred based on the circumstances of the offense and must include a finding that the accused was reckless in disregarding indications of non-consent. All the surrounding circumstances are to be considered in determining whether a person gave consent and whether the accused was reckless in determining if the person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

(Appellant's Br. 16). As previously discussed, such a requirement is based on a misreading of the holding in *Elonis* to require a scienter of recklessness and is contrary to the long-standing requirement that any mistake of fact as to consent must be both honest and reasonable to constitute a defense. But more to the point, appellant's suggested language fails for three reasons. First, appellant's *mens rea* as to his victim's non-consent is irrelevant to whether or not his victim actually consented. Put another way, whether a person has actually consented to engage in

sexual activity is not dependent upon what the accused thinks. Second, injecting a recklessness standard here appears to create an inappropriate requirement whereby a victim must outwardly manifest non-consent in order to establish non-consent; an approach specifically rejected when Article 120 was redrafted in 2007. *Compare* MCM 2005, para. 45(c)(1)(b) (requiring more than a "mere lack of acquiescence" and that a victim "in possession of his or her mental faculties" to manifest her consent as called for by the circumstances) *with* MCM 2008, para. 45(c) (omitting similar requirement to manifest lack of consent by a victim). Third, requiring the government to prove, in the first instance, that appellant was reckless as to his victim's non-consent thwarts a specific statutory scheme making mistake of fact as to consent an available affirmative defense. Appellant's suggested language is misplaced and contrary to the statutory scheme.

First, it is illogical to consider appellant's state of mind when determining what his victim experienced. Article 120(g)(8)(A) defines consent based solely on *the victim's* "freely given agreement to the conduct at issue." In the context of the government's responsibility to prove the element of non-consent, that is, that *the victim* did not consent, information concerning appellant's reckless state of mind does nothing to illuminate for the fact-finder his victim's internal experience. Article 120(g)(8)(C) requires a fact-finder to consider all of the surrounding facts and circumstances to determine whether or not a victim consented; an objective

determination. An overlap between what a fact-finder might objectively consider in this context and what an accused might have considered for the same purpose, does not make the accused's ultimate conclusion relevant to the fact-finder's determination. That being said, appellant's state of mind is otherwise relevant, as Congress intended, not in the context of the definition of consent, but in the context of the mistake of fact as to consent defense. See Article 120(f), UCMJ; R.C.M. 916(j). Nevertheless, appellant's state of mind as to consent is not relevant to his victim's actual consent.

Second, the current version of Article 120, like similar District of Columbia statutes for example, "was intended . . . to change the focus of the criminal process away from an inquiry into the state of mind or acts of the victim to an inquiry into the conduct of the accused." *Neal*, 68 M.J. at 301 (citing *Russell v. United States*, 698 A. 2d 1007, 1009 (D.C. Cir. 1997)). Inclusion of appellant's suggested language in the definition of consent would propel us back several versions of Article 120 to an understanding of rape and sexual assault as defined by the victim's actions. Recklessness requires an accused "knew that there was a substantial and unjustifiable risk that the social harm the law was designed to prevent would occur and ignored this risk when engaging in the prohibited conduct." *See Haverty*, 76 M.J. at 204-05 (C.A.A.F. 2017) (citing *Black's Law Dictionary* 1462 (10th ed. 2014)). It is difficult to imagine a circumstance where

the affirmative defense of mistake of fact as to consent could coexist with the appellant's proposed requirement that the government prove in the first instance that he consciously disregarded indications of non-consent. Rather than conflate actual consent by a victim with whether an accused honestly and reasonably held a mistaken belief that she did consent, this court should conclude that an accused's state of mind as to his victim's consent or lack thereof is more appropriately considered, as Congress intended, as part of an affirmative defense of mistake of fact, and that a reasonable person standard sufficiently delineates the defense[9]. *See* Article 120(f), UCMJ; R.C.M. 916(j).

Lastly, appellant's attempt to force the fact-finder to consider an accused's *mens rea* when determining non-consent frustrates Congress' intent to provide the affirmative defense of mistake of fact under R.C.M. 916(j). Article 120(f) provides "[a]n accused may raise any applicable defenses available under this chapter or the Rule for Court-Martial." Rule for Courts-Martial 916(j) specifically provides, in this context, for the mistake of fact as to consent defense. If, in every case, the government must prove as part of the non-consent element that an

[9] The mistake of fact as to consent defense is predicated on a reasonable sober person, which further highlights that an objective standard is compelled when evaluating the circumstances surrounding the offense. Accordingly, the standard for reasonableness is not what an intoxicated accused subjectively believed about his victim's consent, but what "an ordinary, prudent, sober adult would have [believed] under the circumstances of [the] case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober to be considered reasonable because the person is intoxicated." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-45-14, n. 14 (10 Sep. 2014).

accused was *reckless* as to that non-consent, an accused could never establish an honest and reasonable mistake of fact as to consent. It is impossible to consciously disregard a known risk and still have an honest and reasonable mistake of fact as to that risk. A statute ought "to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 175 (2001)). It is clear from Article 120(f) that the statutory scheme intends to make the affirmative defense of mistake of fact available. Appellant's suggested language thwarts that intent and, therefore, cannot be appropriately read into the definition of consent.

As the panel here was properly instructed on the elements and the applicable affirmative defenses, there was neither plain nor obvious error. This Court should not grant appellant any relief.

II. Any error was harmless beyond a reasonable doubt because appellant's conduct was at least reckless as to DJ's consent.

Should this court determine that general intent is an insufficient *mens rea* for this offense, and it was plain error for the military judge to not sua sponte apply a higher *mens rea*, appellant is still not entitled to relief. Here, appellant's conduct was wrongful even under a reckless standard[10]. Reckless conduct is defined as

[10] Appellant's case is distinguishable from the prejudice analysis in *Tucker*, in that, here appellant faced a fully contested general court-martial. (JA 1). The appellant in *Tucker* pleaded

conduct that "exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved." UCMJ art. 111c.(7). Recklessness requires an accused to know of the risk of harm and ignore that risk. *See Haverty*, 76 M.J. at 204-05 (citing *Black's Law Dictionary* 1462 (10th ed. 2014)).

Appellant's conduct was reckless if not entirely purposeful. In the early morning on August 31, 2015, DJ was escorted to a dark, unfamiliar room that she was told was empty. (JA 19-21). As she engaged in consensual sex with PV2 Thomas, neither appellant nor PV2 Thomas asked for DJ's consent to sex with appellant. (JA 29). In his statement to CID, appellant was asked, "Did you hear the female consent to you having sex with her?" Appellant responded, "No, I wasn't 100% sure. I heard Thomas talking about me then he said it was cool." (JA 230). Despite being present in the room, appellant never spoke a word to DJ and hid in his bed as DJ was leaving. (JA 29, 35, 108). Appellant never spoke to DJ, never requested consent, and exploited the cover of darkness to conceal the fact that he switched places with PV2 Thomas and penetrated DJ from behind without her consent. Appellant here had no basis for believing that DJ would consent to sex without specifically asking her. Appellant and DJ had met in person on two

---

guilty to his offenses and was incorrectly instructed on a negligence *mens rea* during the *Care* inquiry. *Tucker*, *supra* at *2. Accordingly, this Court found that the appellant in *Tucker* was not provident to the offense of providing alcohol to an underaged individual. *Id*. Here, the facts and circumstances of appellant's misconduct were fully developed at trial and this Court can find that his actions were reckless.

prior occasions and never had a conversation. (JA 18). The two never had sexual relations in the past. (JA 229). In fact, appellant did not know DJ's name at the time of his statement to CID. (JA 229). Appellant was, at the very least, reckless as to whether DJ consented to sexual intercourse. Appellant's conduct was wrongful and warrants no relief from this Honorable Court.

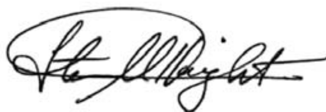
Conclusion

The military judge properly applied the general intent *mens rea* to the sexual assault by bodily harm offense and consent defense. Even if the *mens rea* as applied in this case is considered error, appellant has not satisfied his burden of proving that it constitutes plain error. Finally, should this court find plain error, it is harmless, because appellant's behavior here was reckless. Appellant has not demonstrated any, let alone reasonable, probability that the result would be any different under the reckless *mens rea*. Accordingly, this court should not grant relief.

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

SANDRA L. AHINGA
Captain, Judge Advocate
Appellate Government
Counsel
U.S.C.A.A.F. Bar No. 36905

WAYNE H. WILLIAMS
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060



STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 31651

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,516 words and 630 lines.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

SANDRA L. AHINGA
Captain, Judge Advocate
Attorney for Appellee
October, 2018

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 December __28__, 2018.

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