

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MICHAEL D. OWENS  
BOATSWAIN'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200900417  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 16 April 2009.

**Military Judge:** CDR Kevin O'Neil, JAGC, USN.

**Convening Authority:** Commander, Navy Region Northwest,  
Silverdale, WA.

**Staff Judge Advocate's Recommendation:** CDR S.L. Hladon,  
JAGC, USN.

**For Appellant:** Capt Sean B. Patton, USMC.

**For Appellee:** Capt Jonathan N. Nelson, USMC.

**7 January 2010**

-----  
**OPINION OF THE COURT**  
-----

**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A general court-martial, composed of members with enlisted representation, convicted the appellant, contrary to his pleas, of one specification of forcible sodomy in violation of Article 125, Uniform Code of Military 10 U.S.C. § 925. The court-martial members sentenced the appellant to confinement for 6 months and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

Corrected Decision

The appellant now asserts that the military judge committed prejudicial error by not instructing the members on the lesser included offense of sodomy. We disagree. After carefully considering the parties' briefs and examining the record of trial, we are convinced that the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Art. 59(a) and 66(c), UCMJ.

The appellant was charged with forcibly sodomizing and raping his wife on two separate occasions. At trial the defense argued that both incidents of sex were consensual and that the allegations were the product of a contentious divorce proceeding between the appellant and his wife. The members found the appellant guilty of forcible sodomy and not guilty of rape.

The gravamen of the defense theory of the case was that non-forcible anal sex between a husband and wife occurring in their home was not a crime. This theory was made abundantly clear during the defense counsel's opening statement, cross-examination of the victim, direct examination of the appellant and closing argument. Record at 286-88, 386-87, 445-46, 504-05, 509. Furthermore, the defense counsel did not request that the members be instructed on the lesser-included offense of sodomy and when asked by the military judge if he objected to the proposed instructions or desired any additional instructions, the trial defense counsel took a moment to confer with co-counsel and stated, "... the defense is fine with the instructions provided by the Military Judge." *Id.* at 492.

Instructions on lesser included offenses are required unless affirmatively waived by the defense. *United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992). The preceding exchange between the military judge and the defense counsel, in the context of the whole record, leaves us with no doubt that defense counsel made a purposeful decision to forego the instruction on the lesser included offense of sodomy. Accordingly, we hold that defense counsel affirmatively waived the instruction. See *United States v. Pasha*, 24 M.J. 87, 91 (C.M.A. 1987) (affirmative waiver of instructions on lesser included offenses stemmed from counsels' expressed satisfaction and agreement with the determination of the military judge that certain lesser included offense instructions did not apply).

Additionally, RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) states that failure to object to the omission of an instruction before members close to deliberate constitutes waiver of the objection in the absence of plain error. To establish plain error, the appellant "must demonstrate that there was error, that the error was obvious and substantial, and that the error materially prejudiced his substantial rights." *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999).

In light of *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (in which the Court held that *Lawrence v. Texas*, 539 U.S. 555 (2003), applies to the military)) and the facts particular to this case, the lesser included offense of sodomy was not reasonably raised by the evidence. The evidence adduced at trial established that the appellant anally sodomized his wife in their private residence; the appellant and his wife were adults; the act did not occur in public and was not made public; the act did not involve a minor or prostitute; the act did not adversely impact good order and discipline; the act did not violate a military order; and the act did not involve a senior-subordinate military relationship. Assuming that the act was consensual, and applying the three prong analysis established in *Marcum*, 60 M.J. at 207, sodomy under the aforementioned circumstances falls within the constitutionally protected liberty interest announced in *Lawrence*. As such, the act would not have been an offense under Article 125, UCMJ and there was no requirement to instruct on sodomy. Accordingly, there was no error.

Assuming *arguendo*, that the military judge erred in not instructing the members on the elements of non-forcible sodomy, we find that such error did not materially prejudice the substantial rights of the appellant because the evidence presented to the members established beyond a reasonable doubt that the appellant committed forcible sodomy. At trial the appellant's wife testified that she awoke to a sharp, jarring, and shocking pain in her "butt" and the appellant tightly holding her wrists above her shoulders as she lay on her stomach. Record at 366-67. The appellant then put his penis into her anus. *Id.* at 368. The appellant's wife testified that she was bleeding from her rectum and experienced throbbing pain as a result of the incident. *Id.* at 371, 372. Additionally, the members received Prosecution Exhibits 3 and 7 into evidence, in which the appellant acknowledged and apologized to his wife for sodomizing her and, notwithstanding the appellant's testimony that he and his wife engaged in consensual sodomy, the members concluded that the appellant forcibly sodomized his wife. We conclude that the evidence adduced at trial was sufficient to convict the appellant of forcible sodomy and the failure to instruct on sodomy did not materially prejudice the appellant.

We affirm the findings and the sentence, as approved by the convening authority.

For the Court

R.H. TROIDL  
Clerk of Court