Polloi v. ROP, 9 ROP 186 (2002)
NGIRAILALS POLLOI,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 01-06
Criminal Case No. 00-378

Supreme Court, Appellate Division
Republic of Palau

Decided: September 3, 2002[1]

[1] **Criminal Law:** Judgment of Acquittal

A motion for judgment of acquittal is properly denied when sufficient evidence as to each element of the offense was adduced in the government's case in chief to enable a reasonable mind fairly to find guilt beyond a reasonable doubt.

[2] **Criminal Law:** Instructions

The evaluation of claims of error in instructions to special judges involves a two step process: It must first be determined whether the failure to give a requested instruction was erroneous and if that question is answered in the affirmative, a harmless error analysis must be conducted.

[3] **Criminal Law:** Instructions

Where defendant requests an instruction prior ⊥187 to the time the factfinders retire to deliberate, it is timely.

[4] **Criminal Law:** Instructions

Where instructions do not make clear either directly or when read as a whole that it was the government's burden to disprove heat of passion, the failure to give the requested instruction was erroneous.

[5] **Constitutional Law:** Harmless Error; **Criminal Law:** Harmless Error

An error, not of constitutional dimension, is harmless unless it is more probable than not that the error materially affected the verdict, but where the error is constitutional in nature, the question is

[1]Upon reviewing the briefs and record, the panel concludes that this case is appropriate for submission without oral argument pursuant to ROP R. App. Pro. 34(a).

whether on the whole record the error is harmless beyond a reasonable doubt.

[6] **Constitutional Law:** Due Process; Special Judges; **Criminal Law:** Instructions

Failure to instruct the special judges on an issue on which the government bears the burden of proof is constitutional in nature.

[7] **Criminal Law:** Instructions

A specific instruction which is defective in respect to the burden of proof is not remedied by correct general statements of law elsewhere given in the charge unless the general statement clearly indicates that its consideration must be imported into the defective instruction.

Counsel for Appellant: James Hollman

Counsel for Appellee: David Matthews

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

MILLER, Justice:

Ngirailals Polloi (hereinafter "Appellant") appeals from his conviction for second degree murder. Specifically, he argues that the trial court erred by denying his motion for a judgment of acquittal at the close of the prosecution's case in chief, and also by declining to give the special judges a specific instruction he requested. Because we find that the failure to give the requested instruction was error that was not harmless beyond a reasonable doubt, we reverse.

BACKGROUND

Most of the significant facts in this case are undisputed. On November 4, 2000, the victim, Glen Sato, along with Appellant's brother-in-law, Louis Meteolechol, and several others were drinking at Meteolechol's house in Ngesaol after an evening at a nightclub. At some point during this gathering, Appellant arrived in his car. He quickly got into an argument with Sato, apparently because Sato had an issue with Appellant's driving. Appellant then drove off but returned shortly thereafter. He and Sato began arguing again upon his return and Meteolechol came to intervene. Meteolechol's chosen method of intervention was to strike Sato in the back with a beer can and demand that Sato get off Meteolechol's property, apparently because Meteolechol's mother was trying to sleep. Sato responded by hitting Meteolechol with a piece of wood and the two of them began grappling. Sato, an appreciably larger man than Meteolechol, ⊥188 was soon on top of Meteolechol, pummeling him. Appellant, who testified that he witnessed this altercation, then picked up a piece of wood and struck Sato one blow in the face.

The blow had the effect of shattering Sato's skull and contuding his brain. Sato died six days later without regaining consciousness. After seeing that Sato was unconscious and bleeding, Appellant got in his car and drove away.

At trial, Appellant did not dispute that he hit Sato and caused his death. Rather, his defense centered on the claim that he acted in the heat of passion, provoked by Sato's assault on Appellant's brother-in-law Meteolechol. Appellant filed a motion for acquittal at the close of the government's case in chief, which the trial court denied. The trial court also refused to give a specific instruction requested by Appellant, predicated on the case *Sadao v. ROP*, 5 ROP Intrm. 250 (1996), to the effect that the government bears the burden of *dis*proving that a defendant acted in the heat of passion before a defendant may be convicted of second degree murder as opposed to involuntary manslaughter. Appellant was convicted of second degree murder and this appeal followed.

DISCUSSION

[1] We quickly dispense with Appellant's claim of error arising from the denial of the motion for a judgment of acquittal. A motion for judgment of acquittal is properly denied when sufficient evidence as to each element of the offense was adduced in the government's case in chief to enable a reasonable mind fairly to find guilt beyond a reasonable doubt. *ROP v. Tascano*, 2 ROP Intrm. 179, 186 (1990). Our review of the record demonstrates that, taken together, the witness testimony presented by the government is more than adequate to allow a reasonable mind to conclude beyond a reasonable doubt that Appellant did unlawfully take the life of Glen Sato, and that he did so with malice aforethought. As these are the two elements of the offense of second degree murder, the denial of the motion for a judgment of acquittal was proper and reversal is not warranted on this ground.[2]

[2] Appellant next contends that the trial judge's failure to give his requested instruction impermissibly shifted the burden of proof on the heat of passion question from the government to Appellant, thereby violating his due process rights and necessitating reversal. As this Court explained in *ROP v. Worswick* , 3 ROP Intrm. 269 (1993), the evaluation of claims of error in instructions to special judges involves a two-step process. First, it must be determined whether the failure to give a requested instruction was erroneous. Then, if that question is answered in the affirmative, harmless error analysis must be conducted. *Id.* at 273. *See also* ROP R. Crim. Pro. 52(a).[3]

We begin with the instructions themselves. After listing the elements of the offense of second degree murder and discussing briefly the meaning of those elements, the trial court stated the following:

When it is shown that the killing resulted from the intentional doing of an act,

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[2]Although we find below that a reasonable factfinder *could* have found that Appellant was guilty of the lesser crime of voluntary manslaughter, this conclusion is by no means compelled by the record.

[3]This approach is consistent with United States case law. *See, e.g.*, *Rose v. Clark*, 106 S. Ct. 3101, 3107 (1986).

⊥189 with expressed or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill-will or hatred of the person killed. The word aforethought does not imply deliberation or lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

If, however, you find that the Defendant caused the death of Glen Sato in circumstances otherwise amounting to second degree murder but find that he did so upon a sudden quarrel or in the heat of passion caused by adequate provocation, then you should find the Defendant guilty of voluntary manslaughter. The law defines voluntary manslaughter as follows. Every person who shall unlawfully take the life of another without malice aforethought but upon a sudden quarrel or the heat of passion shall be guilty of voluntary manslaughter. Heat of passion includes rage, resentment, anger, terror and fear. Heat of passion may be produced by rage or fear. Adequate provocation must be such as might naturally induce a reasonable man in the passion of the moment to lose control and commit the act on impulse and without reflection. The passion which rendered the killing of a person voluntary manslaughter must have continued to exist until the commission of the homicidal act. If, from the circumstances, you find that the Defendant's passion had cooled before the killing took place, or if you find that given the passage of time, the passion of a reasonable man would have cooled, you should not find . . . that the Defendant acted in the heat of passion. The law does not permit a person to set up his own standard of conduct or to justify or excuse himself, merely because his passions were aroused, unless the circumstances in which he was place [sic] and the facts with which he was confronted were such as would have aroused the passion of the ordinary reasonable person similarly situated. So, the test to be applied in determining whether a killing was in the heat of passion which will reduce a second degree murder to manslaughter is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinary reasonable person to act rashly and without deliberation and from such passion rather than from judgment.

[3, 4] On this record, we conclude that the ⊥190 trial court erred in failing to give the requested instruction. *Sadao v. ROP* made clear that:

where evidence of heat of passion is presented in a murder trial, the government must prove beyond a reasonable doubt that the homicide was *not* committed in the heat of passion in response to adequate provocation in order to convict for murder – that is, the government has the burden of proving that the defendant killed with malice and that burden includes proving that the malice was not negated by sufficiently provoked heat of passion.

5 ROP Intrm. at 256 (emphasis in original); [4] *see also Omelau v. ROP* , 5 ROP Intrm. 23, 25 n.1 (1994). In this case, Appellant presented evidence of heat of passion at trial and made a timely request for such an instruction, [5] which the trial court denied. Instead, the trial court instructed the special judges as to the essential elements of the offense of second degree murder, and stated that an action arising from the heat of passion can negate the element of malice. Neither directly nor read as a whole did the instructions make clear that, given the evidence and arguments presented in this case, the government needed to disprove heat of passion before the special judges could convict Appellant of second degree murder. The substance of the required instruction was thus not conveyed. *See Gov't of the Virgin Islands v. Isaac* , 50 F.3d 1175, 1180 (3d Cir. 1995) ("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").

[5, 6] The question now becomes whether this error was harmless. The degree of certitude required to find an error harmless varies depending upon the nature of both the error and the case. Harmless error review in a civil case is "less stringent than review for harmless error in a criminal case . . . ." *Kennedy v. S. Cal. Edison Co.* , 268 F.3d 763, 770 (9th Cir. 2001) (internal quotations omitted). Moreover, even in the more exacting context of criminal cases, a distinction must be drawn between constitutional errors and those not implicating constitutional concerns. "An error, not of constitutional dimension, is harmless unless it is more probable than not that the error materially affected the verdict." *United States v. Neuroth* , 809 F.2d 339, 342 (6th Cir. 1987). If, however, the error is constitutional in nature, "[t]he question is whether on the whole record the error is harmless beyond a reasonable doubt." *Rose*, 106 S. Ct. at 3109 (internal quotations omitted) (citing *United States v. Hasting* , 103 S. Ct. 1974, 1981 (1983)); *see also Chapman v. California* , 87 S. Ct. 824, 828 (1967) ("before a federal ⊥191 constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"). In this case, the error is constitutional in nature. *See Hennessy v. Goldsmith*, 929 F.2d 511, 514 (9th Cir. 1991) ("[f]ailure to properly instruct the jury regarding an element of the charged crime is a constitutional error that deprives the defendant of due process unless . . . the error can be treated as harmless") (internal citations omitted)). The proper inquiry on harmless error analysis, therefore, is whether we can say beyond a reasonable doubt that, considering the record as a whole, Appellant was not prejudiced by the error. We cannot say so in this case.

We start by examining the evidence. There may be cases where a defendant's assertion of a defense is so lacking in plausible justification that no reasonable factfinder could have accepted it. In such a case, an error of the sort that occurred here could well be harmless for that reason alone. *See, e.g.*, *Carella v. California*, 109 S. Ct. 2419, 2421 (1989); *Hennessy*, 929 F.2d at 517. This, however, is not such a case. According to Appellant's version of the facts, after Sato had

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[4]The *Sadao* trial court gave the following instruction, which is an accurate statement of the law: "If you have a reasonable doubt whether or not the defendant acted in heat of passion caused by adequate provocation, you should find the defendant not guilty of second degree murder, and consider whether the defendant may be guilty of voluntary manslaughter or involuntary manslaughter."

[5]Although it is not clear from the record whether Appellant sought this instruction at the earliest possible – or even most appropriate – moment, he plainly requested it prior to the time the factfinders retired to deliberate. This is sufficient to render his request timely. *Cf.* Fed. R. Crim. Pro. 30.

provoked a quarrel with him on the evening in question, Appellant saw Sato pummeling an allegedly defenseless Meteolechol and could not contain himself. He then picked up the nearest implement he could find, and struck Sato once. Assuming that a factfinder believed Appellant's testimony, it would not be unreasonable to draw the conclusion that he acted in the heat of passion.

[7] The trial court, as noted above, correctly enumerated the elements of both second degree murder and voluntary manslaughter in the instructions, and also underscored that the government bore the burden of proof as to each element of the charged offenses. But because the instructions speak of "reduc[ing]" second degree murder to voluntary manslaughter without a specific statement that the government bears the burden of disproving the existence of heat of passion, the special judges could well have understood the question of heat of passion as an affirmative defense to be proven by Appellant rather than as a part of the government's burden of proof. [6] This impermissible shifting of the burden of proof obviously would have redounded to Appellant's detriment, and could have altered the outcome of this case. We therefore cannot say beyond a reasonable doubt that the error was harmless.

CONCLUSION

For the foregoing reasons, Appellant's conviction for the offense of second degree murder is REVERSED and REMANDED for further proceedings in accordance with this opinion.

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[6]This problem is not obviated by the trial court's general statements at other parts of the instructions that the government bears the burden of proof as to each essential element of an offense. "A specific instruction which is defective in respect to the burden of proof is not remedied by correct general statements of law elsewhere given in the charge unless the general statement clearly indicates that its consideration must be imported into the defective instruction." *United States v. Sanchez-Lima* , 161 F.3d 545, 549 (9th Cir. 1998) (quoting *De Groot v. United States* , 78 F.2d 244, 253 (9th Cir. 1935)). There is no such indication here.