APPENDIX

No. _____

IN THE
Supreme Court of the United States

JAMES M. HALE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

MAJOR ALLEN S. ABRAMS
Circuit Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1 Washington Circle
Central Circuit
Joint Base San Antonio-Randolph, TX 78150
(202) 631-4827
allen.s.abrams.mil@mail.mil

LIEUTENANT COLONEL ANTHONY D. ORTIZ
Counsel of Record
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
anthony.d.ortiz10.mil@mail.mil

Counsel for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

James M. HALE
Lieutenant Colonel (O-5), U.S. Air Force, *Appellant*

No. 18-0162
Crim. App. No. 39101

Argued October 23, 2018—Decided February 6, 2019

Military Judges: Mark W. Milam and Shelly W. Schools

For Appellant: *Major Allen S. Abrams* (argued); *Lieutenant Colonel Anthony D Ortiz.*

For Appellee: *Captain Peter F. Kellett* (argued); *Colonel Julie L. Pitvorec, Lieutenant Colonel Joseph J. Kubler, and Mary Ellen Payne,* Esq. (on brief).

Judge SPARKS delivered the opinion of the Court, in which Chief Judge STUCKY and Judges RYAN and MAGGS joined. Judge OHLSON filed a separate opinion concurring in part and dissenting in part.

Judge SPARKS delivered the opinion of the Court.

This case arises out of the general court-martial of a reserve officer, Lieutenant Colonel (O-5) James M. Hale (Appellant). Contrary to his pleas, members of the court-martial convicted Appellant of four specifications of attempted larceny, one specification of making a false official statement, and three specifications of larceny in violation of Articles 80, 107, and 121 Uniform Code of Military Justice (UCMJ), §§ 10 U.S.C. 880, 907, 921. Appellant was sentenced to one month of confinement, dismissal, and forfeiture of all pay and allowances. The convening authority approved the sentence. Upon review, the United States Air Force Court of Criminal Appeals set aside one larceny conviction and instead affirmed the lesser included offense (LIO) of attempted larceny.[1] The lower court then affirmed the modified findings and the reassessed sentence.

The lower court found as a matter of law that personal jurisdiction does not exist outside of the hours of inactive-duty training. Here, we review the lower court's conclusion that the court-martial had sufficient jurisdiction over Appellant for two attempted larceny specifications: Specification 3 of Additional Charge II and Specification 2 of Additional Charge 1 (affirmed as the LIO, attempted larceny). Appellant also questions whether the military judge erred in instructing the members that they could

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[1] The lower court also altered the date in another larceny specification by exceptions and substitutions.

convict Appellant for conduct "on or about" the dates alleged in a number of the charged specifications.[2]

We hold that the lower court did not err in upholding the two attempted larceny convictions. The members were entitled to consider evidence of conduct that occurred while Appellant was not subject to court-martial jurisdiction and this circumstantial evidence, coupled with evidence of Appellant's actions when he was subject to jurisdiction, proved sufficient

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[2] This Court granted review of the following assigned issues:

I. The lower court found as a matter of law that personal jurisdiction does not exist outside of the hours of inactive-duty training. The lower court proceeded to find personal jurisdiction existed over Appellant because he was "staying" with his in-laws. Was this error?

II. Whether the lower court erred when it concluded the military judge correctly instructed the members they could convict Appellant for conduct "on or about" the dates alleged in each specification.

And the following specified issue:

III. Whether the lower court erred in concluding the court-martial had jurisdiction over Specification 2 of Additional Charge I, as modified to affirm the lesser included offense of attempted larceny.

to uphold both attempted larceny convictions. We also conclude that, regardless of whether the military judge erred by including the "on or about" language in the instructions to the members, Appellant failed to carry his burden to prove that any material prejudice to his substantial rights resulted from such instructions.[3]

Background[4]

Appellant was an Air Force reserve officer living in Colorado but attached to a squadron in San Antonio, Texas. Between June 26, 2011, and November 19, 2013, Appellant traveled from Colorado to Texas for seven periods of reserve duty. While in Texas, Appellant was engaged in either active duty or inactive duty training (IDT). IDTs consisted of two four-hour work blocks in a given day, from 8:00 a.m. through noon and from 1:00 p.m. through 5:00 p.m. (with the final day of the tour sometimes consisting of just one 8:00 a.m. through noon block). For each four-

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[3] With respect to the jurisdiction issues (Issues I and III), Appellant's specific prayer for relief asks that we set aside the findings of guilty for Specification 2 of Additional Charge I and Specification 3 of Additional Charge II. As for the instructions issue, Appellant's specific prayer for relief requests that we set aside the findings of guilty for Charge II and its specification, Specifications 1 and 2 of Additional Charge I, and Additional Charge II and its specifications.

[4] Here we rely extensively on the lower court's clear and detailed factual description of the case.

hour block, Appellant was paid and received one point towards retirement.

In Texas, Appellant stayed with his in-laws, Mr. and Mrs. Vernon. The charges in question stem from Appellant's claims for lodging reimbursement for these stays, despite the fact that the Joint Federal Travel Regulations (JFTR) at the time prohibited reimbursement for lodging with family. Following each stay, Appellant created false receipts indicating payment to either Mr. Vernon or "Vernon Guest Suites." He submitted these receipts along with travel vouchers seeking reimbursement for lodging expenses. Appellant's in-laws never charged him to stay with them. Instead, he would give Mr. Vernon a check for each stay which Mr. Vernon eventually returned to Appellant uncashed. Appellant later deposited these checks into the Vernon's bank account himself and then wired the money back into his own account. As the investigation into Appellant progressed, the timing of these deposits aligned with critical stages in the investigation as officials noted the absence of or requested copies of the canceled checks. The government paid Appellant for five of the seven stays, a total of $25,071.00.

Appellant was charged with eight specifications. The charging language in each specifies alleged conduct committed "on or about" a certain date or dates. When the military judge instructed members on the elements of each charge, he used the same "on or about" language.

Further facts relevant to the specific charges are developed below.

Analysis

Jurisdiction

Relevant Law

We conduct a de novo review of jurisdiction questions. *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016). When challenged, the government must prove jurisdiction by a preponderance of evidence. *United States v. Morita*, 74 M.J. 116, 121 (C.A.A.F. 2015) *(*citing *United States v. Oliver,* 57 M.J. 170, 172 (C.A.A.F. 2002)).

"An inquiry into court-martial jurisdiction focuses on … whether the person is subject to the UCMJ at the time of the offense." *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012). Court-martial jurisdiction is determined by Article 2, UCMJ, 10 U.S.C. § 802 (2012).[5] *Morita,* 74 M.J. 116, helped to lay down a

[5] The jurisdictional questions in this petition will have limited application given changes by Congress concerning Article 2(a)(3)'s jurisdiction over IDTs. The changes extend jurisdiction to (1) members traveling to and from the IDT training site; (2) intervals between consecutive periods of IDT on the same day, pursuant to orders or regulations; and (3) intervals between IDTs on consecutive days, pursuant to orders or regulations. National Defense Authorization Act (NDAA) for Fiscal Year 2017, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2921 (2016). These changes go into effect in January 2019 (first day of the first calendar month that begins no later than two years after the NDAA date of enactment). *Id.* § 5542.

baseline for when jurisdiction exists over reserve members. In *Morita*, *id.* at 120, this Court clarified that, for reservists, jurisdiction hinges on satisfying Article 2(a) or Article 2(c), UCMJ. Article 2(c) "require[s] that the reservist be, as a threshold matter, 'serving with' the armed forces at the time of the misconduct, and meet the other four criteria set forth in the statute."[6] 74 M.J. at 118. Jurisdiction continues until "active service has been terminated." Article 2(c), UCMJ. Article 2(a)(3), UCMJ, in relevant part, extends jurisdiction to "[m]embers of a reserve component while on inactive-duty training." In *Morita*, this Court determined that the military did not have jurisdiction over a reservist when he had forged his active duty and IDT orders, stating that simply being a member of a reserve component "is not sufficient to find that Appellee was 'serving with' the armed forces." 74 M.J. at 123. In *United States v. Phillips*, this Court concluded that jurisdiction over a reservist did cover the travel day prior to her reporting for active duty. 58 M.J. 217, 220 (C.A.A.F. 2003). The decision emphasized that determining whether someone is serving with the military requires a "case-specific analysis of the facts" and requires a "more direct relationship than simply accompanying the armed forces in[to] the field." *Id.*

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[6] The other four Article 2(c), UCMJ, criteria are:

(1) submitted voluntarily to military authority;

(2) met mental competency and minimum age qualifications …;

(3) received military pay or allowances; and

(4) performed military duties.

Article 121(a)(1), UCMJ, in relevant part, identifies larceny as wrongfully taking, obtaining, or withholding "with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use."

Article 80, UCMJ, defines an attempted offense as "[a]n act, done with specific intent, to commit an offense … amounting to more than mere preparation and tending, even though failing, to effect its commission." The elements include:

> (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.

United States v. Payne, 73 M.J. 19, 24 (C.A.A.F. 2014) (citation omitted). More than mere preparation is interpreted as requiring that the accused take a "substantial step" toward committing the crime. *Id.* This Court has distinguished attempt as going beyond "devising or arranging the means or measures necessary for the commission of the offense" and, instead, engaging in a "direct movement toward the commission after the preparations are made." *United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993) (internal quotation marks omitted) (citation omitted). The explanation section of Article 80, UCMJ, states that "[t]he overt act need not be the last act essential to the consummations of the offense." *Manual for*

Courts-Martial, United States pt. IV, para. 4.c.(2) (2012 ed.) (*MCM*).

In *United States v. Winckelmann*, this Court highlighted the "elusive line separating mere preparation from a substantial step." 70 M.J. 403, 407 (C.A.A.F. 2011) (internal quotation marks omitted) (citation omitted). We favorably quoted several federal cases concerning the contours of a substantial step:

> Federal courts of appeals have defined a "substantial step" as "more than mere preparation, but less than the last act necessary before actual commission of the crime." *See, e.g., United States v. Chambers,* 642 F.3d 588, 592 (7th Cir. 2011). We have adopted a similar approach. *See, e.g., United States v. Byrd,* 24 M.J. 286, 290 (C.M.A. 1987) ("'[A] substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.'") …. Accordingly, the substantial step must "'unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances.'" *United States v. Goetzke,* 494 F.3d 1231, 1237 (9th Cir. 2007).

Id. (alterations in original) (citations omitted). We recognized that a substantial step could be comprised

of something as benign as travel, arranging a meeting, or making hotel reservations. *Id.*[7]

Specification 3 of Additional Charge II

In Specification 3 of Additional Charge II, Appellant was charged with and convicted of attempting to commit larceny on or about November 19, 2013. Appellant completed a series of IDTs, working from 8:00 a.m. through noon and again from 1:00 p.m. through 5:00 p.m. on November 4 through 8; November 12 through 15; and November 18 through 19, 2013, and working a single 8:00 a.m. through noon block on November 20. He stayed with his in-laws during this time and wrote them a check for his stay dated November 20, though the Government was not able to establish exactly what time of day the check was written. On December 3, Appellant submitted his final travel voucher[8] with a receipt he had

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[7] In *Winckelmann*, this Court ultimately decided that a sentence written during an online chat reading "u free tonight" was "simply too preliminary" to constitute a substantial step towards underage enticement. 70 M.J. at 408 (internal quotation marks omitted) (citation omitted).

[8] The submitted voucher lists lodging dates between October 3 and October 20. However, because Appellant's duty orders cover the period from November 3 to November 20, we assume that the incorrect month listed was a clerical error. The lower court found that on December 3, 2013, Appellant created a receipt for his stay and submitted that receipt with his claim for reimbursement.

manufactured for "Vernon Guest Suites" requesting reimbursement for $1,870.00.

We agree with the lower court's finding that, based on Article 2, UCMJ, and supporting case law, no authority existed at the time of the offenses to extend military status to Appellant while engaged in IDTs beyond the designated four-hour blocks of IDT time. Article 2(a)(3) very clearly extends jurisdiction to "[m]embers of a reserve component *while on inactive-duty training*." (Emphasis added.) As the lower court reasoned:

> Unlike other types of reserve duty, an IDT is not a tour but a block of time. Specifically, it is a designated "four-hour period of training, duty or instruction." Air Force Instruction (AFI) 36-2254V1, *Re-serve Personnel Participation*, ¶ 4.1.1 (26 May 2010). The member performing the IDT is paid for and receives a point for that designated four-hour block of time. Appellant was no exception. He was not receiving "regular pay" as the Government suggests. Rather, he received pay and points solely for the IDT blocks he was authorized to complete.

United States v. Hale, 77 M.J. 598, 604 (A.F. Ct. Crim. App. 2018); *see also United States v. Wolpert*, 75 M.J. 777 (A. Ct. Crim. App. 2016) (jurisdiction does not exist over a reserve member who committed criminal acts between periods of IDT).

The lower court determined that Appellant's pattern of previous behavior (this was his seventh stay with his in-laws, with the previous six resulting in fraudulent requests for reimbursement for lodging) taken as a whole demonstrated the "firmness of Appellant's criminal intent." *Hale*, 77 M.J. at 605 (internal quotation omitted) (citation omitted). The lower court concluded that this evidence of Appellant's intent, coupled with the act of staying with his in-laws while he completed his IDTs, constituted the substantial step necessary for an attempted larceny. *Id.* at 605–06.

Appellant takes issue with the lower court's interpretation of the concept of *staying* with his in-laws. Appellant's view is that he was only *staying* with his in-laws when he was physically in their home, for example on days off or during the evenings between his IDT blocks. Therefore, under his view, the act of staying with the in-laws could only occur during periods he was not subject to court-martial jurisdiction. The Government counters that the plain meaning and ordinary usage of the term "staying" in this context means "to live for awhile" or "to live in a place for a short time as a visitor" (internal quotation marks omitted) (citations omitted). Therefore, staying is not strictly limited to the period of time when a guest is physically present but rather spans the full scope of time encompassing a given visit.[9] We also

[9] When questioned during the command-directed investigation, Appellant himself agreed that he did "stay" with his in-laws every time he came to San

adopt the common understanding of the term staying. We therefore conclude that the act of staying with the in-laws spanned the entire period of time during which Appellant resided with them, including both the actual IDT blocks and the gaps between them.

We agree with the lower court that simply staying with the in-laws, by itself, would not be enough to establish a substantial step. However, we believe that Appellant's other actions taken during periods he was not subject to the UCMJ could have been considered by the members to establish Appellant's intent while staying with his in-laws. This is similar to how members are permitted to consider evidence of other acts admitted under Military Rule of Evidence 404(b) to prove the requisite intent for an offense. *See MCM* pt. IV, para. 46.c.(1)(f)(ii) (2012 ed.) ("An intent to steal may be proved by circumstantial evidence."). In order to establish attempted larceny, it is not necessary that every step leading up to or following that attempt occur at times where the Appellant is subject to the UCMJ, so long as some element of the offense occurs during such times. All that Article 80, UCMJ, requires is commission of a single act during IDT or active duty, provided that the act is done with the specific intent of committing a larceny, that the act amounts to more than mere preparation, and that the act tends to effect the commission of a larceny. *Cf.*, *United States v. Kuemmerle*, 67 M.J. 141, 144 (C.A.A.F. 2009) (finding jurisdiction over the appellant's distribution of child pornography offense

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Antonio for reserve duty and that he did "stay" for the entire time period of his reserve duty.

where one of the two acts necessary to establish the offense (i.e., posting the image) occurred prior to the appellant entering active duty because his subsequent decision to keep the image posted occurred while he was subject to the UCMJ).

For this offense, the related evidence the members could have considered on the issue of Appellant's intent included the false receipt Appellant created for a stay at "Vernon Guest Suites," the travel voucher submitted December 3, and a check he wrote to Randall Vernon on November 20, 2013. The members also could have considered evidence of the six other occasions upon which Appellant followed a similar pattern: staying with his in-laws and then submitting false receipts and travel vouchers in order to claim lodging reimbursement for which he was not eligible. Thus, the act of staying with his in-laws with the intent to defraud the government was more than simply an isolated and unimportant circumstance. It was the sine qua non for Appellant's travel fraud scheme.

Specification 2 of Additional Charge I

In Specification 2 of Additional Charge I, Appellant was charged with and convicted of committing larceny on or about May 16, 2012, and September 30, 2012. Between May 16, 2012, and September 30, 2012, Appellant was on active duty orders. He stayed with his in-laws during that time period and, prior to going on active duty, set up a series of automatic interim partial payments to reimburse him for lodging expenses. Four interim payments were then deposited into his bank account

during his active duty period (June 14, July 16, August 13, and September 12). He submitted a pre-travel authorization form on May 3, 2012, and created a receipt for the stay with his in-laws on September 30, 2012. He also wrote checks to his in-laws dated June 30, August 31, and September 30, 2012. Appellant then performed IDT duties, working 8:00 a.m. through noon and 1:00 p.m. through 5:00 p.m. blocks between October 1 through 5, October 9 through 12, and October 15 through 17. Appellant submitted his travel voucher and the receipt to his supervisor on October 2 and he received his final payment on October 12.

The lower court found that, as with the November 19, 2013, offense, jurisdiction did not exist when Appellant was engaged in IDTs except during the four-hour working blocks. The court therefore concluded that, because the receipt of interim payments and staying with his in-laws that occurred during the active duty period were not sufficient to constitute a completed larceny, the court-martial did not have jurisdiction to sustain the larceny conviction. However, the lower court did conclude that jurisdiction existed for the lesser included offense of attempted larceny and affirmed a finding of guilty of that offense.

This specification requires a substantial step analysis similar to the one conducted above. Here, Appellant not only stayed with his in-laws—on this occasion the third stay for which he claimed lodging reimbursement—but also received automatic partial interim lodging payments from the military and created a fraudulent receipt for his stay with the

Vernons, all while on active duty. In addition, the members were entitled to consider as circumstantial evidence events that took place while Appellant was not subject to jurisdiction. This additional evidence included submission of the travel voucher and receipt of final payment as well as arranging for interim payments prior to going on active duty. We conclude that all this evidence, considered together, is sufficient to establish the requisite substantial step towards commission of the offense of attempted larceny.

Improper Instruction

"The military judge shall give the members appropriate instructions on findings." Rule for Courts-Martial 920(a). "This Court presume[s] that the panel followed the instructions given by the military judge." *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017) (alteration in original) (internal quotation marks omitted) (citation omitted).

"Whether a panel was properly instructed is a question of law reviewed de novo." *United States v. Medina,* 69 M.J. 462, 465 (C.A.A.F. 2011) (internal quotation marks omitted) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). In this case, the military judge instructed the members on the elements of the charged offenses, including the "on or about" language. Defense counsel did not object to the instructions at the time they were given. "Where there was no objection to the instruction at trial, we review for plain error." *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013).

Under plain error review, "Appellant has the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *United States v. McClour*, 76 M.J. 23, 25 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)). "[T]he failure to establish any one of the prongs is fatal to a plain error claim." *Id.* (alteration in original) (internal quotation marks omitted) (citation omitted). We determine that Appellant has failed to carry his burden with regard to the third prong. Whether or not the military judge erred in giving instructions on the "on or about" language, Appellant has not proven any material prejudice to his substantial rights.

In his prayer for relief, Appellant asks that this Court set aside findings for five specifications due to instructional error: Charge II and its specification; Additional Charge I, Specifications 1 and 2; and Additional Charge II, and its specifications. Additional Charge I, Specification 1, is a larceny conviction. The others are attempted larceny convictions.

Appellant has not established that the military judge's instructions in any way impacted the members' decision-making process on these offenses. Though there were multiple steps involved in orchestrating the taking of the money, the dates of those steps were well documented through travel vouchers, duty orders, checks, bank statements, etc., which were admitted into evidence. Those dates were not ambiguous and the members were not relying on witness testimony that was open to interpretation.

The members were not asked to consider a separate crime that may have occurred outside the scope of the court's jurisdiction. Rather, the charges here involved concrete acts occurring on concrete dates. Appellant provided no reason to suspect the members did not adhere to the admitted evidence when reaching their verdict.

With regard to the attempted larceny convictions, our decision above on issues I and III establishes that Appellant staying with his in-laws, coupled with circumstantial evidence of acts committed when he was not subject to jurisdiction, is sufficient to constitute a substantial step towards completed larceny. Nothing in Appellant's argument or in the record suggests that members considered other, impermissible, evidence.

With regard to Additional Charge I, Specification 1, the larceny conviction, the charge sheet reads "between on or about 26 June 2011 and on or about 30 September 2011." Appellant was on active duty and therefore under military jurisdiction from June 26, 2011, through September 30, 2011. While he was on active duty, Appellant stayed with his in-laws. He also received interim payments on July 26, August 25, and September 26. He wrote a check to the Vernons on September 27 and created a false receipt for lodging dated September 29. We consider all this evidence sufficient to support a conviction of a completed larceny. Any assumption that the members based their conviction on other evidence of acts taking place when Appellant was not subject to jurisdiction would be purely speculative.

Both parties spent some time analyzing to what degree the Government depended upon the "on or about" language in its closing argument. The Government did reference the "on or about" language. However, given the above points and the fact that the members were clearly instructed that arguments are not evidence, we are not convinced that the remarks made during closing arguments played a significant enough role to have prejudiced Appellant.

Decision

We conclude that the court-martial had sufficient jurisdiction over Appellant to support both challenged attempted larceny convictions. In addition, Appellant has failed to prove any material prejudice stemming from the military judge's instructions to the members.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judge OHLSON, concurring in part and dissenting in part.

Thankfully, the jurisdictional puzzle confounding the Court in the instant case soon will be sorted out. The Military Justice Review Group (MJRG), which was so ably chaired by Senior Judge Andrew Effron, recognized the vagaries inherent in a system whereby jurisdiction over reservists performing inactive duty training (IDT) could—like an office light switch—turn on and off several times during the course of a single work day.[1] *See* Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group 154–55 (Dec. 22, 2015), http://ogc.osd.mil/mjrg.html. Therefore, upon the MJRG's recommendation, Congress amended Article 2(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(3), so as

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[1] Although this brief and episodic form of jurisdiction may seem quite odd, this is not a point on which the majority and I disagree. As the majority correctly notes in its opinion, "[N]o authority existed at the time of the offenses to extend military status to [servicemembers who were] engaged in [inactive duty training] beyond the designated four-hour blocks of IDT time." *United States v. Hale*, __ M.J. __ (7) (C.A.A.F. 2019). The majority opinion also favorably and correctly cites a United States Army Court of Criminal Appeals decision that holds that "jurisdiction does not exist over a reserve member who committed criminal acts between periods of IDT." *Id.* at __ (8) (citing *United States v. Wolpert*, 75 M.J. 777 (A. Ct. Crim. App. 2016)).

to eliminate jurisdictional gaps that previously arose within the interstices of blocks of time dedicated to inactive duty training. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2894–95 (2016). Thus, some much needed rationality is now in the process of being imposed regarding court-martial jurisdiction over reservists.

In the instant case, however, the old jurisdictional rules apply. As explained below, in construing those rules, and in applying the law to the relevant facts, I conclude that the jurisdictional light switch, so to speak, was in the "off" position at the time Appellant took the steps necessary for the commission of one of the attempted larceny offenses. Further, I conclude that the military judge's "on or about" instruction constituted plain error because it directly implicated jurisdictional issues in this case and improperly authorized the panel members to convict Appellant of the attempted larceny charge even if the offense occurred when he was not in a military status. Accordingly, unlike my colleagues in the majority, I would hold that Appellant's conviction for that offense must be set aside and the specification must be dismissed. Therefore, I respectfully dissent.

OVERVIEW

This travel fraud case resulted in Appellant being charged with a number of larceny and attempted larceny offenses. One of these attempted larceny offenses is charged in Specification 3 of Additional Charge II. This specification alleges that Appellant "did within the continental United States, on or about

19 November 2013 attempt to steal money, military property, of a value of over $500.00, the property of the United States Government," in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2012). At the time of this charged misconduct, Appellant, an Air Force reservist, was on IDT for multiple four-hour blocks of time between November 3, 2013, and November 20, 2013. Central to this case is the fact that while performing his IDT at Joint Base San Antonio-Lackland, Texas, Appellant elected to lodge at the home of his in-laws.

A panel of officer members sitting as a general court-martial convicted Appellant of several offenses, including the attempted larceny offense cited above. The members reached their verdict after the military judge instructed them as follows:

> [Y]ou must be convinced by legal and competent evidence beyond reasonable doubt:
>
> (1) That, *on or about* 19 November 2013 … the accused did a certain act, that is: stay at the private residence of his in-laws, …, *write a check to* [*his father-in-law*], *and/or create a lodging receipt reflecting his stay at the* [*in-laws'*] *residence*;
>
> ….
>
> (3) That *the acts* amounted to more than mere preparation, that is, they were a substantial step and a direct

> movement toward the commission of the intended offense.

(Emphasis added.)

The majority concludes that: (1) there was court-martial jurisdiction over the attempted larceny offense charged in Specification 3 of Additional Charge II (Issue I); and (2) the military judge's "on or about" instruction with respect to this specification did not amount to plain error (Issue II). As outlined below, I part ways with both of these conclusions.

I.

Turning first to Issue I, this Court must determine whether the court-martial had jurisdiction over the attempted larceny offense that was alleged to have occurred "on or about" November 19, 2013. "[C]ourts-martial may only exercise jurisdiction over a servicemember 'who was a member of the Armed Services *at the time of the offense* charged.' " *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009) (emphasis added) (quoting *Solorio v. United States*, 483 U.S. 435, 451 (1987)). Stated differently, "Article 2(a), UCMJ, jurisdiction for a reservist hinges on whether *the charged events* occurred during active duty status or IDTs." *United States v. Morita*, 74 M.J. 116, 120 (C.A.A.F. 2015) (emphasis added). I interpret these precedents to mean that a reservist is not subject to UCMJ jurisdiction if the reservist leaves a military status *before all of the elements of a criminal offense are met*.

In terms of the attempted larceny offense at issue in the instant case, this Court has identified "four elements of attempt," including "that the act amounted to more than mere preparation." *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014) (citing *Manual for Courts-Martial*, *United States* pt. IV, para. 4.b (2012 ed.)). In other words, Appellant must "ha[ve] taken a substantial step—some overt act, beyond mere preparation—toward accomplishing" the larceny. *United States v. Schoof*, 37 M.J. 96, 102 (C.M.A. 1993). There is no "litmus test" for determining whether a substantial step exists, and the line between preparation and substantial step is "elusive." *Id.* at 103 (citation omitted) (internal quotation marks omitted). However, the Supreme Court has stated that "*the mere intent* to violate a federal criminal statute is not punishable as an attempt unless it is accompanied by *significant* conduct." *United States v. Resendiz- Ponce*, 549 U.S. 102, 107 (2007) (emphasis added). Indeed, this Court has recognized that the "substantial step must *unequivocally* demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (emphasis added) (citation omitted) (internal quotation marks omitted).

Applying the above law to the relevant facts, I conclude that Appellant's facially benign act of staying with his in-laws while performing IDT does not constitute "a substantial step." After all, Appellant needed a place to stay for his temporary duty, and he was permitted to stay with family members—although he could not legally seek reimbursement for this stay. This single facially benign act while in a

military status did not "unequivocally demonstrat[e] that the crime [would] take place unless interrupted by independent circumstances." *Id.* (citation omitted) (internal quotation marks omitted); *see also United States v. Presto*, 24 M.J. 350, 352 (C.M.A. 1987) (concluding that conduct "tend[ing] to corroborate appellant's criminal intent" did not constitute a substantial step).

I recognize, as the majority and the lower court point out, that six other larcenies or attempted larcenies occurred when Appellant previously stayed with his in-laws. However, because Appellant was authorized to stay with family for his IDT, his mere act of staying with his in-laws in November 2013—which was unaccompanied by any other conduct during his time in military status that was consistent with committing a larceny—does not demonstrate the firmness of his intent to commit that offense. I also recognize that Appellant engaged in acts outside of his military status that, if taken during his IDT, would have established a substantial step while he was subject to court-martial jurisdiction. However, there is no court-martial jurisdiction if the acts necessary to commit a crime occur *after* an accused has left his military status; to be subject to court-martial jurisdiction, the substantial step must occur *during* an accused's IDT status.

In this particular case, it logically follows that because Appellant did not take a substantial step towards commit ting a larceny offense during IDT, this element of the attempt offense was not satisfied—and thus an attempted larceny was not completed—during the time that Appellant was in a military

status. Therefore, there was no court-martial jurisdiction for this attempt offense. *See Morita*, 74 M.J. at 120 ("Article 2(a), UCMJ, jurisdiction for a reservist hinges on whether the charged events occurred *during* … IDTs." (emphasis added)). Accordingly, I would set aside the findings with respect to Specification 3 of Additional Charge II and dismiss the specification.

II.

Even if the majority is correct that there is court-martial jurisdiction over the attempted larceny offense alleged in Specification 3 of Additional Charge II, I conclude that the finding of guilty for this specification should be set aside because the military judge plainly erred by instructing the members that Appellant could be convicted if he committed the larceny "on or about 19 November 2013."

The use of "on or about" in a military judge's instructions "generally connote[s] any time within a few weeks of the 'on or about' date." *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992), *overruled on other grounds by United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017). In the instant case the problem with the military judge's "on or about" instruction arises because it was given in the context of a specification where court-martial jurisdiction was clearly implicated. Court-martial jurisdiction is a binary proposition—it is either there or it is not. *Morita*, 74 M.J. at 120 ("[A]ctive duty is an all-or-nothing condition." (citation omitted) (internal quotation marks omitted)). Therefore, the military judge needed to focus his instructions on the precise dates when

Appellant was on IDT. *Cf. United States v. Thompson*, 59 M.J. 432, 440 (C.A.A.F. 2004) (requiring a military judge "to provide the members with instructions that focused their deliberations on a much narrower period of time" to ensure they did not convict on an offense that fell outside of the statute of limitations).

Because the military judge's "on or about" instructional language did not limit the attempt offense to the IDT period when the court-martial had jurisdiction, the military judge permitted the members to convict Appellant of an attempted larceny even if it occurred when he was no longer in a military status (i.e., when the military had no court-martial jurisdiction over Appellant). This point is underscored by the fact that the military judge's instruction listed three acts as part of the attempted larceny offense with which Appellant was charged—staying with his in-laws, writing a check to his father-in-law, and creating a fraudulent lodging receipt. However, the evidence in the record fails to establish that two of these acts occurred while Appellant was in an IDT status.[2] Indeed, the Government's appellate brief

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[2] In the context of the military judge's and lower court's jurisdictional analyses, neither the military judge nor the lower court found that the writing of the check or the creation of the lodging receipt occurred while Appellant was in a military status. The majority opinion similarly recognizes that the Government did not establish the time of day that Appellant wrote the check. Thus, there is no evidentiary basis to conclude that all of the necessary acts for the commission of an

appears to concede that Appellant's acts of writing a check and creating a lodging receipt occurred *after* he was no longer in an IDT status and therefore not subject to the UCMJ. Under these circumstances, the instructions improperly permitted the members to convict Appellant of an attempted larceny that was not actually completed until *after* Appellant had left his military status.[3] Therefore, I conclude that the military judge clearly or obviously erred when instructing the members in this manner.

I further conclude that this clearly erroneous "on or about" instruction prejudicially impacted the members' deliberations. *See United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (explaining there is material prejudice for plain error analysis when there is a reasonable probability that the outcome would have been different absent the error). The Government did not rely solely on Appellant's act of staying with his in-laws when seeking a conviction for the attempted larceny offense. Instead, trial counsel's findings argument pointed to conduct that occurred when Appellant was not in a military status—writing

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attempted larceny offense occurred when the military had court-martial jurisdiction over Appellant.

[3] Because the military judge's "on or about" instruction specifically allowed the members to consider conduct when Appellant was no longer in a military status, the military judge's general instruction about court-martial jurisdiction did not remedy the error of allowing the members to convict for an offense completed after Appellant left his military status.

a check, creating a lodging receipt, and creating and submitting the final claim for reimbursement. And, as already stated, the military judge also instructed the members that they could consider two of these acts in determining whether there was "more than mere preparation"—despite the fact that these two acts occurred during a period when Appellant was not in a military status. The members were thereby incorrectly left with the impression that they could find a substantial step based on acts that occurred after Appellant had left his military status. This stands in direct contradiction with the jurisdictional requirement that the substantial step, and thus the crime of attempted larceny, must have been completed while Appellant was in a military status.

Finally, as suggested by my discussion of Issue I, it is not a foregone conclusion that the members would have found that Appellant's facially benign act of staying with his in-laws by itself constituted a substantial step.[4] Because the military judge's "on or about" instruction improperly authorized the members to find a substantial step based on conduct that occurred after Appellant had left a military status, and because trial counsel's findings argument also relied on such conduct in seeking a conviction, there is a reasonable probability that, but for the instructional error, the members would have reached a different outcome. Therefore, even if there is court-martial jurisdiction over Specification 3 of Additional

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[4] At oral argument, the Government even conceded that the mere act of staying at the in-laws without more is legally insufficient to constitute an attempt.

Charge II, Appellant has established that the military judge plainly erred in providing the "on or about" instruction with respect to this specification.[5]

III.

For the reasons set forth above, I respectfully dissent from two portions of the majority opinion.[6] First, I conclude that the court-martial lacked jurisdiction over the attempted larceny offense charged at Specification 3 of Additional Charge II and therefore dissent from the majority's resolution of Issue I. On these grounds I would set aside Appellant's conviction for that offense and dismiss the specification. Second, even assuming the court-martial had jurisdiction over Specification 3 of Additional Charge II, I conclude that the military

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[5] Although I find plain instructional error with respect to Specification 3 of Additional Charge II, I concur with the majority's conclusion that the instructional error was not plainly erroneous as to the other charges and specifications because Appellant has failed to establish that the "on or about" instruction led to convictions for conduct that occurred when he was not in a military status. *Cf. United States v. Royal*, 972 F.2d 643, 649 (5th Cir. 1992) (concluding that "on or about" instruction did not constitute plain error because "the facts of the case eliminate the possibility that the jury could have convicted the Defendant for acts barred by the statute of limitations").

[6] I concur with the result reached by the majority for Issue III.

judge plainly erred in providing an "on or about" instruction for this specification and there-fore dissent from the majority's resolution of Issue II insofar as it concerns Specification 3 of Additional Charge II. On these grounds I would set aside Appellant's conviction for that offense and authorize a rehearing.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39101

UNITED STATES
Appellee
v.

James M. HALE
Lieutenant Colonel (O-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 19 January 2018

Military Judge: Shelly W. Schools (arraignment); Mark W. Milam.

Approved sentence: Dismissal, confinement for 1 month, and forfeiture of all pay and allowances. Sentence adjudged 5 March 2016 by GCM convened at Joint Base San Antonio-Lackland, Texas.

For Appellant: Major Allen S. Abrams, USAF.

For Appellee: Major Amanda L.K. Linares, USAF; Major Mary Ellen Payne, USAF; Major Meredith L. Steer, USAF; Gerald R. Bruce, Esquire.

Before JOHNSON, MINK, and DENNIS, *Appellate Military Judges*.

Judge DENNIS delivered the opinion of the court, in which Senior Judge JOHNSON and Judge MINK joined.

PUBLISHED OPINION OF THE COURT

DENNIS, Judge:

A general court-martial comprised of officer members found Appellant guilty, contrary to his pleas, of four specifications of attempted larceny, one specification of making a false official statement, and three specifications of larceny, in violation of Articles 80, 107, and 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 907, 921. The adjudged and approved sentence consisted of a dismissal, confinement for one month, and forfeiture of all pay and allowances.

This case is essentially about a reserve officer who committed travel fraud. The principal issue on appeal is Appellant's status at the time of each offense and whether the court-martial had jurisdiction over each of the specifications for which Appellant was convicted. As a threshold matter, we find that the court-martial lacked jurisdiction over one of the larceny specifications, but had jurisdiction over the lesser-included offense of attempted larceny. We also modify part of the charged timeframe of a second larceny specification by exception and substitution.

The remaining assignments of error challenge whether the military judge erred in admitting summarized evidence pursuant to Military Rule of Evidence (Mil. R. Evid.) 1006; whether the military judge's instruction that Appellant, as a reservist, could be convicted for conduct "on or about" the dates alleged; and whether the evidence supporting Appellant's convictions are legally and factually sufficient to prove that the money stolen was military property and that Appellant had the intent to deceive and permanently deprive.[1] For reasons set forth below, we find no prejudicial error in these remaining assignments of error.

We modify the affected specifications, reassess the sentence, and affirm.

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[1] Appellant alleges legal and factual insufficiency of the evidence establishing "intent to permanently deprive" pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

I. BACKGROUND

Appellant was a member of the United States Air Force Reserves, living in Colorado but attached to the 33d Network Warfare Squadron at Joint Base San Antonio-Lackland (JBSA-Lackland), Texas. Between 26 June 2011 and 19 November 2013, Appellant traveled to San Antonio to complete a total of seven periods of reserve duty. These periods of duty included annual tours, military personnel appropriations tours, and inactive-duty training (IDT). For each period of duty, Appellant decided to stay with his in-laws, Mr. and Mrs. Vernon, and claim lodging reimbursement. This decision proved problematic for two reasons. First, the Joint Federal Travel Regulations (JFTR) in effect at the time of Appellant's conduct prohibited reimbursement for lodging with friends or family. Second, Appellant's in-laws never actually charged him to stay in their home. Nevertheless, at the conclusion of each stay, Appellant.[2] Although Appellant never advised his in-laws what to do with the checks, his bank account balances were insufficient to cover the checks at the time they were written.

Following each of his seven stays, Appellant created a custom receipt reflecting payment. Receipts for the first four stays were signed by Mr. Vernon at Appellant's request. Two receipts were written for the fifth stay: the first receipt contained a generic

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[2] The record is unclear as to when the checks were returned.

"Lodging Receipt" title, and the second appeared to be an official receipt from "Vernon Guest Suites" containing itemized charges. The receipts for the final two stays were similar to the "Vernon Guest Suites" receipt, but added reference numbers for each night's stay. Appellant attached and submitted the receipts he created along with a travel voucher seeking reimbursement for his "lodging expenses" a total of seven times. The Government ultimately paid Appellant for five of his seven stays, totaling $25,071.00.

When submitting his seventh claim for reimbursement, Appellant attached a Microsoft Word version of the receipt he had created, which caught the attention of processing officials. Appellant had written but not provided a check to his in-laws at the end of his seventh stay. When asked for a copy of the cancelled check, Appellant took it upon himself to deposit the check he had written into the Vernon account in order to provide the requested information. Several days later, unbeknownst to his in-laws, Appellant wired the money back into his own account.

Appellant's process of independently depositing checks into the Vernon account and wiring the money back into his own account continued, each time aligning with three critical stages in the evolving proceedings against him: The first check was deposited in December of 2013 when the processing officials requested a copy of the cancelled check. Two additional checks were deposited in April 2014 when Appellant was being interviewed as a subject in the command-directed investigation (CDI). The final six checks were deposited in September 2014 after the

CDI's investigating officer—noting Appellant's inability to provide copies of the cancelled checks—substantiated seven allegations of travel fraud against Appellant.

II. DISCUSSION

A. Jurisdiction

As a member of the United States Air Force Reserves, Appellant is subject to limited military jurisdiction. *See* Article 2, UCMJ, 10 U.S.C. § 802. Appellant identifies three offenses over which he claims the military did not have the requisite jurisdiction: (1) the attempted larceny alleged in Specification 3 of Additional Charge II; (2) the larceny alleged in Specification 2 of Addition-al Charge I; and (3) the larceny alleged in Specification 3 of Additional Charge I. As we explain in detail below, we find that the court-martial properly exercised jurisdiction over Specification 3 of Additional Charge II and Specification 3 of Additional Charge I. We find that the court-martial lacked jurisdiction over Specification 2 of Additional Charge I.

We review questions of jurisdiction de novo. *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009). The Government bears the burden of proving jurisdiction by a preponderance of the evidence. *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002); *see also* Rule for Courts-Martial (R.C.M.) 905(c)(2)(B).

Courts-martial jurisdiction requires that the accused is subject to the UCMJ at the time of the

alleged offenses. *United States v. Ali*, 71 M.J. 256, 261–62 (C.A.A.F. 2012) (citing *Solorio v. United States*, 483 U.S. 435 (1987)). Whether a member is subject to the UCMJ is defined by Article 2, UCMJ. As applied to the facts of Appellant's case, Article 2 identifies the following classes of persons subject to the UCMJ:

Article 2(a)(1)

> Members of a regular component of the armed forces . . . and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

Article 2(a)(3)

> Members of a reserve component while on inactive-duty training; and

Article 2(c)

> Notwithstanding any other provision of law, a person serving with an armed force who—
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental and minimum age qualifications . . . at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties.

See 10 U.S.C. § 802.

Each of these provisions has been the subject of various interpretations. "For the purposes of Article 2(a), UCMJ, jurisdiction, 'active duty is an all-or-nothing condition.'" *United States v. Morita*, 74 M.J. 116, 120 (C.A.A.F. 2015) (quoting *Duncan v. Usher*, 23 M.J. 29, 34 (C.M.A. 1986)). Article 2(a)(1), UCMJ, jurisdiction has primarily been interpreted to attach from the date of activation when lawfully called or ordered into duty. *Id.* Interpretations of Article 2(a)(3), UCMJ, jurisdiction are limited, but courts have consistently applied the plain language meaning of "while on inactive-duty training." *See Morita*, 74 M.J. at 120; *see also United States v. Wolpert*, 75 M.J. 777, 780–81 (A. Ct. Crim. App. 2016) (finding no Article 2(a)(3) jurisdiction where offense occurred during the evening between IDT periods). Subject to the limitations of the UCMJ, service regulations may also set forth rules exercising court-martial jurisdiction authority over reserve component personnel under Article 2(a)(3), UCMJ. *Manual for Courts-Martial, United States,* R.C.M. (2012 ed.) (2012 *MCM*), pt II, R.C.M. 204(a).

The most often cited interpretation of Article 2(c) jurisdiction is from *United States v. Phillips*, 58 M.J. 217 (C.A.A.F. 2003). In *Phillips*, the United States Court of Appeals for the Armed Forces (CAAF) found jurisdiction was established pursuant to Article 2(c), UCMJ, for Lieutenant Colonel (Lt Col) Phillips, a

reserve officer who used marijuana after traveling to her assigned reserve location but before her orders officially began. CAAF noted the question of whether the person is "serving with" the armed forces "is dependent upon a case specific analysis of the facts and circumstances of the individual's particular relationship with the military." *Id*. at 220. CAAF found jurisdiction under Article 2(c), UCMJ, based on its analysis of six factors present in *Phillips*:

> (1) the member was a member of a reserve component on the day in question;
>
> (2) the member traveled to a base pursuant to military orders or was reimbursed for travel expenses by the armed forces;
>
> (3) the orders were issued for the purpose of performing active duty;
>
> (4) the member was assigned to military officers' quarters, occupied those quarters, and committed the pertinent offense in those quarters;
>
> (5) the member received military service credit in the form of a retirement point for service on the day in question; and
>
> (6) the member received base pay and allowances for that date.

Id.

Nearly 12 years later, CAAF rejected a claim that Article 2(c), UCMJ, applied to a reserve officer who had forged orders and committed travel fraud using the forged orders. *Morita*, 74 M.J. at 122–23. Finding only one of the *Phillips* factors met, the court noted that "[a]ctions incident to status as a reservist without more are simply insufficient to confer jurisdiction so broadly." *Id.* at 123, n.6.

Having outlined these jurisdictional interpretations, we turn to the jurisdictional errors asserted by Appellant, addressing each in turn.

1. Attempted Larceny, Specification 3 of Additional Charge II

Between 3 November 2013 and 20 November 2013, Appellant completed a series of IDTs. On each day between 3 November 2013 and 19 November 2013, Appellant completed two four-hour blocks from 0800-1200 hours and 1300-1700 hours. On 20 November 2013, Appellant completed only one four-hour block from 0800-1200 hours. For each four-hour block, Appellant was paid and received one point toward retirement in accordance with military reserve retirement system protocols. Appellant's Air Force Form 40A, *Record of Individual Inactive Duty Training*, indicated that he was also authorized lodging and subsistence during this period.

When his IDT began on 3 November 2013, Appellant stayed with his in-laws, as he had during his previous six periods of duty. He continued to stay with his in-laws during the entire period he was

completing his IDTs through 20 November 2013. Prior to leaving, Appellant followed his custom of writing a check to his in-laws for his stay. The Government could not establish what time the check was created. Although the check was dated 19 November 2013, Appellant told the CDI's investigating officer "I made out the check on 20 November 2013, but didn't see Mr. Vernon on [the] 20th before I left. I then travelled home and deposited the check myself into his account on 11 December 2013 (as reflected on my previously provided bank statement)." On 3 December 2013, Appellant created a receipt for his stay and submitted the receipt and a copy of the 19 November 2013 check with a Standard Form 1164, *Claim for Reimbursement for Expenditures on Official Duty*, to his supervisor. Appellant was ultimately charged with the following:

> In that, LIEUTENANT COLONEL JAMES HALE . . . did with-in the continental United States, on or about 19 November 2013, attempt to steal money, military property, of a value over $500.00, the property of the United States Government.

Appellant asserts, as he did unsuccessfully at trial, that the military lacks jurisdiction over this specification because the Government cannot prove the check was written during one of the four-hour blocks of IDTs Appellant completed. Appellant's argument poses one central question: Does Article 2(a)(3), UCMJ, governing IDTs require proof that a reserve member was in a military status on a given day *or* at a given time? We believe it is the latter.

We first look to whether Article 2(a)(3), UCMJ, contains plain and unambiguous language regarding the dispute in the case. *Morita*, 74 M.J. at 120 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). We agree with our superior court that while the statute "has not been the subject of much analysis, little analysis is required to conclude that the operative statutory language refers to, and thus is limited to, a member of a reserve component while on inactive-duty training." *Id.* (internal quotations omitted).

Unlike other types of reserve duty, an IDT is not a tour but a block of time. Specifically, it is a designated "four-hour period of training, duty or instruction." Air Force Instruction (AFI) 36-2254V1, *Reserve Personnel Participation*, ¶ 4.1.1 (26 May 2010). The member performing the IDT is paid for and receives a point for that designated four-hour block of time. Appellant was no exception. He was not receiving "regular pay" as the Government suggests. Rather, he received pay and points solely for the IDT blocks he was authorized to complete. While he was entitled to be reimbursed lodging expenses, such an entitlement does not alone confer jurisdiction. In fact, at the time of Appellant's offenses, no authority existed to extend a reserve member's military status "while on inactive duty training" beyond the designated block of time listed on the AF Form 40A.[3]

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[3] At the time of Appellant's offenses, the only authority directly addressing jurisdiction during the IDT blocks listed on AF Form 40A was AFI 36-2254V3, *Reserve Personnel Telecommuting/Advanced*

Accordingly, we find that as it existed at the time of Appellant's trial, Article 2(a)(3), UCMJ, did not subject Appellant to the UCMJ.[4]

Distributed Learning (ADL). AFI 51-201, *Administration of Military Justice* (6 Jun. 2013), ¶ 2.9.1., provides that "[r]eserve members performing continuous duty in an inactive duty for training status *overseas* are subject to UCMJ jurisdiction from the commencement to the conclusion of such duty." (Emphasis added.) It is worth noting, however, that both Congress and the Secretary of the Air Force acted to change Article 2(a)(3)'s jurisdiction over IDTs. Congress recently added three subgroups to Article 2(a)(3), UCMJ: (1) members traveling to and from the IDT training site; (2) intervals between consecutive periods of IDT on the same day, pursuant to orders or regulations; and (3) intervals between IDTs on consecutive days, pursuant to orders or regulations. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2921 (2016). Similarly, AFI 51-201, *Administration of Military Justice,* was rewritten and published on 8 December 2017. Paragraph 2.14 of the rewritten instruction removes the word "overseas" and provides that "Air Force Reserve members performing continuous du-ty in an inactive duty training status are subject to UCMJ jurisdiction from the commencement to the conclusion of such duty." AFI 51-201, *Administration of Military Justice*, ¶ 2.14 (8 Dec. 2017).

[4] In 2014, this court addressed the issue of whether a reserve officer's forged IDT orders could establish

Notwithstanding our finding as to Article 2(a)(3), UCMJ, jurisdiction, there remains the question of whether Article 2(c), UCMJ, jurisdiction applies. Applying the *Phillips* factors, we find that it does not. Unlike Lt Col Phillips, Appellant was only authorized reimbursement for lodging rather than full travel per diem. Nor did Appellant receive base pay and allowances "for the day." Instead, Appellant was assigned a unique pay code to be paid and awarded points only for the blocks of IDT completed. We find this evidence insufficient to meet the threshold "serving with" requirement of Article 2(c), UCMJ.

We now turn to Specification 3 of Additional Charge II.

The military judge found that even if the Government could not establish jurisdiction at the time Appellant wrote the check, the specification would survive because staying "at the Vernon house during his stated duty hours" constituted a "substantial step in his attempt to steal from the Air Force." We agree.

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jurisdiction. *Morita*, 73 M.J. at 548. We did not specifically ad-dress whether the offenses occurred during a specific period of IDT, but held that the appellant was in military status on the days of his forged IDT orders. CAAF later overruled our finding that forged documents can establish jurisdiction under Article 2(a)(3). *See Morita*, 74 M.J. at 122. We now squarely address jurisdiction over conduct occurring outside a block of IDTs and agree with our sister court's interpretation in *Wolpert*, 75 M.J. at 781.

As he had done six times previously, Appellant stayed with his in-laws during the entire period he was completing IDTs. Had this been his first time staying with his in-laws during a period of duty at JBSA-Lackland, this alone might not have been sufficient to establish a substantial step and his intent to defraud the Government. However, Appellant's pattern of behavior—staying with his in-laws and then claiming reimbursement for funds he had never actually paid—is sufficient when taken as a whole to demonstrate "the firmness of [Appellant's] criminal intent." *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987) (internal quotation marks omitted). When Appellant's intent is combined with the overt act of staying with his in-laws during his seventh consecutive period of duty at JBSA-Lackland, Texas, it constitutes more than mere preparation. It constitutes attempted larceny.

Accordingly, we find the court-martial properly exercised jurisdiction over Specification 3 of Additional Charge II.

2. Larceny, Specification 2 of Additional Charge I

Between 16 May 2012 and 30 September 2012, Appellant was placed on active duty orders to JBSA-Lackland, Texas. Prior to entering active duty status, Appellant set up an interim voucher which, once approved, automatically disbursed "scheduled partial payments" into Appellant's account. Appellant received three of these scheduled partial payments, all while in active duty status. Appellant, again staying with his in-laws, provided them three checks during

this period. At the conclusion of his stay, he created a receipt and attached the receipt to the travel voucher he created on 30 September 2012. Appellant did not sign and submit the travel voucher until 2210 hours on 2 October 2012, a day on which he completed one IDT between 0800–1200 hours and another between 1300–1700 hours. Because Appellant's scheme had not yet been discovered, his voucher was processed without incident. Appellant was paid at 2018 hours on 12 October 2012, a day on which he completed one IDT between 0800-1200 hours and another between 1300-1700 hours.[5] Appellant was ultimately charged with the following:

> In that, LIEUTENANT COLONEL JAMES HALE . . . did within the continental United States, between on or about 16 May 2012 and on or about 30 September 2012, steal money, military property, of a value over $500.00, the property of the United States Government.

Appellant asserts for the first time on appeal that the Government cannot establish that Appellant completed the offense of larceny while subject to the UCMJ. We agree.

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[5] We note that the text on Prosecution Exhibit 11 of the original record is missing from pages 21–29. We are nevertheless confident that the record is complete for our review as those pages are found in Appellate Exhibit XVII, pages 145–153.

There is no question that Appellant committed larceny. The only question is whether Appellant's larceny is one over which the military has jurisdiction. "The gravamen of the issue before us is the point at which [Appellant's] fraudulent scheme reached fruition." *United States v. Seivers*, 8 M.J. 63, 64–65 (C.M.A. 1979). Appellant was not subject to the UCMJ at three critical points during his travel fraud scheme: (1) when his scheme was set in motion on 3 May 2012; (2) when he submitted his final travel voucher at 2210 hours on 2 October 2012; and (3) when he received his final payment at 2018 hours on 12 October 2012.

Conversely, Appellant received three payments while in active duty status prior to filing his final voucher.[6] The Government argues that these payments completed the larceny and render the timing of Appellant's final payment immaterial. Had Appellant scheduled his interim payments or filed his final voucher while he was in status, we might be inclined to agree with the Government. But those are not the facts of this case. The only actions Appellant took while in status under Article 2, UCMJ, were

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[6] Appellant was permitted to schedule automatic partial payments using the Defense Travel System (DTS) because his temporary duty (TDY) was longer than 45 days. According to the testimony at trial, once Appellant's approving official certified the scheduled payments, no additional action was required by Appellant. Rather, DTS generated automatic payments to him every 30 days in accordance with his orders. Appellant was not required to substantiate his expenses until filing his final voucher.

lodging with his in-laws and receiving interim payments. Such actions are insufficient to constitute a completed larceny.[7]

Accordingly, we find the court-martial lacked jurisdiction over Specification 2 of Additional Charge I as charged and set it aside. We nevertheless find that jurisdiction did exist over the lesser-included offense of attempted larceny in violation of Article 80, UCMJ, and that the evidence demonstrates Appellant's guilt of that offense beyond a reasonable doubt.

3. Larceny, Specification 3 of Additional Charge I

Between 22 October 2012 and 2 November 2012, Appellant was placed on active duty orders to JBSA-Lackland, Texas. This tour was immediately followed by active duty orders between 3 November 2012 and 3 December 2012. Appellant stayed with his in-laws during both periods of duty. During this period, Appellant provided Mr. Vernon a check, created a

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[7] We would be remiss not to acknowledge the Government's legitimate policy concerns about the prosecutorial challenges presented by our holding. Echoing our superior court, we note that these understandable policy concerns cannot be "dispositive of the legal question before us." *Morita*, 74 M.J. at 122. "That only reservists who meet the statutory requirements are subject to the UCMJ reflects Congress's determination that for other misconduct they are subject to the jurisdiction of the civilian courts." *Id.*

receipt of payment, and submitted the receipt along with his travel voucher seeking reimbursement for lodging expenses.

Appellant was originally charged with the following:

> In that, LIEUTENANT COLONEL JAMES HALE . . . did within the continental United States, between on or about 1 October 2012 and on or about 1 January 2013, steal money, military property, of a value over $500.00, the property of the United States Government.

Noting the misalignment between the dates alleged and the dates Appellant was in a military status, the initial disposition of charges recommended the dates in the specification be modified to "between on or about 22 October 2012 and on or about 3 December 2012." The special court-martial convening authority concurred with the recommendation and directed the correction. For reasons that are unclear, the 1 October 2012 date was modified to 20 October 2012, rather than 22 October 2012 as the convening authority had directed. The 20 October 2012 date remained unchanged.

Unlike the two previous jurisdictional claims, Appellant's third and final jurisdictional claim focuses not on the time of the offense, but on the charged timeframe. Specifically, Appellant asserts that because the charged timeframe includes 20 and 21 October 2012, dates on which Appellant was not on active duty orders, the court-martial lacks

jurisdiction. We agree that the inclusion of 20 and 21 October 2012 is erroneous, but we are not persuaded that the court-martial lacked jurisdiction over the offense.

As previously discussed, the test for jurisdiction is one of status at the time of the offense. *See Solorio*, 483 U.S. at 439; *see also* R.C.M. 203 Discussion. The record makes clear that Appellant was in a military status subject to the UCMJ at the time he committed the *offense* of larceny. Still, the *specification* of which Appellant was convicted exceeds the scope of time over which the court-martial had jurisdiction.

Under Article 66(c), UCMJ, this court "may affirm only such findings of guilty . . . as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). This power provides us the authority to make exceptions and substitutions to the findings on appeal, so long as we do not amend a finding on a theory not presented to the trier of fact. R.C.M. 918(a)(1); *see United States v. McCracken*, 67 M.J. 467, 468 (C.A.A.F. 2009); *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999).

Here, although trial counsel referenced the 20 October 2012 date during his closing argument, the Government focused its argument on the date Appellant was paid. Because the record makes clear the offense alleged in Specification 3 of Additional Charge I occurred while Appellant was subject to the UCMJ, this court will exercise its authority to amend the specification to align with the dates of jurisdiction.

Notwithstanding our modification, we find that the court-martial properly exercised jurisdiction over Specification 3 of Additional Charge I.

B. The "On or About" Language in the Instruction

The military judge provided oral and written findings instructions to the members. The instructions included the elements of the offenses, many of which included the phrase "on or about" a given date. Appellant now asserts that, based on the court's limited jurisdiction over Appellant, the military judge's instruction that the members could convict him for conduct merely "on or about" the dates alleged was prejudicial error. Under the facts of this case, we disagree.

Prior to providing these instructions to the members, the military judge provided a copy to trial and defense counsel. Trial defense counsel, despite having made other objections to the instructions, did not challenge the military judge's use of the phrase "on or about" as stated on the charge sheet. Accordingly, this issue was forfeited and we review for plain error. R.C.M. 920(f); *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017).

"Under this Court's plain error jurisprudence, Appellant has the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citing *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)). "[T]he failure to establish any one of the prongs is

fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

We begin with the first prong and consider whether the military judge erred by instructing panel members that among the elements the Government was required to prove was that an offense occurred "on or about" a given date. R.C.M. 920(a) requires the military judge to give the members "appropriate instructions on findings." Appellant relies on *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004), for the proposition that, given the court's limited jurisdiction, the military judge was required to narrow the panel's focus to "on" rather than "on or about" a given date. In *Thompson*, the military judge instructed the members to consider lesser-included offenses which were barred by the statute of limitations. When the members convicted the appellant of the lesser-included offense, the military judge attempted to resolve the issue by pointing to evidence in the record which could support the finding. CAAF held that "[w]hen the evidence reasonably raises issues concerning a lesser-included offense or the statute of limitations, the military judge is charged with specific affirmative responsibilities" to focus deliberations on a "narrower period of time." *Id*. at 439–40.

The *Thompson* case, while informative, is markedly different than the facts presented here. The evidence in Appellant's case did not raise the issue that a lesser-included offense occurred during a time Appellant was not subject to the UCMJ. Rather, through a plethora of documentation, the evidence consistently pointed to actions occurring within the

charged timeframe. Unlike *Thompson*, this was not a case where the members could have used "on or about" to choose from a wide period of time. This was a case involving very specific events either occurring or not occurring on very specific dates and at very specific times. The prospect of the panel convicting Appellant during a time over which he was not subject to the UCMJ was not "reasonably raised by the evidence." There is therefore no error to correct.

In light of Appellant's failure to establish the first prong of the plain error test, we find that the military judge did not commit plain error when he instructed the members to consider whether an offense occurred "on or about" a certain date.

C. Admission of Evidentiary Summaries

During motions practice, trial counsel sought to admit three summaries of Appellant's financial records and travel vouchers. Prosecution Exhibit 54 was a summary of Prosecution Exhibits 2–35. Prosecution Exhibit 55 was a summary of Prosecution Exhibits 41–53. Prosecution Exhibit 56 was a summary of Appellant's bank records, only some of which were also admitted as prosecution exhibits. Trial defense counsel objected to the summaries on several grounds. With respect to Prosecution Exhibit 54, trial defense counsel conceded that the records were voluminous and "inconvenient to the trier of fact."

The military judge was able to resolve some but not all of trial defense counsel's objections. He ultimately admitted the summaries after finding that "the records cannot be conveniently examined in court"

under Mil. R. Evid. 1006. Appellant asserts that the military judge abused his discretion in admitting Prosecution Exhibits 54 and 55. Based on the principles outlined below, we disagree.

As a starting point, we review a military judge's ruling on the admissibility of evidence for an abuse of discretion. *United States v. Nieto*, 76 M.J. 101, 105 (C.A.A.F. 2017). A military judge abuses his discretion when: (1) the findings of fact upon which he bases his ruling are not supported by the evidence of record; (2) he uses incorrect legal principles; or (3) his application of the correct legal principles to the facts is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations and quotation marks omitted). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

Having set forth our standards for review, we next examine the Rule upon which the military judge relied. Mil. R. Evid. 1006 states:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs which cannot conveniently

> be examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at reasonable time and place. The military judge may order the proponent produce them in court.

Mil. R. Evid. 1006.

The Rule contains two requirements for admission: that the contents of the records be voluminous, and that the records be made available for examination. *Id*. Both of these requirements were met at trial. Yet, Appellant now contends that the military judge held an erroneous view of the law in admitting Prosecution Exhibits 54 and 55 as summaries under Mil. R. Evid. 1006 when they were actually "demonstrative aids distilling documents that were already in evidence."

Unlike its federal counterpart, Mil. R. Evid. 1006 has had little analysis in military jurisprudence. *See generally United States v. Reynoso*, 66 M.J. 208, 211 (C.A.A.F. 2008) (summary admissible under Mil. R. Evid. 1006 may include information not independently admissible if that information is reasonably relied upon by the expert creating the summary). Because Mil. R. Evid. 1006 wholly adopted Fed. R. Evid. 1006, we look to interpretations of the federal rule to address the issue raised by Appellant. *See Reynoso*, 66 M.J. at 211.

In *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006), the First Circuit Court of Appeals provided a comprehensive overview of the commonly misunderstood distinction between two types of summarized evidence. The first type is a summary

that fairly represents a voluminous set of documents. The second type is commonly referred to as a "pedagogical device" used to assist the court in the mode of presenting evidence. *Id*. at 396–97 (citing Fed. R. Evid. 611(a)). "A summary chart used as a pedagogical device must be linked to evidence previously admitted and usually is not itself admitted into evidence." *Id*. (citing *United States v. Janati*, 374 F.3d 263 (4th Cir. 2004)) (additional citations omitted).

In most cases, practitioners seeking to admit a summary of a voluminous set of documents do so without also admitting the underlying documents. *Milkiewicz*, 470 F.3d at 397 (citing *United States v. Bakker*, 925 F.2d 728, 736–37 (4th Cir. 1991) (additional citations omitted)). Others, however, seek to admit *both* in order to provide the members with "easier access to . . . relevant information." *Id*. (citing *United States v. Green*, 428 F.3d 1131, 1134–35 (8th Cir. 2005)) (additional citations omitted). Though the admission of both the summary and the underlying evidence has been scrutinized, "the fact that the underlying documents are already in evidence does not mean that they can be 'conveniently examined in court.'" *United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985).

The key distinction between these two types of summaries is the purpose for which they are offered. Here, the Government offered the documents to reflect complex transactional records but also used colors and headings to illustrate their theory of the case. In response to trial defense counsel's objections, the military judge assessed the document, in

painstaking detail, to make clear what parts of the summary would be admissible under Mil. R. Evid. 1006. Only after ensuring that the summaries "accurately reflect[ed]… the underlying information," did the military judge admit Prosecution Exhibits 54 and 55. Contrary to Appellant's assertions, the admitted summaries were not demonstrative aids. They were, in fact, accurate summaries of documents already in evidence. Mil. R. Evid. 1006 does not preclude the admissibility of underlying evidence.

Accordingly, we find that the military judge did not abuse the great discretion he is given in admitting the summaries and providing them to the panel for consideration in their deliberations.

D. Legal and Factual Sufficiency

In his final assignment of error, Appellant asserts that the evidence was legally and factually insufficient to prove: (1) that the property at issue in seven specifications was military property; and (2) that Appellant's actions were taken with the requisite specific intent. We disagree.

We review issues of both legal and factual sufficiency de novo, but the test for each is distinct. "The test for legal sufficiency is 'whether, after weighing the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2007) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "The test for factual sufficiency 'is whether, after weighing the evidence and making allowances for not having personally

observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325). In this unique appellate role, we apply neither the presumption of innocence nor guilt, but rather make our own "independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

We apply these principles to the issues raised by Appellant in turn.

1. Military Property

At trial, Appellant was convicted of three specifications of larceny and four specifications of attempted larceny. Each of these specifications alleged that the money stolen by Appellant was military property. Appellant asserts that the Government failed to meet its burden to prove the money alleged to have been stolen was military property. We disagree.

Whether property is "military property" is a question of law. *United States v. Sneed*, 43 M.J. 101, 103 (C.A.A.F. 1995). There are two factors we consider in resolving that question: (1) the "uniquely military nature of the property itself"; and (2) "the function to which it is put." *Id*. (citing *United States v. Schelin*, 15 M.J. 218, 220 (C.A.A.F. 1983)).

Applying these factors, we conclude that the Government met its burden to prove the money stolen was, in fact, military property. As Appellant correctly

notes, the evidence introduced was not a particular witness testifying on the "nature" of the money involved. Nevertheless, the record is replete with evidence that the money was used for a military purpose. We identify three pieces of evidence to illustrate the point. First, the Government introduced evidence of Appellant's orders at trial, which included reference to the purpose of his period of duty, such as an annual tour or military personnel appropriation. To ensure Appellant's ability to fulfill his assigned mission, these orders authorized Appellant travel expenses. Second, the Government introduced AF Form 40s indicating that Appellant was performing various military functions during his IDT period such as mission support and support for military operations. Appellant, whose home of record was in Colorado, was authorized travel expenses to ensure he could fulfill these assigned missions as well. Finally, there is significant testimony describing how a voucher is processed and ultimately paid through the Defense and Reserve Travel Systems to facilitate travel for regular component and reserve personnel. The evidence provided is sufficient to prove that the money stolen was military property.

2. Specific Intent

The false official statement specification against Appellant requires that he had the "intent to deceive." "'Intent to deceive' means to purposely mislead, to cheat, to trick another, or to cause another to believe as true that which is false." *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 350 (10 Sep. 2014). Each larceny and attempted larceny specification against Appellant requires proof that he

stole the money with the "intent permanently to deprive." This intent may be proven by circumstantial evidence. 2012 *MCM*, pt. IV, ¶ 46.c.(1)(f)(ii).

As he did at trial, Appellant maintains that the errors in filing his travel voucher were due to ignorance, not intention. The record does not support Appellant's contention. Although Appellant's decision to stay with his in-laws may have been reasonable, it was not reasonable for Appellant to essentially force his in-laws to accept a check from him—a check they did not request nor ultimately cash. Despite never having actually paid his in-laws for lodging, Appellant submitted travel vouchers seeking "reimbursement." If Appellant's goal was to ensure they were reimbursed for their "time and inconvenience," it does not follow that Appellant would never ensure the checks were, in fact, cashed by them when he was "reimbursed" by the Government. Instead, Appellant collected the checks that had been returned and deposited them only after the Government became suspicious of his claims, eventually returning the funds to his own accounts. These facts are more than sufficient to establish an intent to deceive and permanently deprive.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence is legally sufficient to support Appellant's conviction beyond a reasonable doubt. *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Moreover, after taking a fresh, impartial look at the evidence, making our own independent determination as to whether the evidence constitutes proof of the required elements of the offenses with which Appellant was

charged, and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

E. Sentence Reassessment

As a final matter, we consider the need to reassess Appellant's sentence after having modified some of the findings on which Appellant was convicted. This court has "broad discretion" in deciding to reassess a sentence to cure error and in arriving at the reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013). We may reassess a sentence only if able to reliably determine that, absent the error, the sentence would have been "at least of a certain magnitude." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000). Our review is guided by the following factors:

> (1) Whether there has been a dramatic change in the penalty landscape or exposure;
>
> (2) Whether sentencing was by members or a military judge alone;
>
> (3) Whether the nature of the remaining offenses captures the gravamen of criminal conduct included within the original offenses and whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses;

> (4) Whether the remaining offenses are of the type with which appellate judges should have the experience and familiarity to reliably determine what sentence would have been imposed at trial.

Winckelmann, 73 M.J. at 15–16.

Applying these principles to the totality of the circumstances, we are confident we can reassess Appellant's sentence. Given the nature of Appellant's remaining convictions, we are confident that Appellant would have received a sentence of at least one month confinement forfeiture of all pay and allowances, and a dismissal.

III. CONCLUSION

The finding of guilty as to larceny in Specification 2 of Additional Charge I is set aside; the lesser-included offense of attempted larceny is affirmed.

The finding of guilty as to Specification 3 of Additional Charge I is affirmed, excepting the figure "20" and substituting therefor the figure "22." The excepted figure is set aside. The substituted figure is affirmed.

The findings, as modified, and the sentence, as reassessed, are correct in law and fact and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings, as modified, and the sentence, as reassessed, are **AFFIRMED**.

FOR THE COURT

KATHLEEN M. POTTER
Acting Clerk of the Court