IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Rickel S. SIENZANT
Airman (E-3), U. S. Navy

NMCCA 200401719 Decided 28 August 2006

Sentence adjudged 15 January 2004. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, Naval Air Station, Whidbey Island, Oak Harbor, WA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

VOLLENWEIDER, Judge:

The appellant was convicted, pursuant to her pleas, of failure to obey a lawful general regulation and disorderly conduct, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. She was convicted contrary to her pleas by a general court-martial consisting of officer and enlisted members of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant was sentenced to a dishonorable discharge, confinement for 39 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant argues that the evidence was insufficient to prove she used unlawful force since she was acting in lawful defense of another and the shooting was the result of an accident.[1]

[1] I. THE EVIDENCE ADDUCED AT TRIAL IS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION BECAUSE APPELLANT DID NOT USE UNLAWFUL FORCE IN EJECTING OS2 MEAD FROM BASE HOUSING;

We have examined the record of trial, the appellant's three assignments of error, the Government's response, and the appellant's reply. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The charges in this case arose, incongruously, out of a surprise birthday celebration at an apartment on board Naval Submarine Base Bangor. Several enlisted Sailors had convened for a party for Disbursing Clerk Third Class (DK3) April Jones, at her apartment. The appellant was a visitor to the apartment,[2] as was the assault victim, Operations Specialist Second Class (OS2) Lakisher Mead. By the time things became unruly, all had been drinking to one degree or another. OS2 Mead had had approximately four drinks over the evening. DK3 Jones was apparently drunk. The appellant on the other hand had had only two glasses of wine and was not intoxicated.

There were either two or three altercations between DK3 Jones and OS2 Mead in which the appellant played a part. We shall analyze the events in three phases. While the time span between the events is unclear, the sequence is undisputed.

Phase One

As the party was winding down, and people began to leave, OS2 Mead saw that DK3 Jones (who was married to a deployed Sailor) was intoxicated and sitting on another male Sailor's lap, so she escorted DK3 Jones to her bedroom. OS2 Mead returned to the bedroom a bit later to talk to DK3 Jones. DK3 Jones was lying on her bed face down, talking to the appellant. OS2 Mead waited for a period of time, and then poured a glass of water on DK3 Jones' back. OS2 Mead claimed this was done as a joke. Not surprisingly, DK3 Jones became irate. The conversation turned loud and scatological. An altercation ensued. DK3 Jones threw punches. OS2 Mead swung back. Furniture was rearranged in the bedroom during the scuffle. The appellant broke up the fight, and two of the male guests pulled OS2 Mead out of the room.

Phase Two

After the two combatants were separated, DK3 Jones told OS2 Mead to leave. The physical fight was over. However, DK3 Jones

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II. THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT DID NOT ACT IN DEFENCE [sic] OF DK3 JONES WHEN APPELLANT SHOT OS2 MEAD; and

III. THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE SHOOTING OF OS2 MEAD WAS NOT THE RESULT OF AN ACCIDENT.

[2] The appellant did not live in DK3 Jones' apartment, and was merely a visitor at the time in question.

continued to tell OS2 Mead in no uncertain terms to leave. OS2 Mead did not immediately leave. DK3 Jones was in the back bedroom. OS2 Mead was in the hallway. The appellant left the apartment, retrieved a loaded semi-automatic pistol from the trunk of her car and returned. OS2 Mead was still in the apartment. The appellant cocked the gun, chambering a round. The safety was off. She raised the gun toward the ceiling and told everyone to leave. The remaining men pushed DK3 Mead out the door. The door latched behind them, shut by the appellant. Only DK3 Jones and the appellant remained in the apartment. No one was fighting. The appellant put her pistol on a baker's rack in the kitchen.

Phase Three

This is the part of the evening in which OS2 Mead was shot. After everyone else had left, OS2 Mead realized that she had left her house keys and cell phone in the apartment. She knocked on the door and asked to be allowed in to get them. DK3 Jones said she could come in. The accused let OS2 Mead into the apartment. OS2 Mead went to the bedroom to get her property. When she returned, she tried to talk to DK3 Jones, to apologize. DK3 Jones started yelling again, so OS2 Mead left the apartment once again. The verbal exchange continued, and DK3 Jones continued to scream at OS2 Mead from her porch, calling OS2 Mead a "broke bitch" as OS2 Mead descended the stairs from the apartment. OS2 Mead took offense, and ran back up to the porch where DK3 Jones was standing. A new physical altercation ensued. DK3 Jones took a swing at OS2 Mead. OS2 Mead tripped DK3 Jones, fell on top of her and began punching. DK3 Jones tried to fight back. DK3 Jones was not in fear for her safety or her life. The appellant went into the apartment and retrieved her pistol. It was loaded, cocked, had a round in the chamber, and the safety was off. She had her finger on the trigger.

Meanwhile, Machinist's Mate Second Class (MM2) Keith Cobb arrived. He saw the fighting and came up the stairs to break it up. He saw the appellant holding the gun and struggled to take it from her. MM2 Cobb told the appellant: "There's no need for this. I'm going to take her." He tried to push the gun over the balcony, but the appellant pulled it back. The gun fired, hitting OS2 Mead in the back. MM2 Cobb claimed he was not holding the gun when it went off. The appellant said they both had their hands on the gun when it went off. After OS2 Mead was shot, MM2 Cobb grabbed OS2 Mead and pulled her off of DK3 Jones. The appellant picked up DK3 Jones and took her back into the apartment. DK3 Jones was still cussing and fussing at OS2 Mead through the screen door. The appellant told her to "be quiet 'cause I just shot her." The appellant took the gun and put it under clothes on a shelf in DK3's Jones' bedroom closet.

Post-Script

When the police arrived, the appellant was belligerent. She was ordered to get down on the floor. She said: "Man, f—k you. I ain't getting on the f—king floor." She was defiant. Ordered to get down on the floor again, by officers with drawn weapons, she said: "I'm tired of this s—t. What the f—k you going to do, shoot me?" The third time she was ordered to get on the floor, she sat down. Ordered to roll over on her stomach, she said: "I am already on the floor. Make up your f—king mind." She finally rolled over on her stomach. The officer placed a knee in the small of her back and grabbed her left wrist. Her other arm was under her stomach, and she was trying to push him off. She said: "Does doing this to a woman make your d—k hard?" She continued to resist.

At trial, DK3 Jones admitted that both fights that evening were mutual combat. OS2 Mead never had a weapon. At no time during the evening did either DK3 Jones or the appellant call security or the police to come get things under control, or to eject OS2 Mead. The appellant testified that all this could have been avoided if DK3 Jones had just come inside and closed the door. DK3 Jones admitted she could have done just that.

The appellant's firearm expert, Evan Thompson from the Washington State Patrol Crime Laboratory testified that the appellant's cheap handgun had a trigger pull of 16 pounds – normal trigger pull would be 6-8 pounds. He testified that the gun's muzzle was next to or on OS2 Mead's back when she was shot. Based on an in-court demonstration and the appellant's testimony, he believed it was possible that the shooting could have been unintentional. Mr. Thompson also testified that bringing a loaded, cocked weapon into this situation was reckless. The appellant also admitted that she had been reckless with the gun.

OS2 Mead's wound was relatively minor. However, her doctor testified that had the bullet gone one inch to the right, it could have entered her spinal cord. If it had gone inward more, it could have punctured her lungs.

Sometime after the incident, the appellant told a co-worker that she had shot OS2 Mead. She did not say if the shooting was an accident or on purpose.

The appellant pled guilty to violating Navy Regulations by having a pistol on base, and to disorderly conduct in the presence of base police after the shooting. She pled not guilty to aggravated assault, but was nonetheless convicted. The members were not informed of the appellant's guilty pleas until the sentencing phase of the trial.

Discussion

I

Ejection of Trespasser by the Appellant

The appellant first argues she cannot be convicted for shooting OS2 Mead because she used lawful force to eject OS2 Mead from DK3 Jones'apartment. The appellant argues that she was "guilty of nothing but standing on her rights." We disagree.

The appellant cites *United States v. Regaldo*, 33 C.M.R. 12 (C.M.A. 1963) for the proposition that "a service member has a legal and moral right to eject a trespasser from his or her military or naval residence." Appellant's Brief of 29 Apr 2005 at 6. In *Regaldo*, the appellant had been convicted, contrary to his pleas, of assault with a dangerous weapon. Two soldiers got in an argument in a *gasthaus* in Germany. The *gasthaus* manager ordered them out. Regaldo, who was not involved in the argument, was clubbed by the manager in an attempt to get Regaldo to leave the premises. Regaldo pulled out a switchblade and stabbed the manager in the stomach. The Court of Military Appeals stated: "It is a well-recognized principle of law that the rightful occupant of a place of business has a legal right to expel from the premises anyone who abuses the privilege by which he was initially allowed to enter thereon," and that "reasonable force may be used to eject a trespasser." *Regaldo,* 33 C.M.R. at 14-15. The Court found that the manager had the right to ask the soldiers to leave and to use reasonable force to eject them. The Court further found that self-defense was not raised by the evidence as Regaldo had no legal right to resist expulsion. In the present case, the appellant was a visitor, not the owner or occupant of the apartment. She was not an agent of DK3 Jones, the lawful occupant. She had no legal right to eject OS2 Mead using any level of force. She had no rights to stand upon.

United States v. Richey, 20 M.J. 251 (C.M.A. 1985), cited by the appellant, also does not further her cause. The issue in *Richey* was whether the appellant was entitled to a self-defense instruction where he was a trespasser who assaulted the rightful occupant of a barracks room. *Id.* at 252. The case cites back to *Regaldo* for the proposition that reasonable force may be used to eject a trespasser, and that the trespasser has no right to refuse or resist. *Id.* at 253 n.2. Again, the appellant herein was not the lawful occupant of the premises, and was not entitled to use any force to eject OS2 Mead.

There is no authority for the appellant's assertion that an unrelated third person may shoot a trespasser. The appellant's lead argument is without merit.[3]

[3] The appellant at trial did not request an instruction related to use of force during ejection of a trespasser.

II

Defense of Another

The appellant's second argument is that she lawfully shot OS2 Mead to defend DK3 Jones. We disagree.

"Affirmative or special defenses, such as accident and defense of another, do not deny that the accused has committed the objective acts constituting the charged offense. Rule for Courts-Martial 916(a). Instead, they deny, 'wholly or partially, criminal responsibility for those acts." *United States v. Jenkins*, 59 M.J. 893, 897 (Army Ct.Crim.App. 2004)(quoting *United States v. McDonald*, 57 M.J. 18 (C.A.A.F. 2002).

Defense of another is a complete defense to aggravated assault "that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances." RULE FOR COURTS-MARTIAL 916(e)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). However, the "accused acts at the accused's peril when defending another. Thus, if the accused goes to the aid of an apparent assault victim, the accused is guilty of any assault the accused commits on the apparent assailant if, unbeknownst to the accused, the apparent victim was in fact the aggressor and not entitled to use self-defense." R.C.M. 916(e)(5) Discussion. The defense is not available if the apparent victim "was an aggressor, engaged in mutual combat, or provoked the attack." R.C.M. 916(e)(4).

In the instant case, the defense is not available to the appellant because DK3 Jones was an aggressor or, at least, a mutual combatant. The earlier fight had ceased and OS2 Mead was leaving. DK3 Jones stood on the porch, taunted OS2 Mead, and threatened OS2 Mead's property. When OS2 Mead returned in response to DK3 Jones' provocation, DK3 Jones threw the first punch. DK3 Jones admitted at trial that the fight was mutual combat. All the facts suggest mutual combat. "Both parties to a mutual combat are wrongdoers, and the law of self-defense cannot be invoked by either, so long as he continues in the combat." *United States v. O'Neal*, 36 C.M.R. 189, 193 (C.M.A. 1966)(quoting *Rowe v. United States*, 164 U.S. 546, 556 (1896)). *See also United States v. Bransford*, 44 M.J. 736, 738 (Army.Ct.Crim.App. 1996); *United States v. Wilhelm*, 36 M.J. 891, 893 (A.F.Ct.Crim.App. 1993). As the defense would not be available to DK3 Jones, it is not available to the appellant.

Even if otherwise available to the appellant, in this case the defense fails the requirement of R.C.M. 916(e)(1) 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.

DK3 Jones testified she was not in fear for her safety or life. No evidence was presented that would indicate that OS2 Mead was inflicting serious damage to DK3 Jones. The facts produced at trial do not support an objective inference that a reasonable and prudent person would have apprehended death or grievous bodily harm was about to be inflicted on DK3 Jones. The presence of two people trying to break up the fight, the appellant and MM2 Cobb, militate against such an inference as well. R.C.M. 916(e)(1) Discussion. Even if such an objective inference was available to aid the appellant, simply no evidence was presented that this appellant subjectively believed that threatening with a loaded weapon or shooting OS2 Mead was necessary to protect DK3 Jones. Despite close to ninety pages of testimony on the merits, and more during sentencing, the appellant never said she believed that she had to shoot OS2 Mead to protect DK3 Jones. It would hardly be believable had she so testified: the appellant was the same size as OS2 Mead, and MM2 Cobb was present as well. It was three-to-one against weaponless OS2 Mead. Clearly shooting her was not necessary to stop the fight.

This assignment of error is without merit.

III

Accident

The appellant's final assignment of error contends that the Government failed to prove beyond a reasonable doubt that the shooting was not the result of an accident. R.C.M. 916(f) states: "A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable." The discussion to that rule, however explains that "The defense of accident is not available when the act which caused the death, injury, or event was a negligent act." The defense is unavailable to one acting recklessly. *United States v. Marbury,* 56 M.J. 12, 13-14 (C.A.A.F. 2001). Additionally, the defense is unavailable if the accused was engaged in an act prohibited by law, regulation or order. *Jenkins*, 59 M.J. at 898-99 (and cases cited therein).[4]

In the instant case, the appellant admitted (and we agree) that she acted in a reckless manner. She was waiving a loaded pistol with the safety off and her finger on the trigger while hitting OS2 Mead with the weapon, and when struggling with MM2 Cobb. Her actions were grossly negligent and the proximate cause of the gunshot injury to OS2 Mead. In addition, the appellant

[4] *See United States v. Curry,* 38 M.J. 77, 79-80 (C.M.A. 1993) for a good discussion of the defense of accident, *mens rea*, and the distinction between the defense of accident and unintentional conduct.

pled guilty to illegally possessing the weapon – an act prohibited by law, regulation or order. We find no merit in this assignment of error.

Conclusion

We affirm the findings and the sentence as approved by the convening authority. The appellant's motion to expedite is denied as moot.

Senior Judge CARVER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court