IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201000153
Thomas J. SCHUMACHER Staff Sergeant (E-6) U.S. Marine Corps, Appellant	)	USCA Dkt. No. 11-0257/MC

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 INTRUCTION.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, because Appellant's approved sentence included a bad-conduct discharge and one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of failing to obey a lawful order, two specifications of simple assault, and communicating a threat, in violation of Articles 92, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 928, and 134. The Members sentenced Appellant to be confined for one year, to be reduced to pay grade E-3, forfeiture of $930 a month for three months, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On appeal, the lower court affirmed the findings and sentence as approved by the Convening Authority. On January 10,

2011, Appellant filed a timely Petition for Grant of Review with this Court. On March 8, 2011, this Court granted review and ordered the parties to brief the granted issue.

Statement of Facts

Appellant lived on base at Camp Pendleton with his wife, Second Lieutenant (2LT) D. (J.A. 33.) On the night in question, Appellant and his wife got into a heated argument that lasted for several hours. (J.A. 45.) The argument started when 2LT D told Appellant that she considered volunteering for a deployment to Afghanistan after completing school. (J.A. 43.) The argument escalated from there until Appellant took his wife's cell phone and would not return it. (J.A. 49.) Both individuals drank alcohol during the course of the evening. (J.A. 47.)

After becoming frustrated with the argument and Appellant's refusal to return her phone, 2LT D warned her husband to give her phone back or else she would "have the neighbors call the cops." (J.A. 19.) 2LT D then walked to their neighbor's house and asked her neighbor, Mrs. K, to call the Military Police (MP). (J.A. 50.) As 2LT D walked to her neighbor's home, Appellant followed her and held his wife's cell phone over her head and teased her in front of Mrs. K's door. (J.A. 19, 51.)

Appellant stood next to his wife, 2LT D, when Mrs. K called the Military Police. (J.A. 51.) When Appellant heard that the Military Police were being called, he went back over to his house. (J.A. 51.) Once Mrs. K got on the phone with the police she noticed that Appellant and 2LT D had left her property. (J.A. 19.) While Mrs. K was on the phone with the police, 2LT D returned to Mrs. K's residence and told Mrs. K that she thought Appellant was getting a gun, and this information was conveyed to the Military Police. (J.A. 20.)

2LT D then returned to her residence and continued to argue with Appellant, who was now inside his garage, where he kept his weapons. (J.A. 54.) Appellant accessed his weapons in the garage and 2LT D told him, "put these weapons away because the military police are coming. . ." (J.A. 55.) They also discussed the fact that they "obviously both [knew] the MPs [were] coming" and that they should go outside to talk to the MPs. (J.A. 55.)

Two MPs, Lance Corporal (LCpl) JF and Sergeant (Sgt) BL, responded to the call and proceeded to Appellant's house. (J.A. 116.) Arriving on the scene they heard yelling and screaming coming from inside Appellant's home. (J.A. 122.) They "pounded" on Appellant's front door and announced their presence. (J.A. 151.) They entered the home where the saw 2LT D standing in the

laundry room area facing into the garage. (J.A. 129-30, 152.) After proceeding into the laundry room, they noticed Appellant in the garage, facing his wife, and holding a rifle under his left arm and a pistol in his right hand. (J.A. 153-54.) 2LT D testified that she was startled when the MPs came in and her testimony suggested that she and Appellant thought that armed intruders had entered their house. (J.A. 60, 64, 98.)

The MPs un-holstered their weapons and took cover inside the home. (J.A. 130.) They ordered Appellant to put down his weapons but he refused. (J.A. 131.) Appellant told the MPs to leave his home. (J.A. 132.) Appellant had the rifle pointed at his wife's abdomen area and the pistol was pointed at her neck and facial area. (J.A. 156.)

LCpl JF took cover behind a door adjacent to the laundry room but he came out from behind the door a number of times to announce his presence and talk to Appellant. (J.A. 156.) Each time LCpl JF would come out to talk to Appellant, Appellant pointed the pistol towards LCpl JF's face and shoulder. (J.A. 157.) At one point, Appellant stated: "I've killed plenty of people in my life, and I'm not afraid to kill a couple of MP's and my wife." (J.A. 159.) Sgt BL had trouble with his radio reception inside the home and left the house to return to his vehicle, where he called for backup. (J.A. 134.)

As LCpl JF was by himself in the home, he made the decision to re-holster his weapon and come out from behind the door. (J.A. 160.) He told Appellant that no one was going to hurt him and to again put down his weapon. (J.A. 160.) Appellant dropped the rifle and put the pistol to his own head. (J.A. 160.) LCpl JF now saw that there was a magazine loaded in the pistol. (J.A. 160.) Sgt BL returned inside the home, and grabbed 2LT D and took her outside. (J.A. 137.) Once 2LT D was out of the home, Appellant put down the pistol and started to load the rifle. (J.A. 161.) LCpl JF then left the house and a perimeter was set up around the home. (J.A. 138.) After other officers arrived, including hostage negotiators, Appellant eventually came out of the home voluntarily and was placed under arrest. (J.A. 184.)

Summary of Argument

The Military Judge did not err when he decided not to give a self-defense instruction because there was no evidence that Appellant apprehended, *on reasonable grounds*, that bodily harm was about to be wrongfully inflicted upon him. While Appellant may claim that he had a subjective belief that armed intruders were in his house, this belief was not objectively reasonable because Appellant knew that the MPs were coming after his wife had asked the neighbors to call 911. Thus, even under a low threshold for determining whether an affirmative defense

instruction must be given, there was no evidence that put self defense "in issue." Also, even if an instruction should have been given, it was harmless beyond a reasonable doubt because any error did not contribute to the verdict obtained below.

Argument

THE MILITARY JUDGE DID NOT ERR WHEN HE REFUSED TO GIVE A SELF DEFENSE INSTRUCTION BECAUSE THE EVIDENCE DID NOT REASONABLY RAISE THE ISSUE. THERE WAS NO EVIDENCE THAT IT WAS REASONABLE FOR APPELLANT TO BELIEVE THAT WRONGFUL HARM WAS ABOUT TO BE INFLICTED UPON HIM. EVEN IF THE INSTRUCTION SHOULD HAVE BEEN GIVEN, THE FAILURE TO INSTRUCT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Allegations of error with respect to mandatory instructions such as affirmative defenses are reviewed de novo. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). When the instructional error raises constitutional implications, the error is tested for prejudice using a harmless beyond a reasonable doubt standard. *Id*.

A. To trigger a self-defense instruction, it is not enough that there was some evidence that Appellant subjectively believed the MPs were about to harm him; there had to be *some evidence* to support the *reasonableness* of that claim.

Military judges have an obligation to instruct on an affirmative defense that has been reasonably raised by the evidence. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). A matter is reasonably raised, and "in issue," when

"some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." *Lewis*, 65 M.J. at 87. Doubts as to whether an instruction should be given are to be resolved in the accused's favor. *United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008).

Self-defense consists of two elements and there must be some evidence with respect to *both* elements to trigger an instruction. *See United States v. Curtis*, 44 M.J. 106, 154 (C.A.A.F. 1996) (holding that "appellant failed to establish either element of the self-defense requirement necessary to trigger an instruction."). Thus, for a military judge to be required to issue an instruction on self-defense, there must be "some evidence" on the record to support a members' finding that (1) the accused apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on him; and (2) in order to deter the assailants, the accused offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm. Rule for Courts-Martial (R.C.M.) 916(e)(2), Manual For Courts-Martial, United States (2008 ed.).

"The test for the first element of self-defense is objective. Thus, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable,

prudent person would have held under the circumstances." R.C.M. 916(e)(1), Discussion. Therefore, in this case, the dispositive question is whether there was some quantum of evidence, however minimal, that Appellant's belief that bodily harm was about to be inflicted on him was objectively reasonable.

1. Appellant was aware that the MPs had been called and knew the MPs were on their way to his house. Thus, there was no evidence to suggest that it was objectively reasonable for Appellant to believe that wrongful harm was about to be inflicted on him.

"[I]n determining the existence of reasonable grounds to anticipate danger, certain factors relating to the accused are considered. For example, to a child or a female a particular situation may present reasonable grounds to apprehend danger, but the same circumstances may not make an adult male apprehensive of death or serious injury . . ." *Curtis*, 44 M.J. at 153. In *Curtis*, this Court found that there was "absolutely no evidence from which a reasonable, prudent person would conclude that appellant had grounds to fear death or grievous bodily harm from [the victim's] single, barefooted kick" because the facts and circumstances revealed that appellant was the aggressor, the victim was considerably smaller than appellant, and appellant did not fear for his safety. *Id*. at 154-55.

Here, Appellant states that there was initial confusion and chaos as to who the MPs were when they came in and consequently,

him and his wife, 2LT D, perceived that the MPs were armed intruders. (Appellant's Br. at 8.) But an allegedly "chaotic" scene goes to Appellant's subjective belief that he apprehended harm; that does not in any way make the belief objectively reasonable under the facts and circumstances of this case——that Appellant knew that the MPs were coming.

Appellant was with his wife when she went over to ask the neighbors to call the police and he heard that the Military Police were being called. (J.A. 18-19, 50-51.) In fact, his wife discussed the MP's imminent arrival with him; that they "both [knew] the MPs [were] coming," and the fact that they should step outside the house to talk to the MPs. (J.A. 55.) Without regard to the credibility of whether they actually believed the MPs were intruders, Appellant's subjective claim, just as in *Curtis*, did not establish any tendency to be objectively reasonable in light of the above facts. As the lower court correctly noted, "any actual confusion as to who the MPs were when they first arrived is irrelevant, because the appellant's fear of illegal intruders about to unlawfully kill him is required to be based on reasonable grounds." *United States v. Schumacher*, No. 201000153, slip op. at 6 (N-M. Ct. Crim. App. Nov. 30, 2010).

Similarly, it was objectively unreasonable for Appellant to believe that the MPs were going to kill him. Civilian Defense Counsel had argued that a self defense instruction was warranted because Appellant had a fear that he was going to be killed by the MPs. (J.A. 460.) This was based on a statement by Appellant during the confrontation with the MPs in which Appellant stated "I know you're going to go outside and waste me." (J.A. 159.) This statement occurred much later in the confrontation with the MPs when, as Appellant notes, he was already aware that LCpl JF was an MP. (Appellant's Br. at 9.) Moreover, no reasonably prudent person could believe the MPs were not lawfully present and would not be justified if they used deadly force against a person pointing a possibly loaded pistol at them.

Consequently, because Appellant knew that the MPs were coming after a 911 call, no reasonable person would be surprised by the actual arrival of the MPs and believe instead that they were armed intruders. Therefore, the matter was not "in issue."

2. While this Court reviews instructional issues in this case *de novo*, the Military Judge and the lower court also applied the correct law in assessing the factual record, because they reviewed whether there was any evidence that Appellant reasonably believed that the MPs were going to wrongfully apply force against him.

This Court reviews the instructional issue de novo. Nevertheless, Appellant asserts that the Military Judge and lower court judged the credibility of the evidence instead of judging whether the evidence raised the issue of self-defense; that they judged whether the defense was proven instead of determining whether there was "some evidence" that would bring the matter into "issue." (Appellant's Br. at 11-12.) As support, Appellant cites to the Record where the Military Judge states that there was no evidence from which "the trier of fact could reasonably conclude that the accused reasonably apprehended the wrongful infliction of bodily harm . . ." (J.A. 236; Appellant's Br. at 11.)

Appellant is correct that at the conclusion of the Article 39(a) session on the self-defense instruction, the Military Judge made the aforementioned statement and ostensibly framed his ruling based on what the trier of fact could reasonably conclude. (J.A. 236.) But while the Military Judge may have arguably misstated the standard at this point, there is no doubt that the Military Judge applied the correct law. A closer look

at the Record shows that during the entire debate over the self-defense instruction, the Military Judge was concerned with whether Appellant's apprehension of wrongful harm was objectively reasonable. (J.A. 205-10; 221-36.)

As conclusive evidence that the correct standard was applied, the Military Judge stated the test and revealed what he was debating: "The test is whether on the [sic] under same facts and circumstance, a reasonably prudent adult male. . . a reasonably prudent adult sober male, faced with the same situation, would have believed that there were grounds to anticipate immediate and wrongful physical harm." (J.A. 230.) The Military Judge later added, "[t]here's no evidence on this record that from——as a matter of law from which a reasonable, prudent person could believe that wrongful bodily harm was going to be inflicted by LCpl JF. And that's what I'm struggling with at the moment." (J.A. 234.)

Ultimately, both the Military Judge and lower court found that there was no evidence to suggest the reasonableness of Appellant's belief——the analysis was correctly based on whether "some evidence was raised so the members could infer the appellant was reasonably in apprehension of wrongful harm." *Schumacher*, No. 201000153, slip op. at 5.

B. The Members did not find any defense witness to be credible and the Government's evidence was overwhelming. Thus, any error here was harmless beyond a reasonable doubt.

When the instructional error raises constitutional implications, the error is tested for prejudice using a harmless beyond a reasonable doubt standard. *Lewis*, 65 M.J. at 87; *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is "whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Lewis*, 65 M.J. at 87 (quoting *Kreutzer*, 61 M.J. at 298 (C.A.A.F. 2005)).

There was overwhelming testimony that Appellant pointed his weapon towards the MP, LCpl JF, and committed the assault. LCpl JF testified that he took cover behind the door but he would repeatedly come out from behind the door and announce his presence to Appellant; and every time LCpl JF came out from behind the door, Appellant continually pointed his weapon towards him. (J.A. 156-57.) LCpl JF testified that he could see the barrel of the gun pointed towards his shoulder and face area. (J.A. 157.) Sgt BL, the other MP, corroborated LCpl JF's testimony. While Sgt BL could not directly see whether the weapon was pointed directly at LCpl JF, he stated that it was pointed in LCpl JF's general direction and LCpl JF was

continually ducking for cover. (J.A. 133, 143.) Both MPs testified that Appellant made comments along the line of: "I've killed people before. It's nothing for me to kill a few f***ing MPs." (J.A. 132, 159.)

The best witness for the Defense was also a Government witness, 2LT D, Appellant's wife. Appellant was also charged with assault against his wife, 2LT D. 2LT D stated that Appellant never pointed a weapon at her and she never felt threatened by Appellant. (J.A. 65, 89, 91.) Despite her insistence that she was never the victim of this alleged assault by Appellant, the Members convicted Appellant of a simple assault against his wife. (Charge Sheet.) The Members found her testimony incredible and unbelievable. More importantly, the Members believed the testimony of the MPs, that Appellant pointed his weapons at 2LT D's mid-section. (J.A. 132, 156.)

2LT D also insisted that her husband did not point the weapons at any of the MPs that night. (J.A. 91.) Thus, the Members did not believe 2LT D's testimony. They found Appellant guilty of simple assault against LCpl JF, relying on the testimonies of LCpl JF and Sgt BL, that Appellant pointed his weapon at LCpl JF.

The Defense had no other credible evidence to present, aside from the subjective belief, as relayed by 2LT D, that

Appellant and her initially thought the MPs were armed intruders. (J.A. 60, 63.) Like all other portions of her testimony, there is no question that the Members did not find this plausible; and if an instruction would have been given on self-defense, it is beyond a reasonable doubt that they would have disregarded her testimony on that matter. Therefore, if it was in fact error to not have instructed on self-defense, the error was harmless beyond a reasonable doubt.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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