IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

MICHAEL J. RICH
Senior Airman (E-4),
United States Air Force,
Appellant

USCA Dkt. No. 19-0425/AF

Crim. App. Dkt. No. ACM 39224

REPLY BRIEF

DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Senior Airman Michael J. Rich, the Appellant, hereby replies to the Government's brief concerning the granted issues, filed on February 3, 2020.

Argument

I.

THE COURT OF CRIMINAL APPEALS ERRED WHEN IT FOUND THAT MISTAKE OF FACT AS TO CONSENT IS NOT A SPECIAL DEFENSE "IN ISSUE" FOR THE OFFENSE OF SEXUAL ASSAULT BY INDUCING A BELIEF BY CONCEALMENT THAT APPELLANT WAS SOMEONE ELSE.

The Government contends that mistake of fact is not a "special defense" within the meaning of Rule for Courts-Martial (R.C.M.) 920(e)(3) and R.C.M. 916; or, even if mistake of fact is a special defense, it was not "in issue" in this case. (Gov. Br. at 15, 20). The Government is wrong on both counts.

A. Mistake of fact as to consent is a "special defense" within the meaning of R.C.M. 920(e)(3) and R.C.M. 916.

R.C.M. 916 enumerates certain special defenses, including mistake of fact. R.C.M. 916 (2016). "Instructions on findings shall include . . . [a] description of any special defense under R.C.M. 916 in issue." R.C.M.

920(e)(3) (2016). The language of R.C.M. 916 defines a "special" defense as a defense that does "not deny[] that the accused committed the objective acts constituting the offense charged, [but] denies, wholly or partially, criminal responsibility for those acts." R.C.M. 916(a) (2016). "Mistake of fact is a special defense. It 'is a defense when it negatives the existence of a mental state essential to the crime charged.'" *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011) (quoting 1 Wayne R. LaFave, Substantive Criminal Law § 5.6(a), at 395 (2d ed. 2003) (additional citation omitted). "Where a special defense is reasonably raised by the evidence, an instruction on that defense is required." *United States v. Davis*, 76 M.J. 224, 228 (C.A.A.F. 2017).

The discussion to R.C.M. 916(a) illustrates the difference between a defense and a special defense using "alibi" and "good character" as examples. *See* R.C.M. 916(a) (2016), Discussion. An accused's good character can be used to show the probability of his or her innocence generally. *See Military Judges' Benchbook*, Department of the Army Pamphlet 27-9 at 7-8-1 (Dec. 4, 2019). "'Alibi' means that the accused could not have committed the offense charged . . . because the accused was at another place when the offense occurred." *Id.* at 5-13. That is,

alibi is *not* considered a special defense because it denies that the accused was even in the location of the alleged offense, and asserts that the accused could not have participated in the physical acts that constitute the crime. On the other hand, mistake of fact is a special defense because it does not deny that the objective acts occurred, but only challenges the accused's criminal responsibility for those acts.

The Government argues that SrA Rich's mistake of fact meant that he "denied committing the objective act constituting the offense." (Gov. Br. at 15). However, this argument is flawed because it broadly equates the "objective act" language of R.C.M. 916(a) with the entire second element of the offense, including its *mens rea*. The Government argues:

> The military judge's instructions made clear that the element contained a specific, wrongful mental state that a guilty accused must possess. Thus, an accused who mistakenly believed a victim consented to the sexual act would be incapable of also possessing the culpable mental state essential to the crime. . . . By alleging he was mistaken, Appellant denied he committed the act constituting the second element of the offense.

(Gov. Br. at 15-16). The statutory elements of sexual assault by false pretense are (1) that a person committed a sexual act upon another person; and (2) did so by inducing a belief by artifice, pretense, or concealment that the accused was another person. 10 U.S.C. § 920(b)(1)

(2016). At its core, the objective act constituting sexual assault by false pretense is the sexual act, and the second element adds the mental state required for criminal responsibility. But, even if R.C.M. 916(a) refers to individual acts underlying the elements, whether SrA Rich "induc[ed] a belief" that he was another person was a legal conclusion, not an objective act. *Id.* Regarding the second element, the military judge further instructed that "'[c]oncealment' is an act of refraining from disclosure or hiding to prevent discovery. Silence when [SrA Rich] knows that [A1C CS] is acting under a misapprehension as to [SrA Rich's] identity may constitute concealment." (JA at 180.) Thus, there are two separate components to the second element. There is the act (silence, or refraining from disclosure); and the *mens rea* (whether SrA Rich knew that A1C CS believed him to be someone else, or specifically intended to trick A1C CS).

SrA Rich did not deny that he remained silent throughout the encounter, nor did he deny that a sexual act occurred. SrA Rich denied that he knew A1C CS to be operating under a misapprehension as to his identity, and thereby denied his criminal responsibility for the offense. This is squarely within the definition of a special defense under R.C.M. 916(a).

Finally, the Government argues that mistake of fact was not a special defense because "[i]n proving Appellant intentionally, unlawfully induced the sexual act through concealment, the government had to prove Appellant did not have a mistake of fact." (Gov. Br. at 20). This recognizes that even if mistake of fact is not a "special" defense, it was part of an element in this case. R.C.M. 920(e)(1) requires instruction on "a description of the elements" of the offense. R.C.M. 920(e)(1) (2016). Consequently, regardless of whether the concept of mistake of fact was a special defense or a part of an element, the military judge was required to instruct the members on it.

B. Mistake of fact as to consent was a special defense "in issue" at SrA Rich's court-martial.

A special defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *United States v. Stanley*, 71 M.J. 60, 61 (C.A.A.F. 2012). The Government contends that mistake of fact was not "in issue" in this case because it "could never 'exist side by side with the Government's prima facie case.'" (Gov. Br. at 26) (citing *United States v. Curry*, 38 M.J. 77, 80 n.4 (C.A.A.F. 1993)). The result in *Curry*, however, was that the Court found instructional error because it "[could not] be

confident that appellant had a fair hearing on his attack on *mens rea*." *Curry*, 38 M.J. at 81. Similarly, the absence of instruction on SrA Rich's attack on *mens rea* – that he believed A1C CS knew she was having sex with him and therefore his silence was not criminal – was prejudicial error. The military judge should have given the Benchbook instruction on ignorance or mistake where specific intent or actual knowledge is in issue, which would have made clear to the members that if SrA Rich was under the belief that A1C CS knew his identity, then he did not engage in the inducement. *See Benchbook* at 5-11-1.

The Government argues that it would "produce absurd results" if the language of R.C.M. 920(e)(3) requires instruction on "all 'defenses' factually in issue and listed under R.C.M. 916." (Gov. Br. at 25). However, if the language of R.C.M. 920(e)(3) does not apply to defenses in R.C.M. 916 that operate to negate the required *mens rea*, it would render R.C.M. 920(e)(3) meaningless for specific intent offenses and offenses requiring actual knowledge. The Government's general concern over "absurd results" also seems to ignore the facts of this case, where the defense counsel requested an instruction on mistake of fact and made

it a central part of closing argument.[1] Certainly, if a special defense contained in R.C.M. 916 is not raised by some evidence, it is not required by R.C.M. 920(e)(3). The military judge should have resolved any doubt whether an instruction should be given in favor of SrA Rich.[2]

C. The omission of an instruction on mistake of fact as to consent materially prejudiced SrA Rich.

The Government argues that any error in the military judge's omitted instruction is "unimportant" in SrA Rich's case because the members convicted him based on the instructions that *were* given:

> The military judge's instructions ensured the court members correctly relied on the elements of the offense to convict Appellant beyond a reasonable doubt. The military judge's instructions made clear that the court members could only convict Appellant if he 'induc[ed] a belief by concealment that Appellant was another person.'

(Gov. Br. at 29). This argument is circular, using the verdict obtained in error to justify why the error was harmless.

---

[1] Even if this Court finds that SrA Rich's defense counsel did not "request" the instruction under the second granted issue, the defense counsel still addressed a mistake of fact instruction with the judge on the record on two occasions.

[2] In contrast to mistake of fact, the military judge, apparently *sua sponte*, instructed that evidence of voluntary intoxication alone could cause the members to have a reasonable doubt as to whether SrA Rich engaged in inducement. (JA at 170.) Voluntary intoxication is enumerated in R.C.M. 916 and would negate the second element.

The members heard argument on two different mistakes of fact: (1) the fiancée argument that trial counsel set up in order to argue it as unreasonable,[3] and (2) the mistake of fact as to consent that was essential to SrA Rich's defense. The omission of a mistake of fact instruction is more prejudicial considering the instructions that were provided. The members were told that evidence of voluntary intoxication alone could cause the members to have a reasonable doubt as to whether SrA Rich engaged in inducement. (JA at 180-81). The members were told that if A1C CS actually consented then she was not induced into the sexual conduct by artifice, pretense or concealment. (JA at 180). The military judge also gave an instruction, over defense objection, that told the members that "[s]ilence when the accused knows that victim is acting under a misapprehension as to the accused's identity may constitute concealment." (JA at 180.) But the members were not instructed on the inverse, that if SrA Rich was under the belief that A1C CS knew his

[3] "When evidence is adduced during the trial which 'reasonably raises' an affirmative defense or a lesser-included offense, the judge must instruct the court panel regarding that affirmative defense or lesser-included offense. . . . The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (internal citations omitted).

identity, then his silence does not constitute concealment.

The members were instructed on and explicitly told to consider multiple defenses and theories of guilt raised by the evidence, but not mistake of fact. As the Government states, military panel members are presumed to follow the military judge's instructions (Gov. Br. at 41); thus, they would not consider a defense on which they were not instructed.

II.

EVEN IF MISTAKE OF FACT WAS NOT A SPECIAL DEFENSE "IN ISSUE," THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE REQUEST FOR AN INSTRUCTION ON MISTAKE OF FACT.

The Government argues that SrA Rich's defense counsel did not request an instruction on mistake of fact because he was "equivocal and passive" in addressing the military judge and mentioned that it may not be a defense in this case. (Gov. Br. at 35). The Government further argues that even if the instruction was requested, the military judge did not abuse his discretion because there is no way to know whether the requested instruction was correct, and the military judge's other instructions were sufficient to address mistake of fact. (Gov. Br. at 38). The Government is wrong, as the instruction was requested and the

military judge's failure to include it was prejudicial error.

A. SrA Rich's defense counsel requested an instruction on mistake of fact as to consent.

The Government cites *United States v. Maxwell* for its proposition that "[t]here must be an objection no later than after the instructions are given and before the court is closed for deliberations, stating that the instructions did not adequately cover the matters raised in the requested instruction." 45 M.J. 406, 426 (C.A.A.F. 1996); (Gov. Br. at 35). However, this rule is not absolute, and it depends on the facts of each case whether instructional error was preserved. *See United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016) (finding instructional error preserved where the military judge demonstrated his awareness of defense counsel's grounds for instruction, disagreed with him, and further objection was likely to be unsuccessful).

The Government argues that trial defense counsel abandoned his request by saying "[y]es, sir" five transcript lines after the military judge expressed skepticism that mistake of fact "works in this fact pattern." (JA at 169). Trial defense counsel was understandably respectful

addressing a military judge in the rank of O-6[4] and holding the position of Chief Trial Judge of the Air Force.[5] This exchange was after the military judge had stated on the record that he granted the defense request for an instruction on consent, and asked "Other than that, do you believe any defenses have been raised by the evidence that I should instruct on?" (JA at 169). SrA Rich's defense counsel reiterated his request that mistake of fact be addressed in the military judge's instructions. (JA at 169). The military judge seemingly addressed mistake of fact at this point in the record only to respond to defense counsel's second request, and to explain why he had implicitly denied the first defense request and not included the instruction in his email draft. Regardless of whether trial defense counsel believed that mistake of fact was a special defense or wrapped into an element of the offense, the record demonstrates that he wanted it to be included in the instructions.

The Government also argues that trial defense counsel abandoned his request for an instruction because he later objected to an instruction over email. (Gov. Br. at 36). At the time trial defense counsel emailed

---

[4] JA at 049.
[5] Record of Trial, Transcript at 4; 41.

his objection to the military judge's proposed instruction on concealment, the above exchange had already occurred and his request for a mistake of fact instruction had been denied. Additionally, trial defense counsel had only previously objected to the "should know" language, and the email expanded the defense objection beyond merely the "should know" language. Trial defense counsel did not abandon his request for a mistake of fact instruction, and he is not required to continually object to the instructions after the military judge denied the request.

B. The military judge's failure to give the defense-requested mistake of fact as to consent instruction was error, and the error materially prejudiced SrA Rich.

This Court has a three-pronged test to determine whether a military judge's failure to give a defense-requested instruction is error: "(1) [the requested instruction] is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation." *United States v. Carruthers*, 64 M.J. 340, 346 (C.A.A.F. 2007) (internal quotation marks and citation omitted).

The Government argues that "the record does not clearly establish that Appellant's requested instruction would be correct," though the experienced military judge surely understood defense counsel to have requested the standard, Benchbook instruction on mistake of fact for a specific intent element. Such instruction is legally correct, and satisfies the first *Carruthers* prong.

The second *Carruthers* prong is met because the instructions given did not include any language about SrA Rich's mistake of fact as to consent. The Government again assumes that the panel members deviated from the military judge's instructions and considered a theory on which they were not instructed, arguing that "the court members necessarily had to reject any suggestion that Appellant had an innocent, mistaken state of mind." (Gov. Br. at 39). It is not expected that court-martial members understand the *mens rea* required for the inducement element of the offense, nor that they would consider SrA Rich's mistake to negate that *mens rea* if not instructed. As this Court said in *Curry*: "Even if we, as lawyers, can sift through the instructions and deduce what the judge must have meant, the factfinders were not lawyers and cannot be presumed to correctly resurrect the law." *Curry*, 38 M.J. at 81.

The military judge declined to give a specific instruction on mistake of fact, and the factfinders cannot be presumed to correctly divine that mistake of fact would have negated the required *mens rea*.

Finally, mistake of fact was vitally important to SrA Rich's overall defense strategy, and the military judge's failure to give the defense-requested instruction prejudiced SrA Rich.[6] The Government contends that its evidence at trial was so overwhelming that an instruction on mistake of fact as to consent would not have changed the outcome of the trial. (Gov. Br. at 43). However, for a penetrative sex offense, the members sentenced SrA Rich to confinement for 60 days, reduction in rank to E-2, a reprimand, and the mandatory dishonorable discharge. This relatively low sentence to confinement fairly indicates that the members believed SrA Rich had an honest mistake of fact as to A1C CS's consent; however, because they were not properly instructed, the members did not know that the same mistake of fact meant that they were required to find SrA Rich not guilty.

---

[6] The reasons discussed on page 6, *supra*, also apply to prejudice under the second granted issue.

WHEREFORE, SrA Rich respectfully requests that this Honorable Court set aside the findings and sentence.

DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on February 13, 2020, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 24(d) & 37

This supplement complies with the type-volume limitation of Rule 24(c) because it contains 2,975 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Century Schoolbook 14-point typeface.

DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellant