

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
F.D. MITCHELL, J.A. MAKSYM, D.O. VOLLENWEIDER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**NEALON F. SMITH II
MACHINIST'S MATE FIREMAN (E-3), U.S. NAVY**

**NMCCA 200900079
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 05 November 2008.

Military Judge: LtCol William Brown, USMCR.

Convening Authority: Commanding Officer, Naval Submarine Support Center New London, Naval Submarine Base New London, Groton, CT.

Staff Judge Advocate's Recommendation: LT P.S. Reutlinger, JAGC, USN.

For Appellant: LCDR Thomas Belsky, JAGC, USN.

For Appellee: CAPT J.J. Bishop, JAGC, USN; CDR K.D. Hinson, JAGC, USN; Maj Elizabeth A. Harvey, USMC.

9 March 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER; Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas of aggravated assault, housebreaking,¹ and carrying a concealed weapon, in

¹ The appellant was originally charged with burglary in violation of Article 129, Uniform Code of Military Justice, 10 U.S.C. § 929. He pled guilty to the lesser included offense of housebreaking in violation of Article 130, UCMJ. The Government did not go forward with the Article 129 charge.

violation of Articles 128, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928, 930, and 934. The appellant was sentenced to confinement for ninety days and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

In his original assignment of error, the appellant alleged that his conviction for housebreaking was improvident because the record established that he did not have, at the time he entered the house, the intent to commit a criminal offense therein.

This Court specified the following issue:

WHETHER THE APPELLANT'S GUILTY PLEA TO CHARGE III, SPECIFICATION 2, AGGRAVATED ASSAULT, WAS IMPROVIDENT WHERE THE MILITARY JUDGE FAILED TO INQUIRE INTO THE APPLICABILITY OF, AND NEGATE, THE DEFENSE OF SELF DEFENSE.²

Having reviewed the record and the pleadings, we find that the appellant's pleas to housebreaking and aggravated assault were improvident.

FACTS

The relevant facts are not in dispute. The incidents giving rise to the charges arose from a domestic disturbance stemming from allegations of infidelity.

On the morning of 20 September 2008, the appellant had an argument with his wife. Mrs. Smith then left the Smith home and went to the home of Brandon Glassbrook. The appellant later drove to Glassbrook's house and asked Glassbrook if he knew where Mrs. Smith was. Glassbrook said he didn't know where she was. Mrs. Smith was hiding nearby in a row of hedges. The appellant left in his truck.

When the appellant left, Mrs. Smith emerged from the hedges, and she and Glassbrook went in the backyard to have a cigarette. The appellant saw his wife go into the back yard. He came back and confronted his wife and Glassbrook in the yard. Glassbrook repeatedly asked the appellant to leave. He didn't. While the appellant and Mrs. Smith continued to argue, Glassbrook went into the house and obtained a box cutter.

Mrs. Smith also entered the house and locked the door behind her. The appellant kicked the door in, entered the house, yelling at and threatening³ his wife and Glassbrook. Glassbrook

² In his original brief the appellant stated that his plea to aggravated assault was provident (Appellant's Brief and Assignment of Error dated 13 April 2009, at 3, n. 1). We deemed further briefing on this issue appropriate.

³ While the appellant answered in the affirmative when the trial judge asked if he threatened his wife and Mr. Glassbrook, and while the stipulation of

brandished the box cutter and asked the appellant to leave. He then reached behind his back and pulled out a KA-BAR combat knife. He said something like "you want to pull blades?" Record at 28. The appellant told the trial judge that he "did not make any type of threatening moves or anything like that, sir." *Id.* at 26. He just held the knife with his right hand front of his right shoulder.⁴ *Id.* at 27. The trial judge did ask the appellant what his intention was. The appellant said that his intention was to show the knife to Glassbrook. "I did that, sir, to show him that my knife was bigger than his, pretty much to display the knife to him, sir." *Id.* Mrs. Smith stepped in to calm the situation, and Glassbrook called 911. *Id.*; Prosecution Exhibit 1 at 2. The Smiths continued to argue, then left Glassbrook's house together. The Smiths were then confronted by local police.

The trial judge went back to discuss what the appellant meant when he said "You want to pull blades?" The appellant replied: "By that I had no intention of pulling any knife out or anything at the time until he pulled out his, sir. And that is the only reason I said, 'Oh, you want to pull out blades' and I pulled out my own KA-BAR, sir. To show him that (inaudible)." Record at 28-29. The trial judge never asked the appellant if he intended to assault either his wife or Glassbrook. There was no unlawful touching or attempted unlawful touching alleged or shown in either the providence inquiry or the stipulation of fact. We have no information from this record as to the distance between the appellant and Glassbrook when the appellant pulled his knife, or whether Glassbrook was advancing on the appellant. In his unsworn statement on sentencing, the appellant said that he never thought about the knife until Glassbrook brandished a box cutter.

DISCUSSION

Guilty Plea Standard of Review

Before accepting a guilty plea, the military judge must find that there is a sufficient factual basis to satisfy each and every element of the offense. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Once the guilty plea is accepted, we will not disturb it, unless the record reveals a substantial

fact states that he threatened them, at no time in the providence inquiry and nowhere in the record are those threats defined. It could be threats to do bodily harm. It could be threats that he would lock his wife out of the marital home. It could be threats to no longer be friends on Facebook. The possibilities are limited only by the imagination. Knowing the nature of these threats, and the actual words used, would have provided important context for determining the legal issues present in this case. We are left to speculation, however.

⁴ The charge sheet in this case stated that the appellant "brandished" a dangerous weapon. "Brandish" is defined as to wave or shake menacingly. Webster's New World Dictionary 176 (College Edition 1968). The appellant's responses during the providence inquiry do not reflect that he brandished his knife. Rather, he admitted that he merely held it at his shoulder.

conflict between the plea and the accused's statements or other evidence of record. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). "[T]he mere possibility of conflict between a guilty plea and the accused's statements" does not necessitate the rejection of his plea. *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). In this case the actual conflicts and the failure of the trial judge to recognize a possible legal defense require us to set aside the appellant's conviction on two charges.

Housebreaking

The appellant pleaded guilty to the charge of housebreaking, and his plea was accepted by the trial judge and approved by the convening authority. The elements of Article 130, UCMJ, housebreaking are as follows:

- (1) That the accused unlawfully entered a certain building or structure of a certain other person; and
- (2) That the unlawful entry was made with the intent to commit a criminal offense therein.

MANUAL FOR COURTS-MARTIAL, Part IV, ¶ 56(b), UNITED STATES (2008 ed.). It is unquestioned that the appellant unlawfully entered Glassbrook's residence. The issue is, therefore, whether the providence inquiry established that the unlawful entry "was made with the intent to commit a criminal offense therein." *Id.*

The Manual of Courts-Martial discusses the issue of intent:

The intent to commit some criminal offense is an essential element of housebreaking and must be alleged and proved to support a conviction of this offense. If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit that offense at the time of the entry.

Id. at ¶ 56(c)(2). In this case, it was alleged that the appellant unlawfully entered Glassbrook's residence with the intent to commit an aggravated assault therein. The question then is whether the providence inquiry established that the appellant had the intent to commit such an assault when he entered the building. We do not believe that such intent was shown. To the contrary, we believe that the appellant showed that he had no such intent at that time.

The Manual of Courts-Martial states that if a crime was committed inside the building unlawfully entered, it *may* be inferred that the accused intended to commit that crime at the time of entry. *Id.* It does not state that such an inference *must* be made. In other words, the Manual describes a rebuttable presumption. In this case, we believe the appellant's statements during the providence inquiry rebutted the presumption that he

had the requisite intent at the time of entry.⁵ The appellant stated clearly that he "had no intention of pulling any knife out or anything at the time until [Glassbrook] pulled out his." Record at 29. Glassbrook brandished his blade after the appellant had entered the house. The trial judge failed to question the appellant about his intent at the time he entered the house.⁶ The conviction for housebreaking cannot be sustained.

As we have found that the appellant's housebreaking plea may not be sustained despite the undisputed fact that he unlawfully entered the house, we must determine whether he may still be found guilty of unlawful entry under Article 134, a lesser included offense to Article 130 Housebreaking. MCM, Part IV, ¶ 56(d)(1). The elements of unlawful entry are as follows:

- (1) That the accused entered the real property of another . . . which amounts to a structure usually used for habitation or storage;
- (2) That such entry was unlawful; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

During the providence inquiry, the trial judge made no inquiry regarding the last element, and those elements do not appear on the charge sheet. For the reasons explained in *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008) and *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009), we may not utilize Article 79, UCMJ, to uphold a conviction of the lesser included offense of unlawful entry.⁷ The appellant's conviction on Charge IV and its specification will be set aside.

⁵ We reach this conclusion irrespective of the outcome of the specified issue.

⁶ The judge asked: "And do you have any problem with my making that finding that you intended to commit the offer type assault on Mr. Glassbrook when you got inside when you got inside [sic] - his home?" The appellant responded: "No, Sir." Record at 36. The trial judge did not seek clarification. The trial judge could easily have simply asked the appellant if he intended, at the time he entered the house, to commit an aggravated assault on Glassbrook by pulling a knife on him. The question was not asked.

On sentencing, in an unsworn statement, the appellant said that he had not even thought about the knife until Glassbrook came upstairs with his box cutter. The Government did not rebut the statement, and the trial judge did not reopen the providence inquiry.

⁷ We have considered *United States v. Conliffe*, 67 M.J. 127 (C.A.A.F. 2009) and find it inapposite. In that case, the appellant had pled guilty to housebreaking, where the crime intended was conduct unbecoming a cadet under Article 133, U.C.M.J. There, unlike the instant case, the trial judge had specifically discussed with the appellant the lesser included offense of unlawful entry. Further, the Court of Appeals for the Armed Forces found that the conduct to which the appellant plead guilty, conduct unbecoming,

Aggravated Assault

The appellant pleaded guilty to the charge of aggravated assault (offer type), and his plea was accepted by the trial judge and approved by the convening authority. The elements of Article 128, aggravated assault, are as follows:

- (1) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
- (2) That the accused did so with a certain weapon, means, or force;
- (3) That the attempt, offer, or bodily harm was done with unlawful force or violence; and
- (4) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

MCM, Part IV, ¶ 54(b)(4)(a). The Manual explains an assault as follows:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. It must be done without legal justification or excuse and without the lawful consent of the person affected. "Bodily harm" means any offensive touching of another, however slight.

Id. at ¶ 54(c)(1)(a).

The Manual explains an "offer" type assault as follows:

An "offer" type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

Id. at ¶ 54(c)(1)(b)(ii). "Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault." *Id.* at ¶ 54(c)(1)(c)(i). The Manual discusses at length circumstances negating an intent to harm:

If the circumstances known to the person menaced clearly negate an intent to do bodily harm there is no assault. Thus, if a person accompanies an

necessarily encompassed service discrediting conduct. *Id.* at 134-35. Aggravated assault has no such equivalent.

apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike, there is no assault. For example, if Doe raises a stick and shakes it at Roe within striking distance saying, "If you weren't an old man, I would knock you down," Doe has committed no assault. However, an offer to inflict bodily injury upon another instantly if that person does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if Doe points a pistol at Roe and says, "If you don't hand over your watch, I will shoot you," Doe has committed an assault upon Roe.

Id. at ¶ 54(c)(1)(c)(iii).

In the instant case, the providence inquiry, supplemented by a stipulation of fact, creates a picture of a verbal argument between the appellant, his wife, and Glassbrook, after the appellant had unlawfully entered Glassbrook's house. Glassbrook appeared with a box cutter, appearing to offer to escalate what had been a verbal scene into a physical confrontation. The only intent shown by the appellant up to that time was to argue, primarily with his wife. A reasonable view of the record indicates that the appellant, after Glassbrook appeared with a box cutter, merely indicated to Glassbrook that if you attack me with your knife, I will defend myself with my knife. The record is clear that the appellant admitted to making no threatening movement with his knife beyond showing it to Glassbrook so that Glassbrook would know that the appellant also had a weapon. With the intervention of Mrs. Smith, the dust-up did not proceed beyond that point. The question before us is whether, under these facts, we may uphold the appellant's conviction for aggravated assault. We find that the conviction must be set aside.

Self-Defense

The providence inquiry must establish not only that the accused himself believes he is guilty, but also that the factual circumstances objectively support the plea. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005); *Care*, 40 C.M.R. 2 at 253; *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994). Inconsistencies and apparent defenses must be resolved, or the military judge must reject the plea. *Shaw*, 64 M.J. at 462; *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006); *United States v. Jennings*, 1 M.J. 414 (C.M.A. 1976). "The existence of an apparent and complete defense is necessarily inconsistent with a guilty plea." *Shaw*, 64 M.J. at 462. See also Article 45(a), UCMJ; RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This inquiry should include a concise explanation of the elements of the defense and "[o]nly after the military judge [makes] this inquiry can he then determine whether the apparent inconsistency or ambiguity has

been resolved." *Phillippe*, 63 M.J. at 310 (footnote omitted); see *United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004).

Despite the fact that the appellant stated that he never thought about his knife, let alone pulled it out and displayed it until Glassbrook brandished his box cutter, the trial judge never defined or explained self-defense to the appellant, or discussed it in any way. Self-defense is considered a special defense, because "although not denying that the accused committed the objective acts constituting the offense charged, [self-defense] denies, wholly or partially, criminal responsibility for those acts." R.C.M. 916(a). See also *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007).

R.C.M. 916(e) addresses self-defense. That rule provides, in pertinent part, that:

It is a defense to . . . assault involving deadly force . . . that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

R.C.M. 916(e)(1). "The first element, under subparagraph (A), has an objective component, involving the perception of a reasonable person under the circumstances. The second element, under subparagraph (B), is wholly subjective, involving the personal belief of the accused, even if not objectively reasonable." *United States v. Dobson*, 63 M.J. 1, 11 (C.A.A.F. 2006).

The Rules for Courts-Martial also state with more particularity, applicable to this case since force was not actually applied:

It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:

(A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) In order to deter the assailant, 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.

R.C.M. 916(e)(2). The trial judge never discussed the facts with the appellant that would allow a determination of whether the appellant reasonably apprehended that Glassbrook was going to attack him with a box cutter, prior to the appellant pulling out his knife. The trial judge did not discuss whether such an attack by Glassbrook would be wrongful, or whether it would be a lawful way of dealing with a verbal altercation with a trespasser.

The right to self-defense is not without limit. The Rules discuss when the right may be lost:

The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

R.C.M. 916(e)(4). The discussion of this subsection is pertinent, given the facts of this case:

A person does not become an aggressor or provocateur merely because that person approaches another to seek an interview, even if the approach is not made in a friendly manner. For example, one may approach another and demand an explanation of offensive words or redress of a complaint. If the approach is made in a nonviolent manner, the right to self-defense is not lost.

Failure to retreat, when retreat is possible, does not deprive the accused of the right to self-defense if the accused was lawfully present. The availability of avenues of retreat is one factor which may be considered in addressing the reasonableness of the accused's apprehension of bodily harm and the sincerity of the accused's belief that the force used was necessary for self-protection.

R.C.M. 916(e)(4), Discussion. "Even a person who starts an affray is entitled to use self-defense when the opposing party escalates the level of the conflict." *United States v. Cardwell*, 15 M.J. 124, 126 (C.M.A. 1983) (citation omitted). See also *Lewis*, 65 M.J. at 88. "The theory of self-defense is protection and not aggression, and to keep the two in rough balance the force to repel should approximate the violence threatened." *Cardwell*, 15 M.J. at 126. As explained by Chief Judge Everett: "Thus, if A strikes B a light blow with his fist and B retaliates with a knife thrust, A is entitled to use reasonable force in defending himself against such an attack, even though he was originally the aggressor." *Id.* See also *United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006) (citing *Cardwell* with approval); *Lewis*, 65 M.J.

at 88 (finding no conflict between R.C.M. 916(e)(4) and the holding in *Cardwell*).

The facts in this case indicate that Glassbrook escalated a verbal contest into one which involved the potential use of weapons. As such, the trial judge had a duty to define and discuss with the appellant the elements of self-defense. Having failed to do so, we must set aside the appellant's conviction of aggravated assault.

CONCLUSION

For the foregoing reasons, the findings of guilty to Charges III and IV, and the sentence, are set aside. A rehearing is authorized at which the appellant may withdraw his pleas of guilty to Charge V and Specification 2 thereunder. If no rehearing on the set aside charges is held, a rehearing on sentence is authorized. Alternatively, the convening authority may approve a sentence of no punishment.⁸

Senior Judge MITCHELL and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

⁸ The new court-martial order issued will correctly list the number of the charges (III, IV, and V vice III, VI, and V) and provide a more thorough summary of the offenses. See MCM, Appendix 17.