

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

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NO. 13-2027

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UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

DHANZASIKAM R. TOLEDO,

Defendant/Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
DISTRICT COURT NO. 11-CR-3075 BB  
UNITED STATES DISTRICT JUDGE BRUCE D. BLACK

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APPELLEE'S ANSWER BRIEF -- NO ATTACHMENTS

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ORAL ARGUMENT IS REQUESTED

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**PRIOR RELATED APPEALS**

There are no prior or related appeals.

**STATEMENT OF ISSUE PRESENTED FOR REVIEW**

Whether the district court abused its discretion in denying Toledo's request for self-defense and involuntary manslaughter instructions.

**STATEMENT OF THE CASE**

On December 13, 2011, a federal grand jury in the District of New Mexico returned an indictment against defendant/appellant Dhanzasikam Toledo that charged him with a single count of second degree murder, in violation of 18 U.S.C. §§ 1153 and 1111. I ROA at 15.<sup>1</sup> Toledo was tried by a jury beginning on September 24, 2012. III ROA at 1.<sup>2</sup>

On September 23, 2012, Toledo filed his amended requested jury instructions. I ROA at 50-64. Toledo requested that the district court give the jury a self-defense instruction and instructions on the lesser included offenses of voluntary manslaughter and involuntary manslaughter. *Id.* at 55, 58-61. The district court gave a voluntary manslaughter instruction, but did not give instructions on self-defense or involuntary manslaughter. *Id.* at 65-87. On September 26, 2012, the jury found Toledo guilty of voluntary manslaughter. *Id.* at 88-89.

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<sup>1</sup> Citations to "I ROA" refer to volume 1 of the record on appeal. The page number refers to the number in the lower right-hand corner of each page.

<sup>2</sup> Citations to "III ROA" refer to volume 3 of the record on appeal, which contains the trial transcript. The page number refers to the number in the upper right-hand corner of each page.

On February 4, 2013, the district court sentenced Toledo to 76 months in prison, followed by three years of supervised release. *Id.* at 97-101. It entered an amended judgment on March 6, 2013. *Id.* Toledo timely filed a notice of appeal on February 22, 2013. *Id.* at 95-96.

### **STATEMENT OF THE FACTS**

#### **A. The Government's Evidence at Trial.**

Toledo is an enrolled member of the Navajo Indian Tribe. *Id.* at 316. In November 2011, Toledo lived with his mother, Irma Sanders,<sup>3</sup> and his step-father, Hershel Sanders, on the Navajo Reservation in Ramah, New Mexico. III ROA at 90-92, 97, 315-16. Toledo's family lived on a large parcel of land on which Toledo's uncle, Arvin Toledo,<sup>4</sup> also lived with his family. *Id.* at 92. The families' residences were approximately 125 yards apart. *Id.* at 289.

Irma and Hershel Sanders had lived in Ramah since 2006 or 2007. *Id.* at 260. Toledo moved in with them in early 2011, after having spent most of his high school years living with his older sister in Texas and Georgia. *Id.* at 89-91.

Toledo initially had a good relationship with Arvin. *Id.* at 92-93. Toledo spent time with Arvin "laughing and talking," and learning about his Navajo

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<sup>3</sup> Irma Sanders will be referred to in this brief as "Irma."

<sup>4</sup> Arvin Toledo will be referred to in this brief as "Arvin."

heritage. *Id.* at 93. Their relationship deteriorated, however, because of “strains in the family.” *Id.*

At around 6:30 or 7:00 in the morning on November 10, 2011, Arvin went to Toledo’s house to ask for money Toledo owed Arvin for building materials. *Id.* at 93-94. Toledo was in a different part of the house and did not talk to Arvin. *Id.* at 96. Arvin had come to the house on prior occasions in unsuccessful attempts to get the money from Toledo. *Id.* at 94, 97.

During the course of that day, Toledo performed chores around the property, including building onto a horse shed and tightening barbed-wire fencing. *Id.* at 99. Arvin’s common law wife, Al-Lynn Tom, saw Toledo and a woman named Justine Sage standing around a fire in a fire pit on the property, about 60 or 70 yards from where Tom was gathering wood. *Id.* at 266. She heard Toledo talking in a “weird voice.” *Id.* at 267. She could not make out what he was saying, but believed that he was “giving attitude.” *Id.*

Subsequently, while Tom was building a fire to cook on in a different fire pit, she clearly heard Toledo say, “I can smell that stinky pussy from here.” *Id.* at 269-70. Tom “couldn’t believe that he said that.” *Id.* at 270. She did not tell Arvin what Toledo had said to her. *Id.* at 272. Nevertheless, Arvin called Irma to complain about the way Toledo was acting. *Id.* at 271. Irma did not respond to Arvin; she hung up on him. *Id.*

Sanders testified that in the late afternoon, just before dark, Arvin called Irma to discuss “some problems outside with yelling back and forth from house to house.” *Id.* at 100. Irma asked Sanders “to go and get the kids to come in.” *Id.*

Sanders found Toledo and Sage by the fire, and brought them back to the house. *Id.* at 102-03. After eating dinner, Irma said “[t]here was a problem going on outside” and they “needed to pray over the animals.” *Id.* at 106. Sanders and Toledo went outside, and Sanders wiped cedar ashes on the horses’ foreheads “to bless the horses and keep the evil spirits away.” *Id.* at 106, 108, 156-57.

One of the four horses was running along a fence line. *Id.* at 108. As Sanders was getting the horse turned around towards the house, he heard Arvin call his name from the other side of the fence. *Id.* at 110-12, 115. Tom testified that Arvin had gone out to close his gate “because he didn’t want nobody coming up to the house and starting anything else.” *Id.* at 272-73.

Arvin asked to talk to Sanders. *Id.* at 111. Sanders walked over to the fence line, and he and Arvin greeted each other with a handshake. *Id.* at 112-13.

The fence at that spot consisted of five strands of barbed wire. *Id.* at 218-19. The top strand was 41½ inches high. *Id.* at 419. The strands were tight, and were connected to wooden posts that were “very solid.” *Id.* at 419-20.

Arvin said to Sanders, “You need to chain your dog.” *Id.* at 112. Sanders responded, “What are you talking about, chain my dogs? All my dogs are



chained.” *Id.* Sanders then realized that Arvin was talking about Toledo. *Id.* at 114-15. Arvin said he wanted his money from Toledo. *Id.* As they spoke, Sanders smelled alcohol on Arvin’s breath. *Id.* at 114.

Sanders testified that “when Arvin was drinking, he could become very violent.” *Id.* at 149. Arvin’s friend, Roger Pino, on the other hand, testified that, while he was not around Arvin every time Arvin drank, in his experience Arvin was not violent when he was intoxicated. *Id.* at 44, 51-52. Arvin’s daughter Adrienne Toledo testified that Arvin “was peaceful unless there was some kind of dispute,” in which case “[h]e would stand up and say what needed to be said.” *Id.* at 300. Ramah Navajo Police Department (RNPD) officer Aileen Evans testified that, in her opinion, Arvin was “a peaceful guy.” *Id.* at 313.

While Sanders and Arvin were talking, Toledo walked up and stood next to Sanders. *Id.* at 117. Toledo listened to the conversation, and then confronted Arvin about taking money from Toledo’s mother, Irma. *Id.* Arvin responded by telling Toledo that he was a kid and to go away. *Id.* Toledo repeated the accusation, which caused Arvin to become “very angry.” *Id.* at 118.

Arvin began directing racial slurs at Toledo, Sanders, and the rest of their family. *Id.* Sanders turned and began walking away, hoping that Toledo would follow him and that Arvin “would shut his mouth and go home.” *Id.* at 119. Arvin “started walking away from the fence.” *Id.* at 120. As Toledo turned to walk

away, he told Arvin to stop calling them “the N word.” *Id.* Arvin “turned around and wheeled back.” *Id.* He “got up in [Toledo’s] face” and repeatedly said, “Nigger, nigger, nigger, nigger, nigger, nigger.” *Id.* at 120, 147.

Arvin and Toledo stood on opposite sides of the fence, “less than six inches from face-to-face, nose tip to tip.” *Id.* at 121. Toledo told Arvin, “I’m not afraid of you,” and then knocked Arvin down. *Id.* at 123-24. Sanders testified that he saw Toledo hit Arvin with “an overhand right,” and thought that Toledo had punched Arvin. *Id.* at 124. In fact, Toledo had stabbed Arvin in the heart. *Id.* at 71-72, 324, 331-32.

Arvin, on his knees, told Sanders to get Irma and call 911. *Id.* at 125. With Toledo following, Sanders went to the house and told Irma to call 911, which she did. *Id.* Sanders and Irma went back outside with a blanket and a spotlight, and found Arvin face down on the ground. *Id.* at 126. They could not get through the barbed-wire fence to get to Arvin. *Id.* at 128-29. They watched as the EMS technicians turned Arvin over and cut his shirt. *Id.* at 129-30. One of the technicians said, “It’s too late, he’s gone.” *Id.* at 130.

Officer Evans was dispatched to the Toledo property at 9:15 p.m., and arrived around eight minutes later. *Id.* at 59. She saw Arvin lying face-down on the ground as she arrived. *Id.* at 64-65. She checked Arvin for a pulse, and found none. *Id.* at 65. She initially saw blood coming from Arvin’s side; when he was

turned over, she saw blood on his chest. *Id.* Arvin died from the stab wound to his chest. *Id.* at 336.

Officer Evans saw Sanders, Irma, Toledo, and two other females standing on the opposite side of the barbed-wire fence. *Id.* at 68-69. She walked over to the fence and began talking to Sanders. *Id.* at 70. As Sanders was telling Officer Evans what had transpired, Toledo said, “I stabbed him.” *Id.* at 71. Toledo motioned with his right hand towards his left sleeve, as if he were pulling a knife out of his left sleeve. *Id.* at 73-74.

Officer Evans and another officer at the scene walked along the fence to where it was loose enough that they could get through. *Id.* at 76. They could not get through the fence at the spot where Arvin’s body was located “because the fence was tight.” *Id.* Toledo was handcuffed and placed in a police unit. *Id.* at 78.

RNPD criminal investigator Charles VanOsdell went to the scene and was briefed on the situation. *Id.* at 173. He then followed the police unit that transported Toledo to the detention center. *Id.* at 174-75. At the detention center, Toledo drew a map that showed where he had buried the knife. *Id.* at 192. During a subsequent search of the property, investigator VanOsdell found the knife partially buried approximately 50 yards from Arvin’s body. *Id.* at 184-86. The knife was one that Sanders had previously given to Toledo. *Id.* at 134, 188. It was a 12-inch Marine Combat Model 498 knife with a 7-inch blade. *Id.* at 236.

B. Toledo's Testimony.

Toledo testified that, as he was working around the property on November 10, 2011, he carried the knife in its sheath inside his shirt sleeve on his forearm. *Id.* at 375. That night, he was standing by the fire pit when he heard Arvin yelling racial slurs about Sanders. *Id.* at 379. Toledo yelled to Arvin, ““Well, if you’re going to call my dad a pussy [ ] why don’t you come down here and you tell him yourself instead of always yelling down.”” *Id.*

Later that evening, after Toledo had gone back inside, Irma asked him to go out with Sanders ““and put ashes on the horses, the animals and the property.”” *Id.* at 383. After dinner, Toledo prepared the ashes and went outside to spread the ashes around the property. *Id.* at 385-87. While Toledo was at the gate on his family’s section of the property, he saw Arvin closing the gate on Arvin’s section of the property. *Id.* at 390. Arvin asked Toledo if one of Toledo’s horses had gotten loose. *Id.* Toledo responded, “No.” *Id.* Arvin then walked away along the fence line and then called out to Sanders. *Id.* at 391.

Toledo saw that Arvin and Sanders were engaged in a conversation, but Toledo stood at a distance and could not hear what they were saying. *Id.* at 393-94. Toledo testified that he approached them after he noticed that Arvin had raised his voice and was getting upset. *Id.* at 394.

Sanders said to Toledo, ““Your uncle Arvin is telling me that you owe him \$100 for the materials he loaned you.”” *Id.* Toledo responded to Sanders that Arvin stole \$300.00 from Irma and that Arvin could deduct the \$100.00 from that. *Id.* at 394-95. Arvin denied stealing any money. *Id.* at 394. Toledo testified that he was aggravated that Arvin “kept kind of bugging about the money.” *Id.* at 396. Arvin was “really mad” and said, ““You’re no family of mine. Your mother is a nigger lover. And you’re just no good niggers. And you’re not true to your word.”” *Id.* at 397.

Toledo testified that he told Arvin, ““Don’t call me no nigger.”” *Id.* at 398. Arvin then stood face-to-face with Toledo and said, ““Nigger, nigger, nigger.”” *Id.* Toledo told Arvin, ““You don’t scare me.”” *Id.* Arvin turned around and was about to walk away. *Id.* at 398-99. Toledo testified that is when Sanders intervened and said, ““Leave it alone.”” *Id.* at 399.

Toledo testified that he turned his head and took one step, when out of the corner of his eye he saw Arvin turn around and start walking towards him “real fast.” *Id.* Toledo claimed that Arvin lunged at him with his hands up. *Id.* Toledo reached into his sleeve, unsnapped the sheath, pulled out the knife, turned around, and stabbed Arvin. *Id.* at 399-400.

When asked by his attorney why he didn’t just back away from Arvin, given that there was a fence between them, Toledo responded: “I don’t know. My first

instinct was just to defend myself.” *Id.* at 402. Toledo admitted that Arvin never touched Toledo during this argument. *Id.* at 403-04.

On cross-examination, Toledo admitted that he was unhappy in Ramah and had planned on leaving the next day, November 11, 2011, to go back to Texas. *Id.* at 411. Toledo admitted that he knew martial arts and was able to defend himself. *Id.* at 413. He admitted that Alvin had never before raised a hand to him or attacked him in any way. *Id.* He admitted to engaging in a heated argument with Arvin, during which he accused Arvin of stealing money from Irma and engaging in witchcraft, and told Arvin to “be a man.” *Id.* at 431. He admitted that when Sanders told him to “just leave it alone,” he responded, “No, because somebody has to let him know about it. So somebody has to put him in his place and tell him, because nobody tells the truth around here.” *Id.* at 433

C. The Jury Instruction Conference.

At the conclusion of the trial, the district court solicited comments from the parties on the court’s proposed jury instructions. *Id.* at 460. Defense counsel noted the absence of self-defense and involuntary manslaughter instructions, and argued that there was “some evidence” supporting those instructions “whether you believe it or not.” *Id.* at 465-66. The court responded that Arvin had not touched Toledo, and that while Arvin had lunged at Toledo, Toledo “said he could step

back .... He said he had several alternatives. I don't see how any of that comes in as self-defense." *Id.* at 466.

The defense then argued that the evidence also supported an involuntary manslaughter instruction: "If he reacted inappropriately in a situation where he overperceived [*sic*] a threat, the jury could find him guilty of involuntary manslaughter." *Id.* at 467. The district court ruled: "I think it's close, frankly, on voluntary manslaughter. But I agreed to put that in. I don't see any involuntary manslaughter. I just don't see any interpretation of the facts that would be reasonable in the context." *Id.* at 470.

After beginning to read the instructions to the jury, the court called counsel to the bench and stated: "Even though it's not going to impact me,<sup>5</sup> I'm having second thoughts about self-defense, and I am inclined to include it. I'll make a record on that. I'm not going to include the involuntary manslaughter, but I will include the self-defense instruction." *Id.* at 472-73. The government argued that a self-defense instruction was not supported by the evidence. *Id.* at 473-74. After further discussion, the court stated: "I might change my mind. I'm going to think about this overnight. That – I don't think the evidence, as I've said is at the point of transparency. So I'll think about it overnight. I'll give them without it. And I'll add it tomorrow, if I change my mind." *Id.* at 476. The court then finished

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<sup>5</sup> Judge Black assumed senior status on October 1, 2012.

instructing the jury without the self-defense or involuntary manslaughter instructions. *Id.* at 477.

The next day, the court heard further argument on Toledo's requested self-defense and involuntary manslaughter instructions. *Id.* at 480-89. The court then stated:

I certainly have no doubt about [not instructing the jury on] self-defense. Unfortunately, it's intertwined with involuntary manslaughter. And I, frankly, also have no doubt about that. I was leaning over backwards yesterday to find a way to protect my colleagues from a retrial. But I've thought about it overnight, and my conclusion is that no reasonable juror could find that based on this evidence. So, hopefully, no reasonable panel of the Tenth Circuit could find it either.

*Id.* at 489.

### **SUMMARY OF THE ARGUMENT**

A defendant is entitled to a requested jury instruction only when there is sufficient evidence to support the instruction. For a self-defense instruction to have been required in this case, the evidence must have been sufficient for a reasonable jury to find that Toledo reasonably believed it was necessary for him to stab Arvin to prevent death or great bodily harm to himself. And an involuntary manslaughter instruction would have been warranted only if the evidence would have allowed the jury to rationally conclude that Toledo acted in self-defense but was criminally negligent in doing so. The facts of this case supported neither instruction.



No reasonable jury could find on the evidence presented at trial that Toledo reasonably believed it was necessary for him to stab Arvin to prevent Arvin from killing him or inflicting great bodily harm on him. Nor would this evidence have permitted the jury to rationally conclude that Toledo acted in self-defense but was criminally negligent in doing so. The district court therefore did not abuse its discretion in refusing to instruct the jury on self-defense or involuntary manslaughter.

### **ARGUMENT**

#### **I. THE DISTRICT COURT’S REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE AND INVOLUNTARY MANSLAUGHTER WAS AN APPROPRIATE EXERCISE OF ITS DISCRETION.**

##### **A. Standard of Review**

This Court reviews “the district court’s decision as to whether there is sufficient evidence to warrant a lesser included offense instruction for abuse of discretion.” *United States v. Harris*, 313 F.3d 1228, 1240 (10<sup>th</sup> Cir. 2002); *see also United States v. Moran*, 503 F.3d 1135, 1146 (10<sup>th</sup> Cir. 2007) (“We review the District Court’s refusal to give requested instructions for abuse of discretion.”). The standard, however, “is not one of ‘broad ranging discretion but is focused narrowly on whether there is any evidence fairly tending to bear on the lesser included offense.’” *Harris*, 313 F.3d at 1240 (quoting *United States v. Humphrey*, 208 F.3d 1190, 1206 (10<sup>th</sup> Cir. 2000)).

B. Discussion

Toledo argues that the district court abused its discretion by not instructing the jury on self-defense and involuntary manslaughter. He contends that “[t]he jury could reasonably have found that [his] actions were genuinely in response to his fear for his safety and motivated by self-defense.” Aplt. Brf. at 16. According to Toledo, the jury could have relied on the following to reach that conclusion: “that is was dark, that Arvin Toledo had a reputation as a man of violence when drinking, that Arvin was in fact intoxicated when the incident occurred, that Arvin Toledo outweighed Mr. Toledo by around 100 pounds and was substantially taller, that Arvin was furiously angry, and that even though a fence separated the two, that Arvin could have done grave harm to Mr. Toledo.” *Id.* But, as discussed below, the evidence introduced at trial did not support a self-defense or an involuntary manslaughter instruction. The district court therefore acted well within its discretion in refusing to give either instruction.

Generally, “a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988); *see also United States v. Davis*, 237 F.3d 942, 945 (8<sup>th</sup> Cir. 2001) (“A self-defense instruction must be given if there is sufficient evidence for a jury to rationally sustain the

defense.”). “A parallel rule has been applied in the context of a lesser included offense instruction.” *Mathews*, 485 U.S. at 63. To obtain a lesser included offense instruction, a defendant must satisfy four criteria:

First, the defendant must make a proper request; second, the lesser included offense must contain some but not all of the elements of the charged offense; third, the elements differentiating the two offenses must be in dispute; and fourth, the evidence must allow the jury to rationally acquit the defendant on the greater charge and convict on the lesser charge.

*United States v. Brown*, 287 F.3d 965, 974 (10<sup>th</sup> Cir. 2002). The only point of contention in this case relates to whether the evidence would have allowed a reasonable jury to find in Toledo’s favor on his claim of self-defense or involuntary manslaughter. *See* Aplt. Brf. at 14.

For a self-defense instruction to have been required in this case, the evidence must have been sufficient for a reasonable jury to find that Toledo reasonably believed it was necessary for him to stab Arvin to prevent death or great bodily harm to himself. *See* 10<sup>th</sup> Cir. Pattern Crim. Jury Instr. 1.28 (2011) (“A person may use force which is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to himself or another.”).<sup>6</sup> As for Toledo’s requested involuntary

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<sup>6</sup> During the jury instruction conference, defense counsel stated that Toledo was defending himself and his step-father. III ROA at 470. When the district court asked what testimony would support a claim that Toledo was protecting his father, defense counsel responded: “The proximity of his father to him, Your Honor.

manslaughter instruction, this Court has held, “[o]ur cases recognize that under [18 U.S.C.] section 1112(a), a defendant may commit involuntary manslaughter if he acts in self-defense but is criminally negligent in doing so.” *Brown*, 287 F.3d at 975. Thus, for an involuntary manslaughter instruction to have been proper, the evidence must have allowed the jury to rationally conclude that Toledo acted in self-defense but was criminally negligent in doing so. The facts of this case supported neither instruction.

In *Brown*, the defendant stabbed the victim in the course of an argument. *Id.* at 969-70. The defendant testified “that he did not mean to stab [the victim] but was trying to hit him with his fist.” *Id.* at 970. At trial, “[h]is defense theory was that he acted in self-defense in a criminally negligent manner in causing” the victim’s death. *Id.* at 974. This Court held that an involuntary manslaughter instruction was required based on the following evidence: (1) the defendant was 21 years old, five feet seven inches tall, and weighed 150 pounds; (2) the victim was 41 years old, over six feet tall, and weighed 240 pounds; (3) the defendant and the victim had previously “had problems,” including an occasion when the victim had shoved the defendant and kicked him out of the house; (4) the defendant stayed away from the victim when the victim was drunk because the victim got mean; (5)

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And that’s not a big piece of this. . . . His father was right close to him, just off his shoulder. And he perceived a lethal threat.” *Id.* at 470-71. The court stated, “I heard nothing that would support that.” *Id.* at 471. On appeal, Toledo does not argue that he was acting in defense of Sanders.

a security guard testified to the victim's propensity for violence and that the victim often picked on the defendant; (6) the defendant testified that the victim liked to fight when he was drunk, that the defendant got the knife from the kitchen to protect himself and scare the victim, that the victim followed him when he went back to the kitchen to return the knife, grabbed him from behind by the shoulder, and swung at him. *Id.* at 976-77. This Court concluded that the evidence was "sufficient to allow the jury to find that while [the defendant] was criminally negligent in attempting to defend himself with a knife, he did not act with the extreme reckless and wanton disregard for human life required to support a conviction for second degree murder." *Id.* at 977.

The facts here are different, however. In this case, Toledo and Arvin did not have a violent history, even when Arvin was drinking. Moreover, while the victim in *Brown* grabbed the defendant by the shoulder before the stabbing, Arvin never touched Toledo. And while the defendant in *Brown* testified that he did not mean to stab the victim, here Toledo admitted that he intentionally stabbed Arvin.

Toledo asserts that *United States v. Yazzie*, 188 F.3d 1178 (10<sup>th</sup> Cir. 1999), is a "roughly similar case." Aplt. Brf. at 16. But *Yazzie* is factually distinguishable from this case. The victim in *Yazzie* was a six foot five, 280 pound member of the Banditos motorcycle gang nicknamed Eagle. *Id.* at 1181-82. His body was covered with tattoos, including a teardrop on his eye "which is a gang sign

indicating he had killed someone.” *Id.* at 1182. One of the defendants had been told that Eagle was looking for him and would be waiting for him at a convenience store in Shiprock, New Mexico. *Id.* at 1180. He considered it a warning. *Id.* at 1183. The defendants testified that they had been told Eagle was carrying a gun in his waistband and a long knife in one of his boots. *Id.* at 1182. The defendants presented testimony that when they arrived at the convenience store, Eagle got out of his car, said “you motherfuckers,” and reached behind him as if reaching for a gun. *Id.* at 1183. Eagle was killed during the ensuing fight with the defendants. *Id.* at 1181-82.

The district court gave a self-defense instruction, but refused to give an instruction on involuntary manslaughter. *Id.* at 1184, 86. This Court reversed the defendants’ convictions, holding that an involuntary manslaughter instruction was required on the facts of the case. *Id.* at 1186-87.

Unlike the defendants and the victim in *Yazzie*, who were strangers, Toledo and Arvin knew each other well. While Arvin had been drinking the night he was killed, Toledo testified that he had previously been with Arvin when Arvin was drunk, and Arvin had never behaved violently towards him. III ROA at 364-65.

Perhaps the most significant fact that distinguishes this case from both *Brown* and *Yazzie* is the barbed-wire fence that separated Arvin and Toledo. Toledo admitted that when Arvin lunged at him, he could have simply backed

away from the fence. III ROA at 402.<sup>7</sup> He did not claim that he was afraid the fence would not hold Arvin back. To the contrary, he told Arvin “you don’t scare me.” Moreover, the evidence clearly established that the fence was solid and extremely difficult to get through.<sup>8</sup> Indeed, Arvin’s own sister, Irma, watched helplessly as Arvin lay face-down on the opposite side of the fence because she could not get through it.

Rather, when asked why he did not just back away from the fence, Toledo said, “I don’t know. My first instinct was to defend myself.” He testified that Arvin “could have easily pulled me over the fence. I was light as a feather.” *Id.* at 403. According to Toledo, when he stabbed Arvin it was “to disable him from attacking me again.” *Id.* at 408. But Toledo admitted that Arvin had not even touched him. And if Toledo had simply stepped back from the fence, Arvin would have been unable to grab him. With the barbed-wire barrier between them, Arvin’s

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<sup>7</sup> Sanders and Toledo’s testimony differ as to when Arvin lunged at Toledo. According to Sanders, after Arvin turned back and lunged towards Toledo, Arvin “got up in [Toledo’s] face” and repeatedly called him “nigger.” III ROA at 120. It was then that Toledo said “I’m not afraid of you” and stabbed Arvin. *Id.* at 123-24. Toledo, on the other hand, testified that after he told Arvin “you don’t scare me,” Arvin turned to walk away. *Id.* at 398-99. According to Toledo, Arvin subsequently turned back around and lunged at him, and he stabbed Arvin as Arvin lunged at him. *Id.* at 399-400. In determining whether Toledo’s requested jury instructions should have been given, Toledo’s testimony is to be given “full credence.” *Yazzie*, 188 F.3d at 1185.

<sup>8</sup> In addition to Officer Evans’ testimony on this point, FBI Special Agent John Fortunato testified that the fence was tight and that he could not climb it. III ROA at 216-19.

size advantage over Toledo was rendered insignificant. Arvin posed no threat to Toledo.

No reasonable jury could have found that Toledo reasonably believed it was necessary for him to stab Arvin to prevent Arvin from killing him or inflicting great bodily harm on him. Toledo barely voiced such a grave fear in his testimony. When asked what he was afraid Arvin was going to do to him, Toledo said, “[t]hat [Arvin] was going to grab me or choke me ... I just know he was going to hurt me ... *I didn’t know* if he was trying to kill me.” *Id.* at 403-04 (emphasis added).

Nor could the jury have rationally concluded that Toledo acted in self-defense, but in a criminally negligent manner. Toledo admitted that he could have avoided Arvin by merely stepping back from the fence. Instead, he chose to reach into his sleeve, unsnap the sheath, pull out the knife, and stab Arvin in the chest. This evidence forecloses any legitimate argument that Toledo acted in self-defense in a criminally negligent manner.

The only reasonable conclusion to draw from the evidence in this case is that Toledo stabbed Arvin in anger during a heated argument. This evidence, including Toledo’s own testimony, does not support a theory of self-defense or of involuntary manslaughter. The district court did not, therefore, abuse its discretion in refusing to give Toledo’s requested jury instructions on those theories.



**CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT**

The evidence in this case was insufficient for a reasonable jury to find that Toledo reasonably believed it was necessary for him to stab Toledo to protect himself from death or great bodily harm, or that Toledo acted in self-defense in a criminally negligent manner. Therefore, the district court appropriately exercised its discretion in refusing to give self-defense and involuntary manslaughter jury instructions.

The United States requests oral argument to address any concerns of the panel not adequately addressed in the briefs.

Respectfully submitted,  
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**BRIEF FORMAT CERTIFICATION**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,214 words.

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DATED this 5<sup>th</sup> day of July, 2013.

*s/ James R.W. Braun*  
JAMES R.W. BRAUN  
Assistant United States Attorney

**CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION**

I HEREBY CERTIFY that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on this 5<sup>th</sup> day of July, 2013.

I ALSO CERTIFY that Marc H. Robert, attorney for Defendant-Appellant Dhanzasikam R. Toledo, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

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