IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim.App. Dkt. No. 39101
Lieutenant Colonel (O-5) JAMES M. HALE, USAF *Appellant*	)	USCA Dkt. No. 18-0162/AF

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

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.

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.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2018). This Court has jurisdiction to review the issues in this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted and adopted.

STATEMENT OF FACTS

Appellant's statement of the facts is generally accepted with the following additional facts.

Appellant admitted that he resided at his in-laws' home by staying in the "guest suite of the house" during the charged timeframes. (J.A. at 393.) At all relevant times during the charged timeframes, Appellant stayed with his in-laws several times from 2011 to 2013 while on valid active duty and inactive duty training (hereinafter, "IDT") orders. (J.A. at 105, 151, 169-70, 226-27, 245-46, 255-274, 304-305, 314-15, 326-27, 340-62, 386-98.) Appellant was allowed to reside at in his in-laws' home for free while he was on orders and reporting for

duty nearby at Joint Base San Antonio-Lackland, TX. (J.A. at 153, 171, 176.) Despite this, Appellant created receipts and wrote checks that purported to show that he paid his in-laws for the periods of time he was on orders and stayed at the residence. (J.A. at 243-44, 253-54, 300-03, 312-13, 323-25, 335, 366, 380, 386-98.)

Specification 2 of Additional Charge I, Attempted Larceny.

Between 16 May 2012 and 30 September 2012, Appellant was on active duty orders. (J.A. at 255-57.) Prior to entering active duty status on 16 May 2012, Appellant arranged to receive automatic disbursements, called a "scheduled partial payment," (hereinafter, "SPP") at set intervals throughout his active duty tour. (J.A. at 87, 105-09, 284, 291.) Indeed, Appellant received three SPPs while in active duty status that included reimbursements for lodging costs. (J.A. at 105-09, 289-99, 509.) Throughout his entire time during this active duty tour, Appellant stayed with his in-laws for free. (J.A. at 153, 171, 176.) After Appellant completed his active duty tour, he created a receipt and attached the receipt to the travel voucher he created on 30 September 2012, which he submitted on 2 October 2012 at 2210 hours when he was not on active duty orders or performing IDT. (J.A. at 109-10, 300.) Appellant was paid his voucher on 12 October 2012. (J.A. at 107, 291.)

Periods of IDT.

As it relates to his convictions, Appellant was on IDT orders during the following relevant periods of time: (1) between 1 October 2012 and 5 October 2012; (2) between 9 October 2012 and 12 October 2012; (3) between 15 October 2012 to 17 October 2012; (4) between 4 November 2013 and 8 November 2013; (5) between 12 November 2013 and 15 November 2013; and (6) between 18 November 2013 and 20 November 2013. (J.A. at 258, 273, 340-362.)[1] Each IDT period was documented on an Air Force Form 40A, *Record of Individual Active Duty Training*. (J.A. at 258, 273, 340-362, 514-538.) For most periods of

[1] Of note, pages 21-29 of Prosecution Exhibit 10 in the record are blank (J.A. 275-83), which include the pages that trial counsel referenced in argument. However, this Court can be confident of what was presented at trial. First, page four (4) of the same exhibit (J.A. at 258) shows a summary of Appellant's IDT status for seven (7) days: 1-5 October 2012 and 9-10 October 2012. Each of those days indicates Appellant was on IDT twice for each of the seven (7) days, totaling fourteen (14) periods of IDT. What follows are fourteen (14) one-page AF Form 40As recording each individual period of IDT for the same days indicated on the summary page. (J.A. at 259-72.) On page nineteen (19) of the exhibit (J.A. at 273), there is a similar summary page that covers five (5) days where Appellant was on IDT twice each day—11-12 October 2012 and 15-17 October 2012—for a total of ten (10) periods of IDT. The following page (J.A. at 274) shows an AF Form 40A recording one (1) period of IDT on 11 October 2018. Therefore, the nine (9) blank pages that follow are the remaining AF Form 40As documenting Appellant's IDTs through 17 October 2012. Second, pages 1 through 29 of Prosecution Exhibit 10 (J.A. at 255-83) are identical to pages 98-100 and 128-53 of Appellate Exhibit XVII (J.A. at 510-38). This is also evident in the testimony at trial referencing this exhibit. (*See* J.A. at 508.) (stating pages 6 through 29 are "all the same form … for different days"). Taken all together, there is little doubt that pages 22-23 of Prosecution Exhibit 10 (J.A. at 276-77) are identical to pages 146-47 of Appellate Exhibit XVII (J.A. at 531-32).

Appellant's IDTs, he was authorized lodging and subsistence. (J.A. at 258-274, 340-62, 514-538.)

Specification 3 of Additional Charge II, Attempted Larceny.

Between 4 November 2013 and 19 November 2013, Appellant completed two four-hour blocks of IDTs from 0800 to 1200 hours and 1300 to 1700 hours. (J.A. at 12, 340-61.) Appellant did not substantiate the SPPs with receipts until after the conclusion of his tour when he filed his final voucher. (J.A. at 12, 107-08, 292-99.) On 20 November 2013, Appellant completed one block of IDT from 0800 to 1200 hours. (J.A. at 362.) Appellant wrote a check, dated 20 November 2013, that purported to pay for his stay at his in-law's home during the period of IDT that ran from 4 November 2013 to 20 November 2013. (J.A. at 366, 397.) It is unclear from the record at what time of day the check was written. Appellant also created a lodging receipt that indicated he had paid for his stay during this period. (J.A. at 365.) Appellant later submitted a voucher to the government with the receipt he created to claim reimbursement for lodging expenses he purportedly paid. (J.A. at 363-64.) After being questioned by the finance office about the lodging receipt and check, Appellant, without authorization, deposited the check into his in-laws' bank account and then subsequently withdrew the funds and then showed proof of the canceled check to

the finance office show the check had cleared. (J.A. at 163-65, 173-74, 367, 369, 397.)

Findings Instructions.

The military judge provided findings instructions to the members, both orally and in writing, that included the phrase "on or about" from the charged specifications. (J.A. at 483, 485-88, 490, 492-97, 499.) Prior to providing the instructions to the members, trial defense counsel did not object to the inclusion of the phrase "on or about." (J.A. at 184-89.)

SUMMARY OF THE ARGUMENT

The Court of Criminal Appeals (hereinafter, "CCA") did not err when it found personal jurisdiction existed over Appellant while he was "staying" with his in-laws. Jurisdiction covers times when a servicemember is subject to the UCMJ and commits acts that are substantial steps in a prosecution for attempt, under Article 80, UCMJ. Here, Appellant made a substantial step satisfying his conviction of attempted larceny when he stayed with his in-laws for free during the charged timeframes and then later filed for lodging reimbursement expenses. In addition, the CCA did not err when finding the military judge correctly instructed the members "on or about" the charged timeframes due to the evidence providing precise dates and time periods that showed when Appellant committed certain acts and when he was subject to the UCMJ. Even if the military judge did err in

instructing the members, Appellant cannot establish material prejudice to a substantial right given the state of the evidence presented, the members could not have found that Appellant committed his misconduct on days when he was not subject to the UCMJ. Finally, the CCA did not err when it found the court-martial had jurisdiction over Specification 2 of Additional Charge I, as modified to affirm the lesser included offense of attempted larceny. The CCA correctly found that Appellant committed prosecutable acts that constituted substantial steps of attempted larceny while subject to the UCMJ.

ARGUMENT

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 DID NOT ERR WHEN IT PROCEEDED TO FIND PERSONAL JURISDICITON EXISTED OVER APPELLANT BECAUSE HE WAS "STAYING" WITH HIS IN-LAWS.

Standard of Review

Jurisdiction is a legal question that is reviewed de novo. United States v. Kuemmerle, 67 M.J. 141, 143 (C.A.A.F. 2009). The burden is on the government to establish jurisdiction by a preponderance of the evidence. R.C.M. 905(c)(2)(B); United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002).

Law

Court-martial jurisdiction exists where: (1) there is jurisdiction over the offense; (2) personal jurisdiction over the accused; (3) and a properly convened court-martial. United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006). As to personal jurisdiction, military courts-martial require that an accused is subject to the UCMJ at the time of an alleged offense. 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)). A member of a reserved component is subject to the UCMJ while the member is on active duty or "while on inactive-duty training." Article 2(a)(1) and (3), UCMJ, 10 U.S.C. § 802(a)(1) and (3). Service regulations may also set forth rules exercising court-martial jurisdiction authority over reserve component personnel under Article 2(a)(3), subject to the limitations set forth under the UCMJ and the Manual for Courts-Martial. R.C.M. 204(a).

Active duty is defined as "full-time duty in the active military service of the United States." 10 U.S.C. § 101(d)(1). Inactive duty training is defined as "a duty prescribed for Reserves by the Secretary concerned," and "special duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned." 10 U.S.C. §

101(d)(7). Servicemembers are not authorized reimbursements for lodging costs when staying with a friend or relative. (J.A. at 403-47.)

Larceny is completed when a servicemember subject to the UCMJ "wrongfully takes, obtains, or withholds, by any means, from the possession of the owner … any money … with intent to permanently deprive or defraud another of the use and benefit of the property or to appropriate it to his own use." Article 121, UCMJ, 10 U.S.C. § 921.

Attempt is an inchoate offense that requires four elements be met:

> (1) [T]hat 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) (citing Manual for Courts-Martial, United States, part IV, para. 4b (2012 ed.) (MCM)). The overt act must "directly tend[] to accomplish the unlawful purpose." MCM, pt. IV, para. 4.c(2) (2012 ed.). However, an overt act does not have to be the last essential act required to complete an offense. Id. In fact, an attempt may still be committed where an accused commits "an overt act, and then voluntarily decide[s] not to go through with the intended offense." Id. An act that amounts to more than "mere preparation" has been interpreted to mean a "'substantial step' toward commission of the crime." Payne, 73 M.J. at 24 (citations omitted).

As it relates to attempt crimes, "[t]he rule in this country seems to be based less upon concerns with the proximity to completion of the crime than on dangers posed by people … seriously intent upon committing specific crimes." United States v. Schoof, 37 M.J. 96, 102 (C.A.A.F. 1993). As a result, the inquiry is focused on "the firmness" of an appellant's resolve to commit the crime. United States v. Jones, 37 M.J. 459, 461 (C.M.A. 1993) (citing Schoof, 37 M.J. at 103 (C.M.A. 1993); United States v. Byrd, 24 M.J. 286, 290 (C.M.A. 1987)). Put another way, a substantial step is one that "is strongly corroborative of the defendant's criminal intent." Schoof, 37 M.J. at 103 (citing Byrd, 24 M.J. at 290).

Mere preparation consists of "devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." Id. A "substantial step must unequivocally demonstrate 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) (citations omitted). This Court has recognized that a "substantial step" is a fact specific determination. Id. Acts that set the "criminal scheme in motion … constitute conduct going beyond mere preparation." United States v. Jones, 32 M.J. 430, 432 (C.M.A. 1991) (citing United States v. Church, 32 M.J. 70, 75 (C.M.A. 1991) (Sullivan, C.J., concurring)). And an act may be a substantial step that goes beyond mere preparation despite several steps remaining to complete

the offense of larceny. United States v. Smith, 50 M.J. 380, 383 (C.A.A.F. 1999) (citation omitted). The acts of an appellant, before, during, and after, the attempt to commit a certain offense under the UCMJ is telling when deciding whether those acts "exceeded mere preparation." Church, 32 M.J. at 73 (finding it clear "that appellant did everything he thought not only necessary but possible to make the enterprise successful – before, during, and after the supposed crime."). Similarly, in analyzing the facts to determine specific intent for attempt, the acts alone are not determinative, but "[t]he circumstances in which those acts were done are also indicative." Jones, 32 M.J. at 432.

Federal circuit courts have considered the meaning of "substantial step" in further detail: (1) An appellant "does not have to get very far along the line toward ultimate commission of the object crime in order to commit the attempt offense." United States v. Turner, 501 F.3d 59, 68 (1st Cir. 2007) (citing United States v. Doyon, 194 F.3d 207, 211 (1st Cir. 1999)); (2) The "main purpose of the substantial step requirement is to distinguish between those who express criminal aims without doing much to act on them and others who have proved themselves dangerous by taking a 'substantial step' down a path of conduct reasonably calculated to end in the substantive offense." Doyon, 194 F.3d at 212; (3) The substantial step itself need not be criminal to constitute an attempt, but it must be necessary to commit the crime and be of such a nature, that in context, one

"could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to commit" the offense. Walters v. Maass, 45 F.3d 1355, 1359 (9th Cir. 1995); and (4) the substantial step need not prove intent by itself, the "intent may need to be proven separately." United States v. Bilderbeck, 163 F.d 971, 975 (6th Cir. 1999).

A CCA "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 includes the authority to approve or affirm "so much of the finding as includes a lesser included offense." Article 59(b), UCMJ, 10 U.S.C. § 859(b). However, a CCA may only affirm a lesser included offense if it is based on a theory presented to the trier of fact. United States v. Standifer, 40 M.J. 440, 445 (C.A.A.F. 1994) (citing United States v. McKinley, 27 M.J. 78, 79 (CMA 1988) (quotation and additional citations omitted).

Analysis

Court-martial jurisdiction exists over all periods of IDT where Appellant was "staying" with his in-laws. On 19 November 2013, and during all periods he was on IDT, personal and subject matter jurisdiction existed over Appellant and his offense while he was "staying" at his in-laws. The CCA determined that, when Appellant was on IDT, jurisdiction was limited to the specific periods of time he

was on IDT, as documented on AF Form 40As. (J.A. at 9-10). These periods were limited to two four-hour blocks where Appellant was present and reported for duty. (J.A. at 9.) Nevertheless, Appellant was "staying" at his in-laws during these blocks of IDT, and thus, subject to the UCMJ.

Even though Appellant reported for duty during the two four hour blocks of IDT, Appellant was contemporaneously "staying" at his in-laws' home during this time period. Appellant argues that it is paradoxical to conclude that Appellant was "not just working, but also 'staying' at his in-laws' house at the same time." (App. Br. at 24). However, Appellant narrowly defines "stay" to mean where one is physically located at any given time. This definition contradicts the plain meaning and ordinary usage of the word in this context. Absent a statutory definition, this Court has considered the "plain meaning" and the "common and approved usage" to define a term. Kuemmerle, 67 M.J. at 143 (citing and quoting United States v. McCollum, 58 M.J. 323, 340 (C.A.A.F. 2003) ("words should be given their common and approved usage") (other citations omitted). In the context of Appellant staying at his in-laws' home, the most accurate definitions for "stay" are

"to live for a while,"[2] "to live in a place for a short time as a visitor,"[3] or "[to] live somewhere temporarily as a visitor or guest."[4]

The regulation judicially noticed by the military judge also uses the word "stay" consistent with the definitions above. (J.A. at 403-34.) One such instance is the regulation's prohibition of reimbursement of lodging expenses "for a member who *stays* with a friend or relative." (J.A. at 403.) (emphasis added.) Clearly, the appropriate definition of "stay" in the case at bar is that Appellant "live[d] for a while" at his in-laws' home or that he "live[d] [at his in-laws' home] temporarily as a visitor or guest" as opposed to defining the CCA's holding in a paradoxical manner to read "stay" to mean Appellant was physically present at his in-laws' home while also on IDT.

This interpretation also accords with the common understanding of "staying" at a lodging facility or in someone's home temporarily as a guest. One's "stay" is not normally understood to mean it is strictly limited to periods of time when the guest is physically present in said quarters. Instead, guests are allowed to leave their belongings and come and go as they please as they attend to the day's

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[2] Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/stay (last visited 1 July 2018).
[3] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/stay (last visited 1 July 2018).
[4] English Oxford Dictionary, https://en.oxforddictionaries.com/definition/stay (last visited 1 July 2018).

business instead of having to haul their luggage and personal items to and fro at every instance they leave the premises. Instead, a "stay" is normally understood to be completed when a guest vacates the quarters and takes all belongings while having the intent to begin "staying" at another location. This is in contrast to Appellant's interpretation where, if taken to its logical conclusion, a "stay" is completed every time the guest leaves the premises, for any period of time.

Most notably, Appellant's definition of "stay" is not supported by his own statements captured in Prosecution Exhibit 39, which were in response to questions posed during a command-directed investigation into the legitimacy of his filed vouchers:

> 4. Concerning your lodging arrangements, Where did you stay?
> A: The house of Mr. Randal Vernon, [], San Antonio, TX.
> 5. Did you *stay* at this particular residence *the entire time period* during this tour?
> A: Yes.
> …
> 8. Did you *stay* at this residence *every tim*e you came to San Antonio for Reserve duty?
> A: Yes.
> 9. If no, *where else* did you stay?
> A: I did not stay *anywhere else*.
> …
> 11. Do you have a cleared check that indicates payment to the owners?
> A: I have requested that if Mr. V[] had not cashed the check that he do so. I gave him a check at the *conclusion of my stay*. I will provide the check upon receipt.
> …

> 19. Why did you fabricate a lodging residence to make it look like a legitimate commercial establishment?
> A: … I had contracted *to stay at the residence* and Mr. Baker told me that a regular bill was required…. The bottom line is that if I had been told by Mr. Baker, or anyone else for that matter, that what I was doing or the lodging location was improper I would not have pursued the issue further and never *stayed* there again.
> …
> 40. Did you stay at this particular residence *the entire time period during this particular tour*?
> A: Yes.
> 62. Did you stay at this particular residence *the entire time period during this particular tour*?
> A: Yes.

(J.A. at 387-89, 392) (emphasis added). Appellant's own statements show the most reasonable interpretation of the word "stay" refers to periods of times he lived at his in-laws' home as a guest instead of limiting it to times he was physically present at the residence. Once Appellant arrived at his place of duty during an IDT, if a coworker asked where he was staying, he would answer "with his in-laws." (R. at 390) (stating "[d]uring my TDYs I also told people I worked with where I was staying.") He would not have answered such a question by stating where he was physically located at that moment.

In addition, Appellant stated that he gave checks "at the conclusion of [his] stay[s]," which, according to the record, reflected a period of time encompassing the entire period of consecutive days that he was on IDT and active duty orders. (J.A. at 105, 151, 169-70, 226-27, 243-46, 253-74, 300-305, 312-15, 323-27, 335,

340-62, 366, 380, 386-98.) This definition of "stay" is also evidently the most appropriate when considering Appellant's fabricated lodging receipts and checks purportedly written to pay for his stays at his in-laws' home showed dates that ran from the first day of his "stay" through the last. (J.A. at 243-44, 253-54, 300-03, 312-13, 323-25, 335, 366, 380, 386-98.) Consequently, this Court should find that Appellant was "staying" at his in-laws' home during the four hour blocks of IDT and, as a result, there is jurisdiction over Specification 3 of Additional Charge II and over Appellant on 19 November 2013.

Turning to the offense of attempted larceny, Appellant's stay at his in-laws' home was a substantial step that amounted to more than mere preparation. When Appellant stayed at his in-laws' home, it "directly tend[ed] to accomplish the unlawful purpose of" wrongfully obtaining reimbursement for lodging expenses. By not actually paying for lodging, a voucher paid to Appellant was not a reimbursement, but a financial net gain that could only be accomplished when Appellant stayed at his in-laws' home for free.

Moreover, staying at his in-laws' home did not have to be "the last essential act required to complete" the offense to constitute a substantial step. MCM, pt. IV, para. 4.c(2) (2012 ed.). It does not matter that the creation of the lodging receipt, writing of the check, or filing of the voucher happened during periods Appellant was not subject to the UCMJ. However, these acts may be considered to show that

Appellant's act of residing at his in-laws was done with the specific intent to commit larceny because the stay was *necessary* to achieve Appellant's aim of profiting from his larcenous scheme. *See* Walters, 45 F.3d at 1359 (stating the substantial step does not need to be criminal, but must be necessary to commit the crime). It does not matter that Appellant was "allowed to stay with his in-laws, just not entitled to compensation for doing so." (App. Br. at 25). Even if, taken by itself, the sole act of staying at one's in-law's home is not inherently criminal, Appellant's stay was necessary to commit the crime. Therefore, it was a substantial step to commit attempted larceny.

For instance, to profit and obtain money through his illegal scheme, Appellant was required to either stay somewhere at zero cost to him and submit a totally false voucher for reimbursement or inflate the amount he was actually due on his voucher if he did indeed pay some amount to stay at a lodging facility. In either scenario, staying somewhere for less than what he would claim on his voucher was *necessary* to commit larceny. Thus, staying at his in-laws' home for free was a critical part of his plan to defraud the government and set his "criminal scheme in motion" constituting "conduct going beyond mere preparation." Jones, 32 M.J. at 432.

Appellant argues that Appellant's stays are not substantial steps because they did not bring him close "to illegally obtaining money from the military."

(App. Br. at 25). However, a substantial step may be several steps removed from actually completing the offense. Smith, 50 M.J. at 383. And the focus of the analysis is not "concerned with the proximity to completion of the crime." Schoof, 37 M.J. at 102.

Appellant also contends that the act of "staying" on its own was only mere preparation. (App. Br. at 25). But that conclusion ignores the evidence of what happened "before, during, and after" Appellant stayed at his in-laws' home, which should be considered in determining whether it was a substantial step. Church, 32 M.J. at 73. Indeed, the circumstances under which Appellant stayed at his in-laws' home are indicative and must be considered. Jones, 32 M.J. at 432. As the Ninth Circuit Court of Appeals quoted in Walters,

> although behavior need not be incompatible with innocence to be punished as an attempt, "it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design" to commit the particular crime charged.

45 F.3d at 1359 (citing United States v. Scott, 767 F2d 1308, 1312 (9th Cir. 1985)) (additional citations omitted). Several facts in the record provide such context.

First, before staying with his in-laws during this period of IDT, Appellant determined they were not interested in being compensated and would not cash any checks received from him for his stays. (J.A. at 153-54, 158-59, 171-74.)

Knowing this, Appellant wrote a check purporting to pay for his stay with his submitted voucher after his stay. (J.A. at 366.) Second, Appellant created a false lodging receipt that indicated he had paid for his stay. (J.A. at 365.) Third, Appellant submitted a voucher to the government with the false receipt to claim reimbursement for the lodging expense he purportedly paid. (J.A. at 363-64.) Fourth, after being questioned about the lodging receipt and check, Appellant, secretly and without permission, deposited the check into his in-laws' bank account and then subsequently withdrew the funds. (J.A. at 163-65, 173-74, 367, 369, 397.) These "circumstances in which those acts were done are [] indicative" of Appellant's specific intent to attempt to commit larceny. Jones, 32 M.J. at 432. The evidence is clear that at the time Appellant stayed with his in-laws, he had already formed the specific intent to commit larceny. Therefore, the second element of attempted larceny is met. Again, it does not matter that "staying" with in-laws is not a crime. The intent existed, and "staying" was necessary to effectuate the larceny. Appellant had to stay with his in-laws to effectuate the crime, because if he had stayed in billeting at Joint Base San Antonio-Lackland, Texas, or at an off-base lodging facility, he would have been charged for his stay.

As discussed above, staying with his in-laws for free was an indispensable part of his scheme. And Appellant's actions surrounding his substantial step of staying at his in-laws' residence show that it "exceeded mere preparation."

Church, 32 M.J. at 73. Examples of acts that would amount to preparations in Appellant's case would be securing permission to stay at his in-laws' home or ascertaining whether his stay there would be free. These acts, unlike staying at his in-laws' home, do not take a substantial step "down the path of conduct reasonably calculated to end in the substantive offense." Doyon, 194 F.3d at 212. Combined with proof of his specific intent to attempt to commit larceny, Appellant's stay at his in-laws' home was a "direct movement toward the commission after the preparations [were] made." Schoof, 37 M.J. at 103. Appellant went beyond "devising or arranging the means or measures necessary for the commission of the offense" and, instead, made a "direct movement toward the commission after the preparations are made." Id. Thus, Appellant's stays at his in-laws' home were substantial steps that amounted to more than mere preparation.

In sum, Appellant's stay was a substantial step taken during the charged timeframe in Specification 3 of Additional Charge II and while Appellant was subject to the UCMJ. This was the exact theory of the prosecution's case in presenting the evidence to the members. (J.A. at 206.) Therefore, Specification 3 of Additional Charge II should be affirmed.

WHEREFORE, the United States respectfully requests this Honorable Court deny Appellant's request to set aside the finding of guilty for Specification 3 of Additional Charge II.

II.

THE MILITARY JUDGE DID NOT COMMIT PLAIN ERROR WHEN INSTRUCTING THE MEMBERS THEY COULD CONVICT APPELLANT FOR CONDUCT "ON OR ABOUT" THE DATES ALLEGED, AND APPELLANT WAS NOT PREJUDICED.

Standard of Review

"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) (quoting United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008)).

Law

Military judges "shall give the members appropriate instructions on findings." R.C.M. 920(a). Failure to object to an instruction constitutes waiver in the absence of plain error. R.C.M. 920(f). The instructions are reviewed for plain error when trial defense counsel does not object. United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013) (citing United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012)). To show plain error, Appellant has the burden to show there was "(1) error that [was] (2) clear and obvious and (3) result[ed] in material prejudice to his substantial rights." United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation omitted). Unless all three prongs are established, an appellant's claim must fail. United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Appellant cites to United States v. Thompson in support of his argument; however, Thompson is distinguishable from this case. 59 M.J. 432 (C.A.A.F. 2004). In Thompson, this Court found that a military judge erred when he failed to engage the appellant with discussions regarding the fact "that a substantial portion of the time period set forth in the proposed instructions included dates in which prosecution of the lesser-included offenses was barred by the statute of limitations." 59 M.J. at 439. This Court found the military judge erred because he did not either obtain a knowing and voluntary waiver to the statute of limitations from the appellant, or in the alternative, instruct the members with modified instructions as to the lesser included offenses. Id. at 439-40.

The appellant in Thompson was accused of raping his stepdaughter at various locations, and the charged time frame spanned three and a half years. *See generally* 59 M.J. 432. Testimony elicited at trial indicated that the appellant performed various sex acts on his stepdaughter, not only vaginal intercourse, from October 1985 to March 1996. Id. The members returned a verdict of not guilty of rape, but guilty of the lesser included offense of indecent acts with a child. Id. at 433. The problem that arose was due to the fact that the summary court-martial convening authority received the charges on 3 January 2000. Id. at 435. So the appellant could only be tried for lesser included offenses occurring on or between 3

January 1995 and 1 March 1996 due to the five year statute of limitations. Id. at 435-36.

As a result, this Court noted that the military judge had two options, which hinged on whether the appellant knowingly and voluntarily waived the statute of limitations: (1) advise the appellant of his right to assert the statute of limitations and then obtain a knowing and voluntary waiver of that right, pursuant to the obligations prescribed in R.C.M. 907(b)(2)(B), to instruct the court members with the original charged timeframe as to the lesser included offense; or (2) if the appellant asserted the statute of limitations or was not advised of his right to do so under R.C.M. 907(b)(2)(B), instruct the court members that the appellant could be found guilty of the lesser included offense only if it occurred between 3 January 1995 and 1 March 1996. Id. at 439. Ultimately, this Court held that it was "the failure of the military judge to focus the panel's deliberations on the narrower time period permitted by the statute of limitations" that required the finding of guilt to be set aside. Id. at 440.

In contrast, this Court found jurisdiction over a child pornography distribution offense when a substantial step to the crime was committed prior to the appellant entering active duty. Kuemmerle, 67 M.J. 141. This Court held that "distribution" consisted of two acts: (1) posting the image; and (2) delivery of the image. Id. at 144. In Kuemmerle, the appellant posted a photo containing child

pornography in an online forum prior to entering active duty. Id. at 142. After the appellant entered active duty, an investigator accessed and viewed the image. Id. This Court found that the appellant was subject to the UCMJ at the time the delivery occurred, and consequently the court-martial had jurisdiction over the offense, even though the first act of distribution, the posting of the image, occurred prior to entry onto active duty. Id. at 144-45.

The words "on or about" generally connote any time within a few weeks of the specified date. United States v. Brown, 34 M.J. 105, 110 (C.M.A. 1992) (citations omitted). In general, a variance between the date charged and the date established at trial is not fatal if the latter is within the statute of limitations. United States v. Gehring, 20 C.M.R. 373, 376 (C.M.A. 1956). "On or about" means that the prosecution does not have to prove the exact date, "if a date reasonably near is established." United States v. Hunt, 37 M.J. 344, 347 (C.A.A.F. 1993) (citing United States v. Nersesian, 824 F.2d 1294, 1323 (2nd Cir. 1987)); Brown, 34 M.J. at 110); *see also See* United States v. Allen, 50 M.J. 84, 87 (C.A.A.F. 1999) (finding where "a charge employs 'on or about' language, the Government is not required to prove the specific date alleged in the charge"). There is an exception to this general rule when time is of the essence to the charged offense. *See* United States v. Parker, 59 M.J. 195 (C.A.A.F. 2003). For example, time is of the essence when an accused is charged with several similar

acts at the same place or if it changes the nature of the offense or maximum permissible punishment. United States v. Krutsinger, 35 C.M.R. 207, 210 (C.M.A. 1965).

"The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against." R.C.M. 307(c)(3), Discussion at (D)(i). It is proper to allege the date of an offense as "on or about" a specified day. R.C.M. 307(c)(3), Discussion at (D)(ii).

A court-martial has jurisdiction if it is properly convened, the accused is subject to court-martial jurisdiction, and the offense is subject to court-martial jurisdiction. R.C.M. 201(b). "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" are subject to the UCMJ. Article 2(a)(1), UCMJ, 10 U.S.C. §802(a)(1). Additionally, "[m]embers of a reserve component while on inactive duty training" are subject to the UCMJ. Article 2(a)(3), UCMJ, 10 U.S.C. §802(a)(3). A reserve member remains subject to the jurisdiction of the UCMJ for offenses committed during a period of active duty or IDT, even after the active duty or IDT period has ended. Article 3(d), UCMJ, 10 U.S.C. §803(d).

Analysis

A. The military judge did not err.

The military judge's instructions to the members that they could convict Appellant for conduct "on or about" the dates alleged in each specification were not erroneous—plainly or otherwise. It is well established that charging "on or about" a specified day is proper. R.C.M. 307(c)(3), Discussion. In fact, the language used in charging an accused is for the purpose of identifying the offense "and enabl[ing] the accused to understand what particular act or omission to defend against." R.C.M. 307(c)(3), Discussion. It is not the charging language that establishes jurisdiction. Jurisdiction is established based on when the offense was committed and Appellant's duty status at the time of the offense. R.C.M. 201(b)(4) and (b)(5); United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006) (citing Solorio, 483 U.S. 439).

B. Appellant suffered no prejudice.

Even if the military judge plainly erred by using the "on or about" language in the instructions, Appellant cannot demonstrate material prejudice to a substantial right. While the government, when charging "on or about," is not generally required to prove "exact date[s]" if dates "reasonably near" are proven, it did so here with precision. Hunt, 37 M.J. at 347. The "finite time frame" charged did not mislead Appellant nor the members in determining what dates he committed

crimes that subjected him to a court-martial's jurisdiction. Id. Moreover, the evidence in this case was replete with precise dates: typed dates on orders indicating Appellant's duty status, handwritten dates on checks, typed dates on receipts, printed dates on bank statements, and electronic time stamps on vouchers. This was not a case of ambiguous witness testimony as to certain dates or timeframes necessary to establish jurisdiction. The dates of Appellant's misconduct are literally captured in black and white.

This is in stark contrast to Thompson, where the conviction relied solely on the memory of an individual who was a child at the time she was victimized, and was testifying several years after the fact. No firm dates were established in Thompson, only generalizations; and even then the evidence seemed to show the misconduct happened outside the statute of limitations. Here, Appellant's convictions were based on dates certain that were established by competent evidence. Any "variance between the date[s] charged and the date[s] established at trial [are] not fatal" to the convictions because the latter were dates when Appellant was subject to the UCMJ. *See* Gehring, 20 C.M.R. at 376 (C.M.A. 1956) (finding the latter not fatal because the evidence was "within the period of limitation").

Similarly, Appellant suffered no prejudice from the charged "on or about" language, because the members were not presented with evidence that would have allowed them to convict Appellant for conduct outside the charged timeframes.

Appellant was charged with three specifications of larceny, four specifications of attempted larceny, and one specification of making a false official statement. Appellant alleges that the military judge's instructions for each specification prejudiced him, but claims the error "most evidently affected" the Specification[5] of Charge II, Specifications 1[6] and 2[7] of Additional Charge I and Specification 3[8] of Additional Charge II. (App. Br. at 33). However, Appellant suffered no harm for all other specifications that covered periods he was on active duty orders, because Appellant's acts during those timeframes were limited to acts committed while he was subject to the UCMJ.[9] Appellant was not on active duty orders during the charged timeframes on 12 November 2013[10] and 19 November 2013,[11] when he was in IDT status on both occasions. (J.A. at 226-27, 245-46, 255-83, 304-05, 314-16, 326-27, 340-362.)

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[5] Attempted larceny "on or about 12 November 2013" in violation of Article 80, UCMJ, 10 U.S.C. § 880.
[6] Larceny "between on or about 26 June 2011 and on or about 30 September 2011" in violation of Article 121, UCMJ, 10 U.S.C. § 921.
[7] Larceny "between on or about 16 May 2012 and on or about 30 September 2012" in violation of Article 121, UCMJ, 10 U.S.C. § 921.
[8] Attempted larceny "on or about 19 November 2013" in violation of Article 80, UCMJ, 10 U.S.C. § 880.
[9] Appellant was on active duty during the charged timeframe of Specification 3 of Additional Charge I as modified by AFCCA. United States v. Hale, 77 M.J. 598, 607 (A.F. Ct. Crim. App. 19 January 2018) (J.A. at 13-14.)
[10] The date charged in the Specification of Charge II.
[11] The date charged in Specification 3 of Additional Charge II.

C. The members were not presented with evidence that Appellant committed misconduct outside the charged timeframes.

Appellant's fears in the case *sub judice* that the panel members "were given the option of relying on a legal theory devoid of jurisdiction" are unfounded. (App. Br. at 31). Any acts outside the charged timeframes were only presented to the members as circumstantial evidence to infer Appellant's state of mind, as discussed below. Panel members must reckon the facts in evidence with the charges and specifications before them. They cannot simply make up information and convict Appellant of whatever they choose. It is not believable to suppose the members manufactured false dates and actions in their minds and then convicted Appellant based on those ideas merely because the language "on or about" existed in the specifications.

Instead, the panel found Appellant guilty as charged. (J.A. at 539-43.) Using a common sense approach to interpreting the members' findings, the findings mean that the members convicted Appellant of acts committed during the charged timeframes, which coincide with when Appellant was subject to the UCMJ. As such, the military judge did not commit plain error when he instructed the members using the "on or about" language.

D. The members could have properly relied on acts outside the charged timeframe to establish Appellant's intent.

Appellant also contends that the members were required "to rely on acts outside of when [Appellant] was subject to UCMJ jurisdiction." (App. Br. at 32 (citing J.A. 226-27, 234, 242, 243-44, 255-74, 284, 291, 294-96, 298, 300-03)). However, this was not improper as it was circumstantial evidence proving Appellant's specific intent when he *was* subject to the UCMJ. Both attempt and larceny require the prosecution to prove specific intent. Article 80, UCMJ, 10 U.S.C. § 880; Article 121, UCMJ, 10 U.S.C. § 921. Circumstantial evidence may be used to prove specific intent for larceny and attempted larceny. MCM, pt. IV, para. 46.(f)(ii) (2012 ed.). The acts referenced by Appellant do just that. Evidence that Appellant committed acts when he *was not subject* to the UCMJ is still relevant and permissible to provide context to his acts when he *was subject* to the code. And these acts prove that he had the specific intent to permanently deprive. More specifically, evidence that Appellant wrote checks or created lodging receipts when not subject to the code, could be considered by the members to find Appellant had the specific intent to permanently deprive while staying with his in-laws during periods he was subject to the UCMJ. Therefore, the members' reliance on Appellant's acts when he was not subject to the UCMJ are still appropriate.

E. Trial counsel's arguments did not prejudice Appellant.

In addition, Appellant's concerns based on various points during trial counsel's findings arguments are also unfounded. (App. Br. at 31 (citing J.A. 191, 196, 198-200, 203-05, 221.)). At no point during trial counsel's arguments did his references to the evidence imply Appellant was guilty for any periods outside of the charged timeframes. On the contrary, trial counsel made several statements during argument recognizing that Appellant could only be found guilty for acts occurring while he was subject to the UCMJ. (J.A. at 198, 206, 221.)

Further, the military judge instructed the members that counsels' arguments are not evidence and that any explanations of the law that was inconsistent with the court's instructions should be disregarded. (J.A. at 483-07.) Therefore, trial counsel's argument on the law and evidence did not prejudice Appellant due to the presumption that court members follow a military judge's instructions. United States v. Custis, 65 M.J. 366, 372 (C.A.A.F. 2007.). As such, any questions regarding jurisdiction posed by the members during trial on the merits (*See* J.A. at 147-48) resulted in no prejudice because it was before the military judge fully instructed the members on the law.

Notwithstanding the presumption that the members followed the military judge's instructions, trial counsel's argument did not prejudice Appellant as it relates to the "on or about" language. Regarding all of the specifications of which

Appellant was found guilty, it is uncontroverted that Appellant stayed with his in-laws during the charged timeframes. (J.A. at 150-51, 169-70, 386-98.) When considering this critical fact while reviewing the record, it is clear that trial counsel's arguments on the relevant specifications did not cause material prejudice to Appellant.

1. *Trial counsel's argument on Specification 1 of Additional Charge I, larceny "between on or about 26 June 2011 and on or about 30 September 2011."*

As to Specification 1 of Additional Charge I, trial counsel did not implore that the panel consider the "on or about" language when deliberating. Instead, trial counsel clearly linked the charged timeframe of "between on or about 26 June 2011 and on or about 30 September 2011" to a particular document, Prosecution Exhibit 1 (J.A. at 226-27.). This evidence proved that Appellant was on active duty, not before or after, but during the charged timeframes. (J.A. at 191.)

2. *Trial counsel's argument on Specification 2 of Additional Charge I, larceny "between on or about 16 May 2012 and on or about 30 September 2012."*

As to Specification 2 of Additional Charge I, trial counsel explained the circumstances that showed Appellant committed larceny within the charged timeframe without using the "on or about language." (J.A. at 195-96.) Subsequently, trial counsel did explain, as an alternative theory that the panel could use the "on or about" language to find Appellant guilty based on evidence that he received a payment on 12 October 2012, which was outside of the charged

timeframe; however, Appellant was still subject to the UCMJ on 12 October 2012 and trial counsel tied the language to precise times supported by the evidence, pages 22-23 of Prosecution Exhibit 10[12] (J.A. at 275-83 (found at J.A. at 530-38), and Prosecution Exhibit 54 (J.A. at 509). (J.A. at 196-97.) Thus, trial counsel's argument did not ask the members to find Appellant guilty of a timeframe where he was not subject to the UCMJ.

3. Trial counsel's argument on Specification 1 of Additional Charge I, larceny "between on or about 20 October 2012 and on or about 3 December 2012."

In regards to Specification 3 of Additional Charge I, trial counsel made no reference to the "on or about" language, but did emphasize that when Appellant was not on orders, "the military court doesn't have jurisdiction over him." (J.A. at 198.) And during his argument, trial counsel again pointed directly to evidence—Prosecution Exhibits 17 (J.A. at 304-05.), 18 (J.A. at 306-11.) and 21 (J.A. 314-16.)—that showed the precise dates Appellant was subject to the UCMJ within the charged timeframe. (J.A. at 197-99.) Trial counsel did the same when arguing the elements of the Specification of Charge II, by pointing directly to evidence—Prosecution Exhibit 32 (J.A. at 350-51)—to establish Appellant was subject to the UCMJ on the charged day. (J.A. 200-01.)

[12] As discussed in footnote 1, the relevant pages are found at J.A. at 530-38.

4. Trial counsel's argument on Specification 1 of Additional Charge II, attempted larceny "between on or about 3 November 2012 and on or about 3 December 2012."

As to Specification 1 of Additional Charge II, trial counsel again focused on evidence showing Appellant was on orders during the charged timeframe—Prosecution Exhibits 21 (J.A. at 314-316.), 25[13] (J.A. at 325)—and did not reference the "on or about" language. (J.A. at 203-05.) Likewise, when arguing the elements of Specification 2 of Additional Charge II, trial counsel did not argue the "on or about language," but referenced evidence—Prosecution Exhibit 8 (J.A. at. 253.)—that showed Appellant was on orders during the charged timeframe. (J.A. at 205.) Notably, trial counsel stated to the members that "the only thing the government could do is charge an attempt" because "[u]nfortunately, it was after he was off orders." (J.A. at 206.) Trial counsel made a similar general comment regarding jurisdiction stating that the attempted larcenies "would've been completed charges but for" the government catching on to it and "but for him falling off the jurisdiction of this court." (J.A. 221.)

[13] Trial counsel did not explicitly use the words "Prosecution Exhibit 25" when referencing the evidence; however, his references to "the check, $3286" and the date on the check, "3 December 2012," match the check in Prosecution Exhibit 25.

5. Trial counsel's argument on Specification 3 of Additional Charge II, attempted larceny "on or about 19 November 2012."

As to Specification 3 of Additional Charge II, trial counsel once again did not argue the "on or about" language, but referenced evidence, Prosecution Exhibit 32 (J.A. at 340-62.), to show Appellant was on orders during the charged date. (J.A. at 206.) Trial counsel's references to Appellant writing "that check" and creating "that lodging receipt" was proper argument of circumstantial evidence that proved Appellant's intent to attempt larceny during the charged date of 19 November 2013. (J.A. at 206.) Moreover, the specification was for an attempt, not a completed larceny; and the members were clearly instructed by the military judge that they must find Appellant "stay[ed] at the private residence of his in-laws … [wrote] a check … and/or [created] a lodging receipt reflecting his stay" during the timeframe charged. (J.A. at 497.)

In addition, the evidence showed that Appellant stayed at his in-laws on the date in question, created a lodging receipt dated 19 November 2013, and wrote a check dated 20 November 2013. (J.A. at 365, 366, 395, 397.) And should this Court find that the members could not find the lodging receipt and check were created when Appellant was subject to the UCMJ, the evidence is undisputed that Appellant "stayed at the private residence of his in-laws" on 19 November 2013, and this Court should nevertheless affirm the findings as to Specification 3 of Additional Charge II based on the United States' answer to Issue I above.

Simply put, to the extent that this Court finds a court member may have been influenced by the arguments of counsel, trial counsel's argument was focused on evidence that either occurred squarely within the charged timeframes (i.e., Appellant staying with his in-laws) or referenced circumstantial evidence that proved Appellant's larcenous specific intent (i.e., creating fraudulent lodging receipts, and writing checks purporting to pay his in-laws) for staying with his in-laws while he was subject to the UCMJ. Trial counsel's argument did not direct the members to find Appellant guilty of any conduct outside of the periods he was subject to the UCMJ.

In conclusion, even if this Court finds the military judge's instructions erroneous, Appellant was not prejudiced. As previously stated, the evidence presented at trial clearly showed all of Appellant's misconduct fell well within the charged timeframes. What Appellant alludes to in his brief is that the military judge should have instructed the members that they must find that Appellant's misconduct fell inside the charged timeframe, and not "on or about." But that is in essence what the members did anyway. Even if the military judge had instructed the members this way, they still would have returned a verdict of "guilty as charged" because the evidence presented indisputably showed that the misconduct occurred within the charged timeframes and not on dates outside of, but close to,

the charged timeframe. Consequently, Appellant cannot establish prejudice—material or otherwise—and he is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court deny Appellant's request to set aside the findings for Charge II and its specification, Specifications 1 and 2 of Additional Charge I, and Additional Charge II and its specifications, and the sentence.

III.

THE LOWER COURT DID NOT ERR 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.

Standard of Review

Jurisdiction is a legal question and is reviewed de novo. Ali, 71 M.J. at 261.

Law

The law set out in Issue I above is adopted here for Issue III.

Larceny requires that there must be "a taking, obtaining, or withholding" of property that is wrongful. Article 121, UCMJ, 10 U.S.C. § 921. An obtaining is wrongful when property is acquired by false pretenses. *See* United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010) (noting the term "'larceny' encompasses … obtaining property by false pretenses") (citations omitted); *see also* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judge's*

Benchbook, para. 3-46-1 (1 January 2010) ("[a]n obtaining is wrongful only when it is accomplished by false pretenses with a criminal state of mind").

Conversely, the theory of wrongful withholding larceny contemplates the scenario where the property comes into possession of the appellant, whether legally or illegally, but is later wrongfully withheld from its rightful owner. *See* United States v. Hale, 28 M.J. 310, 311 (C.M.A. 1989) (holding that "[e]ven though appellant rightfully obtained possession of the vehicle, his retention of it beyond the period contemplated by the rental contract was a wrongful withholding from the possession of the owner within the meaning of Article 121 of the Uniform code) (citations omitted); *see also* MCM, pt IV. para. 46.c(1)(b) (2012 ed.) (stating "a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement"). In addition, a withholding arises "when a return … or delivery is due" and an appellant fails to return property to its rightful owner. MCM, pt IV, para. 46.c(1)(b) (2012 ed.).

Analysis

The lower court did not err when affirming Specification 2 of Additional Charge I, as modified to the lesser included offense of attempted larceny in violation of Article 80, UCMJ. (J.A. at 12.)

Appellant's three assertions that the CCA erred are incorrect: (1) "the remaining acts did not constitute a unit of prosecution;" (2) "even if they did, they

were not substantial steps;" and (3) "even if they were substantial steps, the acts … only support a withholding theory of larceny, which was not presented to the members and therefore could not be approved as a lesser-included offense." (App. Br. at 34). First, Appellant committed prosecutable acts during the charged timeframe that are "overt" under Article 80, UCMJ. Appellant's acts of lodging with his in-laws for free and obtaining the scheduled partial payments (hereinafter, "SPP") are prosecutable overt acts under Article 80, UCMJ. Both acts are overt because they "directly tend[ed] to accomplish the unlawful purpose" of obtaining reimbursement payments to which Appellant was not legally entitled and, therefore, prosecutable under Article 80, UCMJ. MCM, pt IV, para. 4.c(1) (2012 ed.).

Appellant reads this Court's decision in Hines to stand for the proposition that an appellant may only be convicted of larceny or an attempt thereof if the appellant was subject to the UCMJ "at or near the starting point of the illegal activity." (App. Br. at 35); United States v. Hines, 73 M.J. 119, 122, 123 (C.A.A.F. 2014). However, Hines does not stand for the rule Appellant suggests. The Court's relevant holding in Hines was that "the starting point of the illegal activity" is germane in determining whether an accused may be convicted of one offense or many. Id. Hines does not suggest that an appellant may only be convicted of larceny, or attempted larceny, if he was subject to the UCMJ at "the

starting point of the illegal activity." In fact, this reading of Hines is contrary to a plain reading of the elements of attempt under Article 80, UCMJ. Article 80, UCMJ, requires an overt act that "directly tends to accomplish the unlawful purpose." MCM, pt IV. para. 4.c(1) (2012 ed.). None of the elements require or suggest that the overt act be "at or near the starting point of the illegal activity." The only temporal condition is that the overt act be done contemporaneously with the "specific intent to commit a certain offense under the code." Id. Appellant's acts of staying with his in-laws for free and receiving the SPPs "directly tend[ed]" to accomplish the purpose of receiving the reimbursements to which Appellant was not legally entitled. Id.

In addition, Appellant's position is contrary to this Court's opinion in Kuemmerle. 67 M.J. 141. There, the appellant was convicted of distribution of child pornography. Id. As discussed above in Issue I, this Court found that the offense consisted of two acts: (1) the appellant's posting of the image online prior to entering active duty; and (2) the receipt of the image by a law enforcement agent after appellant entered active duty. Id. at 144. This Court upheld the conviction, finding jurisdiction over the offense and the appellant because the delivery occurred when he was subject to the UCMJ. Id. at 144-45. The reasoning in Kuemmerle is directly applicable to rebut Appellant's position.

Appellant scheduled the SPPs, filed his voucher for payment, and received his final reimbursement payment while he was not subject to the UCMJ, much like when the appellant in Kuemmerle posted the image online. And as when the delivery of the image in Kuemmerle occurred, Appellant's receipt of the SPPs and staying with his in-laws occurred while subject to the UCMJ. As a result, similar to Kuemmerle, the fact that Appellant's scheme began prior to being subject to the UCMJ does not divest a court-martial from exercising jurisdiction over subsequent acts committed while he was subject to the UCMJ. As will be discussed further below, other evidence presented demonstrates that at the time Appellant stayed with his in-laws and had already received SPPs, he had formed the specific intent to perpetrate his larcenous scheme. Therefore, Appellant's actions committed while subject to the UCMJ are prosecutable overt acts under Article 80, UCMJ, as attempted larceny.

As to Appellant's second assertion, his acts were substantial steps that amounted to more than mere preparation. Lodging for free at his in-laws' home and receiving the SPPs went beyond "devising or arranging the means or measures necessary for the commission of the offense … [and] preparatory steps." MCM, pt IV. para. 4.c(2) (2012 ed.). Appellant's stay at his in-laws' home for free during his reserve duty was necessary so as not to incur a debt and to receive the whole lodging reimbursement as a net gain. Any other lodging arrangements, such as on-

base billeting or an off-base hotel, would have cost Appellant money and would have made any payments he received from the government true reimbursements to which he would have been legally entitled. Such reimbursements for actual lodging costs would not have been larceny. Accordingly, the free stays at his in-laws and receipt of the SPPs were "necessary for the commission of the offense." Id. Indeed, these actions were "direct movement[s] toward the commission of the offense," and it does not matter that they were not "the last act essential to the consummation of the offense." Id.

Furthermore, the circumstantial evidence surrounding this specification proved Appellant's specific intent to commit larceny while taking the substantial steps. Appellant received three SPPs and stayed at his in-laws' home for free all while in active duty status during the charged timeframe. The receipt of the SPPs combined with: (1) Appellant's scheduling of the SPPs before entering active duty status; (2) filing of his final voucher after leaving active duty status; and (3) staying with his in-laws for free while on active duty status, informed the members of Appellant's specific intent to attempt to commit larceny during the charged timeframe. Consequently, staying at his in-laws' residence for free and receiving the SPPs were substantial steps towards attempted larceny taken by Appellant.

In response to Appellant's third assertion, his acts were supported by a theory presented to the members. Contrary to Appellant's assertions, the

prosecution's theory supported a finding of guilty for a taking or obtaining theory of larceny and not a withholding theory. (App. Br. at 34, 37). It is undisputed by Appellant that it was illegal for him "to *obtain* compensation for staying for free at his in-laws" based on the authorization he filed before he was subject to the UCMJ and the voucher he filed after he was subject to the UCMJ. (App. Br. at 35 (citing J.A. at 12) (emphasis added)).

The evidence most logically supports the finding that Appellant wrongfully *obtained* the SPPs between 16 May 2012 and 30 September 2012, as opposed to a theory that he *withheld* the money. As correctly identified by the CCA, Appellant's travel fraud scheme was set in motion on 3 May 2012 when he ensured he would receive the SPPs. (J.A. at 12.) A withholding theory is inapplicable to Appellant's case because he obtained the payments on false pretenses pursuant to scheduling the payments on 3 May 2012. He was not required to substantiate the scheduling of the SPPs until filing his final voucher at a date after the conclusion of his tour. (J.A. at 12, 107-08, 292-99.) In other words, Appellant did not rightfully obtain possession of the payments at the outset and then later withhold it from the rightful owner as the appellant did in Hale. 28 M.J. 310. Thus, Appellant

wrongfully[14] obtained all three SPPs. Appellant did not fail to return the property to its rightful owner "when a return … or delivery [was] due," as is required under a withholding theory of larceny because no such due date existed. MCM, pt IV. para. 46.c(1)(b) (2012 ed.). He was *never* entitled to receive any compensation for staying with his in-laws. Appellant's actions are more accurately categorized as an obtaining theory of larceny under Article 121, UCMJ. And the theory of wrongfully obtaining the payments: (1) is supported by the evidence presented at trial (J.A. at 107-08, 284, 291, 294-96, 298, 300-03); (2) was argued to the members by trial counsel (J.A. at 195-97); and (3) properly instructed by the military judge to the members. (J.A. at 488-89). Thus, the CCA did not err when affirming Specification 2 of Additional Charge I, as modified to the lesser included offense of attempted larceny in violation of Article 80, UCMJ.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the lower court's finding that the court-martial had jurisdiction over Specification 2 of Additional Charge I, as modified to affirm the lesser included offense of attempted larceny.

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[14] As similarly argued in Issue I, Appellant's actions of staying for free at his in-laws and filing the false voucher after completing his active duty tour circumstantially prove that his request to receive SPPs initiated on 3 May 2012 was fraudulent from the outset. Therefore, Appellant's receipt of the three payments was wrongful due to his intent to illegally obtain them being formed on 3 May 2012.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the decision of the Air Force Court of Criminal Appeals.

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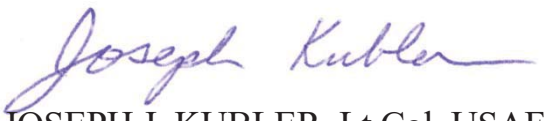

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 July 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 11,030 words.

This brief complies with the typeface and type style requirements of Rule 37.

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