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

**Before**
**R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**RONALD F. MURPHY, JR.**
**PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201300100**
**SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 20 November 2012.
**Military Judge:** Col Philip Betz, USMC.
**Convening Authority:** Commanding Officer, Marine Aviation Logistics Squadron 39, Marine Aircraft Group 39, Camp Pendleton, CA.
**Staff Judge Advocate's Recommendation:** LtCol K.C. Harris, USMC.
**For Appellant:** LT Jared Hernandez, JAGC, USN.
**For Appellee:** LCDR Brian C. Burgtorf, JAGC, USN; Capt Matthew M. Harris, USMC.

**29 October 2013**

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**OPINION OF THE COURT**

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

PER CURIAM:

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of attempted larceny, disrespect toward a noncommissioned officer, larceny, and housebreaking, in violation of Articles 80, 91, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 891, 921, and 930. The members sentenced him to

be confined for 90 days and to be discharged with a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

On appeal, the appellant argues that the evidence against him at trial was legally and factually insufficient to sustain his guilty finding for housebreaking.[1] After careful consideration of the record of trial and the parties' pleadings, we conclude that the findings and sentence are correct in law and fact. Further, we find no error materially prejudicial to a substantial right of the appellant.[2] Arts. 59(a) and 66(c), UCMJ.

**Factual Background**

One morning while making rounds through the barracks, the duty noncommissioned officer (DNCO) discovered an unsecured door to a room on the fourth deck. Opening the door, he called out

[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] At his arraignment on 15 October 2012, following the military judge's advice on his forum rights, the appellant reserved forum selection and reserved formal entry of pleas. Record at 7, 9. On 22 October 2012, a different military judge presided at a pretrial motion session and noted that election of forum and entry of pleas were reserved. *Id*. at 14. That same day, trial defense counsel submitted to the military judge a written notice of forum and pleas, indicating that the appellant elected trial by members with enlisted representation and that the appellant pleads not guilty to all charges and specifications. Appellate Exhibit XI at 11. From 19-20 November 2012, a third military judge presided over the two-day trial. During his preliminary instructions, the military judge advised the members that "[a]t an earlier session of this court, the [appellant] entered pleas of not guilty to all charges and specifications." Record at 86. The appellant, through counsel, fully participated in voir dire, challenges, and presentation of evidence before the panel without objection to the court's composition. We are satisfied that the appellant was tried by a court composition of his choosing. We find that the military judge's failure to obtain the appellant's forum election on the record was merely a procedural error that did not materially prejudice a substantial right of the appellant. *United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005); *United States v. Morgan*, 57 M.J. 119, 122 (C.A.A.F. 2002).

Similarly, the appellant voiced no objection when the military judge advised the panel that the appellant previously pleaded not guilty to all offenses. The military judge's assertion was in agreement with the written notice submitted by trial defense counsel, and also in full accordance with the appellant's legal presumption. *See United States v. Jackson*, No. 200900427, 2010 CCA LEXIS 65, *2, n.1, unpublished op. (N.M.Ct.Crim.App. 25 May 2010) (finding no error where pleas and forum selection were reserved at arraignment but never entered onto the record by the appellant). Although the record lacks formal entry of pleas, we find that this deficiency did not materially prejudice a substantial right of the appellant. Art. 59(a), UCMJ.

but received no response. A short time later, he went back to the same room to check again. This time he entered the room, took a look around and, upon seeing no sign of anyone present, proceeded to leave. As he passed by the bathroom, the appellant stepped out.

The appellant was restricted to the barracks at the time. When the DNCO asked what he was doing, the appellant replied that he had no hot water in his room and had permission to use the shower in this room. The DNCO noticed that he was fully clothed in jeans, a black t-shirt and "doo-rag" on his head. When he asked who gave him permission, the appellant struggled to name either individual listed on the placard outside the door. The DNCO also noticed black wires protruding from the pocket of the appellant's jeans, which the appellant indicated was a laptop charger he was borrowing. The DNCO then instructed the appellant to place the charger on a nearby table and accompany him downstairs to the duty hut.

Once downstairs, the DNCO looked up contact numbers for the two Marines assigned to the room, Corporal (Cpl) B and Lance Corporal (LCpl) D. He called the numbers listed for both but could not reach either one. Moments later LCpl D called back. He informed the DNCO that he had not given anyone permission to use his room; however, he was unsure about his roommate, Cpl B. After a short time, Cpl B called the DNCO back and advised that he gave the appellant permission to use the shower in his room.

Shortly after his conversation with the DNCO, LCpl D returned to his barracks room. When he went into the bathroom, he noticed a black backpack sitting in the shower. Stuffed inside he found his Xbox game console and approximately 18 of his Xbox games. As he was surveying the bag's contents, the appellant stepped into the room, took a quick look inside the bathroom, and then stated that Cpl B said it was okay for him to use their shower. However, LCpl D observed that the appellant was fully clothed and had no shower gear with him. He then watched as the appellant stepped back into the bathroom, turned on the shower, and then left to retrieve his shower gear from his room.

Not sure what to make of this, LCpl D called his roommate, Cpl B. Cpl B confirmed that he had given the appellant permission to use the shower. But when LCpl D explained how he found the backpack in the shower with his stuff inside, Cpl B told him "to go get the duty." Record at 184. Moments later, the appellant returned to the room and told LCpl D that he would

wait until Cpl B returned to take a shower. After hesitating a moment, LCpl D grabbed the backpack and went downstairs to the duty hut to inform the DNCO what happened.

At trial, Cpl B testified that he noticed two missed calls on his cell phone that morning, one from the DNCO and one from the appellant. He first called the appellant, who asked if he could use Cpl B's shower. Cpl B told him he could and hung up. A few minutes later, Cpl B returned the DNCO's call. When the DNCO asked if the appellant had permission to be in his room, Cpl B said that he did and that he was using his shower. Cpl B testified that after speaking with the DNCO he next received a call from his roommate, LCpl D, who told him about finding the backpack in their shower. Finally, he testified that he never gave the appellant permission to use his room prior to that morning, and never gave the appellant permission to use his laptop charger.

On cross-examination, trial defense counsel attacked Cpl B's credibility with a theory that he, along with another Marine, concocted a scheme to steal from LCpl D. During the defense case in chief, trial defense counsel called two witnesses who offered negative opinions of Cpl B's character for truthfulness.

**Discussion**

The appellant argues that Cpl B's "testimony alone was not sufficient to convict [him] of housebreaking [as] Cpl B[] was shown to have serious questions regarding his character for truthfulness . . . [and his] testimony was the sole evidence used to convict [the appellant] of housebreaking." Appellant's Brief of 20 Aug 2013 at 3. We disagree.

The tests for legal and factual sufficiency are well-known. For legal sufficiency, we must determine "whether, considering 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. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for legal sufficiency, this court must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty,* 38 M.J. 131, 132 (C.M.A. 1993). The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the

witnesses, [we ourselves are] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

The evidence at trial, although largely circumstantial, paints a convincing portrait of a barracks thief. For example, when the DNCO asked the appellant for his military identification, all the appellant could produce was a damaged debit card, which he told the DNCO he had "used to get into his room because he couldn't afford a key for his room." Record at 169. Unfortunately for the appellant, the DNCO caught him in a room assigned to Marines he could not name, with Cpl B's laptop charger in his pocket and a backpack full of LCpl D's gear stashed in the bathroom. Furthermore, the evidence plainly revealed that the appellant called Cpl B to ask to use his shower only after the DNCO discovered him in LCpl D and Cpl B's bathroom.

In short, the record is replete with circumstantial evidence that the appellant fully intended at the time of his unlawful entry to commit the crime of larceny. Based on our review of the record, we find ample evidence apart from Cpl B's testimony to convince us that a "rational trier of fact could have found the essential elements of the crime [of which the appellant was found guilty] beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007) (citing *Jackson*, 443 U.S. at 318-19). We are likewise convinced of the appellant's guilt beyond a reasonable doubt.

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

For the Court

R.H. TROIDL
Clerk of Court