IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Sergeant (E-5) **NICHOLAS E. DAVIS** United States Army Appellant	)	Crim. App. Dkt. No. 20160069 USCA Dkt. No. 19-0104/AR

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE MENS REA OF "KNOWINGLY" APPLIES TO THE CONSENT ELEMENT OF ARTICLE 120c(a)(2), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920c(a)(2)(2016).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On January 29, 2016, at Joint Base San Antonio, Texas, an officer panel sitting as a general court-martial convicted the appellant, Private (PV2) Nicholas Davis, contrary to his pleas, of one specification of false official statement, one

specification of indecent recording, and one specification of broadcasting an indecent recording in violation of Articles 107 and 120c, UCMJ, 10 U.S.C. §§ 907 and 920c. (R. at 714). The general court-martial also convicted appellant, pursuant to his pleas, of two specifications of failure to obey a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892. (R. at 233). Appellant was acquitted of two specifications of sexual assault by bodily harm and one specification of sodomy. (R. at 622, 714). The military judge dismissed a third specification of sexual assault by bodily harm as multiplicious, or, in the alternative, as an unreasonable multiplication of charges for findings with respect to the sodomy specification. (R. at 161).

The court-martial sentenced appellant to be reduced to the rank of E-1 and to be discharged from the service with a bad-conduct discharge. (R. at 792). On November 30, 2016, the convening authority approved the sentence as adjudged. (Action).

On August 30, 2018, the Army Court dismissed the indecent broadcasting specification as factually and legally insufficient and affirmed the remaining findings and sentence. (Appendix A). Appellate counsel filed a motion for reconsideration on September 17, 2018, and on October 18, 2018, the Army Court denied the motion. (Appendix B).

Appellant was notified of the Army Court's decision, and in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on December 17, 2018. This Court granted Appellant's petition for grant of review on April 2, 2019 and ordered no briefs to be filed under Rule 25. On June 18, 2019 this Court affirmed the judgment of the United States Army Court of Criminal Appeals. Appellate defense counsel filed a Petition for Reconsideration on June 28, 2019. On July 31, 2019 this Court granted the petition and ordered briefs to be filed under Rule 25.

Statement of Facts

I. The Sexual Encounter

On November 28, 2015, a group of eight individuals, including appellant, went to the Riverwalk in San Antonio, Texas, to celebrate Private (PV2) James Sumrall's birthday. (R. at 357). The group decided to rent a room at the Ranch Motel on a bustling strip of Broadway that is "well-traveled." (R. at 360, 453). The rented room was on the ground floor with a window facing the parking lot. (R. at 454, Def. Ex.'s. J-R). Any passerby could look through the window and see what was happening inside the room because the group did not close the shades. (R. at 454).

The group spent the afternoon drinking in the room. (R. at 436). Eventually, the group of eight dispersed, leaving only PV2 Sumrall, PV2 Jacob

Harrell, appellant, and PV2 JE. (R. at 370). Private Sumrall was asleep in one bed; the latter three were in the other. (R. at 368-70). Shortly after the other four members of the group left the room, PV2 JE began kissing appellant, followed by PV2 Harrell rubbing PV2 JE's legs through her pants. (R. at 369, 371-72). Ultimately, the three Soldiers had group sex. (R. at 373-76).

Sometime later, but before sunset, PV2 Ethan Bakely and Specialist (SPC) Michelle Capps, having been with the group earlier, returned to the room. (R. at 452-53). Receiving no answer when he knocked on the door, PV2 Bakely looked through the uncovered window and testified he saw a partially nude PV2 JE "jum[p] off" from on top of a male and hurry to the bathroom at the sight of him in the window. (R. at 453-55). Appellant then let them into the room. (R. at 439).

Private Bakely went to wake up a still sleeping PV2 Sumrall to ensure no one would be late for evening formation, and SPC Capps subsequently left the room with PV2 JE. (R. at 438, 442-43). Before leaving, appellant showed PV2 Bakely a video from his phone depicting PV2 JE actively engaging in sex with appellant, who was positioned behind her. (R. at 444; Pros. Ex. 10).

According to SPC Capps, PV2 JE stated immediately after the sex that she had wanted to be a "good girl for Cottrell", her boyfriend at the time, but she had "enticed them" and "[couldn't] believe this happened again." (R. at 551). Apparently, however, PV2 JE later changed her mind and made an allegation of

sexual assault against appellant for which appellant was ultimately acquitted. (R. at 401, 714).

II. The Trial

Prior to panel deliberations, the military judge instructed the panel on what he believed were the elements of the offense: 1)That at or near San Antonio, Texas, on or about 28 November 2014, the accused knowingly videotaped the private area of Private (E-2) JE; 2) that the accused did so without the consent of PV2 JE; 3) that under the circumstances at the time of the charged offense, PV2 JE had a reasonable expectation of privacy; and 4) that the accused's conduct was wrongful. (R. at 633-34).

The military judge recognized the evidence raised the defense of mistake of fact as to consent to the offense of indecent visual recording and instructed the panel:

> "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the videotaping. 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. 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 offenses, the accused was not under a mistaken belief that the alleged victim consented to the videotaping, the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the videotaping, if you are

> convinced beyond a reasonable doubt that at the time of the charged offenses, the accused's mistake was unreasonable, the defense does not exist.

(R. at 635-38).

Defense counsel did not object to the instruction and, at the time, both of the instructions conformed to the Military Judges' Benchbook. (R. at 619); Dep't of the Army Pam. 27-9 (Sept. 10, 2014) [Benchbook].

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WHETHER THE MENS REA OF "KNOWINGLY" APPLIES TO THE CONSENT ELEMENT OF ARTICLE 120c(a)(2), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 920c(a)(2) (2016).

Standard of Review

In the absence of a defense objection, this Court reviews panel instructions for plain error. *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017). "Panel instructions are analyzed for plain error based on the law at the time of appeal." *Id.* "Under plain error review, [military courts] will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused." *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011).

Law

Appellant was charged with a violation of Article 120c(a)(2), UCMJ, 10 U.S.C § 920c(a)(2), which provides that anyone who "*knowingly* photographs,

videotapes, films or records by any means, the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy … is guilty of an offense." (emphasis added). Thus, Congress explicitly included a particular *mens rea*—that the offense be done knowingly—for the statute at issue here.

What mental state is required for commission of a federal crime is a question of congressional intent. *Staples v. United States*, 511 U.S. 600, 605 (1994). In determining Congressional intent, courts start from a longstanding presumption, traceable to common law, that Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). The Supreme Court applies the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text. *See Staples*, 511 U.S. at 606.

Recently, the Supreme Court reiterated that, as "'a matter of ordinary English grammar,' we normally read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime." *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (quoting *Flores-Figueroa* v. *United States*, 556 U. S. 646, 650 (2009)). In *Rehaif*, the holding concerned the interplay between two federal statutes. The first, 18 U.S.C. § 922(g), states, it "'shall be unlawful for any person

. . . , being an alien . . . illegally or unlawfully in the United States,' to 'possess in or affecting commerce, any firearm or ammunition.'" *Id*. The second, § 924(a)(2), states, "'[w]hoever knowingly violates certain subsections of §922, including §922(g), 'shall be' subject to penalties[.]'" *Id*., slip op. at 3. The Court held that the term "knowingly" in § 924(a)(2) applied to both the possession of a firearm element and to the illegal alien status element in § 922(g). *Id*. at 2195. The Supreme Court thus set aside the conviction as the district court had only applied knowingly to the possession of the firearm element. *Id*. at 2200.

This decision was consistent with *Flores-Figueroa*, where the Supreme Court interpreted 18 U.S.C. § 1028A(c), a statute that criminalizes anyone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 556 U.S. at 647. The Supreme Court held that the statute required the government to prove that the accused (1) knowingly transferred a means of identification and (2) actually knew that the means of identification belonged to another person. *Id*. In coming to this conclusion, the court found that under ordinary English usage, a person would typically assume that an adverb, such as 'knowingly,' when modifying a transitive verb (that is, a

verb with an object, such as 'transferred'), not only modifies the verb but modifies the object of the verb as well. *Id*. at 651.[1]

An instructional error as to the elements of an offense is tested for harmlessness beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 13-15 (1999). In application of the harmlessness standard in *Neder*, the Supreme Court relied on two factors in concluding that the error was harmless beyond a reasonable doubt: (1) the element was uncontested; and (2) the element was supported by overwhelming evidence. *Neder*, 527 U.S. at 17 (citing *Chapman v. California*, 368 U.S. 18, 24 (1967)). However, when a faulty jury instruction prevents the jury from considering a statutory defense, harmless error cannot be established by looking solely at the government's evidence in the light most favorable to the government. *See Neder*, 527 U.S. at 25.

[1] To illustrate: "If a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy *and* that the toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese." *Flores-Figueroa*, 556 U.S. at 651 (emphasis in original).

Argument

I. The military judge erred when he instructed the panel that appellant need only have knowingly recorded PV2 JE.

By improperly instructing the panel, the military judge misapplied the law and impermissibly reduced the burden of proof on the prosecution. Applying *Rehaif* to this case, the statutory elements required the government to prove not just that appellant knowingly recorded but also that appellant *knew* the recording was done without consent. Moreover, the mistake of fact instruction the military judge gave the panel did not cure this error because it was incompatible with the statutory elements. *Flores-Figueroa* informs this Court the test for knowingly is a subjective one. Therefore, the military judge should have instructed the panel that if appellant had an honest belief that the recording was consensual, even if such belief was not reasonable, then no crime was committed because appellant necessarily did not *know* the recording was without consent.

II. The error was plain and obvious in light of *Flores-Figueroa* and *Rehaif*.

Failing to instruct the panel that appellant must know the recording was without consent, and instead adding a requirement that any mistake must be reasonable, was plain and obvious error in light of *Flores-Figueroa* and *Rehaif*. As a consequence of the mistake of fact instruction here, the military judge imported a negligence *mens rea* where an objective, reasonable person standard is applied.

However, the statutory element necessitates the application of a subjective test which requires the appellant to knowingly record without consent.

In this case, the military judge should have instructed the panel that in order to find the appellant guilty of indecent recording, the panel had to find not only that the complaining witness did not consent to the recording, but also that the appellant knew it. Such an instruction would have ensured the government proved the required *mens rea*, rather than allowing the government to erroneously lessen the burden of proof on the critical element that separates innocent from criminal behavior.

The military judge's instruction that the panel could convict the appellant based on negligence rather than knowledge was obviously error. Thus, the first two prongs of plain error analysis are satisfied. *See Haverty*, 76 M.J. at 208.

III. The error was not harmless beyond a reasonable doubt.

With regard to the third prong of the plain error analysis, the defense theory of the case was that PV2 JE consented to the recording, or at least appellant did not know that she did not consent. (R. at 676-78). Appellant acknowledged that he had not obtained her affirmative consent. (Pros Ex. LIX at 22:40:10-59). However, given the facts and circumstances of the recording, the panel could have concluded that although his belief that she consented was unreasonable, he actually did not know that she did not consent.

At the time of the recording, PV2 JE was in a motel room with three men and having sex with two of them. (R. at 368-76). The room was on the first floor of the motel and the sex acts were readily visible to any random person who walked past the unobstructed window. (R. at 454). In fact, another soldier (PV2 Bakely) looked in the window when no one answered his knock at the door, and he saw appellant and PV2 JE having sex. (R. at 454-55).

The group nature of the sex acts bears upon appellant's subjective belief that PV2 JE was willing to have the sex act not just witnessed, but recorded by others in their circle. Given the open nature of the sexual acts, the panel could have believed the defense theory but convicted appellant because they felt his decision-making was negligent, as instructed by the military judge.

Conclusion

The panel was erroneously instructed that if a mistaken belief as to consent was merely negligent then appellant's mistake was criminal. This Court "presume[s] that the panel followed the instructions given by the military judge." *Haverty*, 76 M.J. at 208 (citing *United States v. Custis*, 65 M.J. 366, 372 (C.A.A.F. 2007)). Under the unusual circumstances of appellant's sexual encounter with PV2 JE, the panel could well have determined that his belief was negligent, but not knowing. Given that possibility, this instructional error is not harmless beyond a reasonable doubt.

WHEREFORE, appellant respectfully requests that this Honorable Court set aside the finding for Specification 1 of Charge IV.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Davis, Crim App. Dkt. No. 20160069, USCA Dkt. No. 19-0104/AR was electronically filed brief with the Court and Government Appellate Division on August 29, 2019.

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