

THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

U N I T E D S T A T E S,            )    FINAL BRIEF ON BEHALF OF  
                                  )    APPELLANT  
                                  )      
                                  )    Crim. App. No. 20100815  
                                  )      
Sergeant (E-5)                    )    USCA Dkt. No. 14-0029/AR  
**RONALD J. DAVIS,**                )      
United States Army,               )      
                                  )    Appellant

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

U N I T E D S T A T E S,	)	<b>FINAL BRIEF ON BEHALF OF</b>
Appellee	)	<b>APPELLANT</b>
	)	
v.	)	
	)	Crim. App. No. 20100815
Sergeant (E-5)	)	
<b>Ronald J. Davis,</b>	)	USCA Dkt. No. 14-0029/AR
United States Army,	)	
Appellant	)	

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

**Issue Presented**

WHETHER THE ARMY COURT OF CRIMINAL APPEALS  
ERRED IN FINDING THAT THE MILITARY JUDGE'S  
FAILURE TO INSTRUCT ON THE AFFIRMATIVE  
DEFENSE OF DEFENSE OF PROPERTY WAS HARMLESS  
BEYOND A REASONABLE DOUBT.

**Statement of Statutory Jurisdiction**

The Army Court of Criminal Appeals [hereinafter Army Court]  
had jurisdiction over this matter pursuant to Article 66,  
Uniform Code of Military Justice, 10 U.S.C. § 866 (2012)  
[hereinafter UCMJ]. This Honorable Court has jurisdiction over  
this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)  
(2012).

**Statement of the Case**

On September 20, 2010, September 30, 2010, and October 1,  
2010, a military judge sitting as a general court-martial  
convicted Sergeant (SGT) Ronald J. Davis, in accordance with his  
plea, of failure to go to his appointed place of duty (two

specifications) in violation of Article 86, UCMJ, 10 U.S.C. § 886 (2008). An officer panel sitting as a general court-martial acquitted SGT Davis of assault with a dangerous weapon, but found SGT Davis guilty, contrary to his plea, of the lesser included offense of simple assault with an unloaded firearm in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2006). The officer panel sentenced SGT Davis to reduction to E-4, confinement for ninety days, and a bad-conduct discharge. The military judge awarded SGT Davis thirty-four days confinement credit against the sentence to confinement. The convening authority approved the adjudged sentence, and credited SGT Davis with thirty-four days of confinement against his sentence to confinement.

The Army Court affirmed the findings and the sentence on July 15, 2013. (JA 001). On November 19, 2013, this Honorable Court granted SGT Davis' petition for review. In accordance with Rule 30 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Motion for Extension of Time to File Final Brief and Joint Appendix on December 16, 2013. The motion was granted to January 8, 2014.

#### **Summary of Argument**

The Army Court found that the military judge's failure to instruct the panel members sua sponte on the affirmative defense of defense of property to be error. The Army Court then went on

to determine that it was "clear beyond a reasonable doubt that a rational [panel] would have found the defendant guilty absent the error" and, as such, the error did not contribute to the verdict in this case. *United States v. Davis*, ARMY 20100815 (Army Ct. Crim. App. 15 July 2013) (mem. op.) citing *United States v. Baxter*, 72 M.J. 507, 513 (Army Ct. Crim. App. 2013) and *United States v. Hearn*, 66 M.J. 770, 777 (Army Ct. Crim. App. 2008). The Army Court's ruling is based on the clearly erroneous finding of fact that SGT Davis did not provide SPC SS a reasonable amount of time to comply with his demand to leave. The Army Court erred in concluding that no rational panel would find that SGT Davis believed brandishing an unloaded firearm in response to SPC SS's trespass was reasonable. The Army Court also erred in finding that the instructional error could not have contributed to SGT Davis' conviction.

#### **Statement of Facts**

##### **Ernie's Bar**

On February 20, 2010, SGT Ronald Davis went with his wife, Elizabeth Davis, to Ernie's Bar in Harker Heights, Texas, to watch an Ultimate Fighting Championship fight. (JA 115-116). Joining them at Ernie's were Specialist (SPC) SS and his girlfriend, AR. (JA 116-117). Also in attendance that night were SGT Daniel Scott and his wife, Tiffany Scott. (JA 117). Ernie's is right next to the Davis residence and the plan for

the evening was for everyone to come back to the Davis' house afterwards so that no one would have to drive home intoxicated. (JA 116).

### **Wild Country**

At around 2200 hrs, SPC SS and his girlfriend left Ernie's to go to "Wild Country" to dance. (JA 022). According to SPC SS, neither he nor his girlfriend had anything to drink while at Wild Country. (JA 022). However, SGT Davis testified that when SPC SS and his girlfriend returned from Wild Country to Ernie's shortly before midnight, they both appeared intoxicated. (JA 118-119). Both were "staggering a little bit, slurring their words, [and their] eyes were a little glassy." (JA 119).

### **Ride Back to Davis Residence**

Sometime after midnight, SPC SS, his girlfriend, and Elizabeth Davis left Ernie's to go back to the Davis residence. (JA 024). Sergeant Davis left to go to a pool hall, "Rack 'Em," in order to play pool. (JA 121). On the way back to the Davis residence, SPC SS got into an argument with his girlfriend over the fact that she also wanted to play pool. (JA 025). Specialist SS did not want to go to the pool hall because he had an ex-girlfriend that worked there, and he did not want there to be "any weirdness." (JA 025).

## **Davis Residence**

Shortly after arriving at the Davis residence, SPC SS and his girlfriend "ran out into the streets screaming at each other, yelling profanities." (JA 160). Initially, Elizabeth Davis was able to defuse this tense situation by calmly talking to SPC SS. (JA 161). That led to SPC SS coming back inside where the three watched television. (JA 162). However, SPC SS "got up and just started yelling at her and calling her profane names. And she got up and ran out the door and then he chased after her." (JA 162). Elizabeth Davis was in the driveway consoling Ms. AR while SPC SS ran into the street. (JA 162).

## **Sergeant Davis' Account of Davis Residence Incident**

According to SGT Davis, Elizabeth Davis sent a text to him that said, "These two, they're arguing and it's getting out of control. I need you to come home now." (JA 122). Sergeant Davis got in his truck and headed home. (JA 122). En route home, SGT Davis passed SPC SS in the street "about two to three houses from [his] house." (JA 122). According to SGT Davis, after he parked his vehicle in his driveway, he then said to AR, "You all are no longer welcomed here. Get the fuck off my property" and proceeded into his home. (JA 127-128). Sergeant Davis began walking toward the house and heard SPC SS yelling, "What the fuck's the matter with you? What are you doing?" (JA 128). Sergeant Davis yelled back, "You all need to

get the hell out of here. I don't want you here no more." (JA 128).

Sergeant Davis went into his house and swung the door shut behind him, but the door did not close all the way. (JA 129). Sergeant Davis saw the unloaded "Smith and Wesson 40 semi-automatic pistol" [hereinafter pistol] that he had left on the kitchen table earlier in the night after he was cleaning it. (JA 130, 151). After grabbing the unloaded pistol, SGT Davis went towards his bedroom with the intention of putting the pistol in its safe and going to sleep. (JA 131). However, as SGT Davis turned to go to the bedroom, he noticed that his wife was not in the house and his door was still slightly open. (JA 131).

As SGT Davis approached the door, SPC SS came to the door.<sup>1</sup> (JA 131). Sergeant Davis told SPC SS to get out and pushed him out of the doorway. (JA 134). Now on the sidewalk area near the house, SPC SS asked SGT Davis "what the fuck [his] problem was, why the fuck [was he] acting like this." (JA 134). Then, SPC SS came toward SGT Davis yet again and lunged toward him with a punch.<sup>2</sup> (JA 134). In response, Sergeant Davis pushed SPC SS in the stomach with his left hand and drew his unloaded pistol with

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<sup>1</sup> Elizabeth Davis testified that SPC SS approached the door "pretty fast . . . not a full-on run, but it was pretty fast." (JA 170).

<sup>2</sup> Elizabeth Davis testified that she never saw her husband swing at SPC SS, but she did see SPC SS take a swing at her husband. (JA 171).

his right hand. (JA 134). Sergeant Davis then held the unloaded weapon drawn at SPC SS for about twenty to thirty seconds and told him "You really need to get out of here." (JA 136).

### **Specialist SS's Account of Davis Residence Incident**

According to SPC SS, he wanted to calm the situation down, so he walked toward the house. (JA 053). He observed that "Sergeant Davis basically made a beeline into the house after he got home." (JA 053). Specialist SS also "yelled to him trying to figure out what was going on as he was walking in." (JA 053). Specialist SS walked up to the house, and Sergeant Davis walked inside and then came back outside. (JA 031). The two men were standing where the sidewalk meets the porch and, according to SPC SS, the following exchange took place:

SGT Davis: "I can't believe that you would do this at my house."

SPC SS: "What do you mean?"

SGT Davis: "I give you a place to stay for the night and then you pull this shit."

SPC SS: "What are you talking about? You need to relax. You need to settle down."

SGT Davis: "Don't tell me to settle down in my own house."

SPC SS: "You just need to relax."

(JA 031).

According to SPC SS, it was at this point that SGT Davis took a swing at him and SPC SS responded by saying, "I'm not going to fight you." (JA 031). Specialist SS testified that SGT Davis did not make contact with him. (JA 031). Then, according to SPC SS, SGT Davis went down to his knee, put his right arm behind him, pulled out a gun, cocked it, pointed it at his face, and said, "I'll shoot you, I'll shoot her, I'll shoot everybody."<sup>3</sup> (JA 031).

### **Specialist SS's Anger and Reputation for Untruthfulness**

During cross-examination, SPC SS proclaimed that his life-long anger management issues ceased a year prior to this incident. (JA 068). However, when defense counsel pressed as to whether SPC SS had really changed his ways within the last year, SPC SS conceded that around January 11, 2010, he said that he was having "significant mood swings, anger, and irritability issues over the holidays[.]" (JA 073). Thus, SPC SS admitted that his statement about not having anger issues within the last year was not actually true. (JA 073).

In addition to testimony about SPC SS's anger management issues, there was also testimony from soldiers in SPC SS's unit

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<sup>3</sup> AR also testified that SGT Davis said this statement. (JA 099). This statement formed the basis of the Specification of Charge II, of which SGT Davis was found not guilty. Furthermore, AR testified that she had six to eight drinks that night. (JA 087). AR also testified that she did not see what transpired in the twenty to thirty seconds before SGT Davis was holding a gun. (JA 110).

regarding his reputation for truthfulness. Staff Sergeant Hardy testified that SPC SS "can be sometimes untruthful." (JA 182). Staff Sergeant Forester testified that SPC SS is "not truthful" and has a reputation for untruthfulness. (JA 186). When SGT Scott was asked about SPC SS's character for truthfulness, he responded that: "if it would benefit to stretch the truth, he would. I mean, I wouldn't say that he's an all out complete and total liar, but you know, there would be a little bit extension, you know, just to make sure that he was good." (JA 197).

Additional facts necessary for disposition of the issue presented are set forth below.

#### **Issue Presented**

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE AFFIRMATIVE DEFENSE OF DEFENSE OF PROPERTY WAS HARMLESS BEYOND A REASONABLE DOUBT.

#### **Standard of Review**

The adequacy of a military judge's instructions is reviewed de novo. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006). When the instructional error raises constitutional implications, as instructions involving self-defense do, the error is tested for prejudice using a "harmless beyond a reasonable doubt" standard. *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012) citing *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). "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.'" *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)). The burden of proof is on the government to "prove, beyond a reasonable doubt, that the instructional error did not contribute to the members' guilty findings." *Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007) citing *Dearing*, 63 M.J. at 484.

### **Law and Argument**

#### **Not Harmless Beyond a Reasonable Doubt**

In *United States v. Dearing*, this Court found prejudicial error where a military judge "generally instructed a panel on the issue of self-defense," but failed to tailor that instruction to the facts of the case. 63 M.J. at 483-85 (emphasis added). Here, as in *Dearing*, the military judge's instructions were not sufficiently tailored to the facts of SGT Davis' case because the military judge never instructed the panel on personal defense of property—"The evidence has raised the issue of defense of property in relation to the offense of simple assault with an unloaded firearm." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 5-7 (1 Jan. 2010). *Dearing* held that without a proper self-defense instruction, "the members did not have

guideposts for an informed deliberation." *Id.* at 487 (internal quotations omitted).

Similarly, in this case, because the members were not instructed as to SGT Davis' right to defend his property, they did not have guideposts for an informed deliberation. As such, a theory of defense was eviscerated. See *id.* at 485. Since this error could have contributed to SGT Davis' conviction, it was not harmless beyond a reasonable doubt.

In *United States v. Adams*, the military judge's failure to "define the accused's right to stand his ground" resulted in the members not having the "proper guideposts" on the law of self-defense. 5 U.S.C.M.A. at 563, 18 C.M.R. at 195 (1955). The lack of proper guideposts amounted to prejudicial error because it "allow[ed] the court members to believe that the accused had a duty to retreat." *United States v. Yabut*, 20 U.S.C.M.A. 393, 395, 43 C.M.R. 233, 235 (1971) (interpreting the "crucial point" of the *Adams* opinion). Similarly, here the instructions were deficient and not harmless beyond a reasonable doubt as the error allowed the court members to believe that SGT Davis had a duty to retreat.

In light of SPC SS's testimony that SGT Davis took the first swing (JA 031), it was not error for the judge to instruct the panel that "a person who intentionally provoked in their attack upon himself is not entitled to self-defense . . . unless

it was physically impossible for him to withdrawn [sic.] in good faith." (JA 211). However, because of SPC SS's character for untruthfulness and anger issues, as explained above, the Army Court erred in concluding that it was "clear beyond a reasonable doubt that a rational [panel] would have found the defendant guilty absent the error." *United States v. Davis*, ARMY 20100815 (Army Ct. Crim. App. 15 July 2013) citing *United States v. Baxter*, 72 M.J. 507, 513 (Army Ct. Crim. App. 2013) (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)). To the contrary, given SPC SS's untruthful character and his anger issues, it is clear that a panel would likely have found SGT Davis not guilty had they known that SGT Davis had a right to defend his property.

While the panel was instructed that SGT Davis may have been a provocateur, they were never given the option to find that he was merely a person ejecting a trespasser that refused to leave. This court found in *Marbury* that "[i]t is well established that a servicemember has a legal right to eject a trespasser from his or her military bedroom . . . and a legal right to protect his or her personal property." *United States v. Marbury*, 56 M.J. 12, 15 (C.A.A.F. 2001) (internal citations omitted).

However, "these legal rights are not unlimited, and they must be exercised reasonably." *Id.* Reasonable force is that which is "reasonably necessary to eject the trespasser or

*otherwise protect the property."* *Id.*; see also 2 W. La Fave, *Substantive Criminal Law*, § 10.6(a) (2nd ed. 2003) (defines reasonable force as "the amount of force that reasonably appears necessary to prevent threatened interference with the property").

Sergeant Davis could not and did not have the opportunity to first leave his house prior to re-engaging SPC SS in his own doorway. SGT Davis testified:

[I]f we get into a fist fight, this dude hits me and knocks me out, what's going to happen to my family, my house, his girlfriend because--I mean, they've already been fighting and--you know, this was what my wife was telling me, that she was so worried that she had to call me and tell me to come home because of what they were saying to each other.

(JA 142-143). Further, SPC SS re-approached SGT Davis' home after SGT Davis drove by him in the street. (JA 053, 131). This clearly shows that SPC SS had the opportunity to leave and goes toward the alleged initial aggressor.

SGT Davis yelled in SPC SS's direction, "You all need to get the hell out of here. I don't want you here no more." (JA 128). Despite this warning, SPC SS still moved in the direction of the Davis' house and entered the doorframe. (JA 131-132). It was not until SGT Davis was face-to-face with SPC SS in the doorway of his own home that he realized SPC SS was a threat to his property. (JA 133). The fact that SPC SS entered the

doorframe shows that he had an opportunity to leave. The military judge's failure to instruct the panel on defense of property precluded the panel from properly determining whether SGT Davis' actions to remove a trespasser from his property were *reasonable*.

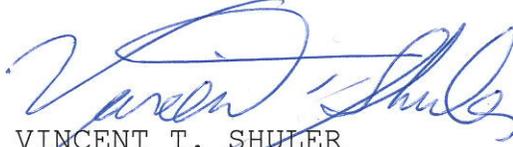
In light of SPC SS's anger management issues and the size discrepancy (SPC SS was bigger than SGT Davis), there certainly was some evidence for the panel to find that pointing an unloaded firearm at SPC SS was a reasonable way for SGT Davis to defend his property and eject SPC SS therefrom. (JA 073, 142). Further, given SPC SS's character for untruthfulness, the Army Court's determination that the evidence that SGT Davis did not provide SPC SS with a reasonable amount of time to comply with his demand to leave and that SGT Davis was the initial aggressor, the military judge's failure to instruct on defense of property was not harmless beyond a reasonable doubt. A rational panel would likely have found that SGT Davis' behavior on the night in question was reasonable had they been properly instructed that he had no duty to retreat and could defend his property against trespass by SPC SS.

**Conclusion**

WHEREFORE, SGT Davis respectfully requests that this Honorable Court set aside the finding of guilty as to the Specification of Charge I and reassess the sentence.



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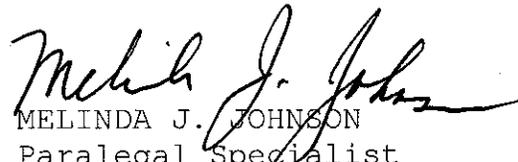
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Davis, Crim. App. Dkt. No. 20100815, Dkt. No. 14-0293/AR, was delivered to the Court and Government Appellate Division on January 8, 2014.

  
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