

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

**Before  
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**STEVEN F. MITCHAM  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201200060  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 1 December 2011.

**Military Judge:** LtCol Robert G. Palmer, USMC.

**Convening Authority:** Commanding Officer, Weapons and Field  
Training Battalion, Marine Corps Recruit Depot, Parris  
Island, SC.

**Staff Judge Advocate's Recommendation:** Col E.R. Kleis,  
USMC.

**For Appellant:** LCDR John T. Zelinka, JAGC, USN.

**For Appellee:** Capt Crista D. Kraics, USMC.

**29 May 2012**

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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 military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiracy, two specifications of making a false official statement, one specification of wrongfully disposing of military property, and one specification of obstructing justice in violation of Articles 81, 107, 108, and

134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 908, and 934. The military judge sentenced the appellant to confinement for nine months, reduction to pay grade E-1, forfeiture of \$950.00 pay per month for nine months, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority suspended confinement in excess of six months and the adjudged forfeitures. He also waived automatic forfeitures for a period of six months.

In his sole assignment of error, the appellant alleges that Specifications 1 and 2 of Charge II, making a false official statement, fail to state an offense because the specifications do not expressly allege that the statements were made with the intent to deceive.

We have carefully examined the record of trial and the pleadings of the parties, and conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Whether a specification states an offense is a matter we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the offense, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *Crafter*, 64 M.J. at 211; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). When a specification does not expressly allege an element of the intended offense, appellate courts must determine whether the element was necessarily implied. *Fosler*, 70 M.J. at 230. The interpretation of a specification in such a manner as to find an element was alleged by necessary implication is disfavored. *Ballan*, 71 M.J. at 35. In this instance, we find that the element, "with the intent to deceive," was not alleged, either expressly or implicitly. Having found error, we now address whether the error materially prejudiced the appellant.

A charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error. *Id.* at 34, 35 n.8; *United States v. Cotton*, 535 U.S. 625, 631 (2002). Applying the plain error framework, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and, (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

In this case, the appellant pled guilty pursuant to a pretrial agreement. As part of his pretrial agreement, the appellant entered into a stipulation of fact in which he admitted that the statements made to Naval Criminal Investigative Service were made with the intent to deceive. Prosecution Exhibit 1 at 5. Prior to accepting his plea, the military judge accepted the stipulation of fact into evidence. Additionally, he explained the elements of each offense, to include the element that the statements were made with the intent to deceive; he defined "intent to deceive" for the appellant; the appellant acknowledged his understanding of the definition and then admitted and explained how his statements were intended to deceive. Record at 24, 32, 34. Under such circumstances, we find that the providence inquiry for Specifications 1 and 2, of Charge II provided "notice of the offense of which [the appellant] may be convicted and all elements thereof before his plea [was] accepted and, moreover, protect[ed] him against double jeopardy." *Ballan* at 35. Accordingly, the appellant suffered no prejudice from the failure to allege the "intent to deceive" element.

#### **Conclusion**

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court