UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER L.T. SINGLETON
United States Air Force

ACM 36400

16 July 2007

Sentence adjudged 7 January 2005 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Lance B. Sigmon.

Approved sentence: Dishonorable discharge, confinement for 4 years and 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Charles W. Gittins, Esq. (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Captain Donna S. Rueppell (argued), Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Major Mark D. Hoover.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

SOYBEL, Judge:

The appellant was charged with attempted premeditated murder and unlawfully carrying a concealed weapon, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. He pled not guilty to both charges, but was convicted of the lesser included offense of attempted voluntary manslaughter and unlawfully carrying a concealed weapon. On appeal, the appellant asserts the evidence at trial was legally and factually insufficient to sustain his conviction for attempted voluntary manslaughter.

We reviewed the record of trial, the assignment of error, the government's answer thereto, the appellant's reply brief and entertained oral arguments of counsel. We carefully considered the evidence of record in light of the standards set forth by our superior courts. *See generally United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Applying this guidance, we conclude the evidence is legally and factually sufficient to support the appellant's convicition. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994).

It was undisputed that the appellant shot the victim. The victim was shot either five or six times, getting hit once in the ankle, once in the wrist, and either three or four times in the chest and abdomen. The appellant claims it was done in self-defense because the victim had earlier in the evening threatened to kill him with a razor.

According to the appellant, at the time of the shooting the victim was coming toward him while reaching into his pocket for what the appellant believed was the razor. This occurred while the appellant was standing outside his car, between the body of the car and the opened driver's-side door. According to the appellant's version of events, he was trapped by the opened door and could not retreat. He maintains they struggled over possession of the gun (which the appellant kept hidden in the arm rest located on the driver's-side door) and, even though the appellant was able to push the victim back, the victim came toward him again. He further claims that he tried to warn the victim off with a shot at the ground.[1] He testified that after the first shot, he turned his head, shut his eyes, and continued to pull the trigger. He evidently hit the victim as the victim continued to approach.

The victim's testimony coincided with the appellant's version of the facts regarding the early part of the evening. They drove together in the appellant's car to a night club in Virginia Beach, Virginia. On the way to the club they had a disagreement over several things including which songs they wanted to hear in the car. This ended with the victim throwing his drink on the dashboard of the appellant's car. The victim was also angry at the appellant for not giving him the car keys to get his hat before entering the club. Once in the club, the victim slapped the appellant's beer off a table and slapped a cigar out of his mouth. After this incident the appellant said he was leaving, walked out of the club and headed to his car. The victim followed.

Their two stories diverge at this point. Contrary to the appellant's version, the victim testified that although he did a have a razor in his wallet, he never took it out, nor did he threaten the appellant with it that evening. He said he used it often at work, where he had to open shipping boxes. Because of the frequency of these razors being used by others and not returned, he must have stuck one in his wallet. He also testified he was not

[1] This first shot ricocheted off the pavement and hit the victim in the ankle.

aware he even had it on his person that evening. According to the victim, he and the appellant never struggled outside the car and the appellant started shooting him as the victim was approaching, but still two car-lengths away.

The members heard all of this testimony, including the fact that the police arrived within minutes of the shooting and found a bullet and shell casings on the ground, but no razor. The victim's personal belongings, turned over by the hospital, included a wallet with a razor in it. There was no blood on the wallet or razor. The appellant's appearance just after the shooting was neat and clean, not disheveled or bloody as one might expect if he were involved in a struggle. Despite a determined and steadfast trial defense, it is obvious the members believed the victim over the appellant. Returning a conviction for attempted voluntary manslaughter also indicates they found the appellant acted in the heat of passion, caused by adequate provocation. Applying the standards outlined in the above mentioned cases, we find no reason to overturn the findings of the members.

The appellant also asserts the military judge should have instructed the members on the lesser included offense (LIO) of assault with intent to commit voluntary manslaughter. During oral argument, the appellant's counsel advocated that *United States v. Wells*, 52 M.J. 126 (C.A.A.F. 1999) and *United States v. Jackson*, 6 M.J. 261 (C.M.A. 1979), support the notion that a military judge's failure to provide this instruction, even if not requested by the parties, is plain error and requires reversal. While this may be true as a general proposition, these cases also provide that there must be some evidence that places the lesser included offense in issue.

We find the evidence in this case actually excludes this lesser included offense from issue rather than placing it in issue. The *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 64 (c)(1) (2002 ed.),[2] states that an assault with intent to commit another offense, in this case voluntary manslaughter, is not necessarily equivalent to an attempt to commit the offense. The manual explains "an assault can be committed with the intent to commit an offense without achieving that proximity to consummation of an intended offense which is essential to an attempt." *Id.* In other words, someone may assault another with certain intent, but their actions fall short of an actual attempt.

Thus, in this case, had the appellant merely displayed the weapon or perhaps forgot to load it, we might be able to say that the evidence placed the LIO of assault with intent to commit voluntary manslaughter in issue. However, by shooting the victim multiple times, the appellant's actions completely surpassed the point that makes such an instruction meaningful.[3] In other words, the facts clearly showed that he "achiev[ed] that

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[2] The 2002 edition of the *MCM* was in effect at the time of the appellant's trial.

[3] Another example would be failing to instruct on simple assault in this case. This omission would not be an error even though strictly speaking that offense would be an LIO at some level, to premeditated murder under these facts. However that offense was so early in the escalating events that lead to the charged crime, that instructing the

proximity to consummation of an intended offense which is essential to an attempt." *MCM*, Part IV, ¶ 64 (c)(1). The evidence excluded the need to instruct the members on the LIO of assault with intent to commit voluntary manslaughter and the appellant was not prejudiced by its omission.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator

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members on it would not be reasonable. Not every possible LIO must be brought before the members. As the *Wells* and *Jackson* cases indicated, the evidence must reasonably place the LIOs in issue.