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.

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, Appel-

[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).

lant wrote and provided Mr. Vernon a check for the amount equivalent to the amount he was entitled to be reimbursed. Each time Appellant provided a check, Mr. or Mrs. Vernon simply placed it in a drawer and eventually returned the check to 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 "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.

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

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 Additional 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 within 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 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). Simi-

(Footnote continues on next page)

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]

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.

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,

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larly, 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 duty 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 jurisdiction. *Morita*, 73 M.J. at 548. We did not specifically address 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.

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.

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–

[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.

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 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 receipt of payment,

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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.

[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.*

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 Speci-

fication 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 factfinder 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