DOCKET NO. 13-2027

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DHANZASIKAM R. TOLEDO,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

ON THE DEFENDANT'S APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CAUSE NUMBER CR 11-3075 BB
THE HONORABLE BRUCE D. BLACK, DISTRICT JUDGE
FOR THE DISTRICT OF NEW MEXICO

NO ATTACHMENTS

MARC H. ROBERT
Assistant Federal Public Defender
111 Lomas Blvd NW, Suite 501
Albuquerque, New Mexico 87102
(575) 346-2489
marc_robert@fd.org

July 22, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Defendant-Appellant Dhanzasikam R. Toledo submits the following Reply Brief in response to Appellee's Answer Brief, which was filed July 5, 2013.

ARGUMENT

1. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER WHERE EVIDENCE WAS PRESENTED AT TRIAL INDICATING THAT MR. TOLEDO ACTED IN SELF DEFENSE, AND WHERE THE JURY COULD HAVE CONCLUDED THAT MR. TOLEDO ACTED IN SELF DEFENSE BUT IN A RECKLESS OR CRIMINALLY NEGLIGENT MANNER. MR. TOLEDO'S CONVICTION MUST BE REVERSED AND REMANDED.

The government argues in its Answer Brief (hereinafter "AB") that the district court did not abuse its discretion in refusing to instruct the jury on involuntary manslaughter because no reasonable jury could have found either self-defense or imperfect self-defense (and thus involuntary manslaughter) on the evidence presented at trial. The government sets up a straw man by taking a narrow view of the evidence, and defeats the straw man by taking a narrow view of the law. Application of the relevant caselaw to the evidence presented at trial requires reversal and remand.

Mr. Toledo encountered his uncle on a pitch-dark November night in rural West-Central New Mexico. Fear and anger created a dangerous situation. Mr. Toledo reacted to an aggressive physical movement by his uncle, the victim Arvin

Toledo, which Mr. Toledo fairly interpreted as a significant threat. Mr. Toledo's reaction resulted in a single stab wound to Arvin, and the wound was placed in such a way as to have caused Arvin's death. The placement of the wound was not carefully calculated; it was the unfortunate result of the frenzied actions of two bodies in motion. Mr. Toledo was tried for second degree murder and convicted of voluntary manslaughter.

The evidence supporting Mr. Toledo's belief that he acted in self-defense, and requiring the submission of the requested jury instructions, was detailed in Mr. Toledo's opening brief. It will be summarized below.

Mr. Toledo and his step-father, Curtis Sanders, went outside to spread sacramental ashes because of Mr. Toledo's mother's fear that something evil was afoot. T. at 103, 106, 108, 383. She, and Mr. Toledo, feared "skinwalkers", entities in Navajo cosmology who are humans who can take animal form and commit evil acts against their enemies. T. at 255.

Mr. Sanders described Arvin as a "raging bull", and "very violent", when he was intoxicated. Mr. Sanders perceived that Arvin was intoxicated on the night that Arvin was killed, a perception that was confirmed in the autopsy. T. at 315. Mr. Toledo testified that he feared a violent attack by Arvin at the moment that he struck the fatal blow. T. at 403. Mr. Toledo feared two different things: that Arvin would

harm Mr. Toledo through some metaphysical thing that Mr. Toledo believed Arvin was capable of performing, and that Arvin would grab Mr. Toledo's throat, or pull him over the three-strand barbed wire fence. T. at 403.

The encounter at the fence became very ugly fairly quickly. Arvin hurled racial epithets at Mr. Toledo and at Mr. Sanders, something he had a history of doing when drunk. T. at 367. Arvin became "very, very angry". T. at 118. Mr. Toledo asked Arvin to "stop calling us names" as the three began to move away from the fence.

It was not simply hypothetical fears and name-calling, however, that caused Mr. Toledo to act. As Mr. Toledo testified, Arvin suddenly spun back toward where Mr. Toledo was standing at the fence, hollering "nigger, nigger, nigger". T. at 399. Mr. Sanders testified that Arvin lunged at Mr. Toledo, almost running to where Mr. Toledo was standing, which was very near the fence. T. at 147, 162. Mr. Sanders testified that Arvin and Mr. Toledo had been six inches apart. T. at 124. As Mr. Toledo described it to the jury, Arvin had his hands up in an apparently aggressive posture when he lunged toward Mr. Toledo. T. at 399. Mr. Toledo said that he did not intend to kill his uncle; he only struck because he saw Arvin strike at him. T. at 408, 451.

The government suggests that there was little more than generalized fear motivating Mr. Toledo's actions. The description of events in the government's brief

minimizes Arvin's actions discussed above, and in Mr. Toledo's opening brief. *See* AB at 2-7, 8-9; *see* BIC at 4-8. In view of the evidence presented at trial, however, the district court's abuse of discretion is evident.

The government makes much of the existence of the three-strand barbed wire fence between Mr. Toledo and Arvin. While the presence of the fence is not without significance, that significance can easily be overstated. The government characterizes the fence as "tight (*see* AB at 7), but the testimony at trial was hardly conclusive on this point. Mr. Sanders described the fence as "like a rubber band". *See* BIC at 6; T. at 123. A law enforcement officer testified that upon a careful examination, the fence was looser at some points than at others. T. at 219, 247. The fence may or may not have been an effective obstacle to Arvin's attack on Mr. Toledo; however, Mr. Toledo did not have the same luxury as the law enforcement officers to take the necessary time to test the fence for strength at that location. As he testified, he reacted instantly to Arvin's lunge, Arvin's hands very near Mr. Toledo's face. T. at 400. Arvin was significantly larger than Mr. Toledo, and he was drunk. Mr. Toledo had good reason to fear Arvin, and to react in a self-defensive way.

The government embellishes this point by claiming in its brief that law enforcement officers were unable to get over or through the fence while they were investigating the incident. AB at 7, 19. This description challenges credulity, and the

evidence at trial. The fence consisted of three strands of barbed wire, about 41 inches tall. If the wire was strung with extreme tension, as the government suggests, it would be possible to climb over the fence, since the strands would be firm enough to support steps. If it was not, the strands could be separated by hand sufficiently for a person to pass between the strands. As the evidence indicates, though, the wire strands comprising the fence was of varying strength and tension, and was anything but an impenetrable barricade.

The government also makes much of Mr. Toledo's statement to Arvin that Mr. Toledo was not afraid of him. AB at 6, 19. The government takes this statement literally; a more reasonable interpretation is that a person who feels compelled to make such a statement is indeed afraid of the person at whom the statement is directed. *See* T. at 481-82.

Taking the evidence in the light most favorable to Mr. Toledo, as the law requires, there was more than enough evidence to require the submission of jury instructions on self-defense and involuntary manslaughter. The district court abused its discretion in refusing to do so.

The government argues that these instructions should be given only if a reasonable jury could have found self defense on the strength of the evidence presented. Summarizing Mr. Toledo's argument on the evidence presented, the

government omits all reference to the intoxicated Arvin's aggressive physical actions toward Mr. Toledo. AB at 14. However, this Court does not address this issue with so blunt an instrument as the government would suggest.

The jurisprudence on this question is discussed in detail in Mr. Toledo's opening brief. This Court's statements in *United States v. Brown*, 287 F.3d 965 (10th Cir. 2002), relied upon by the government in its argument (as well as by Mr. Toledo), are worth repeating: in determining whether a rational jury could convict a defendant of manslaughter and acquit him of second degree murder,

> we bear in mind that the [involuntary manslaughter] instruction must be given if there is *any evidence to support it, even if that evidence is weak and contradicted*, that we must give full credence to Mr. Brown's testimony, and that "there may be some evidence of a lesser offense *even though this depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute.*" *Humphrey,* 208 F.3d at 1208 (quoting *Belton v. United States,* 382 F.2d 150, 155 (D.C.Cir.1967), and omitting citations and internal quotations, and adding emphasis).

The importance of this concept cannot be overstated. The effect of this Court's pronouncements on this issue is to leave the question of the validity of the self defense claim, and the magnitude of the responsibility to be assessed against the accused (murder versus voluntary manslaughter versus involuntary manslaughter) if the jury finds that the facts do not fit the legal definition of self defense, in the hands

of the jury. What the district court did in this case, and what the government argues should have been done, is to take the central question in this case out of the hands of the jury and to decide the factual dispute in the jury's stead. *See* T. at 183-84. It cannot be gainsaid that there was "any evidence to support [the self defense claim], whether weak or contradicted" presented to the jury and the district court at trial. *Id*.

The government argues that the "only point of contention in this case relates to whether the evidence would have allowed a reasonable jury to find in [Mr.] Toledo's favor on his claim of self-defense defense or involuntary manslaughter". AB at 15. This mischaracterizes the law. The question for this Court is whether there was *any evidence* supporting the self defense argument, even if that evidence was weak or contradicted. The indisputable answer is that there was substantial evidence in support of Mr. Toledo's defenses. The district court rejected that evidence as sufficient to support the instruction, apparently largely because of the district court's belief that Mr. Toledo could have stepped back from the wire fence. T. at 481-84. In doing so, the district court inappropriately became the finder of fact.

Whether Mr. Toledo acted in self defense as that concept is defined in the law was a question for the jury. Whether, if the legal definition of self defense was not met, Mr. Toledo acted in a criminally negligent manner in his response to the perceived threat presented by Arvin was likewise a factual question for the jury. The

district court apparently found the evidence unconvincing. The district court usurped the jury's function in refusing to instruct the jury on these matters. The district court abused its discretion. Mr. Toledo's conviction must be reversed and remanded for retrial.

2. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE ISSUE OF SELF DEFENSE, WHEN EVIDENCE WAS PRESENTED TO THE JURY THAT MR. TOLEDO ACTED IN SELF DEFENSE. MR. TOLEDO'S CONVICTION MUST BE REVERSED.

As set forth in Mr. Toledo's Brief in Chief, "'a defendant is always entitled to an instruction giving his theory of defense if supported by the evidence.'" *Brown*, 287 F.3d at 974 (quoting *United States v. Yazzie*, 188 F.3d 1178, 1185 (10th Cir. 1999); *United States v. Moore,* 10 F.3d 270, 273 (10th Cir. 1997).) As discussed in that brief and above, this is so even if the evidence is "weak" or disputed.

The discussion of this issue is largely subsumed within the argument presented above regarding the failure to instruct the jury on involuntary manslaughter. As the district court recognized, these issues are significantly intertwined. The jury in this case could have found that Mr. Toledo committed involuntary manslaughter if it found that he acted with a self defensive mens rea but did so in a criminally negligent manner. *Brown*, 287 F.3d at 975; *Yazzie*, 188 F.3d at 1186; *United States v. Benally*,

146 F.3d 1232, 1237; *United States v. Begay*, 833 F.2d 900, 901 (10th Cir. 1987). Without having the benefit of the district court's instructions on the legal concept of self-defense, however, the jury would have had no guidance in their inquiry. Without knowing how the law defines self defense, the jury would have been without the essential tools for unraveling these questions.

The jury heard evidence in support of Mr. Toledo's arguments at trial. It was denied, however, the legal framework within which to assess that evidence. The jury was not told that self defense was an available finding, and that it would, if found, require a verdict of not guilty. The jury was not told that if response to the perceived threat was not reasonable, a verdict of guilty of involuntary manslaughter was available. The jury was presented with three options: guilty of second degree murder, guilty of voluntary manslaughter, and not guilty of anything. The jury acquitted Mr. Toledo of second degree murder, the offense for which the prosecutor argued, and convicted Mr. Toledo of the least significant option, other than acquittal, with which the jury was presented.

CONCLUSION

Evidence was presented which fairly raised Mr. Toledo's self defense explanation for the single stab wound which resulted in the death of his uncle, a death he expressly did not intend. Even if the jury had rejected self defense as a complete

defense, the jury could have concluded that Mr. Toledo over-reacted to the perceived threat posed by Arvin Toledo, or that his response to that threat was disproportionate to the magnitude of the threat, and convicted him of the lesser included offense of involuntary manslaughter. The jury rejected the government's theory that the death was the result of second degree murder. The jury convicted Mr. Toledo of the only other option presented by the district court short of outright acquittal.

Under the circumstances presented here, the law plainly required the submission of both the self defense and the involuntary manslaughter jury instructions. The district court abused its discretion by refusing to submit both of those instructions. Mr. Toledo's conviction must be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas Blvd. NW, Suite 501
Albuquerque, New Mexico 87102
(505) 346-2489

/s/ Marc H. Robert

MARC H. ROBERT
Assistant Federal Public Defender
NM Bar # 3942
Counsel for Defendant Dhanzasikam Toledo

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Times New Roman, a proportionately spaced 14-point font, and includes 2,077 words, excluding items enumerated in Rule 32(a)(7)(B)(iii). I relied on my word processor, Corel WordPerfect, to obtain the count.

/s/ Marc H. Robert

MARC H. ROBERT

CERTIFICATE OF COMPLIANCE WITH DIGITAL REQUIREMENTS

Pursuant to Emergency General Order Filed October 20, 2004, and its revisions, I certify that, with respect to the digital documents on the CD-ROM filed with this document:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the document filed with the Clerk, and

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, i.e., Symantec AntiVirus Corporate Edition, Version 8.0, updated July 22, 2013, and according to the program, are free of viruses.

/s/ Marc H. Robert

MARC H. ROBERT

CERTIFICATE OF SERVICE

I, Marc H. Robert, certify that a true copy of the foregoing was sent by first class mail, postage prepaid, and submitted digitally to the Clerk of the Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, esubmission@ca10. uscourts.gov, and to Assistant United States Attorney James R.W. Braun, P.O. Box 607, Albuquerque, New Mexico 87103, james.braun@usdoj.gov, this 22nd day of July, 2013.

MARC H. ROBERT
Assistant Federal Public Defender
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
marc_robert@fd.org

/s/ Marc H. Robert

MARC H. ROBERT