**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br>*Appellee*<br><br>v.<br><br>Senior Airman (E-4)<br>MICHAEL J. RICH<br>*Appellant* | ) UNITED STATES' BRIEF<br>)<br>)<br>)<br>) Crim. App. Dkt. No. 39224<br>)<br>)<br>) USCA Dkt. No. 19-0425/AF<br>) |

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# UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUES

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KELSEY B. SHUST, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
kelsey.b.shust.mil@mail.mil
Court Bar No. 36522

BRIAN C. MASON, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
brian.c.mason10.mil@mail.mil
Court Bar No. 33634

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
mary.e.payne46.civ@mail.mil
Court Bar No. 34088

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
shaun.s.speranza.mil@mail.mil
Court Bar No. 33821

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

## ISSUES PRESENTED

**I.**

**DID THE COURT OF CRIMINAL APPEALS ERR 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?**

**II.**

**IF MISTAKE OF FACT WAS NOT A SPECIAL DEFENSE "IN ISSUE," DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY DENYING THE DEFENSE REQUEST FOR AN INSTRUCTION ON MISTAKE OF FACT?**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C § 866(c) (2016). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C § 867(a)(3).

## STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

## STATEMENT OF FACTS

***She just wanted to go to sleep.***

After a night of drinking alcohol, A1C CS and her boyfriend, A1C AK, decided to spend the night at Appellant's apartment in downtown Grand Forks, North Dakota. (*See* JA at 69, 90, 134.) A1C AK had been dorm suitemates, coworkers, and good friends with Appellant. (JA at 67, 132.) A1C CS also considered Appellant to be a friend. (JA at 86.)

Around 0200 hours, they arrived to Appellant's apartment and hung out. (JA at 69–70.) A1C CS and A1C AK continued arguing, as they had been earlier in the night. (*See* JA at 95, 99, 100–01.) They argued about A1C AK's jealousy, and they argued because A1C CS tried to intervene to stop Appellant from hitting on one of her friends. (JA at 99.)

As the night wore on, Appellant offered the couple his bed to sleep but they

declined. (JA at 70, 151.) Appellant said they should just take his bed in a couple of hours when he got up for a deployment weapons training. (Id.) Appellant had to report around 0500 or 0530. (JA at 166.) A1C CS and A1C AK agreed. (JA at 101.) Around 0300 hours, Appellant went upstairs to his bedroom. (JA at 71.) A1C CS and A1C AK then tried to go to sleep together on the living room couch. (JA at 70, 135.)

But A1C CS was uncomfortable and couldn't sleep. (JA at 73.) After about 30 minutes, she nudged A1C AK to go upstairs and wake up Appellant so that they could go sleep in Appellant's bed. (Id.) A1C AK returned, but Appellant wasn't awake. (Id.) A1C CS nudged A1C AK again to wake up Appellant, and A1C AK went upstairs. (Id.) When A1C AK returned, A1C CS still didn't know if Appellant was up. (*See* JA at 74.) She nudged A1C AK a third time to go see if Appellant was awake. (JA at 74.) This time, A1C AK confirmed Appellant was in the shower. (Id.) A1C AK then showed A1C CS upstairs where Appellant's bed was and said A1C AK would join her after Appellant left for training. (Id.)

Finally, A1C CS went to sleep. (Id.) She awoke to someone trying to tug her tight pants off. (JA at 76.) She thought it was A1C AK, and she was "mad" and "a little irritated." (JA at 77.) She said his name in a "nice loud tone." (*Id.*) Only dim moonlight shown through a nearby window into the dark room. (*See id.*) She couldn't see anything. (JA at 77.) There was no reply, so she "kind of went

back to sleep." (JA at 130.) But the tugging continued. (JA at 78.) A1C CS's body "kind of shook" as the person tried to get off her pants. (*See* id.) She just wanted to go to sleep and the tugging to stop, so she took off a pant leg. (JA at 78.)

As A1C CS laid on her back, she felt a penis penetrate her vagina. (JA at 78–79, 113.) Again, she said her boyfriend's name. (Id.) She said the name a little louder and more agitated because she wanted to sleep. (JA at 79.) Again, there was no reply. (Id.) The person on top of her penetrated her for approximately five minutes. (JA at 113.) Then he leaned down and kissed her. (JA at 79.) A1C CS realized at that point the person she thought was her boyfriend was not. (Id.) She pushed him into the moonlight, saw it was Appellant, and then pushed him off of her. (JA at 79–80.) Appellant "started to apologize" and "rambl[ed] on," saying, 'Oh sh**. I am so sorry. I am so sorry. I'm drunk. I thought you were my fiancé[e]' and not to tell [A1C AK.]" (JA at 80, 115.) Appellant also later claimed to another colleague that Appellant went to bed, expecting his fiancée, but it wasn't who he thought it was. (JA at 167.)

Meanwhile, Appellant's fiancée lived in Canada, had just had a child, and was not at Appellant's apartment. (*See* JA at 179.) And Appellant reported to weapons training that morning around 0500 or 0530. (JA at 166.) He texted his coworker he would be running late and showed up with donuts for the whole class.

(Id.)

***Mistake of fact as to consent is "wrapped into the charge itself."***

On the first day of trial, the military judge indicated he received proposed instructions from both sides. (JA at 63.) "In large part," the parties agreed, although "one area[] of dispute" involved defining some terms of the charged offense. (Id.) The military judge said he would send his own draft instructions overnight. (Id.) He advised, "[W]hatever I have in there is not a ruling in any way. It will start the discussion though so we can start to frame objections when we deal with that as we will likely have some time tomorrow to talk instructions." (Id.) The subsequent exchange followed:

> MJ: Defense counsel, are you going to ask for a mistake of fact instruction? Is that fair?
>
> DC: Yes, sir.
>
> MJ: Okay, that helps. Again, I'm not ruling on any of this. It's just that it will help me as I work towards it.
>
> DC: Consent and mistake of fact. We -- our position is that those are not necessarily defenses in this case. They are more of elements that have to be proven on the front end because it's a -- it's a broad charge, basically. So, the basis is specific intent.
>
> MJ: That just helps me as [I] craft and finalize the instructions.

(JA at 63–64.)

The following day, the parties discussed instructions again:

> MJ: When I sent out my instructions last night, I did include the consent discussion, which isn't necessarily a defense, but it is, at least something I think would be wise to instruct on. So, my plan is to instruct on it. Other than that, do you believe any defenses have been raised by the evidence that I should instruct on? Defense Counsel?
>
> DC: Your Honor, I have not had a chance to look at the instruction you sent out honestly. However, with regard to mistake of fact, we believe it would be an appropriate defense -- we believe it is wrapped into the charge itself, the way that it is charged. They have to prove that our client did not have a mistake of fact, so some language regarding mistake of fact may be appropriate. However, you may have already included it, and I just haven't looked at it.
>
> MJ: I hadn't, because I don't know if mistake of fact defense works in this fact pattern. I am trying to work through it. What you will see in tonight's, is some language about voluntary intoxication. . . . It's not necessarily an offense that involves a specific intent, but it does involve inducement, which indicates some kind of knowledge on behalf of your client. Not maybe specific intent, as we view it in premeditation, or something like that, but at least knowledge that your client has engaged in artifice, concealment, trickery, or something like that.
>
> DC: Yes, sir.

(JA at 169.) The military judge then asked the parties to "[t]ake a look at what I've done with the instructions." (JA at 170.) The military judge concluded the discussion by saying he would send out the final version overnight, subject to objections or requests for additional instructions. (JA at 171.) He directed the

parties to email him any suggestions or changes. (JA at 171.)

Overnight, trial defense counsel objected via email to an instruction on silence. (JA at 216.) Trial defense counsel argued the instruction suggesting that concealment can occur through silence when the accused knows the victim is acting under a misapprehension as to the accused's identity went "beyond simply defining the term." (Id.) Beyond that objection and identifying some typos, trial defense counsel stated via email that "[w]e did not have any other objections or suggested changes to the proposed instructions." (Id.)

Back in the courtroom the next day, the military judge ruled on the instructions and overruled the defense objection to the instruction regarding silence.[1] (JA at 176.) The military judge then checked again to see whether either side had any other objections or requests for additional instructions. (JA at 177.) Trial defense counsel said: "No, Your Honor." (Id.)

Ultimately, in relevant part, the military judge instructed the court members that to find Appellant guilty, they must be convinced by legal and competent evidence beyond a reasonable doubt that Appellant penetrated A1C CS's vulva with his penis; and that he did so by inducing a belief by concealment that Appellant was another person. (*See* JA at 179–80.) "Concealment," was defined

[1] The military judge concluded the instruction was an appropriate way to frame the evidence. (JA at 176.)

as "an act of refraining from disclosure or hiding to prevent disclosure. Silence when the Accused knows that [the] victim is acting under a misapprehension as to the accused's identity may constitute concealment." (JA at 180.) The military judge further instructed:

> The evidence has raised the issue of whether [A1C CS] consented to the sexual conduct listed in the Specification of the Charge. All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven that the sexual conduct was done by inducing a belief by artifice, pretense, and concealment that the accused was another person beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven that the sexual conduct was done by inducing a belief by artifice, pretense, and concealment that the accused was another person.
>
> The evidence has raised the issue of voluntary intoxication in relation to the offense of sexual assault. I advised you earlier that one of the elements of the offense of sexual assault, the way it's charge[d] here, is the accused induced in the alleged victim a belief by artifice pretense, and concealment that the accused was another person. In deciding whether the accused induced in the alleged victim a belief by artifice, pretense, and concealment that the accused was another person, you should consider . . . the evidence, if any, of voluntary intoxication. The law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants. Thus, evidence the accused was intoxicated, may, either alone, or together with other evidence in the case, cause you to have a reasonable doubt the accused

engaged in the inducement defined above.

(JA at 180–81.) When the instructions were read to the court members, trial defense counsel did not object.

***Appellant evidenced "consciousness of his own guilt."***

During closing arguments, trial counsel argued there was no way Appellant honestly believed A1C CS consented to having intercourse with him, given the lies Appellant told when A1C CS realized Appellant was on top of her. (JA at 186, 191–92.) Trial counsel argued:

> If this was a consensual encounter as defense counsel described in opening, why say, 'Oh sh**. I'm sorry. I'm drunk. I thought you were my fiancée.' Why say that? The natural response is, I'm sorry. I thought you were into this. Oh, I'm sorry. We shouldn't have done that.

(JA at 191.) Instead, Appellant's statements went "to his consciousness of his own guilt." (Id.) Appellant "did not believe that this was his fiancée. His fiancée lived in Canada; had just had a child, and had not been seen anywhere near, by any of the witnesses at any point." (JA at 192.) Thus, any claim that Appellant honestly believed A1C CS was his fiancée was "simply ridiculous and makes no sense." (Id.) It was not a "real possibility" that Appellant "really thought this was his fiancée." (JA at 195.) Additionally, trial counsel argued Appellant wasn't drunk as he had claimed:

> If he is so drunk he can't tell the difference between his friend and his fiancée, how, in the world does he have the presence of mind, in that moment, to say, "Don't tell [A1C AK." He can't figure out who this person is, he is so drunk. But he knows she better not let his friend know. . . . He then has the presence of mind to finish getting dressed, drive the 20 to 25 minutes to base; stop on the way and realizing that he's going to be late, to get donuts for the group.

(JA at 192.)

Trial defense counsel argued Appellant and A1C CS had consensual sexual intercourse and suggested they only came up with a story to tell people they mistook each other if they thought people would find out. (JA at 200.) Alternatively, defense counsel argued Appellant mistakenly believed A1C CS consented because he saw A1C CS laying on his bed, and the last thing he remembered was that A1C CS had been downstairs arguing with A1C AK. (JA at 205.) Trial defense counsel said, "[A]ll of the reasons for consent are reasons that he too would believe, wait a second, she consented to this." (JA at 207.)

Trial counsel rebutted trial defense counsel's argument that A1C CS consented to the intercourse, dismissing the idea A1C CS consented because she had argued with A1C AK. (JA at 210.) Trial counsel described again how the couple laid down on the couch together and how A1C AK had helped A1C CS get upstairs into bed. (Id.) Trial counsel argued:

> [T]his arguing, this heartbreaking argument, that

> apparently was so heartbreaking that they still laid down on the couch together when it was over. . . . That's the heartbreaking argument that's going to cause her to go have sex with another man?

(Id.) In the end, trial counsel argued Appellant made no mistake: Appellant took a shower, walked down the hallway awake, and then took advantage of A1C CS, and Appellant knew A1C CS believed that Appellant was actually her boyfriend. (Id.)

## SUMMARY OF ARGUMENT

No instructional error occurred, and this Court should affirm the findings and sentence against Appellant. The first granted issue asks whether the military judge had a sua sponte duty to instruct on the defense of mistake of fact as to consent. Appellant asserts the military judge had a duty, because mistake of fact as to consent was a special defense in issue in Appellant's case. But mistake of fact as to consent was not a special defense in issue here, as contemplated by the Rules for Courts-Martial (R.C.M.), for two different reasons: It was not a "special defense," but even if trial defense counsel's strategy was categorized as a special defense under R.C.M. 916(j)(1), it was not legally "in issue" for Appellant's crime.

The crime of sexual assault by inducing a belief by concealment that the accused was someone else requires the accused to have a culpable mens rea. By

arguing Appellant was mistaken regarding whether A1C CS consented, Appellant attacked the government's evidence regarding Appellant's mens rea—an element of the offense. Therefore, Appellant's strategy in defending against the crime was not a "special defense," as defined in R.C.M. 916(a). It was a "defense," or a commonly used defense trial strategy. Raising the "defense" had no impact on what the prosecution was required to prove.

Alternatively, even if mistake of fact as to consent is always considered a "special defense," then the military judge still had no duty to instruct under R.C.M. 920(e)(3). Rule for Courts-Martial 920(e)(3) purports to mandate instruction for "any special defense under R.C.M. 916 in issue." However, this Court has consistently read the rule to require instruction for "special defenses" operating like "affirmative defenses." In this case, Appellant's attack on the mens rea element did not operate as an "affirmative defense." Appellant merely sought to negate an element of the crime. The military judge had no sua sponte duty to instruct on mistake of fact as to consent, and no plain error resulted, so this Court should affirm the decision of the Air Force Court.

With no sua sponte duty to instruct, then the second granted issue assumes trial defense counsel requested an instruction on mistake of fact as to consent and asks whether the military judge abused his discretion when he denied it. However, Appellant did not make a sufficient request to preserve this issue.

There was no clear or obvious error in the military judge's instructions, and the strength of the evidence, along with Appellant's chosen trial defense strategy, ensured he suffered no prejudice.

Ultimately, the government proved beyond a reasonable doubt that Appellant had a guilty mens rea as an element of the offense. As a result, the government necessarily disproved that Appellant was merely mistaken. The distinction between "defenses" that attack elements, and "special" or "affirmative defenses," drives differing legal obligations for trial courts to instruct with respect to the same. Therefore, this Court should reject Appellant's invitation to require military judges to instruct on evidence that may simply negate an element of a crime in every case, and affirm Appellant's conviction and sentence.

## ARGUMENT

### I.

### THE COURT OF CRIMINAL APPEALS DID NOT ERR 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.

#### *Standard of Review*

The question regarding whether a mistake of fact operates as a "special" or "affirmative" defense that requires instruction is reviewed de novo. *See* United

States v. Schumacher, 70 M.J. 387, 389 (C.A.A.F. 2011) (citing United States v. Lewis, 65 M.J. 85, 87 (C.A.A.F. 2007)).

***Law & Analysis***

**A. The military judge had no sua sponte duty to instruct because mistake of fact as to consent was not a "special defense" "in issue" which required instruction under R.C.M. 920(e)(3).**

Military judges have a statutory duty under Article 51(c), UCMJ, to instruct the members of the court of the elements of the offense before findings deliberations. Article 51(c), UCMJ, 10 U.S.C. § 851(c) (2012). Rule for Courts-Martial 920(e)(1) likewise provides that military judges shall instruct on the elements of the offense. Rule for Courts-Martial 920(e)(3) further provides that military judges shall instruct on "[a] description of any special defense under R.C.M. 916 in issue."

R.C.M. 916 contains three labels for defense strategies: "defenses," and "special" or "affirmative defenses." The section heading refers to "Defenses," and proceeds to distinguish between "defenses" and "special defenses." *See* R.C.M. 916(a) ("As used in this rule, 'defenses' *includes* any special defense . . . [.]" ) (emphasis added) The Discussion section then states "[s]pecial defenses are also called affirmative defenses." R.C.M. 916(a), Discussion. A "special defense," under R.C.M. 916(a) does not deny the accused committed the objective acts

constituting the offense charged. Instead, a "special defense" "denies, wholly or partially, criminal responsibility for those acts."

"Whether an instruction on a possible defense is warranted in a particular case depends upon the legal requirements of that defense and the evidence in the record." United States v. Jones, 49 M.J. 85, 90 (C.A.A.F. 1998). Without instruction on certain defenses, the court members may be "insufficiently informed" as to the "law of the case" where such a defense is properly raised. United States v. Ginn, 4 C.M.R. 45, 48 (C.M.A. 1952) (holding that "an uninformed court-martial" cannot know the technical legal view of the circumstances of an affirmative defense which would excuse a killing otherwise classified as murder); *see also* United States v. Davis, 76 M.J. 224, 228 & n.5 (C.A.A.F. 2017) (citing Ginn, 4 C.M.R. at 48, and stating the Article 51(c), UCMJ, duty to instruct on elements "extends to affirmative defenses as well"). Failure to provide correct and complete instructions to the panel before deliberations may amount to a denial of due process. United States v. Wolford, 62 M.J. 418, 419 (C.A.A.F. 2006) (citation omitted).

**1. Mistake of fact as to consent was not a "special defense" in issue because Appellant denied committing the objective act constituting the offense.**

The first reason the military judge had no sua sponte duty to instruct in Appellant's case centers on the language in R.C.M. 916(a). As the Air Force Court

correctly determined, the military judge did not err because mistake of fact as to consent was not a "special defense" as defined in R.C.M. 916(a). Appellant attacked the government's prima facie case. Appellant thereby denied he committed an act constituting the offense.

Appellant's crime of sexual assault by inducing a belief of his identity by concealment required proof of two elements: (1) Appellant penetrated A1C CS's vulva with his penis; and that (2) he did so by inducing a belief by concealment that Appellant was another person. Article 120(b)(1)(D), 10 U.S.C. § 920(b)(1)(D) (2012); (JA at 50). To convict Appellant of the charged conduct, the court members had to find beyond a reasonable doubt that Appellant acted intentionally to conceal his identity to commit the sexual act with A1C CS.

Given the evidence, the military judge correctly told the court members that Appellant's silence may constitute concealment when he knew that A1C CS incorrectly believed him to be someone else. (*See* JA at 180 ("Silence when the Accused knows that [the] victim is acting under a misapprehension as to the accused's identity may constitute concealment.")) The second element required knowledge and specific intent. 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. Appellant could not be mistaken about A1C CS's consent while simultaneously knowing that she believed him to be someone else—her boyfriend. There would be nothing to conceal. By alleging he was mistaken, Appellant denied he committed the act constituting the second element of the offense. *Cf.* R.C.M. 916(a).

Appellant's argument regarding his alleged mistake of fact as to consent, then, did not constitute a "special defense" as R.C.M. 916(a) contemplates. Rather, "it is merely a restatement" of one of the "basic premises" of the criminal law: A defendant cannot be convicted when it is shown that he does not have the mental state required by law. Wayne R. Lafave, Substantive Criminal Law, §5.6(a) at 395 (2d ed. 2003). When an element of the crime inherently requires an accused to have a criminal mens rea, and not be mistaken, then a defense theory of mistake of fact as to consent is nothing more than attack on the sufficiency of the government's proof.[2] That is why at least one criminal law treatise chooses not to classify "mistake of fact" as a "defense" at all—"so as to emphasize that . . . it is commonly accepted that the prosecution is required to disprove the mental state-

[2] But that is not to say mistake of fact as to consent cannot properly constitute a "special defense" in the way R.C.M. 916(a) describes. Mistake of fact as to consent generally operates in this way when it serves to add an additional element of proof to a general intent crime that the government must disprove. *See* United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019) (mistake of fact as to consent is an "affirmative defense" to sexual assault by causing bodily harm).

negating mistake beyond a reasonable doubt." *Id.* Here, given the language of R.C.M. 916, Appellant's trial defense strategy must properly be called a "defense" rather than a "special defense." *See* Lafave, *supra*, § 9.1(a)(1) at 5 ("[C]haracterization of a given failure of proof as a defense rather than a defect in proving the offense depends, for the most part, upon common language usage.") (quotation marks and footnote omitted); *but see* United States v. Goodman, 70 M.J. 396, 399 (C.A.A.F. 2011) (seemingly citing Lafave, *supra*, § 5.6(a) at 395, to support the proposition that "mistake of fact is a special defense").

State court cases involving rape by forcible compulsion are instructive on the question of whether mistake of fact as to consent defense strategies require instruction. Like sexual assault by inducing a belief that the accused was someone else, rape by forcible compulsion requires the accused to compel a victim to participate in sexual intercourse while knowing the victim does not consent. Courts have held that proving a defendant forcibly compelled a victim to engage in sexual intercourse implicitly proves the victim did not consent, and the defendant did not have a mistake of fact as to the victim's consent. *See* State v. W.R., 181 Wash. 2d 757, 765 (Wash. 2014); People v. Williams, 81 N.Y.2d 303, 317 (N.Y. 1993). As the Court of Appeals of New York stated:

> Manifestly, it is unnecessary to forcibly compel another to engage in sexual acts unless that person is an unwilling participant. Thus, the jury, by finding that defendants used forcible compulsion to coerce the victim to engage in

> sodomy and intercourse, necessarily found that defendants believed the victim did not consent to the sexual activity. The instructions given covered the defense theory and the court did not commit reversible error in declining to give additional instructions on mens rea or mistake of fact.

Williams, 81 N.Y.2d at 317.

Here, if A1C CS consented to penetration knowing it was Appellant, or if Appellant believed she did, it would be manifestly unnecessary for Appellant to induce a belief by concealment that he was someone else. Just as the defendants in Williams could not act forcibly to compel their unwilling victims without knowledge of their lack of consent, Appellant could not induce a belief by concealment that he was someone else without knowing that A1C CS did not consent to sexual intercourse with him. *See* id. He induced a belief that he was actually A1C CS's boyfriend, because A1C CS would consent to have sexual intercourse with her boyfriend. The element of inducement by concealment, as instructed by the military judge, required Appellant to have a culpable mens rea. Like in Williams, by convicting Appellant of the charged offense, court members necessarily found that Appellant possessed the required mens rea and believed A1C CS did not consent to the sexual activity. *See* id.

In sum, mistake of fact as to consent was "wrapped into the charge itself," just as trial defense counsel described. (JA at 169.) Appellant intentionally induced A1C CS to believe that Appellant was her boyfriend so that Appellant

could commit the sexual act. Appellant concealed his true identity because he knew he otherwise would not have A1C CS's consent. In proving Appellant intentionally, unlawfully induced the sexual act through concealment, the government had to prove Appellant did not have a mistake of fact. Mistake of fact as to consent was a "defense" and not a "special defense" because it did not concede Appellant committed the objective acts constituting the offense charged. *Cf*. R.C.M. 916(a). Therefore, mistake of fact as to consent was not a "special defense" in issue for Appellant's offense of sexual assault by inducing a belief by concealment that appellant was someone else. And because mistake of fact was not a "special defense," the military judge had no sua sponte duty to instruct on it under R.C.M. 920(e)(3).

**2. Even if mistake of fact as to consent is always called a special defense by virtue of being listed R.C.M. 916, then it was not legally "in issue" because it was not operating like an affirmative defense under these circumstances.**

Even if we assume mistake of fact as to consent should always be called a "special defense,"[3] then the other reason the military judge had no sua sponte duty to instruct in Appellant's case centers on the language in R.C.M. 920(e)(3). Rule

[3] This Court said in the 2017 Davis case and in Goodman that "[m]istake of fact is a special defense" without qualification. Davis, 76 M.J. at 228; Goodman, 70 M.J. at 399. In Goodman, this Court further cited R.C.M. 916(j)(1) and suggested that mistake of fact is special defense, even if it "goes to an element" of the crime. *See* 70 M.J. at 339.

for Courts-Martial 920(e)(3) requires instruction on "any special defense under R.C.M. 916 *in issue*." (emphasis added). Here, mistake of fact as to consent was not in issue because of the legal requirements of Appellant's offense. *See* Jones, 49 M.J. at 90 ("Whether an instruction on a possible defense is warranted in a particular case depends upon the legal requirements of that defense and the evidence in the record.")[4] Mistake of fact as to consent did not legally operate like a special or affirmative defense, which would have altered the prosecution's burden to prove the defense didn't exist, and therefore didn't require instruction.

The origin and purpose of R.C.M. 920(e)(3) make clear that the rule applies

[4] The discussion to R.C.M. 920(e) states "[a] matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." Many cases address the question of whether a special (affirmative) defense is "in issue" by primarily conducting a factual inquiry. *See, e.g.*, Davis, 76 M.J. at 229, 230 (mistake of fact was a "special defense" but no evidence suggested such a belief was reasonable); United States v. Davis, 73 M.J. 268, 272 (C.A.A.F. 2014) (defense of property was an available defense factually "at issue"); United States v. DiPaola, 67 M.J. 98, 102 (C.A.A.F. 2008) (mistake of fact was an affirmative defense and "some evidence" required instruction). However, as this Court suggested in Jones, 49 M.J. at 90, the question of whether a special defense is "in issue" is both a legal and factual inquiry. To determine if an instruction is required, trial courts must assess both whether the "defense" is operating as an affirmative defense to the charged crime and whether "some" evidence demands the court members receive instruction. *See* United States v. Gurney, 73 M.J. 587, 596 (A.F. Ct. Crim. App. 2014), *rev. denied*, 2014 CAAF LEXIS 756 (C.A.A.F. 1 Jul. 2014) (evaluating a "required" instruction by answering (1) whether mistake of fact can be an affirmative defense to maltreatment under Article 93, UCMJ; and (2) if so, whether some evidence was raised in this case that required the military judge to instruct the members on mistake of fact as to consent as an affirmative defense").

to defenses operating like affirmative defenses. The Analysis to R.C.M. 920(e) notes that the subsection is based on Article 51(c), UCMJ, and on the first paragraph of paragraph 73a of the 1969 Manual for Courts-Martial. Manual for Courts-Martial, Analysis of the Rules for Courts-Martial app. 21 at A-21-69 (2016 ed). The relevant 1969 Manual for Courts-Martial paragraph states the military judge "should give instructions on the law governing each affirmative defense reasonably in issue under the evidence and on the meaning of each term having a special legal connotation employed in the instructions." Manual for Courts-Martial, ¶ 73a at 13-2 (1969 rev. ed.). For charges requiring proof of specific intent or actual knowledge, for example, "instructions on the possible effect of intoxication . . . must be given when this is an issue reasonably raised by the evidence." Id. The Analysis to the R.C.M. further cites a case involving an affirmative defense. *See* id. (citing United States v. Steinruck, 11 M.J. 322 (C.M.A. 1981) (concerning affirmative defense of agency)); *see also* United States v. Taylor, 26 M.J. 127, 128 (C.M.A. 1988), *overruled on other grounds by* Davis, 76 M.J. at 225 (summarizing Steinruck as holding that a military judge has a duty to instruct on affirmative defenses reasonably raised by the evidence).

While the language of R.C.M. 920(e)(3) refers to "special defenses," case law from this Court recognizes that the rule is also referring to "affirmative defenses." *See* United States v. Stanley, 71 M.J. 60, 62 (C.A.A.F. 2012) ("[W]hen

an affirmative defense is raised by the evidence, an instruction is required."); Schumacher, 70 M.J. at 389 ("A military judge must instruct members on any affirmative defense that is 'in issue.'") (citation omitted); Lewis, 65 M.J. at 87 ("A military judge is required to instruct the members on special (affirmative) defenses 'in issue.'") (citation omitted)).

The rationale for requiring military judges to instruct on affirmative defenses is simple. A lack of an affirmative defense instruction could result in a wrongful conviction. Unlike standard "defenses," "affirmative defenses" functionally add additional essential elements of proof the government must negate for an accused to be held criminally culpable. *See* McDonald, 78 M.J. at 379; United States v. Barnes, 39 M.J. 230, 233 (C.M.A. 1994) (holding a military judge had a duty to instruct on an affirmative defense because without such an instruction, and with no dispute over a crime's statutory elements, the court members had no choice but to convict the accused). One commentator describes this category of defenses as "offense modification" defenses because "the actor has apparently satisfied all elements of the offense charge," but yet "has not in fact caused the harm or evil sought to be prevented by the statute defining the offense." Lafave, *supra*, § 9.1(a)(2) at 6 (quoting Paul Robinson, Criminal Law Defenses, §23 (1984)). Affirmative defenses may also provide non-intuitive legal justifications or excuses for what may otherwise constitute criminal behavior. *See* Ginn, 4 C.M.R. at 48;

*see also* Lafave, *supra*, § 9.1(a)(3) & (4) at 6–8. The point is that instruction on these affirmative defenses may be required as a matter of due process—to ensure only a legally culpable accused is convicted.

For Appellant, no such constitutional concern was at issue. Neither the origins nor purpose for instructing on affirmative defenses lend support for requiring instruction on a "defense" that merely negates an element required by the definition of the offense. Appellant's court members could not convict him unless they found Appellant deliberately intended to conceal his identity from A1C CS. In other words, the court members could not convict Appellant if he was honestly mistaken.

Appellant's reliance on the 2002 case United States v. McDonald to support a contrary conclusion is misplaced for two reasons. First, McDonald does not expressly consider the distinction between a "defense" that negates an element of the crime and a "special" or "affirmative defense" that effectively admits to the elements but denies criminal responsibility. Second, Appellant overstates this Court's McDonald holding. (App. Br. at 15–16 (citing McDonald, 57 M.J. 18, 19 (C.A.A.F. 2002)). In McDonald, the appellant was convicted of wrongfully buying stolen retail merchandise, among other charges. Id. The appellant testified he did not know any of the merchandise was stolen. Id. at 20. Trial defense counsel did not ask for an instruction, nor did the military judge sua sponte

instruct, on the defense of ignorance or mistake of fact using the standard instruction recommended in the Military Judges' Benchbook. Id. at 20–21. This Court recognized that instructions for affirmative defenses are required but went on to state that "[a]n honest-mistake-of-fact instruction is appropriate where it is raised by the evidence *and* is a defense to buying or attempting to buy stolen property." Id. at 20 (emphasis added). Although this Court found constitutional error, and analyzed for prejudice using the harmless beyond a reasonable doubt standard, this Court found no prejudice and recognized that the instruction would have been "perhaps[] redundant[]" with the other instructions the military judge had provided. Id. at 22. Thus, although the Court found a mistake of fact instruction was "required," the Court appears to also recognize the instruction may not have been required to ensure the appellant received due process. To be sure, Court accurately stated, "The ultimate question is whether the military judge's instructions somehow relieved the Government of its responsibility to prove appellant had" the requisite culpable state of mind. Id.

To interpret R.C.M. 920(e)(3) strictly and assume mandatory instruction applies to all "defenses" factually in issue and listed under R.C.M. 916, as Appellant suggests, would produce absurd results. Such a reading must necessarily imply that R.C.M. 916 is a complete list of all defenses which require instruction. But "by its own terms, R.C.M. 916 provides an illustrative rather than exhaustive

list of defenses." United States v. MacDonald, 73 M.J. 426, 435 (C.A.A.F. 2014). Additionally, the language of R.C.M. 920(e)(3) cannot reasonably require instruction for some "defenses" that operate to negate elements of proof, but not others, without regard to the nature of the crime at issue. Moreover, such a reading would result in needless and confusing instructions. Military judges, as a matter of course, are not required to instruct on every possible evidentiary attack on the government's elements.

The mandate for a "defense" instruction therefore must depend on the legal requirements for the charge and the evidence in the record. *See* Jones, 49 M.J. at 90. Trial courts must determine that instruction on the elements of the crime alone insufficiently informs the court members of that which makes an accused's conduct criminally culpable under the statute so as to avoid court members convicting an accused whose conduct, for whatever reason, is not legally criminal. *See* Ginn, 4 C.M.R. at 48. Put simply, R.C.M. 920(e)(3) can't mean what Appellant argues it means.

The elements of Appellant's offense make clear that mistake of fact as to consent was not legally "in issue" as a special or affirmative defense. The "defense" could never "exist side by side with the Government's prima facie case." *See* United States v. Curry, 38 M.J. 77, 80 & n.4 (C.M.A. 1993) (distinguishing between "affirmative defenses" and defenses that operate to "cancel[] out" one or

more mens rea components). Mistake of fact as to consent was not a defense legally "in issue" for the offense of sexual assault by inducing a belief by concealment that Appellant was someone else. No instruction was required.

**B. Assuming mistake of fact as to consent was a "special defense" "in issue" and required instruction, the military judge's failure to provide the instruction was not clear or obvious prejudicial error.**

For the reasons discussed in depth in Issue II, Appellant forfeited the issue of whether an instruction was sua sponte required. Forfeited instructional error is reviewed for plain error. Davis, 76 M.J. at 230. Relief will only be granted where an appellant establishes (1) there was error that was (2) clear or obvious, and that (3) materially prejudiced a substantial right of the accused. United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018). This Court evaluates instructions "in the context of the overall message conveyed to the jury." United States v. Bailey, 77 M.J. 11, 17 (C.A.A.F. 2017) (quoting Humanik v. Beyer, 871 F.2d 432, 441 (3d Cir. 1989)).

**1. Any error was not clear or obvious, given the state of the law**.

Assuming the military judge had a sua sponte duty to instruct on mistake of fact as to consent because it was a special defense at issue for the charged offense, then there was error. Only the second and third prongs of a plain error analysis remain. Under the second prong, any instructional error was not clear or obvious. The military judge's colloquy with trial defense counsel in attempting to sort

through the meaning of mistake of fact within the case underscores this point. Both parties struggled and had to work through the application. (*See* JA at 63–64, 169.) There are no instructive cases from this Court addressing sexual assault under Article 120(b)(1)(D), 10 U.S.C. § 920(b)(1)(D), and therefore no cases addressing the interplay between a mistake of fact "defense" and the mens rea component already prescribed as an element of the offense. In fact, the Air Force Court en banc split evenly on the question. (*See* JA at 17.) Any error regarding the lack of instruction was not clear or obvious.

**2. The instructions and evidence before the court members ensured any error was harmless beyond a reasonable doubt.**

Furthermore, any error did not materially prejudice Appellant's substantial right to due process.[5] When instructional errors have constitutional implications, such as in the case of a failure to instruct on an affirmative defense, then the error is tested for prejudice under a harmless beyond a reasonable doubt standard. *See* United States v. Behenna, 71 M.J. 228, 234 (C.A.A.F. 2012) (citation omitted); *see*

[5] Because the United States disputes that the instruction was constitutionally required, we also dispute that the military judge's failure to give the instruction was constitutional error that requires a stricter "harmless beyond a reasonable doubt" prejudice standard. If the instruction was required only to comply with R.C.M. 920(e)(3), then a traditional plain error prejudice standard would apply. *See* Davis, 73 M.J. at 271 n.4 (suggesting this Court assumed, without deciding, that prejudice was analyzed for harmlessness beyond a reasonable doubt). Regardless, the facts of this case meet even the harmless beyond a reasonable doubt standard.

*also* United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019). "Only when the reviewing authority is convinced beyond a reasonable doubt that the error did not contribute to the defendant's conviction or sentence is a constitutional error harmless." Behenna, 71 M.J. at 243. While the jury can't be "totally unaware" of the feature of the trial later held to be erroneous, the error must be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." United States v. Othuru, 65 M.J. 375, 377 (C.A.A.F. 2007) (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991)).

Any error is "unimportant" in the totality of Appellant's case because the military judge provided broad, comprehensive instructions that adequately conveyed the essential elements of the case. 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." (*See* JA at 180.) This inducement by concealment required a culpable mens rea, under the instructions, because it constituted "an act of refraining from disclosure or hiding to prevent disclosure." (Id.)

Given the evidence adduced, the military judge further framed how the members could evaluate whether Appellant had the criminal intent the element required. First, the court members were free to find Appellant's silence when he knew the victim was acting under a misapprehension as to his identity could constitute concealment and provide the requisite mens rea. (Id.) Second, the court members were free to find that A1C CS consented to the sexual conduct, which could cast doubt on whether Appellant's conduct induced A1C CS to engage in sexual intercourse with him. (Id.) Further, the court members were free to find that Appellant was intoxicated, which could also cast doubt on whether Appellant engaged in the inducement by concealment. (Id. at 180–81.)

The focus of the military judge's instructions, as well as the arguments of counsel, pointed the court members toward assessing Appellant's state of mind. When the court members returned a verdict finding Appellant guilty of having penetrated A1C CS by inducing a belief by concealment that Appellant was someone else, they found beyond a reasonable doubt he had the culpable state of mind the crime required. They found he was not mistaken as to A1C CS's consent.

Any error is additionally "unimportant" in the totality of Appellant's case because Appellant's defense would not have been enough to overcome the strength of the evidence, even if an instruction had been given. Appellant was convicted as a result of his own actions and statements, which proved there was no real

possibility that he mistakenly thought A1C CS consented to have sexual intercourse with him. When Appellant first tried to pull A1C CS's pants off, she laid in his bed, sleeping. (JA at 76.) Then she twice said her boyfriend's name out loud as she grew more irritated. (JA at 77, 79.) Appellant said nothing. (JA at 79, 130.) His silence, in this context, "spoke volumes." *See* People v. Leal, 180 Cal. App. 4th 782, 789 (Cal. App. 2d. 2009) (considering a similar statute for sexual assault involving concealment). Appellant knew A1C CS believed Appellant was her boyfriend but chose to say nothing and continue his assault. Without a response from the person on top of her, A1C CS continued to lay in bed as she was penetrated. (JA at 113.)

When A1C CS realized the person on top of her was Appellant and not her boyfriend, she pushed him off of her. (JA at 80.) Appellant responded by concocting excuses. (*See* JA at 80, 115.) He claimed he was drunk. (Id.) He claimed he thought she was his fiancée. (Id.) But these explanations were dishonest and implausible. *See also* McDonald, 57 M.J. at 22 (an appellant was convicted "as a result of his own statements and actions" that included "implausible explanation[s]"). Appellant was not drunk. He reported sober for deployment weapons training that morning around 0500 or 0530. (*See* JA at 166.) On his drive, he managed to alert a coworker he would be late and managed to pick up donuts for the whole class. (*See* id.) Appellant also didn't actually believe the

woman asleep in his bed was his fiancée. Appellant's fiancée lived in Canada, had just had a child, and was not at Appellant's apartment. (JA at 179.) In truth, Appellant had just taken a shower and was fully aware that A1C CS acquiesced only because she thought he was her boyfriend. (*See* JA at 74, 80, 115.) Appellant penetrated her anyway. Appellant's actions and words proved he was not mistaken. The evidence overwhelmingly proved Appellant's guilt, just as the court members found. The lack of instruction did not prejudice Appellant.

Appellant's case for prejudice is unpersuasive. Although the military judge did not instruct the court members on the legal terminology of "mistake of fact," the instructions ensured that the court members had to find Appellant possessed a culpable state of mind to convict him. The law required the court members to find Appellant "induced by concealment" a belief that Appellant was someone else; they were not required expressly to consider language regarding "mistake of fact." (*Cf.* App. Br. at 19.)

Additionally, the argument from trial counsel was harmless beyond a reasonable doubt. Like the dissenting judges from the Air Force Court, Appellant asserts that the absence of a mistake of fact as to consent instruction contributed to Appellant's conviction because trial counsel's argument "misled the panel" into believing his mistake of fact as to consent had to be both honest and reasonable, when the mistake only had to be honest. (Id.; JA at 45.) Both Appellant and the

dissenting judges took issue with how trial counsel apparently "sarcastically" questioned the premise of the defense argument regarding A1C CS and A1C AK arguing, stating "Really? That's the heartbreaking argument that's going to cause [A1C CS] to go have sex with another man?" (Id.)

But both Appellant and the dissenting judges fail to consider the context of trial counsel's argument. Even if one assumes trial counsel's argument attacked only Appellant's mistake of fact as to consent, and not consent in and of itself,[6] trial counsel was not arguing Appellant's alleged belief was unreasonable. Trial counsel argued that such a belief was so outrageous that it was not true or sincere under the circumstances. *See* United States v. True, 41 M.J. 424, 426 (C.A.A.F. 1994) (In order for a mistake of fact to be honest, "[t]he mistaken belief must be true and sincere rather than feigned or mere pretext.")

The facts established A1C CS and her boyfriend A1C AK argued through the night. Part of their argument even stemmed from A1C CS trying to intervene to stop Appellant from hitting on one of her friends. (JA at 99.) But the argument was not serious enough to force A1C CS to leave A1C AK's presence or even to sleep on the floor. From Appellant's outside observer perspective, then, trial counsel had reason to argue Appellant did not truly believe A1C CS's argument

[6] Trial defense counsel seemingly relied on the evidence regarding A1C CS and A1C AK's arguments to argue both that A1C CS consented and that Appellant had a mistake of fact as to her consent. (*See* JA at 197, 205, 225.)

with A1C AK would inspire A1C CS to consent to have sexual intercourse with him. Trial counsel fairly attacked whether Appellant honestly held a mistaken belief. The evidence from earlier in the night indicating that A1C CS knew Appellant had a fiancée and tried to stop Appellant from hitting on her friend additionally supports trial counsel's argument. (*See* JA at 99.) Appellant did not mistakenly believe A1C CS consented. The scope of the military judge's instructions and the strength of the evidence should convince this Court beyond a reasonable doubt that any error from the lack of instruction did not contribute to Appellant's conviction and was harmless. *See* Behenna, 71 M.J. at 243

### *Conclusion*

WHEREFORE, the United States respectfully requests this Court find the Air Force Court correctly determined that mistake of fact as to consent was not a special defense "in issue" for Appellant's crime, and Appellant is entitled to no relief.

## II.

## IF MISTAKE OF FACT WAS NOT A SPECIAL DEFENSE "IN ISSUE," THE MILITARY JUDGE ACTED WITHIN HIS DISCRETION IN NOT GIVING AN INSTRUCTION ON MISTAKE OF FACT.

### *Standard of Review*

When deciding whether the military judge properly instructed a panel, this

Court uses a de novo standard of review. Bailey, 77 M.J. at 14 (citation omitted). When an accused fails to preserve an instructional error by an adequate objection or request, this Court tests for plain error. Davis, 76 M.J. at 229 (citations omitted).

***Law & Analysis***

**A. The defense did not preserve the issue.**

To preserve a claim of error based on an instruction request, this Court has cautioned that "merely requesting an instruction is ordinarily not sufficient." United States v. Maxwell, 45 M.J. 406, 426 (C.A.A.F. 1996). "There 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." Id. (citations omitted).

Here, as the Air Force Court stated, "[a]t best, the Defense merely requested some instruction on mistake of fact." (JA at 17.) The first indication the defense might want a mistake of fact instruction came during a preliminary discussion in which the military judge stated he was seeking to "start the discussion" so that the parties could "start to frame objections." (JA at 63.) Trial defense counsel indicated in this context that he would be asking for instruction on consent and mistake of fact as to consent, although trial defense counsel also said he understood they were "not necessarily defenses in this case." (JA at 63–64.)

In a subsequent preliminary discussion, the military judge told counsel he included a consent discussion and specifically asked trial defense counsel if he should instruct on any other "defense." (JA at 169.) Trial defense counsel suggested "some language regarding mistake of fact may be appropriate." (Id.) But trial defense counsel also concurred when the military judge expressed his own uncertainty with whether "mistake of fact defense works in this fact pattern." (Id.) The military judge explained his view of the crime, and trial defense counsel said: "Yes, sir." (*See* JA at 169.)

Ultimately, when the military judge sent his final instructions over email and directed counsel to respond with any suggestions or changes, trial defense counsel only objected to the instruction regarding silence. (JA at 171; 216.) Trial defense counsel said he had "no further objections or suggested changes" in writing. (JA at 216.) The following day, trial defense counsel again declined the military judge's invitation to object or request additional instructions. (JA at 177.)

Trial defense counsel's exchanges with the military judge show that trial defense counsel was equivocal and passive in whatever request he made. Trial defense counsel merely indicated "some language may be appropriate." (JA at 169.) He didn't insist on language or even propose specific language for the military judge to consider. Without specific proposed language, it is unclear whether Appellant requested instruction on an honest and reasonable mistake of

fact, just an honest mistake of fact, or something else. *Cf.* United States v. Killion, 75 M.J. 209, 212–13 (C.A.A.F. 2016) (quoting specific language of a defense-requested instruction); (*but see* App. Br. at 24 ("Defense counsel simply requested the standard instruction on mistake of fact[.]")). So when the military judge concluded, consistent with trial defense counsel's initial assessment, that mistake of fact was not necessarily a defense, it is logical to conclude that the defense simply abandoned its concern regarding a mistake of fact instruction. (*Cf.* App. Br. at 23.) Without some objection or assertive request, trial defense counsel did not preserve the issue. It was thus forfeited absent plain error.

**B. Even if the defense preserved the issue, the lack of instruction was not an abuse of discretion under Carruthers.**

If trial defense counsel did properly request a mistake of fact instruction, then the military judge did not abuse his discretion in denying the defense's request. While a counsel has the right to request tailored instructions, a military judge has "substantial discretionary power" in deciding on the instructions to give. Bailey, 77 M.J. at 14 (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 512 U.S. 1244 (1994)); R.C.M. 920(c), Discussion. This Court applies a three-prong test to determine whether a military judge abuses his discretion in denying a requested instruction: (1) The requested instruction is correct; (2) it is not "substantially covered" in the main instruction; and (3) it is on such a valid 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) (citations omitted). All three prongs must be satisfied for there to be error. United States v. Barnett, 71 M.J. 248, 253 (C.A.A.F. 2012).

For the first factor, the record does not clearly establish that Appellant's requested instruction would be correct. All Appellant requested was "some language" regarding mistake of fact. (JA at 169.) He did not specify what language would be appropriate. To this end, Appellant cannot definitively show his "requested instruction" was correct as a matter of law.

Appellant similarly cannot show the requested instruction was not "substantially covered" in the main instruction. A requested instruction is "substantially covered" in the main instruction when the main instruction "adequately address[es]" the underlying issue. Carruthers, 64 M.J. at 346 (citing Damatta-Olivera, 37 M.J. at 477–79). Here, the underlying issue concerned whether Appellant possessed an innocent, mistaken or criminally culpable mens rea. The main instruction already provided that Appellant deliberately had to deceive A1C CS to induce the sexual act. "Concealment," according to the instruction, meant "an act of refraining from disclosure or hiding to prevent disclosure." (JA at 180.) The court members had to find Appellant acted to refrain from disclosing his identity or hid his identity to prevent A1C CS finding out the

truth. (*See* JA at 180.) To find Appellant guilty, the court members necessarily had to reject any suggestion that Appellant had an innocent, mistaken state of mind.

On the second factor, the actions of trial defense counsel also shed light on whether a requested instruction is "substantially covered." *See* Carruthers, 64 M.J. at 346–47; United States v. Gay, 16 M.J. 475, 477–78 (C.M.A. 1983). In Carruthers, the defense had the opportunity to review the military judge's planned instructions and did not object. Carruthers, 64 M.J. at 346–47. Later, the trial defense counsel seemingly acquiesced when the military judge indicated he reviewed the defense's requested instruction but thought the standard instruction was adequate. *See* id. at 347. In Gay, the Court found "defense counsel must have been of the same opinion" as the military judge regarding the sufficiency of the main instruction "because he did not, by objection or request for additional instruction, seek further amplification of" the instruction at issue. 16 M.J. at 478.

Like in Carruthers and Gay, the actions of trial defense counsel show the issue regarding mistake of fact as to consent was substantially covered in the main instruction. Trial defense counsel had the opportunity to review the military judge's planned instructions. Trial defense counsel did not object in writing or in person. (JA at 177, 216.) When asked if they had objections or requests for additional instruction, trial defense counsel said no. (JA at 177.) Instead, trial

defense counsel deferred to the military judge's judgment, which indicates that trial defense counsel must have been of the same opinion as the military judge. The main instructions substantially covered the matter.

**C. Appellant suffered no prejudice.**

The third factor under Carruthers and the third factor for plain error review both assess whether Appellant suffered prejudice in that the lack of an instruction materially prejudiced Appellant's substantial right to defend himself. Here, no prejudice resulted in the context of the overall message conveyed to the court members. *See* Bailey, 77 M.J. at 17.

For the same reasons as described above, the military judge fulfilled his statutory duty to instruct on the elements of the offense. *See* Article 51(c), UCMJ, 10 U.S.C. § 851(c). Additionally, the court members were not precluded from considering evidence or argument from trial defense counsel attacking the government's proof. The military judge instructed the court members:

> All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven that the sexual conduct was done by inducing a belief by . . . concealment that the accused was another person beyond a reasonable doubt.

(JA at 180.) This instruction put evidence of consent squarely into the realm of consideration for Appellant's state of mind. Trial defense counsel underscored the correlation in the evidence by arguing that "all of the reasons for consent are

reasons that [Appellant] too would believe, wait a second, she consented to this." (JA at 207.) As a result, the court members were informed they could consider all of the evidence concerning consent—including whether Appellant had a mistaken belief— potentially to negate a finding that Appellant acted culpably. The absence of an explicit mistake of fact instruction did not materially prejudice Appellant.

Appellant asserts the lack of an instruction "seriously impaired the defense's presentation of its case," and attempts to argue that court members are incapable of assessing evidence to determine whether an accused acted mistakenly or with intentional deceit in cases of sexual assault by concealment. (App. Br. at 24.) In effect, Appellant argues court members cannot determine whether Appellant had criminal intent. This suggestion discounts the quality of military juries and the command of commonsense. Military panels are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. Article 25, UCMJ, 10 U.S.C. § 825. They are instructed that they are expected to use their common sense, and their knowledge of human nature and the ways of the world in weighing and evaluating the evidence. (JA at 360.) They are also presumed to follow the military judge's instructions. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

In spite of trial defense counsel's advocacy to the contrary, the court members followed the military judge's instructions to reach the ultimate

conclusion that Appellant had a culpable state of mind. Trial defense counsel had the ability to freely attack the government's evidence. And he did so. (*See* JA at 196–209; 222–25.) Trial defense counsel "discussed at length the issues of consent and mistake of fact as to consent during closing argument." (App. Br. at 25.) Neither the military judge nor trial counsel subjected trial defense counsel's presentation to any limitations or objections. *Cf.* Curry, 38 M.J. at 80–81 (military judge effectively told court members to disregard any evidence on a "defense" because it was not applicable to the specific intent offense at issue).

Appellant may wish the military judge would have injected technical legal labels into the instructions potentially to describe Appellant's state of mind. But there should be no doubt that even without such labels, the court members convicted Appellant because they concluded he intentionally and deliberately induced a sexual act with A1C CS by concealing from her that he was not her boyfriend as she believed. While she laid on Appellant's bed, trying to sleep, and twice said her boyfriend's name, Appellant's silence spoke volumes. Appellant concealed his identity. Upon his discovery, Appellant immediately tried to concoct an implausible story that not even trial defense counsel embraced as their defense strategy.

In sum, the court members found beyond a reasonable doubt that Appellant was not honestly mistaken regarding A1C CS's consent. The lack of a specific

instruction did not deprive Appellant of a defense or seriously impair its effective presentation. Appellant's case proceeded according to his chosen trial defense strategy and resulted in a conviction. There was no error, plain or otherwise, in the instructions. And as argued with respect to Issue I, the evidence was overwhelming such that an instruction on mistake of fact as to consent would not have changed the outcome of the trial. The lack of an instruction did not prejudice Appellant.

## *Conclusion*

WHEREFORE, the United States respectfully requests this Court find no error in the military judge's instructions and affirm the decision of the Air Force Court.

## CONCLUSION

WHEREFORE the United States respectfully requests this Court affirm the Air Force Court decision upholding Appellant's finding of guilty and sentence.

KELSEY B. SHUST, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
kelsey.b.shust.mil@mail.mil
Court Bar No. 36522

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
mary.e.payne46.civ@mail.mil
Court Bar No. 34088

BRIAN C. MASON, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
brian.c.mason10.mil@mail.mil
Court Bar No. 33634

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
shaun.s.speranza.mil@mail.mil
Court Bar No. 33821

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I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 3 February 2020.

KELSEY B. SHUST, Capt, USAF
Appellate Government Counsel
Air Force Legal Operations Agency United
States Air Force
(240) 612-4800
Kelsey.b.shust.mil@mail.mil
Court Bar No. 36522

## ***CERTIFICATE OF COMPLIANCE WITH RULE 24(d)***

1. This brief complies with the type-volume limitation of Rule 24(c) because:

☒ This brief contains approximately 10,927 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

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/s/

KELSEY B. SHUST, Capt, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division
Date: 3 February 2020