UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Thomas J. Schumacher Staff Sergeant, (E-6) U. S. Marine Corps, Appellant.	**APPELLANT'S BRIEF ON THE MERITS** **USCA Dkt. No. 11-0257/MC** **Crim. App. No. 201000153**

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

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Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO GIVE A SELF-DEFENSE INSTRUCTION.

Statement of Statutory Jurisdiction

The lower court reviewed Appellant's case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A general court-martial, composed of members with enlisted representation, tried Appellant on August 3-6, 2009. Contrary to his pleas, Appellant was found guilty of two specifications of simple assault in violation of Article 128, UCMJ, one specification of failing to obey a lawful order in violation of Article 92, UCMJ, and one specification of communicating a threat in violation of Article 134, UCMJ. He was sentenced to one year confinement, reduction in pay grade to E-3, forfeiture of $930 pay per month for three months and a bad-conduct discharge. The convening authority approved the sentence as adjudged, and except for the bad-conduct discharge, ordered it executed. On November 30, 2010, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings of guilty and the sentence. Appellant subsequently filed a timely petition for grant of review with this Court. On March 8, 2011, this Court granted Appellant's petition for review.

Statement of Facts

On the evening of November 8, 2008, Appellant was in his garage toying with his firearms, as was his custom when faced with stress. (JA 54.) His wife, Army Second Lieutenant (2LT) KD, (JA 35) was there as well (JA 54). They had been having a long, loud argument about her potential deployment. (JA 44-45.) During the course of that argument, he had taken her work cell phone from her and was childishly refusing to return it. (JA 49-50.)

2LT KD wanted her phone back and had had the neighbors call the Military Police (MPs) in front of Appellant. (JA 18, 201-02.) She thought that the MPs would come and force Appellant to give the phone back, (JA 50-51) and had held some hope that merely calling the police would "scare [him] into giving [her the] phone back." (JA 50.) It had not.

Instead, Appellant had taken the phone, gone back into the house, (JA 51) and retreated to the garage. (JA 54.) 2LT KD had followed him, and continued to argue with him about the phone. (JA 54.) The neighbor who made the call to the MPs testified that, at some point, 2LT KD had come back out without Appellant and said "I think he's going to get a gun." (JA 20.) But 2LT KD was angry with Appellant, not frightened of him. (JA 54.) And she did not believe that the MPs would simply enter her residence. *See* (JA 98.) In the garage, she reminded

Appellant that the MPs were coming and asked him to step outside so that they could talk to the MPs when they arrived. (JA 55.)

But unbeknownst to the couple, when Military Police officers Sergeant (Sgt) Long and Lance Corporal (LCpl) F were dispatched to the couple's home they were told that this childish argument over a cell phone was a "domestic assault in progress," and that the husband was possibly going to get a gun. (JA 116.) They arrived on scene and heard the couple arguing. (JA 122.) Although the MPs knocked on the door and announced themselves prior to entering the home, (JA 126) 2LT KD, who was in the garage with Appellant, did not hear them do so (JA 63). The first time she knew of their presence was when they appeared behind her with "their guns drawn," and "scared the crap out of [her]." (JA 57.)

What happened next happened "fast." (JA 60.) At first 2LT KD did not know who these unknown armed men were; (JA 60) they were dressed in camouflage utilities like any other person on base (JA 162) and had guns out. Appellant, standing there with his rifle and pistol, was similarly confused. (JA 98.) And because the MPs believed that Appellant was in the middle of assaulting his wife a standoff naturally ensued. (JA 65-67.) LCpl F, the victim of the assault charge at issue, took cover behind a door and tried to identify himself as an MP. (JA 156.) Unfortunately, it was "kind of hard" because he was talking over

2LT KD and yelling over both her and Appellant at the same time. (JA 156.) Both 2LT KD and Appellant were yelling at the MPs—— who they perceived as possible armed intruders——to get out of their house, (JA 63) and it was during this initial confusion that Appellant pointed his weapon at LCpl F (JA 157). LCpl F stepped out and back from behind the doorway several times; each time, Appellant pointed his pistol at LCpl F and then pointed the weapon away after LCpl F retreated back behind the door. (JA 156, 169.) After Appellant realized the armed intruders were MPs, he told them that they were "not buddies" and that he knew the MPs were going to "waste [him]" or "blast him." (JA 159.)

At trial, the military judge refused to give a self-defense instruction, (JA 236) and he expressly prohibited defense counsel from arguing self-defense (JA 224). During his instructions on findings, the military judge instructed the members that simple assault was a lesser included offense of the charged specification, and that the elements of simple assault were that: (1) Appellant offered to do bodily harm to LCpl F; (2) by pointing a firearm at him (3) unlawfully. (JA 240-41.) Further facts necessary to the resolution of the case are detailed below.

Summary of Argument

Appellant's conviction for assault on LCpl F should be set aside because the evidence raised the affirmative defense of self-defense, the military judge incorrectly refused to instruct on the affirmative defense, and Appellant was prejudiced by this error.

Argument

THE MILITARY JUDGE ERRED IN REFUSING TO GIVE A SELF-DEFENSE INSTRUCTION.

Standard of Review

A military judge must instruct members on any affirmative defense in issue. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). An affirmative defense is in issue when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." *Id.* (internal quotations omitted). If a required instruction is not given, the error is harmless only if it "appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting *Chapman v. California*, 386 U.S. 1, 18 (1999)). The question of whether the jury was properly instructed is a question of law reviewed *de novo*. *Id*.

Discussion

Appellant's conviction for assault upon LCpl F should be set aside because the military judge misinterpreted the evidence

and misapplied the law. This led to his refusal to give a self-defense instruction, which gutted Appellant's defense.

1. The evidence raised the issue of self-defense

The low evidentiary threshold required to trigger a self-defense instruction was met here. A military judge must instruct the panel on an affirmative defense whenever there is some evidence "to which the military jury may attach credit if it so desires." *Lewis*, 65 M.J. at 87. Any doubt regarding whether an instruction should be given is to be resolved in favor of the accused. *United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008) (citations omitted); R.C.M. 920(e)(3). And neither the source of the evidence nor its credibility should be considered in the determination of whether an affirmative defense has been raised. *Lewis*, 65 M.J. at 87.

Here then, the question becomes whether there was some evidence——regardless of the source or credibility of that evidence——that indicated Appellant may have (1) reasonably "feared that death or grievous bodily harm was about to be inflicted wrongfully" on him, and that (2) he believed the pointing of his weapon at LCpl F was necessary for his protection against the infliction of death or grievous bodily harm. Rules for Courts-Martial (R.C.M.) 916(e)(1). There was. And it came from the government's own witnesses.

From Appellant's point of view, he was having a domestic dispute with his wife over her potential deployment. He knew that the argument had been loud and that the MPs had been called, but he thought they were coming to handle his childish refusal to return his wife's cell phone——not a "domestic assault in progress" involving a firearm. Neither he nor his wife believed that the MPs would enter their home without permission under these circumstances. When the MPs did, their sudden armed presence scared 2LT KD and startled Appellant. The couple had no idea who the MPs were, and saw them as armed intruders. There was confusion. There was yelling. Guns were everywhere. And although LCpl F attempted to identify himself as a military police officer, he did so peeking out from behind the cover of a door (JA 156) while Appellant and his wife simultaneously yelled for the armed intruders to get out of their house. The scene was chaos. And it was at the height of this initial confusion that Appellant pointed his weapon at LCpl F. (JA 157.) Thus, not only was the issue of self-defense raised, it was raised credibly. There was much more than "some evidence" here. And because of this, the members should have been given the self-defense instruction.

2. The errors below

Both the military judge and the lower court, however, incorrectly concluded that a self-defense instruction was not

warranted. They came to this conclusion through two errors. First, they incorrectly evaluated the evidence presented. Second, they applied the wrong standard to the question of whether the defense had been raised.

A. The military judge and the lower court misinterpreted the facts

The military judge held——and the lower court agreed——that "[there was] no evidence of facts and circumstances at the time of the alleged assault . . . from which the trier of fact could reasonably conclude that the accused reasonably apprehended the wrongful infliction of bodily harm . . . ." (JA 236); *United States v. Schumacher*, NMCCA No. 201000153, slip op. at 6 (N-M. Ct. Crim. App. November 30, 2010) (unpublished). As discussed above, this is an incorrect legal conclusion——there was credible evidence that Appellant was acting in self-defense.

The military judge and the lower court came to the opposite conclusion, however, because they focused their attention on the wrong facts and failed to recognize the importance of the testimony presented. For example, the military judge and the lower court focused on Appellant's statements that he was afraid the military police were going to kill him. (JA 6, 231-32.) As the military judge and the lower court noted, these statements came after Appellant was aware that LCpl F was an MP. But while Appellant's belief at this point that the MPs were going to kill him may have been unreasonable, this is irrelevant as the

assault had already occurred. Appellant pointed his weapon at LCpl F during the initial confusing moments of the encounter (JA 157) while LCpl F was popping in and out from behind a door (JA 169), not after he said that he thought the MPs were going to "waste" him. And it is Appellant's mental state at the time of the assault that is pertinent to the self-defense question. As discussed above, Appellant may have reasonably believed he was defending himself at that point.

Still, the lower court concluded that "there is no evidence in the record that demonstrates the appellant pointed his weapon at LCpl F until after he knew" LCpl F was an MP. *Schumacher*, No. 201000153, slip op. at 6. In the lower court's version of the events, the situation was orderly. The fact that LCpl F "announced his presence" was sufficient to satisfy it that Appellant knew LCpl F was an MP. *Id*. But the testimony of LCpl F and 2LT KD suggest that the actual scene was anything but orderly; it was highly charged, frenetic, and confusing. LCpl F himself said that he was having trouble communicating through the chaos and yelling. (JA 156.) And because of this chaos the members might have found——had they been given the opportunity to——that Appellant reasonably believed that LCpl F was an armed intruder he needed to protect himself from.

B. The military judge and the lower court applied the wrong standard

The members never had the opportunity to consider self-defense, however, because the military judge and the lower court also erred by applying the wrong standard. The relevant question was whether there was "any evidence" of self-defense that the members could attach credit to if they chose. *DiPaola*, 67 M.J. at 100. But the military judge examined the record for evidence "from which the trier of fact could reasonably conclude that the accused reasonably apprehended the wrongful infliction of bodily harm . . . ." *Schumacher*, No. 201000153, slip op. at 6. This was error. The military judge's personal opinion that the evidence was not credible was irrelevant. The members were supposed to determine the credibility themselves. By refusing to give the instruction based on his own determination that the evidence raising the defense was not credible, he substituted his judgment for that of the military members. This is not permitted.

The lower court, for its part, compounded the error by affirming Appellant's conviction and the military judge's reasoning. It too applied the wrong standard. The NMCCA——just like the trial court——judged the credibility of the evidence that raised the defense. It then agreed with the military judge that there was no evidence from which the "trier of fact could reasonably conclude" that the affirmative defense had been

proved. *Schumacher*, No. 201000153 at 6. From this, the lower court concluded that the record lacked the quantum of evidence necessary to trigger the instruction. *Id.* But this methodology incorrectly conflated the question of whether the defense was raised with the question of whether the defense was proved. They are separate issues.

The military judge and the lower court were only supposed to determine whether the defense had been raised. As discussed above, it had. And once raised, the question of whether it had been proved was for properly instructed members to decide. But because the trial court and the lower court applied the wrong standard for determining whether the defense had been raised, the issue did not reach the members at all.

3. The impact of not giving the instruction

This was not a harmless error. The failure to give a required instruction is harmless only if it appears beyond a reasonable doubt that the absence of the instruction did not contribute to the outcome of the case. *McDonald*, 57 M.J. at 20. As Justice Scalia explained, the inquiry is not whether "in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original).

That high standard cannot be met here. As discussed above, there was sufficient credible evidence on the record for the members to conclude Appellant was acting in self-defense. It was within the purview of the members to believe that evidence. Had they, Appellant could have been acquitted of the assault charges. But because the military judge never gave the self-defense instruction, the members never considered the evidence in this light and Appellant was robbed of a possible acquittal. Thus, it cannot be said beyond reasonable doubt that the failure to give the instruction did not contribute to the outcome of the case.

Conclusion

Specification 2 of Charge I (Appellant's conviction for assault on LCpl F) should be set aside. The trial judge and the lower court both misinterpreted the evidence and applied the wrong standard in determining whether the affirmative defense of self-defense had been raised. Rather than determining if there was "some evidence" to which the members could "attach credit if they desire," *Lewis*, 65 M.J. at 87, the trial judge and the lower court required Appellant to show evidence from which the members could "reasonably conclude" that self-defense had been proved. This was error. And as a result, the members were not instructed on the theory of self-defense and the overall outcome here is unreliable. It cannot be said beyond a reasonable doubt

that the failure to instruct the jurors that they could acquit Appellant of the assault charge if they believed he was acting in self-defense did not contribute to the verdict obtained. Accordingly, Appellant respectfully requests that this Court set aside his conviction for Specification 2 of Charge I and his sentence, and order a rehearing.

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CERTIFICATE OF FILING AND SERVICE

I certify that this brief was delivered electronically to the Court, and that copies were delivered electronically to the Appellate Government Division and to Code 40 on April 1, 2011. I also certify that I caused the Joint Appendix in this case to be delivered, in paper form, to the Court and the government on the same day.

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