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

Before
J.R. PERLAK, J.K. CARBERRY, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RICHARD R. MOTT
SEAMAN (E-3), U.S. NAVY

NMCCA 200900115
GENERAL COURT-MARTIAL

Sentence Adjudged: 5 August 2010.
Military Judge: Col Daniel J. Dougherty, USMC.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.D. Hutchison JAGC, USN (15 November 2010).
For Appellant: LT Daniel LaPenta, JAGC, USN; LT Ryan Santicola, JAGC, USN.
For Appellee: Capt Robert Eckert, Jr., USMC.

30 April 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

CARBERRY, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his plea, of one specification of attempted premeditated murder, in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. The appellant was sentenced to confinement for nine years, reduction to pay grade E-1, and a dishonorable discharge from

the United States Navy. The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered the sentence executed.

The appellant raises four assignments of error: (1) that the evidence was not factually and legally sufficient to support the conviction in light of his mental disease or defect; (2) that the military judge erred by not suppressing the appellant's statement to Naval Criminal Investigative Service (NCIS) special agents because the appellant did not make a knowing and intelligent waiver of his right against self incrimination; (3) that the military judge's instructions to the members unconstitutionally shifted the burden to the appellant to disprove the specific intent element; and, (4) that the military judge's instructions to the members regarding mental responsibility denied the appellant due process of law.

After consideration of the pleadings of the parties, as well as the entire record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

Much of the pertinent background to this case is detailed in our initial opinion, *United States v. Mott*, No. 200900115, 2009 CCA LEXIS 424, unpublished op. (N.M.Ct.Crim.App. 24 Nov 2009). After we set aside the findings of guilty and the sentence, and authorized a rehearing, the appellant was retried for the same offense of attempted premeditated murder of Seaman (SN) JG. Prior to his retrial, the appellant moved to suppress his statements to NCIS taken the same day as his attack on SN JG.

The evidence offered during the motion session was largely undisputed. Following the appellant's attack on SN JG on the mess deck of the USS CAPE ST. GEORGE (CG 71), agents from the local NCIS office interviewed him at their office on base. The case agent, who also conducted the interview, testified at the hearing that he advised the appellant of his Article 31(b), UCMJ, rights at the outset of the interview through the use of a standard Military Suspect's Acknowledgement and Waiver of Rights Form. Appellate Exhibit VII at 6; Record at 32-33. In addition to initialing every numbered paragraph, the appellant signed and dated the form and agreed to speak with the case agent. During the interview, he ultimately made incriminating statements

regarding the attempted murder of SN JG. His statement was reduced to writing and received in evidence at trial. Prosecution Exhibit 5. A portion of the interview was video recorded and also received into evidence at trial. PE 6.

On the video-recorded portion of the interview, the appellant details his motivation for and planning of his attack on SN JG. Even though they had never met, the appellant believed that SN JG had been the leader of a group of people that attacked, drugged, and raped him several years earlier. The appellant describes his motivation for attacking SN JG as trying to save his own life and the lives of his family, as he believed SN JG had come to the USS CAPE ST. GEORGE to kill them all. He explained how he planned the attack, first thinking about getting a gun from a shipmate but later deciding it might draw too much attention. Instead, he opted to purchase a lock-back type folding knife with a partially serrated edge from the Navy Exchange for the purpose of attacking SN JG. Finally, he acknowledged that during his attack he understood he was stabbing a person and that his actions could have resulted in SN JG's death.

Knowing and Intelligent Waiver of the Right against Self-Incrimination

At the pretrial suppression hearing, trial defense counsel argued that the appellant's waiver of his right against self-incrimination was invalid as it was not knowing and intelligent. In support, the defense called a forensic psychiatrist, who opined that the appellant's diagnosed paranoid schizophrenia prevented him from understanding the consequences of the waiver. Record at 90. The Government called the NCIS case agent who testified that the appellant appeared to fully understand the rights advisory form. *Id*. at 59. The military judge then made an oral ruling denying the motion, which he later supplemented with written factual findings. Record at 113; AE XLVIII.

The Fifth Amendment guarantees the right against self-incrimination. *United States v. Mapes*, 59 M.J. 60, 65 (C.A.A.F. 2003). Accordingly, a confession made to law enforcement during an interrogation is only admissible where it was preceded by a valid waiver of the right against self incrimination. MILITARY RULE OF EVIDENCE 305(g)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

We review the military judge's denial of the appellant's pretrial motion to suppress his statements to NCIS for an abuse

of discretion. *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003). We accept the military judge's findings of fact unless they are clearly erroneous or unsupported by the record, *United States v. Campos*, 48 M.J. 203, 206 (C.A.A.F. 1998), and we review his conclusions of law *de novo, United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000). The Government shoulders the burden of establishing the validity of a waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). In this case, the military judge made lengthy and detailed factual findings to support his ruling denying the appellant's motion to suppress. AE XLVIII. His factual findings are well-supported by the record and we accept them for purposes of our *de novo* review.

A waiver of the right against self-incrimination is valid where it is voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *United States v. Delarosa*, 67 M.J. 318, 326 (C.A.A.F. 2009). Validity contains two distinct components. First, a voluntary waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). Second, a knowing and intelligent waiver must be one made with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Burbine*, 475 U.S. at 421. However, the appellant need not have known and understood every possible consequence of a waiver to make it valid. *Colorado v. Spring*, 479 U.S. 564, 574 (1987). Rather, he need only have been fully advised such that he understands the rights in question. *Id*. We do not assess the wisdom of the decision to waive a right, merely its voluntary, knowing, and intelligent nature. *Id.* at 575.

Determination of whether a waiver was voluntary, knowing, and intelligent is made through consideration of the totality of the circumstances. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005). These circumstances include: (1) the mental condition of the appellant; (2) his age, education, and intelligence; (3) the character of the detention, including the conditions of the questioning and rights warning; (4) and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions. *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002). Further, the conduct of the appellant, up to and during the interview itself, is also a relevant factor for consideration. *See Garner v. Mitchell*, 557 F.3d 257, 265 (6th Cir. 2009); *Smith v. Mullin*,

379 F.3d 919, 933-34 (10th Cir. 2004); *United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998).

We note that the appellant does not challenge the voluntariness of his statement. Rather, he argues that his mental disease or defect prevented him from making a knowing and intelligent waiver of his right against self-incrimination. We turn now to the circumstances surrounding his waiver.

1. Mental Condition of the Appellant

The first factor for consideration is the appellant's mental condition at the time of the waiver. There is no dispute that at the time of the interview he was suffering from paranoid schizophrenia. Even so, a diagnosed mental health condition does not necessarily vitiate one's ability to execute a valid waiver of the right against self-incrimination. *Connelly*, 479 U.S. at 169-71. We must assess what impact the appellant's paranoid schizophrenia had on his ability to understand the right he possessed and his ability to comprehend the consequences of waiving that right. Here, ample evidence exists to support the conclusion that despite his paranoid schizophrenia, the appellant fully understood his right and appreciated the consequences of its waiver.

For despite his mental condition, the appellant was able to understand that his decisions and actions produced consequences. This fact is supported by the record, which reflects that the day before the attack, he decided against asking a shipmate for a gun because he thought it would draw unwanted attention. Additionally, defense expert testimony confirmed that the appellant understood that he would go to the brig for attacking SN JG. Record at 385; 414; 441-42. This awareness on the part of the appellant demonstrates that he was fully capable of understanding and appreciating that his actions carried consequences. Furthermore, during the interview the appellant repeatedly took steps to revise his written statement to cast his actions in a more favorable light. These efforts to minimize the wrongfulness of his conduct and place himself in the best possible light demonstrate that he understood that his statement would be evaluated by others and ultimately be used against him. All of these facts demonstrate that the appellant understood the consequences of his decision to waive his right against self-incrimination.

Expert testimony concluded that the appellant's waiver was unknowing, because although he was sure about what he did, that

is, stab SN JG, the appellant believed that SN JG had raped him in the past and was going to kill him at some point in the future. Record at 89. However, the fact that the appellant may have had a delusion that motivated his attempt to murder SN JG does not correlate to his incomprehension of the right against self-incrimination and the consequences of waiving that right. Accordingly, we do not find the opinions of the defense experts persuasive.

2. Age, Education and Intelligence

The record amply demonstrates that the appellant was intellectually capable of understanding the right in question. At the time of the interview, he was 24 years old, could read and write English and was only a few credits shy of earning a bachelor's degree. AE XLVIII at 2(l). The defense expert testified that in his view the appellant was of average intelligence. Record at 80.

3. Character of the Detention

There was nothing unusual about the rights advisement process or the NCIS agent's questioning. The NCIS case agent provided a rights advisory form to the appellant in a standard interview room and the form clearly explained the nature of the right in question as well as the consequences of waiving it in plain English. Record at 33-34, 52; AE VII at 6. The case agent did not observe anything during the rights advisory process to suggest that the appellant was confused or did not understand. Record at 59.

4. Manner of the Interrogation

There is no evidence in the record to suggest that the interview was of undue length or that the case agent improperly used force, threats, promises or deception. At trial, the defense conceded the case agent was not aware of any mental deficiencies on the part of the appellant. *Id.* at 97. Nor did the case agent attempt to exploit or prey upon the appellant's mental defect.

5. Conduct of the Appellant

Notwithstanding the appellant's peculiar comments during the interview, his conduct, both before and during the interview, indicates that he understood the right in question. The appellant was oriented to time, place, and activity. AE

XLVIII at 2(i). He fully participated in his conversation with the NCIS case agent and responded appropriately to the questions asked; that is to say, his answers were responsive to the questions asked and demonstrated that both his memory and thought processes were intact. And while some of his responses were bizarre and contained implausible assertions, they were responsive to the questions asked and demonstrated effective communication abilities.[1] AE XLVIII at 2(j). Additionally, the defense expert acknowledged that the appellant understood the questions being asked of him during the interview. Record at 81.

Upon consideration of the totality of the circumstances, we conclude that the Government carried its burden to establish the validity of the waiver. The appellant understood the nature of his right against self-incrimination. The appellant also comprehended and appreciated the consequences of waiving that right. The appellant made a voluntary, knowing and intelligent waiver of his right against self-incrimination. The military judge did not abuse his discretion in denying the defense motion to suppress the statement of the appellant.

Legal and Factual Sufficiency

The appellant next challenges the evidence as legally and factually insufficient to support his conviction. First, he argues that no reasonable member could have found, beyond a reasonable doubt, that he was able to form the premeditated design to kill required for the charged offense. Second, he claims no reasonable fact finder would have failed to find that the affirmative defense of lack of mental responsibility was established by clear and convincing evidence. During trial, the defense called two experts, both forensic psychiatrists, who testified that they diagnosed the appellant as a paranoid schizophrenic. Record at 360, 438. Both experts opined that the appellant could not appreciate the wrongfulness of his actions in stabbing SN JG. Record at 386; 458.

Issues of legal and factual sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "Evidence is legally sufficient if, viewed in the light most favorable to the Government, a rational trier of fact could

[1] The bizarre statements included allegations of being kidnapped by U.S. Special Forces soldiers when he was a teenager in the Bronx, receiving personal phone calls from both President Clinton and then-Governor Bush, and being repeatedly sexually assaulted over the years by a group or gang of persons who watched him at all times.

have found the essential elements of the crime beyond a reasonable doubt." *United States v. Wincklemann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for legal sufficiency, all reasonable inferences are drawn in favor of the prosecution. *United States v. Bright,* 66 M.J. 359, 365 (C.A.A.F. 2008). A finding is factually sufficient where "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). Specific intent may be established by circumstantial evidence. *United States v. Davis*, 49 M.J. 79, 83 (C.A.A.F. 1998).

A. Premeditated Design to Kill

Ample evidence exists in the record from which a reasonable fact finder could have found all elements of the charged offense, including the challenged element of a premeditated design to kill. The evidence offered at trial demonstrated that the appellant purchased a knife in preparation for attacking SN JG. In the moments immediately preceding the attack, he watched SN JG on the mess deck from a vantage point in the kitchen to determine the opportune moment to strike. He then approached SN JG under the pretext of obtaining a glass of water, evincing premeditation. The appellant attacked SN JG from behind, slashing his throat with a potentially lethal blow, thereby evincing his intent to kill. He then repeatedly screamed out his motivation for the attack, "you raped me!" as he delivered two more potentially lethal stab wounds before being subdued by others, further evincing his intent to kill through both the type of injury inflicted and the motivation for doing so, i.e., revenge for raping him. Finally, both experts offered by the defense testified that the appellant understood what he was doing, that he had the ability to formulate specific intent, that he formulated a plan and acted upon it, and that he understood that he would most likely go to the brig for his actions.

After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder could have found all the essential elements of the charged

offense beyond a reasonable doubt. Likewise, after weighing all the evidence in the record of trial and making allowances for not personally observing the witnesses, we are ourselves convinced beyond a reasonable doubt of the appellant's guilt. We turn now to the appellant's challenge that no reasonable fact-finder would have failed to find the affirmative defense of lack of mental responsibility proven by clear and convincing evidence.

B. Lack of Mental Responsibility

Lack of mental responsibility is an affirmative defense. RULE FOR COURTS-MARTIAL 916(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). An appellant lacks mental responsibility if, at the time of the offense, he (1) was suffering from a severe mental disease or defect, and (2) as a result he was unable to appreciate the nature and quality of his actions or the wrongfulness of his actions. Art 50a(a), UCMJ; R.C.M. 916(k)(1); *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001). The appellant had the burden at trial to establish this affirmative defense by clear and convincing evidence. Art. 50a(b), UCMJ; R.C.M. 916(k)(3). At trial, the members found the appellant failed to carry his burden by clear and convincing evidence. AE XXXIV, Findings Worksheet. We will only reject the members' finding if we conclude that no reasonable fact-finder could have found the defense was not established by clear and convincing evidence. *Martin*, 56 M.J. at 107.

Neither party disputes that the appellant suffered from a severe mental disease or defect--paranoid schizophrenia--at the time of the offense. In addition, the appellant does not challenge the initial prong of the affirmative defense, the ability to appreciate the nature and quality of his actions. Instead, his challenge is limited to the second prong of the affirmative defense, i.e., his paranoid schizophrenia rendered him unable to appreciate the wrongfulness of his actions as he did not subjectively consider his actions to be wrongful. Based on his delusions, he believed that he had no choice as he thought SN JG was going to kill him and his family. Due to his delusional belief, both defense experts opined that the appellant was unable to appreciate the wrongfulness of his conduct, and the appellant contends that their opinions were not contradicted in the record. Accordingly, the appellant argues any reasonable fact finder would have found that the affirmative defense was established by clear and convincing evidence.

In addressing this argument, we first note that the Court of Appeals for the Armed Forces has not defined the phrase "appreciate the wrongfulness" in its existing case law. *See Martin*, 56 M.J. at 107-10 (finding appellant failed to establish affirmative defense under any possible definition for wrongfulness). There are, however, three recognized possible definitions for the word wrongfulness in this context:

> (1) legal wrongfulness, as in "contrary to law"; (2) moral wrongfulness, as in "contrary to public morality," determined objectively by reference to society's condemnation of the act as morally wrong; or (3) moral wrongfulness, as in "contrary to personal morality," determined subjectively by reference to the defendant's belief that his action was morally justified . . . .

United States v. Ewing, 494 F.3d 607, 616 (7th Cir. 2007) (emphasis omitted). The appellant urges us to adopt the third definition, that is, whether he subjectively believed his actions to be morally wrongful. We agree with the Seventh Circuit's well-reasoned analysis in *Ewing* and decline the appellant's invitation to define wrongfulness from his subjective perspective. *See id*. at 616-20. We conclude that the phrase "appreciate the wrongfulness" must employ an objective societal standard of moral wrongfulness.

Applying this standard, we find ample evidence in the record that the appellant understood and appreciated that society would view his actions as wrongful. Both experts testified that the appellant understood he would go to jail as a result of attacking SN JG. Record at 385; 441-42. During the NCIS interview, the appellant repeatedly changed his written statement to place his actions in a better light. By doing so, the appellant tacitly acknowledged that others would view his actions as morally wrongful. Furthermore, he understood and acknowledged that he would be incarcerated as a result of his actions. It was not until the conclusion of the interview that the NCIS agent informed the appellant that he would be headed to the brig.

We recognize that both defense experts testified that the appellant did not appreciate the wrongfulness of his actions. We do not, however, find their opinions persuasive. Upon closer examination, both experts based their opinions on an erroneous understanding of the applicable legal standard for measuring

whether the appellant appreciated the wrongfulness of his actions.

The first defense expert, Dr. Simmer, based his opinion on a definition of wrongfulness that focused on the subjective moral code of the appellant. He testified that because the appellant thought he was acting in self-defense, his actions were not wrongful to him.[2] Record at 386. As explained above, the insinuation of a subjective standard is incorrect. The correct standard is objective; whether the appellant appreciated that society would recognize his actions as wrongful. Therefore, we are not persuaded by this aspect of Dr. Simmer's testimony.

The second defense expert, Dr. Sadoff, another forensic psychiatrist, also opined that the appellant did not appreciate the wrongfulness of his actions. Dr. Sadoff acknowledged that the appellant knew and understood that killing another person was both illegal and morally wrong. Record at 440. However, he concluded that the appellant did not appreciate the wrongfulness of his actions because he did not subjectively believe it was morally wrong to kill SN JG. Record at 440-41. But, similar to Dr. Simmer, Dr. Sadoff also utilized an incorrect subjective definition for wrongfulness to reach his conclusion, similarly rendering that opinion of no value.

After carefully reviewing the record of trial, we are convinced that a reasonable fact-finder could have found that the appellant failed to establish the affirmative defense. Both defense experts' opinions were premised upon an incorrect legal definition. Other evidence existed from which a reasonable fact finder could infer that the appellant did appreciate the wrongfulness of his actions. Likewise, after weighing all the evidence in the record of trial and making allowances for not personally observing the witnesses, we are ourselves convinced that the appellant failed to establish the affirmative defense

[2] We note that even if the appellant's delusions were somehow controlling, the circumstances of this case do not satisfy the requirements for self-defense. Here, the victim was seated eating breakfast and did not even know the appellant was in his proximity when the appellant attacked him from behind. No reasonably prudent person in the appellant's position could have believed he was about to suffer bodily harm. Further, defense counsel never attempted to raise a self-defense argument. *See United States v. Hibbard*, 58 M.J. 71, 76 (C.A.A.F. 2003) (explaining that defense never having argued or raised a particular affirmative defense may be considered in determining what defenses were reasonably raised by the evidence). No plausible claim of self-defense exists under the facts of this case.

of lack of mental responsibility. The conviction was both legally and factually sufficient.

Instructional Error

For his third assignment of error, the appellant argues that the military judge's instructions to the members impermissibly created a presumption that the specific intent element was satisfied, thereby unconstitutionally shifting the burden to the defense to disprove this element. He contends that military judge's instructions shifted the burden of proof with the following two sentences: "[t]he accused is presumed to be mentally responsible. This presumption continues throughout the proceedings until you determine, by clear and convincing evidence, that he was not mentally responsible."[3] Record at 508; AE XXXV at 6. The issue before us is whether the instructions, read as a whole, properly charged the members with the correct burden of proof on the premeditation element of the attempted murder offense charged.

Failure to provide correct and complete instructions to the members can amount to a denial of due process. *See United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979). Whether a panel was properly instructed is a question of law we review *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). A challenged instruction is not reviewed in isolation; rather, it is reviewed within the context of the entire set of instructions. *Boyde v. California*, 494 U.S. 370, 378 (1990); *United States v. Simpson*, 56 M.J. 462, 466 (C.A.A.F. 2002).

Prior to delivering the challenged instruction, the military judge instructed the members no less than five separate times that the Government shoulders the burden of proof on the elements of the charged offense. Record at 497-98, 507. Immediately following the challenged sentences, the military judge reiterated that it remains the Government's burden to prove each element of the charged offense beyond a reasonable doubt. *Id.* at 508; AE XXXV at 6. He also expressly instructed the panel that due to mental disease or defect the appellant may have been "mentally incapable of entertaining the premeditated design to kill." Record at 521; AE XXXV at 8. Last, he instructed them to consider all evidence on the issue of a

[3] We note that the military judge followed the recommended instruction from the Benchbook verbatim. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, Instruction 6-4 Mental Responsibility at the Time of the Offense (1 Jan 2010).

possible mental disease or defect and whether the existence of such a condition deprived the appellant of "the ability to act willfully or to entertain the premeditated design to kill." Record at 521; AE XXXV at 8.

We find the military judge properly instructed the members both on the elements of the charged offense and the affirmative defense of lack of mental responsibility. The challenged portion of his instructions was not delivered as part of the instructions on the elements. Rather, it was delivered once the military judge began instructing the panel on the affirmative defense of lack of mental responsibility. Based on our review of the totality of the instructions, we conclude the members were properly instructed and the challenged portions did not shift the burden of proof to the defense on any element of the charged offense.

The appellant last argues that the military judge erred when he failed to give an instruction regarding the dual use of evidence pertaining to mental disease or defect. The dual use instruction is a component of the partial mental responsibility instruction. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, Instruction 6-5 (1 Jan 2010). The instruction explains that evidence of a mental disease or defect can be considered on the premeditation element of the charged offense, and also on the affirmative defense of lack of mental responsibility. The appellant argues the military judge had a *sua sponte* duty to provide the dual use instruction because the issue of the appellant's ability to formulate a premeditated design to kill was implicated by the evidence at trial.

The military judge bears the primary responsibility for properly instructing the members on the elements of the offenses, as well as potential defenses raised by the evidence and other questions of law. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). Although a military judge has substantial discretionary power to decide whether to issue an instruction, he or she has a *sua sponte* duty to instruct on affirmative defenses reasonably raised by the evidence. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010). Failure to object to the omission of an instruction or to the substance of a given instruction prior to closing for deliberations constitutes waiver in the absence of plain error. R.C.M. 920(f); *see also United States v. Robinson*, 38 M.J. 30, 31 (C.M.A. 1993) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial

court.")). Intentional waiver of a known right at trial extinguishes it from appellate review. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009).

In a pretrial Article 39(a), UCMJ, session, the military judge expressly asked the defense about their intentions regarding inclusion of the partial mental responsibility instruction. Record at 75. The defense demurred, stating they would reserve judgment until hearing all of the evidence to determine if they wanted the instruction. Following the close of evidence, the military judge again expressly asked the defense if they wanted the partial mental responsibility instruction. Record at 492. The defense responded in the negative, thereby affirmatively waiving the inclusion of the instruction. *Gladue*, 67 M.J. at 313.

Even in the absence of a determination of waiver, we likewise decline to grant relief. Since partial mental responsibility does not amount to an affirmative defense, the military judge had no *sua sponte* duty to include the instruction. R.C.M. 916(k)(2). Applying the waiver found in *R.C.M.* 920(f), we would test for plain error. The plain error standard requires a plain or obvious error that materially prejudiced a substantial right of the accused. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008). Any error cannot be said to be plain and obvious when the military judge had no duty to provide the instruction. Furthermore, even if it were plain and obvious error, we fail to see any resultant prejudice. The substance of the 'dual use instruction' was covered in other portions of the instructions.

Conclusion

Having examined the record of trial, the appellant's assignments of error, and the pleadings, we conclude that the findings and the 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. The findings and the sentence are affirmed.

Senior Judge PERLAK and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court