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

Before
R.E. VINCENT, J.A. MAKSYM, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DELANO V. HOLMES
LANCE CORPORAL (E-3), U.S. MARINE CORPS RESERVE

NMCCA 200800501
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 December 2007.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commander, I Marine Expeditionary Force, U.S. Marine Corps Forces, Pacific, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col J.R. Ewers, Jr., USMC.
For Appellant: LT Heather Cassidy, JAGC, USN.
For Appellee: Capt Mark Balfantz, USMC.

8 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of making a false official statement and negligent homicide, in violation of Articles 107 and 134, Uniform Code of Military

Justice, 10 U.S.C. §§ 907 and 934.[1] The appellant was sentenced to reduction to pay grade E-1 and a bad-conduct discharge. The convening authority approved the findings and the sentence as adjudged.

The appellant's sole assignment of error is that the military judge erred by failing to instruct the members that self-defense was a defense to negligent homicide.

We have examined the record of trial, the appellant's assignment of error and reply, and the Government's answer.[2] We conclude the military judge erred to the material prejudice of the appellant's substantial rights and order relief in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant, a mobilized reservist, deployed with 1st Battalion, 24th Marines, 4th Marine Division, to Fallujah, Iraq in 2006. He was initially assigned to the Quick Reaction Force (QRF), where he frequently came under direct and indirect enemy fire while serving as a vehicle turret gunner.

The appellant's unit was also responsible for perimeter security at the Civilian Military Operations Center (CMOC) in Fallujah. Their observation posts were located near one of Fallujah's main roads and often subject to enemy fire. Due to its proximity to the CMOC entrance, Post 1A was manned by a United States Marine and an Iraqi Army (IQA) soldier. Post 1A was an exposed, elevated position with limited ballistic protection, and internal dimensions of approximately seven feet by seven feet; assigned personnel performed post duties seated in adjacent chairs facing the nearby road. Record at 761-64, 781; Prosecution Exhibit 47.

At approximately 0400, 31 December 2006, the appellant, then armed with a Squad Automatic Weapon, reported for his first duty on Post 1A. Private (Pvt) Hassin, IQA, was already standing post and was armed with an AK-47. Approximately two

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[1] The appellant was charged with unpremeditated murder in violation of Article 118, UCMJ, but convicted of the lesser included offense of negligent homicide.

[2] Though not raised as an error, the military judge did not announce assembly of the court-martial as required by RULE FOR COURTS-MARTIAL 911, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Record at 620-24; *see United States v. Hawkins*, 24 M.J. 257, 258-59 (C.M.A. 1987)(holding assembly not dependent upon military judge's announcement, but occurs "when the *voir dire* of the members begins")(quoting *United States v. Dixon*, 18 M.J. 310, 313-14 (C.M.A. 1984)).

hours later, several rounds were fired from an AK-47 within Post 1A, and the appellant requested a corpsman report to Post 1A. Responding Marines and IQA personnel discovered Pvt Hassin's body on a landing just outside Post 1A. He had lost a large volume of blood, showed no signs of life, and was subsequently pronounced dead. At trial a forensic pathologist testified that Pvt Hassin suffered 44 knife wounds, including 17 stab wounds, and died from blood loss resulting from multiple stab wounds. Record at 1353; PE 29.

Over the next three weeks the appellant provided four statements about the incident; one written statement to his unit, two written statements and one videotaped statement to Naval Criminal Investigative Service (NCIS) special agents. PE 6, 7, 8, 10. In each statement the appellant provided the following basic version of the events.

He stood Post 1A with an unknown IQA soldier (later identified as Pvt Hassin) from approximately 0400-0600, 31 December 2007. While standing post and while it was still dark, Pvt Hassin opened a cellular phone which emitted a bright blue light, touched the keys, and then put the phone away. The appellant was aware Post 1A had previously been subjected to sniper fire, and he was concerned about light discipline on post. Pvt Hassin then lit a cigarette with a lighter, and the ignition of the lighter and burning of the cigarette illuminated the post, prompting the appellant's unsuccessful attempts to persuade Pvt Hassin to extinguish the cigarette.

The appellant claimed he used several Arabic and English phrases, as well as gestures in an effort to get Pvt Hassin to extinguish the cigarette. The appellant believed Pvt Hassin understood what he was trying to communicate, but laughed at or mocked his efforts. The appellant then reached over and knocked the cigarette from Pvt Hassin's hand. He claims that Pvt Hassin then grabbed or pinned his arm, which prompted him to push Pvt Hassin against the post's interior wall. They then fought in the confined space of Post 1A for a period of time.

In his first three statements, the appellant claimed that Pvt Hassin subsequently fired a several round burst from the AK-47 at him. PE 6 at 2, PE 7 at 4, PE 8 at 5-6. He also claimed that at approximately the same time, a second IQA soldier appeared and grabbed him from behind. PE 6 at 2, PE 7 at 4, PE 8 at 5-6. The appellant then stated that, fearing for his life, he took out his bayonet and began stabbing Pvt Hassin, and the

second IQA soldier ran away. PE 6 at 2, PE 7 at 4-6, PE 8 at 5-7.

In his videotaped, fourth statement, the appellant admitted lying in his previous accounts, as Pvt Hassin had not fired the AK-47 and there was no second IQA soldier involved in the incident. PE 10. The appellant also admitted firing the AK-47, explaining that he was concerned his command would turn on him. *Id.* In that statement, the appellant claimed that Pvt Hassin reached for his AK-47 while the two men were fighting, so he stabbed him in order to protect himself. *Id.* The appellant stated he had been through numerous life threatening incidents with the QRF, but that this time "it wasn't the same, and I did panic." *Id.*

At trial, the defense theory was self-defense and reasonable doubt as to guilt. The defense raised numerous issues with the evidence, including the reliability of the appellant's fourth statement, multiple perceived deficiencies in the investigation, and discrepancies between the Government pathologist's wound measurements and identification of the appellant's bayonet as the source of those wounds. Record at 1575-90, 1808-39.

The military judge instructed the panel on the elements of charged offense, unpremeditated murder, and numerous lesser included offenses including negligent homicide. He also instructed the members that the evidence "raised the issue of self defense in relation to . . . unpremeditated murder and the lesser included offenses of voluntary manslaughter, [and all included assaults]." *Id.* at 1861, 1863. He noted that self-defense is "a complete defense" to those offenses, but did not instruct the members that self-defense was a defense to either involuntary manslaughter or negligent homicide. *Id.* at 1861. The appellant did not object to the military judge's instructions or request a self-defense instruction with respect to negligent homicide.

II. Instructions on Findings – Self-Defense

A. Principles of Law

"A military judge is required to instruct the members on special (affirmative) defenses 'in issue.'" *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)(quoting RULE FOR COURTS-MARTIAL 920(e)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)). "A matter is considered 'in issue' when 'some evidence, without

regard to its source or credibility, has been admitted upon which members might rely if they choose.'" *Id.* (quoting R.C.M. 920(e), Discussion; *United States v. Gillenwater*, 43 M.J. 10, 13 (C.A.A.F. 1995)). Self-defense is a special defense to a homicide, 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." *Id.* (quoting R.C.M. 916(a)); *see also* R.C.M. 916(e)(1).

"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 (quoting *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)). We review the adequacy of the military judge's instruction *de novo*. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006).

B. Discussion

The appellant asserts that the military judge erred by failing, *sua sponte*, to instruct the members that self-defense was a complete defense to negligent homicide. The appellant argues that his "conduct could have been negligent, but still lawful," if he were acting in self-defense at the time he inflicted the knife wounds on the victim. Appellant's Brief of 23 Oct 2008 at 20-21. He also argues that the military judge's failure to properly instruct the members on self-defense is constitutional error and was not harmless beyond a reasonable doubt.

The Government asserts that self-defense is not a defense to negligent homicide, as self-defense necessarily involves the admission that one's actions are intentional and thus cannot apply to negligent homicide. The Government argues in the alternative that: (1) the appellant is actually asserting a defense of accident under the guise of self-defense, and (2) even if self-defense could be a defense to negligent homicide, some evidence was not raised because the appellant "intended to use deadly force." Government's Answer of 29 Dec 2008 at 6-14.

(1) Self-Defense as a Defense to Negligent Homicide

The offense of negligent homicide has five elements, including that the killing "was unlawful." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 85b. The manual explains that: "Negligent homicide is any unlawful homicide

which is the result of simple negligence." MCM, Part IV, ¶ 85c(1). The manual defines self-defense as a special defense to, "homicide, assault involving deadly force, or battery involving deadly force." R.C.M. 916(e)(1). The plain language of the manual provides no limitation on the type(s) of homicide to which the defense of self-defense applies.[3] *Id.*

In *United States v. Thomas,* the then Court of Military Appeals set aside findings of guilty to negligent homicide after concluding the military judge's instructions on self-defense were "insufficient and misleading." 11 M.J. 315, 317 (C.M.A. 1981). In *Thomas*, the appellant, a military policeman in uniform, shot and killed an unarmed assailant during a scuffle. Although the defense requested an instruction on self-defense that addressed Thomas' drawing and use of his sidearm as a club (*i.e.,* less than deadly force), the military judge instructed only on self-defense by means of deadly force. *Id.* at 316. In reversing, the court reasoned that the military judge's instructions focused "on a self-defense test which [justified] the use of deadly force," but "fail[ed] to address the self-defense in the use of less than deadly force; that is, the [appellant's - then] drawing of [his] weapon for the purpose of using it as a club." *Id.*

Both the plain language of the manual defining the elements of negligent homicide and the defense of self-defense, as well as *Thomas*, indicate that self-defense can be a defense to negligent homicide.[4] *See* MCM, Part IV, ¶ 85b; R.C.M. 916(e)(1); *see also Thomas*, 11 M.J. at 316. The implementing provisions of the manual provide no limitations on the types of homicide to which self-defense applies, and *Thomas* has neither been overruled nor distinguished in a manner relevant to this

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[3] The Military Judges' Benchbook paraphrases the manual's use of the word "homicide" without articulating any limitations on the type(s) of homicide to which the defense of self-defense applies. Dept. of the Army Pamphlet 27-9 at 746-48, (Interim Changes since Ch-2, 15 Jan 2008).

[4] We agree with the Government's assertion that the status of self-defense as a defense to negligence based homicides varies among jurisdictions. *Compare People v. Curtis*, 37 Cal. Rptr. 2d 304, 318 (Cal. Ct. App. 1994), *with State v. Bowie*, 684 So. 2d 68, 72 (La. Ct. App. 1996)(Gross negligence negated if defendant charged with committing negligent homicide kills in self-defense), *and Harshaw v. State*, 39 S.W.3d 753, 756 n.1 (Ark. 2001)(Arkansas Criminal Code one of few modern codes that follow section 3.09(2) of the Model Penal Code and treat homicide in imperfect self-defense as a problem of "reckless manslaughter, or of negligent homicide, depending upon whether the defendant's belief as to the necessity of the homicide was reckless or negligent").

question. On the contrary, *Thomas* is cited in the manual itself as support for the discussion underlying R.C.M. 916(e)(3). MCM, App. 21, at A21-64.

Moreover, based upon the unique facts in *Thomas*, the court recognized the requirement for two distinct self-defense instructions in that negligent homicide case: (1) "a self-defense test which [justified] the use of deadly force," and (2) an instruction "to address the self-defense in the use of less than deadly force." *Thomas*, 11 M.J. at 316.

We conclude that "self-defense" can be a defense to negligent homicide.[5]

(2) Was Self-Defense to Negligent Homicide Raised by the Evidence?

"A matter is considered '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 (citations omitted). The appellant asserts that self-defense constitutes a legal justification or excuse that may render a negligent homicide lawful and that there was "some evidence" of self-defense in this case. We agree.

The primary issues in this case were self-defense and the sufficiency of the Government's evidence. Although there was some dispute as to the source and depth of several of Pvt Hassin's wounds, the record establishes that Pvt Hassin died as a result of wounds inflicted by the appellant's repeated stabbing and striking with his bayonet. With the exception of the appellant's statements, there is no evidence as to why he stabbed Pvt Hassin. Prior to trial, the appellant provided four statements describing the events preceding his stabbing of Pvt Hassin which were similar in some respects, and significantly different in others. *Compare* PE 6, 7, 8 *with* PE 10.

The similarities include: Pvt Hassin's alleged light discipline violations while standing post, the appellant's

[5] Self-defense is also a possible defense to involuntary manslaughter, a culpable negligence offense. *See United States v. Yanger,* 67 M.J. 56, 57-58 (C.A.A.F. 2008)(holding military judge recognized possibility of self-defense during involuntary manslaughter providence inquiry, then properly determined defense was not raised after comprehensive inquiry); *see also United States v. Lincoln*, 38 C.M.R. 128, 132 (C.M.A. 1967)("Self-defense renders any homicide [including involuntary manslaughter] excusable and is a defense to all degrees thereof").

alleged efforts to persuade Pvt Hassin to extinguish his cigarette, the appellant's forcible removal of the cigarette, Pvt Hassin's alleged restraint of the appellant's arm, and a subsequent fight. The primary differences in the accounts are that initially the appellant claimed that Pvt Hassin obtained his AK-47 and fired several rounds at him during the fight, and that a second IQA soldier was involved in the altercation. Whereas in the final version the appellant claimed that there was no second IQA soldier involved in the incident, that Pvt Hassin reached for, but did not fire his AK-47 while fighting with the appellant, and that he, the appellant, fired Pvt Hassin's AK-47 following the altercation in an effort to corroborate his version of the events.

The principles of law applicable to self-defense are well-settled, the accused must "[a]pprehend[], on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully [upon him]," and "[b]elieve[] that the force [he] used was necessary for protection against death or grievous bodily harm." R.C.M. 916(e)(1). At trial the Government introduced the four statements made by the appellant that while engaged in a closed-quarters fight with Pvt Hassin, Pvt Hassin reached for, and/or fired several rounds from his AK-47 at the appellant, and that the appellant, while in fear for his life, repeatedly stabbed Pvt Hassin with his bayonet. PE 6, 7, 8, 10. Although the appellant's multiple versions of events, admitted firing of the victim's AK-47 in an effort to corroborate his story, and the number and type of wounds present significant reasonability, source and credibility issues; those same statements also constitute "some evidence," that he was acting in self-defense when he stabbed Pvt Hassin. *Lewis*, 65 M.J. at 87.

We therefore conclude that the military judge erred by failing, *sua sponte*, to instruct the members that self-defense was a defense to negligent homicide.[6] Because instructions on special defenses are not waived by a failure to request them, or to object to their omission, we conclude that the military judge's error was not waived. *Id.;* R.C.M. 920(e)(3).

(3) Was the Error Harmless Beyond a Reasonable Doubt?

[6] Though not essential to resolution of this issue, the appellant also asserted the second instructional issue discussed in *Thomas,* that there was evidence that "he intended to use less than deadly force to defend himself." Appellant's Reply of 2 Jan 2009 at 2.

The "military judge's failure to give a complete and correct self-defense instruction created a constitutional error, requiring us to determine whether the error was harmless beyond a reasonable doubt." *Lewis*, 65 M.J. at 89 (citing *Dearing*, 63 M.J. at 484). "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." *Dearing*, 63 M.J. at 482 (citations and internal quotation marks omitted).

The appellant was acquitted of all offenses of which the military judge instructed that self-defense was a "complete defense." Record at 1861, 1863, 1881. Notwithstanding his pretrial admissions and the 44 documented knife wounds, the appellant was ultimately convicted only of the lesser of the two included homicide offenses the members had been instructed were not subject to the defense of self-defense.

Under the unique circumstances of this case, the military judge's incomplete instruction essentially precluded the members from considering self-defense with respect to negligent homicide, undercut the defense's primary theory, and could very well have contributed to the finding of guilty.

We conclude that the military judge's failure to properly instruct the members that self-defense was a defense to negligent homicide and involuntary manslaughter constituted error, and that the error was not harmless beyond a reasonable doubt.

III. Conclusion

The finding of guilty of negligent homicide is set aside. The remaining findings of guilty are affirmed. The sentence is set aside.[7] The same convening authority may order a rehearing on a charge of negligent homicide and the sentence. If the convening authority determines that a rehearing on that charge is impracticable, he may dismiss the charge and order a rehearing on the sentence only. If the convening authority determines that a rehearing on the sentence only is impracticable, he may approve a sentence of no punishment.

Senior Judge VINCENT and Judge MAKSYM concur.

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[7] The appellant is entitled to 295 vice 294 days of pretrial confinement credit. Record at 5, 72, 1883; Staff Judge Advocate's Recommendation of 14 May 2008 at 2-3.

For the Court

R.H. TROIDL
Clerk of Court