

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

**BEFORE**

**D.A. WAGNER**

**R.E. VINCENT**

**E.B. STONE**

**UNITED STATES**

**v.**

**Jose C. MIERGRIMADO  
Corporal (E-4), U. S. Marine Corps**

NMCCA 200501128

Decided 22 February 2007

Sentence adjudged 23 January 2004. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

JEFFREY W. CARVER, Civilian Appellate Defense Counsel  
LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel  
Capt R.E. MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Chief Judge:

The appellant entered a not guilty plea before a general court-martial composed of officer members to a sole charge of attempted premeditated murder in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. The members found the appellant not guilty to the charged offense, but guilty to the lesser included offense of attempted voluntary manslaughter, also in violation of Article 80, UCMJ. The appellant was sentenced to confinement for six years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged. The appellant raises in three assignments of error that the military judge erred by instructing the members on the lesser included offense of attempted voluntary manslaughter; by prohibiting the civilian trial defense counsel from mentioning the Federal Sentencing Guidelines in argument; and by refusing to inform the members as to the maximum punishment for voluntary manslaughter.<sup>1</sup>

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<sup>1</sup> The latter issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appellant's Brief and Assignments of Error of 11 April 2006 set forth an additional assignment of error, that the military judge

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

### **Background**

In May of 2003, the appellant's unit had relocated from Iraq into Kuwait and was awaiting redeployment to the United States. While encamped in Kuwait, the unit was in Weapons Condition FOUR, requiring that they carry their firearm at all times or have it watched by someone, such as when showering or exercising. In addition, the Marines were to carry ammunition in magazines on their person, but to have no magazine in the weapon or any round in the chamber. In preparation for their return to the United States, a Remain Behind Element (RBE) was established to remain in Kuwait after the main unit had redeployed to load vehicles and equipment aboard sea-going vessels. On 25 May 2003, the vehicle keys and responsibility for the vehicles' condition had been turned over to the RBE. The appellant had left his sleeping bag in one of the vehicles and asked the sergeant normally in charge of that vehicle for the keys. The sergeant told the appellant that he had turned the keys over to Corporal (Cpl) Steven Eichenberger, USMC, and that the appellant would have to get the keys from him. The appellant's initial request to Cpl Eichenberger for the keys was rebuffed in rude fashion. The appellant later asked for the keys again, but to no avail. Finally, the appellant had his sergeant intervene on his behalf, gaining both access to the keys and the wrath of Cpl Eichenberger.

Before approaching Cpl Eichenberger with his sergeant, the appellant had hidden a crescent wrench under a towel in his hand, just in case Cpl Eichenberger, who was larger and more powerful than the appellant, attempted to harm him. After the sergeant left the area, Cpl Eichenberger threw the entire box of keys he was responsible for on the floor of the RBE tent and told the appellant to get the keys himself. By now, the two Marines had exchanged foul language and were in the midst of a running argument. As the appellant was looking for the right key, Cpl Eichenberger shoved him in the shoulder. The appellant responded by swinging the now-exposed wrench at Cpl Eichenberger, striking a glancing blow to his shoulder. Several other Marines then intervened as the appellant found the right key and departed and Cpl Eichenberger challenged the appellant to drop the wrench and fight him without a weapon.

When the appellant returned the keys to Cpl Eichenberger, he began to bump chests with the appellant and pushed the appellant

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erred by allowing evidence of the victim's injuries into evidence during the Government's case on the merits. This assignment of error was withdrawn by the appellant as meritless on 2 August 2006.

around the RBE tent. The appellant responded by raising his rifle to a firing position, with the muzzle inches from Cpl Eichenberger's face. Cpl Eichenberger reacted by grabbing the muzzle and sweeping it from his face, while at the same time kicking the appellant in the leg and punching him in the head. Cpl Eichenberger then threw the appellant into the wall of the tent, near the entrance from which he had entered. The appellant immediately raised his weapon and fired, striking Cpl Eichenberger in the neck and causing life-threatening injuries. Only intervening and immediate medical attention resulted in Cpl Eichenberger eventually reaching stateside and, ultimately, surgery to repair and then by-pass his carotid artery. At trial, the appellant did not contest the fact that he had shot Cpl Eichenberger, but claimed self-defense and contested the premeditated aspect of the acts.

### **Instruction on Lesser Included Offense**

We review the propriety of the military judge's instructions to the members *de novo*. *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002). A military judge has a *sua sponte* duty to instruct the members on any and all lesser included offenses reasonably raised by the evidence adduced at trial. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999) (quoting *United States v. Clark*, 48 C.M.R. 83, 87 (C.M.A. 1973)). The Supreme Court has held that an instruction of a lesser included offense is appropriate "where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone v. United States*, 380 U.S. 343, 350 (1965).

Article 79, UCMJ, states that an accused may be found guilty of a lesser included offense where the accused has been placed on fair notice, either expressly or by fair implication in the pleadings, of the existence of the lesser included offense. In the instant case, the lesser included offense of voluntary manslaughter is listed in Article 118, UCMJ, as a lesser included offense of premeditated murder. The appellant, at trial, objected to the introduction of evidence of lesser included offenses, which was properly overruled by the military judge. He later objected to the military judge's instructions to the members regarding the elements of any lesser included offenses, claiming, erroneously, that his objection to those instructions trumped the military judge's duty to instruct on the offenses reasonably raised by the evidence. Here, the Government did desire that the instructions be given and the Government is equally entitled to request instruction on the lesser included offenses, where they are reasonably raised by the evidence. *United States v. Emmons*, 31 M.J. 108, 113 (C.M.A. 1990).

The appellant essentially presents two arguments in support of this assignment of error. The first is that the instruction on voluntary manslaughter should not have been given because it contains the same elements as unpremeditated murder, citing the

Supreme Court's holding in *Sansone* that: "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone*, 380 U.S. at 350. What the appellant fails to recognize is that both voluntary manslaughter and unpremeditated murder are lesser included offenses of the charged greater offense of premeditated murder in this case. There is no dispute that both lesser included offenses differ from the charged offense because the charged offense requires premeditation and the lesser included offenses do not. This satisfies the *Sansone* test. While it is true that the two lesser included offenses have the same factual elements listed in the Manual for Courts-Martial, unpremeditated murder is a more serious offense than voluntary manslaughter. Voluntary manslaughter carries a maximum sentence including confinement of 15 years versus the maximum of life in prison for unpremeditated murder. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶¶ 43e and 44e. The two offenses are distinguished because a conviction for voluntary manslaughter includes the requirement that the act or omission of the accused that resulted in death be committed "in the heat of passion caused by adequate provocation," where unpremeditated murder does not. MCM, Part IV, ¶ 44c(1)(a).

The appellant also argues that the instruction on the lesser included offenses were improper in this case because he objected to them at trial and was entitled to have the case go to the members in an "all or nothing" form solely on the charge of premeditated murder, citing *United States v. Waldron*, 9 M.J. 811 (N.C.M.R. 1980), *aff'd*, 11 M.J. 36 (C.M.A. 1981). This case is factually distinct from *Waldron*, however. In *Waldron*, the military judge erred because he had instructed the members on a lesser included offense over the objection of the defense counsel where there was no factual dispute at trial as to the element distinguishing the greater charged offense from the lesser included offense. *Waldron*, 11 M.J. at 37 (The appellant admitted intentionally killing the victim, but claimed that he did so in self-defense and, therefore, instruction on any lesser included offense was error.). In the appellant's case, there was a passionate contest at trial regarding whether the appellant intended to kill the victim at all, as the appellant testified that he was trying to wound the victim. In addition, there was a factual contest regarding whether the act had occurred in the heat of the moment or had been a calculated response by the appellant.

### Conclusion

The remaining two assignments of error are without merit. We pause only to comment on the assertion in the appellant's brief and assignments of error that the military judge's response to a member's question regarding maximum punishments "implied that trial defense counsel had not been truthful in his argument." Appellant's Brief and Assignments of Error of 11 Apr

2006 at 11. This is an absurd and incorrect reading of the military judge's very plain, and very correct, ruling at trial. We caution counsel to ensure that their implications based on their reading of the record are accurate and have some substantial basis. We affirm the findings and the sentence, as approved by the convening authority.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL  
Clerk of Court