IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Staff Sergeant (E-6) MICHAEL L. WILSON United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20210276 USCA Dkt. No. 23-0225/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Granted Issue

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S JOURNAL UNDER MILITARY RULE OF EVIDENCE 404(B).

Facts

A. Journal

As Respondent's Brief notes, the Journal was dedicated to Appellant's wife. (JA 258, 317; SA 008-011; Gov't Br. 4). However, the Judge/Respondent failed to note or consider that the adult stories were also fantasies. (3DSA 001-2).[1]

[1] The Judge had all the stories on disc (JA 259). The CID summaries of the stories were also in App. Ex. XI. (3DSA 001-2).

The sixth story fantasized about a police officer who had sexual relations with an adult he pulled over including mutual/consensual oral sex and vaginal penetration with the officer's baton. (3DSA 001-2). The seventh involved an orgy that included a male using a lit candle to penetrate his spouse orally, vaginally, and anally. (3DSA 002). The stories went between first and third person. (JA 258, 260).

B. The Timeline

Neither the Judge nor Respondent ever address *when* the Journal was penned in relation to *any* allegation. The crimes took place from 2012 until March 2019, but did not cover from July 26, 2018 through February 23, 2019 when Appellant was deployed (despite the Prosecution alleging it did). (JA 008, 010, 069-70).

Although the allegations were prior to and in early March 2019, the Journal was not discovered until September 2019. (JA 266).

C. The Ruling and Instructions

Although the Government alleges the Judge's written ruling was provided to the parties before calling the panel, they cite no support. (Gov't Br. 12). However, the opposite is supported given Pros. Ex. 11's use in the Judge's ruling. (JA 321, 322, 324).The Judge's ruling notes that Appellant and *one* story's protagonist share

an 'occupational field'.[2] The Judge cited Prosecution Exhibit 11 for this proposition. (JA 321, 322, 324). The Special Victim Prosecutor (SVP) *never* offered that exhibit or *even argued* that the "foreign girl" story was similar because of the medical fields. This is some evidence that this ruling came later as the prosecution had not pre-marked exhibits on Friday, May 7th.

D. The Trial

The Respondent claims the journal's dedication page was pre-marked by Appellant. (Gov't Br. 13). However, it cites no evidence that this was done prior to the Judge's ruling.[3]

Law and Argument

The Respondent never addressed/had no response to:

a. "When" the Journal was penned in relation to the allegations;

b. The Judge's addition, without request, of Absence of Mistake;[4]

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[2] The protagonist in the "foreign girl" story was a military doctor. However, the accused was not a doctor, but rather a 68W, Army combat medic. The Judge relied on this 'correlation' at least three times. (JA 321, 322, 324).

[3] The Respondent speculates that because Appellant did not ask the court-reporter to mark Def. Ex. D while authenticating it at trial, that it was therefore technically "marked" before that very second.

[4] The Respondent avoids absence-of-mistake so much that it omits a portion of the Judge's ruling in its block quote to excerpt it. (Gov't Br. at 24). That quote concludes stating "…– the same is true for countering a mistake of fact as to age

c. The Judge's evidentiary coaching, among other orders, to "Get that" and "Get that, I want that too;"[5]

d. *All* stories being fictitious and protected by the First Amendment; and

e. The Judge's instruction being broader than the SVP's request in "A4."[6]

A. The Judge abused his discretion by failing to address key facts and failing to fully address all *Reynolds'* Factors without even considering a First Amendment analysis.

A judge abuses his discretion when he: (1) predicates a ruling on facts that are not supported by the evidence of record (2) uses incorrect legal principles, (3) applies correct legal principles to the facts in a clearly unreasonable way, or (4) fails to consider important facts. *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022)(citing *United States v. Solomon*, 72 M.J. 176, 180-81 (C.A.A.F. 2013)).

Importantly, in *Solomon*, this Court held the judge abused his discretion despite completing a full analysis and applying all factors because he omitted key

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defense, if applicable." (JA 325).

[5] Similar instances were found when the Judge 'coached' the Government to Prior Consistent Statement. (SA 024-37).

[6] Similarly, the Judge ignored another Government concession/request when the Defense made an Unreasonable Multiplication of Charges motion to which the Government partially conceded. (3DSA 025).

facts that revolved around the timeline and did not properly apply the M.R.E. 403 factors. *Id.* at 180 (the "judge appropriately conducted a full M.R.E. 413 analysis, including balancing under M.R.E. 403, on the record, but the content of that analysis is problematic.").

To be afforded deference for an "articulated"/"proper" balancing test, M.R.E. 403 includes, but is not limited to: "potential for less prejudicial evidence; distraction of the factfinder, time needed for proof, temporal proximity, frequency of the acts, presence or lack of intervening circumstances, and the relationship between the parties." *Id.*

1. *The Judge omitted, misstated, and/or miscited multiple facts*

A. Timing is Everything – the Judge omitted a fact that affects every Reynolds' prong

As in *Solomon*, the Judge/Respondent here "wholly failed to grapple with the important" fact of "when" the stories were penned in relation to the allegations. *Solomon*, 72 M.J. at 181. A key factor in both legal and logical relevance is whether the "nexus" between the uncharged act and the allegation is close "in time, place, and circumstance." *United States v. Metz*, 34 M.J. 349, 352 (C.M.A. 1992) (citing *United States v. Janis*, 1 M.J. 395, 397 (C.M.A. 1976)). According to Merriam-Webster, motive is "something (such as a need or desire) that causes a

person to act." Merriam-Webster defines intent as "a usually clearly formulated or planned intention … [and] the state of mind with which an act is done."

These two non-propensity purposes (along with, here, the "judicially added" mistake-of-fact) allude to circumstances which *predate* an act—i.e. a reason, purpose, or state of mind. It was critical for the Judge's 403 analysis (and *Reynolds*' second prong) to address the "nexus" between the Journal and the allegations explaining their relationship in terms of "time, place, and circumstance." *Id*.

Timing is often important – "The issue of what a defendant's state of mind was *immediately prior* to his contact with a sexual target purporting to be a minor is routinely a serious point of contention." *United States v. Curtin*, 489 F.3d 935, 952 (citing *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000)(quoting *Jacobson v. United States*, 503 U.S. 540 (1992)("contextual and circumstantial evidence becomes acutely relevant to a defendant's material state of mind 'prior to his contact' with the object of his sexual attention"))[7]

[7] *Jacobson* and *Poehlman* are both internet "sting" cases where entrapment defenses were raised. Only after intent/predisposition/motive was placed "in issue," was the prosecution allowed to introduce sexual literature/videos. Both cases note the evidence to show intent/motive/predisposition needed to arise "prior to [the underlying crime]." *Poehlman*, 217 F.3d at 703-04 (quoting *Jacobson*, 503 U.S. 540).

Since the SVP offered no evidence of "when" the fantasies were written, the Judge never established whether they predated the allegations that occurred all the way back to 2012. Further, the Journal was discovered six months after the last allegation when Appellant had just returned from deployment and reunited with his wife (whom the stories were written for). Where time cannot be established, the relevance drops. The further it falls down the relevance ladder, the less probative value it has with an inverse increase to its prejudice. *Solomon*, 72 M.J. at 181.

B. The Judge stepped in to meet the Government's Burden of Proof/Persuasion basing facts on evidence that was not presented.

Another fact that illustrates the Judge's abuse of discretion and his transition to the evidence's proponent is his citation of Prosecution Exhibit 11 *multiple* times. (JA 321, 322, 324). In attempting to link the fantasies and pushing their admissibility under M.R.E. 404(b), the Judge points out that the protagonist of one story shared a similar occupational field.

However, as indicated *supra*, the SVP *never* offered Prosecution Exhibit 11 or *even argued* that the "foreign girl" story was similar because of the medical fields *prior to* the Judge's ruling. The Government's motion did not contain that evidence, nor does the SVP provide it after one of the Judge's four orders/directives to "Get that, I want that too." (JA 045, 46, 60). Rather, the Government's written motion only contains one three-sentence-paragraph about

"similarity" solely noting "at times throughout the journal the accused switches between first and third person. Some of the entries contain explicit detail about sexual intercourse and other sexual activities with underage girls." (JA 260).

The closest the SVP came to suggesting the "Judge's similarity finding" was saying that story's protagonist was "an American service member" during the 'Friday-Before-Trial' hearing. (JA 058). But that's it. Normally the judge can only base his/her decision on evidence in the record before him, and not go beyond what is available for a particular motion/issue. *See generally Rudometkin*, 82 M.J. at 402 ("[the Judge] had to make his decision based on the record before him and the appellate judges must decide whether [the judge] abused his discretion based on that same record"). Here, the Judge went and found evidence to admit the Journal.

C. The Judge omitted the Journal's context.

The Judge erred by not discussing/ignoring that the other stories were fantasies. The Judge notes "reviewing the Accused's three journal entries . . ." (JA 322). But he never discusses the journal's context regarding it being for Appellant's wife, other than describing that as a "self-serving" claim *despite* the journal's foreword/dedication and FBI agent Nestor's 39(a) testimony. (JA 322, 027). By removing the context from the couple's *overall* fantasies/protected speech such as

the police-baton story or candles, the Judge omitted facts that reduce the probative value, and ignored how the First Amendment should heighten the analysis.

2. The Government fails to grasp "at issue" as defined by precedent and ignores applicable precedent.

The Government misinterprets *Reynolds'* second prong and whether the evidence, *at trial*, was "at issue." *United States v. Grimes*, 244 F.3d 375, 384 (5th Cir. 2001)(citing *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980)("Normally, if intent is not at issue, then extrinsic evidence is not admissible"). Although the Respondent identifies this prong's requirements for "of consequence"/"at issue", Respondent jumps straight to the Judge's ultra-broad findings without discussing how the evidence was presented *at trial* or how the litigation made intent, motive, and absence-of-mistake "at issue."[8] (Gov't Br. 22). This was the Military Judge's same error when he did not wait, as Appellant requested and this Court repeatedly has suggested, to see the "issues" at trial. *Trimper*, 28 M.J. at 461; *Orsburn*, 31 M.J. at 185; *Steen*, 81 M.J. at 262.

The Government's disregard of "at issue" is out-of-sync with this Court and others' "at issue"/"material" precedent. *See, e.g.*, *Curtin* 489 F.3d at 935 (citing

[8] Instead of analyzing the evidence presented *at trial*, the Government adopts the Judge's holding where evidence is 'always relevant' by stating "[The Military Judge] correctly concluded that in cases involving sexual exploitation of children an accused's intent to engage in those acts is probative" (Gov't Br.19).

United States v. Brunson, 657 F.2d 110, 115 (7th Cir. 1981)("We routinely have held that circumstances surrounding an alleged crime become more relevant *when the defendant makes his intent a disputed issue*"). Where "intent" is *affirmatively* contested by the accused, there are dozens of examples of this being what makes the evidence "at issue"/probative. *Id.* However, as foreshadowed for our case:

> [*Curtin*] was not a case where the defense, relying on the government's burden of proof, simply contended that the government's evidence fell short of demonstrating the required intent beyond a reasonable doubt [like here]. [In *Curtin*], the defense was not merely arguing that the intent had not been proved, but rather that [Appellant] harbored a completely different intent than the intent required to convict; and the defense set out aggressively to establish this innocent intent in the minds of the jurors…
>
> [Appellant's] defense makes the [literature] in [his] possession all the more relevant because this is where the battle lines were drawn -- what was in [Appellant's] mind as he traveled to meet [the girl]. Consequently, the stories were not of marginal relevance, the stories were at the core of the only material fact the defense sought to dispute.

Id. at 948-50. *Curtin* discusses *at length* the need for the evidence's direct link to a *disputed issue,*citing multiple cases where Intent/motive/predisposition was the main/only issue. *Id.* at 951.

Although the Respondent/Judge cling to *Harrow*, noting that prosecutors can introduce evidence of motive/intent before the defense presents its case, both fail to note that it is often because the defense telegraphed the key "issue" in opening,

motions, or witness requests. *United States v. Harrow,* 65 M.J. 190 (C.A.A.F. 2007)(noting that this Court distinguished *Estelle* going both ways on this issue, and that the Accused *had* presented evidence raising an accident argument before the Government used 404(b)).[9] *Curtin* also analyzed this principle noting that Federal Circuits note how that "issue" was practically always 'brought-out' by the defense allowing prosecutors to pre-empt it. *Id*. What's more, in all those cases, the accused later made those areas contested/"at issue" generally making any error harmless/not fully analyzed.

Here, like *Curtin* predicted, Appellant's trial strategy pointed out that the prosecution did not meet its burden; not a case focusing on a mistaken/different intent/motive. While Appellant does not dispute that prosecutors can put on

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[9] Despite citing *Harrow*, the Government omits that *Harrow* definitively states this Court has found the opposite in multiple cases. *Harrow*, 65 M.J. at 202.

> This Court has dealt inconclusively with the holding of *Estelle* on the ground that *Estelle* involved a state rule of evidence. *Compare United States v. Diaz*, 59 M.J. 79, 95 n.3 (C.A.A.F. 2003)(distinguishing *Estelle*), and *United States v. Morrison*, 52 M.J. 117, 122-23 (C.A.A.F. 1999) (not citing, but implicitly rejecting *Estelle*), *with United States v. Whitner*, 51 M.J. 457, 461 (C.A.A.F. 1999), and *United States v. Sweeney*, 48 M.J. 117, 120 (C.A.A.F. 1998)(approaching that prosecutors must prove every element).

evidence for elements, even *Harrow* was a specific intent case (premeditated murder) where defense already raised an argument for "accident." Here, the Judge instructed that only two specifications, both involving the daughter, involved specific intent. And even then, the daughter's allegations spanned seven years; there was no accident/mistake defense that would need to highlight the accused's "intent" or "motive." Although Respondent attempts to minimize *Curtin's* analysis on this prong/issue, it ignores both the "at issue" and First Amendment analyses, which the court called the "central issue". 489 F.3d 945-56.

3. The Government avoids that the Judge failed to do a full 403 analysis, misstated the facts' weight since he had not seen/heard the evidence, and omitted multiple factors

The Judge missed/omitted and/or failed to thoroughly analyze almost all of this Court's M.R.E. 403 factors. *Solomon,* 72 at 180. A key factor is the "nexus" being "close in time, place, and circumstance", *Janis*, 1 M.J. at 397; as well as the availability of alternatives, time for presentation, distraction, and temporal proximity. *Solomon,* 72 M.J. at 180. The Judge based his 403 analysis on just four factors with minimal analysis: (1) no other evidence was available for intent, (2) his instructions would cure any prejudice, (3) it would not cause a distraction/waste of time, and (4) the victims' testimony was already prejudicial.

A. Other Evidence was Available/Admitted which diminishes the Journal's probative value and contradicts the Judge's 403 analysis

Probative value decreases when other evidence is available for the "disputed" issue/element. *Id.* at 181. Here, the Judge stated because "direct evidence of intent, motive, *and lack of mistake* is usually unavailable, the prosecution *must* rely on circumstantial evidence." (JA 325)(emphasis added). For that reason, the Judge then stated the journal had a "high" probative value. (JA 325).

However, as Respondent points out, the prosecution had "direct" evidence of intent when it called the neighbor to testify that Appellant told her he had liked children "forever" and that he desired to have anal sex with her. (Gov't Br. 29)("The journals were not the only evidence of appellant's intent and motive…"). This evidence was presented *before* the journal was admitted. (JA 112).
The cases the Judge relied on, such as *Hays*, note the evidence's importance because it is a "contested" issue and the evidence is the "*only* means of ascertaining that mental state." 62 M.J. 158, 164 (C.A.A.F. 2005)(internal citation omitted)(emphasis added). This line of cases about the evidence being the "*only* means of ascertaining that mental state" is taken from *Huddleson v United States*. 485, U.S. 681, 685 (1998). These are distinguishable; this is not an inchoate case like in *Hays*/*Lieu*. Thus, the Judge was wrong and his analysis flawed.

B. The instructions were not detailed, accurate, or clear to mitigate prejudice or keep the panel from applying propensity.

The Judge next based his 403 ruling on his "instructions [which] will clearly instruct the members as to the limited purpose." As noted in Appellant's original brief, the instructions were not tailored like in *Curtin* or *Orsburn*, and did not distinguish what was/was not propensity despite it being directly next to, and under the same header as, the 414 instruction. "Bad character" under 404(b) is not synonymous with "propensity" to a lay person, and the Judge presented the instructions in a way that did not alleviate propensity concerns.[10] By not defining/differentiating between "bad character" and "propensity", this invited the panel to use subjective definitions.

Additionally, the instruction increased the prejudice as it allowed the Journal's unfettered application to all specifications, whether intent was an element or not. This is consistent with the Respondent's concession that the ruling "does not seem to limit the evidence to Specifications 4 through 6 but rather applies it to all specification [sic] of the charge." (Gov't Br. 16, n. 15).

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[10] While Respondent claims that Appellant did not make this point at the Army Court (Gov't Br. at 26), Appellant did (along with the Military Judge's bias). (3DSA 004).

C. The Judge ignored this Court's "waste of time" precedent

The Judge allegedly analyzed the time for presentation. This factor corresponds to how 'much' attention the evidence draws. However, the Judge never does an analysis; he states "the alleged offenses in this case are serious offenses, and the trial must take all the time reasonably necessary to ensure a fair trial for both sides." (JA 325, para 4). That's it.

That "analysis" is owed no deference unlike where this Court may give deference when the Judge "controls" the evidence's presentation/time. Even in *Solomon* where the judge "appropriately conducted a full" analysis, that analysis still failed. *Solomon*, 72 M.J. at 181. For example, although the judge noted the time it would take to present the evidence in *Solomon*, because of the poor proffer/supporting evidence here, the Judge did not account for time; he actually said time did not matter because these were "serious allegations." *Id.*

To enter the journal, the government called two witnesses and had rounds of direct, cross, redirect, and re-cross. (JA 130-32; SA 006-014; 3DSA 030-31). Because the Judge didn't wait-and-see as requested, it caused a distraction and more emphasis to already marginally relevant and highly prejudicial evidence.

The *Solomon* Court noted that in determining the "distraction" and time-to-present factors, judges should consider the evidence's use in opening and closing.

Id. at 181-82. Here, the government mentioned it as its "call to action" in opening, closing, and rebuttal. (JA 078-79, 204-05, 214; SA 012-14). *See Berry*, 61 M.J. at 97 (finding a 'waste of time' occurred where government's opening and closing statements highlighted the prior act)(citation and quotations omitted); *cf. James*, 63 M.J. at 222 (judge limited evidence's scope to brief testimony); *United States v. Bailey*, 53 M.J. 38, 41 (C.A.A.F. 2001)(judge "kept the witness' testimony abbreviated and focused").

Here, the judge allowed the back and forth over defense objection under the best evidence rule/403 to the FBI agent giving her opinion about the journal's contents (*after* it was admitted). (SA 008-011). The judge *improperly* overruled the objection and allowed the FBI agent to continue implying that there was even more smutty child stories. (SA 010-11). Where judges in other cases limited the testimony, here the Judge allowed it over objection. *Solomon*, 72 M.J. at 182 ("Although we recognize that the military judge would not have known when he admitted the [ ] evidence that the [] counsel would overdo it in this manner, the military judge failed to take action during trial to limit its overuse . . .")

D. The Judge failed to analyze all other 403 factors including temporal proximity, alternatives, and frequency of the acts

The Judge failed to analyze other key *Solomon* factors. The "potential for less prejudicial evidence" was available through redactions of irrelevant portions, or like in *Curtin* and *Harvey*, having law-enforcement testify to the stories' existence (about adults and/or children) without graphic details like blood mixed with semen. *United States v. Harvey*, 991 F.2d 981, 996 (2d Cir. 1993). Likewise, the Judge failed to note the "temporal proximity" factor as highlighted *supra* or the "frequency of the acts" (especially in relation to the more than double of "adult" stories). This further undercuts any "deference" this Court should give to the Judge's ruling.

E. The Journal, with its sexual nature and blood/incest, was extremely prejudicial.

Prejudice is "unfair" if it has an "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 Advisory Committee's Note; *Old Chief v. United States*, 519 U.S. 172, 180 (1997). "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *See, e.g., United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005).

Even "normal biological functions induce disgust when exposed to public view. Perverse sexual fantasies generate even more intense disgust." *Curtin*, 489 F.3d at 964 (citing *United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993))("We accept without need of extensive argument that implications of child molestation . . . unfairly prejudice a defendant."); *see also Harvey*, 991 F.2d at 996 (sexually deviant videos created "disgust and antagonism" toward the defendant, "and resulted in overwhelming prejudice against him."). This is without even mentioning the incest in the stories since "incest has had a rare power to disgust." *Curtin*, 489 F.3d at 964 (quoting Richard A. Posner, *Sex and Reason* 201 (1994)).

Unlike *Acton*, which the Respondent/Judge cite for the proposition that because child molestation involves deviant acts, it is not prejudicial to admit the journal's deviant acts, here, the victims were *not* named in the stories. 38 M.J. 330, 332 (C.A.A.F. 1993) . In *Acton*, the admitted evidence was appellant showering and showing pornography to his teenage children. *Id.* This Court found the third *Reynolds'* prong was met because "[a]ny prejudicial impact based on the evidence's shocking nature was diminished by the fact *the same* conduct was already before the court members." *Id*. at 334. (emphasis added). Although the Respondent/Judge used this quote to indicate the journal would not be prejudicial, both misapply *Acton* because *Acton* involved the actual crime/confession/victims,

not a separate legal act that never named the victims or was temporally connected, like here.

In *Acton*, the judge admitted the evidence *after* these events, with the same victims, had already been received into evidence through appellant's confession – without objection. Simply put, *Acton* was not the first time the panel heard that *very same evidence* for *the same victims*. That is not the case here, where the unnamed persons in First Amendment protected stories *only* came in through the Judge's ruling. Further, unlike *Acton*, the journal came in *before* the daughter testified. Plus, in *Acton*, the 404(b) evidence was so temporally close that the judge inquired whether it was *res gestae. Id*.

Here, the fantasies "served no relevant purpose" other than to insinuate that Appellant acted in conformity with the written self-expressions. Its admission is further improper given that most specifications did not require specific intent and the defense case highlighted the two victims' inconsistencies, evidentiary gaps, and date-disparity between the tree pictures and the alleged sexual act versus his intent.

B. The Judge Abused His Discretion by Not Considering the First Amendment

The Supreme Court and Federal Courts have often applied a heightened analysis/more exacting 403 analysis when evidence is protected by the First Amendment. *See Jacobson*, 503 U.S. at 550. The Respondent avoids addressing

this precedent. When evidence is not contraband, like in *every* case the Judge/Respondent cites, there is even more protection. *Id.* (holding the "legally ordered and received [ ] Bare Boys magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act"). Here, authoring the fantasies for one's wife was a legal act, so like *Jacobson* instructs.

> It may indicate a predisposition to [author] sexually oriented [stories] that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act *within a broad range, not all of which is criminal*, is of little probative value in establishing predisposition.

Id. (emphasis added). Although the Respondent attempts to distinguish *Curtin* by indicating it was just a case about the judge not fully reading the exhibits, that ignores *Curtin*'s First Amendment analysis and how a heightened/more-exacting 403 analysis should apply. 489 F.3d at 953 ("the central question"). This is supported by the concurrences/dissents highlighting the First Amendment protections at length with Supreme Court holdings and logically/legally persuasive arguments.

> In this case, our inquiry must be even more conscientious because, as the government acknowledges in its appellate brief, [Appellant] was not charged with unlawful receipt of obscene material…Thus, there is no contention that [Appellant's] possession of the simulated child pornography was illegal.

Harvey, 991 F.2d at 995; *Curtin*, 489 F.3d at 959 ("Our freedom to read and think requires a high wall restricting official scrutiny").

"There is no avoiding the First Amendment implications of using what people read as evidence of what they did." *Id.* at 959-60 (citing *Stanley*, 394 U.S. at 565). *Stanley* based its decision on the material being obscene, not merely pornographic; therefore, the First Amendment protects private reading material *even if* the material itself is not protected because it is obscene. *Id.* at 960.

Fantasy is constitutionally protected. *Id.* In *Jacobson*, the Supreme Court held a person's inclinations and "fantasies . . . are his own and beyond the reach of government." 503 U.S. at 550. "Based on *Stanley* and *Jacobson*, [Appellant] had a First Amendment right to possess and read the disgusting stories he [authored] and to fantasize about the criminal sexual conduct they describe." *Curtin*, 489 F.3d. at 960. As the *Curtin* concurrences explained, people fantasize about vacations they will never take, space-flight, and go to psychiatrists for troubling fantasies they want to avoid like suicide. *Id.* at 961-62. Simply put, perverse sexual desire is a character trait - "Using a person's perverse sexual fantasies to prove action in conformity therewith is exactly what subsection (a) of Rule 404 prohibits" *Id.* at 963.

C. MRE 404(b) Notice is Different than Section III Disclosures

This Court has not answered whether MRE 404(b) notice requires notice formally or, as the government *now* claims, constructively. However, lower courts and 404(b)'s history indicate formal notice is required and well-in-advance of trial in normal circumstances despite the Government's incorrect footnote.

1. Formal Notice – the Form and Function of 404(b) Notice is Different than Section III Disclosures

Some of the amendments to F.R.E. (and M.R.E.) 404 were seen as "new" while others were seen as "clarifying" to law that already existed. The rule for notice should fall into the latter category indicating the formal notice, including theories, were always the rule/requirement.

Fed. R. Evid 404(b) now requires the prosecution to "articulate" "the permitted purpose" "and the reasoning that supports the purpose." The Committee Note indicates that language was "clarifying" the existing law. The Note describes how it removed "the general nature" language because of how "some courts" have interpreted it to mean that prosecutors don't need to describe "the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose." The Note ends that point by describing the language makes "clear what notice is required." This is in contrast to other 404

sections which the Committee outright eliminated (the defense request) and the requirement to provide notice "in writing" which was new.

Formal notice lines up with military caselaw. For example, in *Hilliard*, a similar situation arose where the government never provided 404(b) notice, but attempted to rely on the evidence provided in pretrial discovery and that their failure to disclose was not intentional, but due to "a mistaken belief that the evidence did not fall with [MRE] 404(b)." 2019 CCA LEXIS 21, at *3.[11]

Hilliard noted that "there is a difference between when a rule requires disclosure of evidence and when a rule requires notice." *Id*. at *4 (*comparing* MRE 304(d) (disclosure) *with* MRE 807(b) (notice). Distinguishing the two, *Hilliard* indicated "the defense should expect" that evidence "will be inadmissible when they have not received notice under the [] exception and no other [ ] exceptions appl[y]." *Id.* at *4-5.

The CCA then noted there are different forms of "unfair surprise": Even if a party is not surprised by evidence's "existence," "the party may nonetheless be surprised by the *admissibility*." *Id.* at *5.

> when the rules of evidence require notice as a condition to admissibility, a party can reasonably expect that absent

[11] Despite the Government analyzing *Hilliard* at the Army Court to note that it stands for the proposition of how Section III disclosures and 404(b) notice are different, the government does not mention/cite/*cf Hilliard* now. (3DSA 029).

> such notice (and good cause) the evidence will not be admissible. Appellant correctly argues that if the requirements for notice are not enforced, the effect would be to allow a type of trial by ambush. Trial by ambush is highly disfavored in the military.

Id. at *5 (internal citations omitted). Key to ACCA's reasoning is how the defense may strategize to reflect how the Government would attempt to offer evidence.

Similarly, *Hilliard* noted that the judge did not state whether there was good cause, but Government's ignorance of the Rule was *not good* cause. *Id.* However, unlike here, the *Hilliard* judge affirmatively offered the defense a continuance which the defense refused. *Id.* Although the Court did not find prejudice because the defense refused the continuance, the evidence was used minimally, and the evidence was unrelated to the charged sexual misconduct, it still noted that "[i]f, absent good cause, a rule requires a party to provide notice prior to admitting evidence, upon timely objection it is error to admit the evidence if there is neither notice nor good cause." *Id.* at *6; *See also United States v. Ruffin*, 575 F.2d 346, 358 (2d Cir. 1978)(holding that the legislative history of Residual History means the notice requirement was intended to be "rigidly enforced."). For example, when defense does not file MRE 412 notice despite the rule's requirement, prosecutors can plan the presentation of their case under the assumption that such predisposition evidence will not be admitted. *Id.* (internal citations omitted).

Hilliard's logic is equally applicable to a Judge's pretrial order requiring notice in specific forms and by deadlines. *Id.* at *5 ("When the rules [ ] require notice as a condition to admissibility, a party can reasonably expect that absent such notice (and good cause) the evidence will not be admissible.").

To accept the Government's new approach would seemingly curtail the notice requirement. Under a broad reading, jurisdictions practicing open-file discovery would not need to provide separate notice for evidence the Government intends on offering under 404(b) (other than potentially Section III disclosures). That was rejected in *Hilliard.* Under a more restrictive reading, the Government would need to offer *any* manner of admitting the evidence – even unavailing arguments, as in *Czachorowski* and here – to evade more specific references to 404(b). 66 M.J. 432 (C.A.A.F. 2008).

Moreover, the theory that the Government offers the evidence may touch on admissibility. Here, the Government offered the evidence as an opposing party statement and originally argued that the *entire* journal was direct evidence. Unlike *Czachorowski*, preparing against an 801(d)(2)(A) statement is a binary question: did the accused make the statement or not? Preparing against 404(b) requires more consideration: is the evidence used for propensity or another purpose, and if another, how close is the connection and does it survive MRE 403?

2. Timing the Notice

While Appellant agrees this Court has not stated "when" or "how long" is enough for sufficient notice, this a highly factual determination. *United States v. Perez-Tosta*, 36. F.3d 1552, 1560 (11th Cir. 1994)(citing the Judiciary Committee note to Fed. R. Evid. 404(b)("what constitutes a reasonable . . . disclosure will depend largely on the circumstances of each case"). The Army Court has found one-month notice sufficient where the government provided formal written notice outlining the evidence and theory of admissibility. *United States v. Shuford*, 2021 CCA LEXIS 72 (A.C.C.A. 2021). Most courts that analyzed this *specific* question indicate that two to three weeks is sufficient, but there are circumstances that could require longer periods such as complex multi-defendant cases or threats to prospective witnesses' safety. *United States v. Falkowitz*, 214 F. Supp. 2d 365, 393 (S.D.N.Y. 2002)(string citation omitted). That said, there is scant caselaw when the "theories" of admissibility are either not offered at all by the government or are modified at the last minute (including their application).

Although the Respondent cites Federal cases decided before the more stringent notice requirement went into effect, which allowed varying degrees of "time", the majority of cases do not stand for that proposition. *See e.g., Watson*, (not analyzing 48 hour notice because defendant did not show prejudice); *Erickson*

(not analyzing timeliness but instead attempting to determine whether notice was sufficient to apprise the defense); *Russell* (not analyzing timeliness; considering whether notice was sufficient to alert defense after formal written notice).

The only cases the Government cited that analyzed timeliness were where the evidence was turned over virtually the same day the Government discovered it. *See, e.g., Preciado* (notice on the same day it was discovered); *Perez-Tosta*, 36. F.3d at 1560 (late notice okay when given one day after its discovery).

Importantly though, the Government's citations cut against their argument, given the SVP's action here. In *Perez-Tosta*, where the Eleventh Circuit detailed the test Appellant suggests this Court apply, the court notes that the "notice requirement's purpose of 'reducing surprise' is not served by allowing mere negligence to excuse [] failure to give notice." *Id.* at 1561. *Perez-Tosta* specifically analyzed "the construction of 404(b)'s reasonable notice requirement", and given the recent changes and caselaw, the Respondent's argument is repeatedly undercut by precedent, history, and the purpose of the rule. *Id.* at 1561.

D. RCM 905(d) requires Good Cause for Motion's ruling after entry of Pleas

Despite the Respondent's claim that the Judge did not need to show good cause, that ignores R.C.M. 905(d). That is not surprising as the Government

misstates when the appellant entered pleas, which was actually May 7, 2021. (JA 064).[12] That rule states

> a motion made before pleas are entered *shall* be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge *for good cause* orders that determination to be deferred until trial ...

Id. R.C.M. 905(b) notes that this rule applies to "any defense, objection, or request which is capable of determination without the trial of the general issue of guilt."[13] *United States v. Helwig*, 32 M.J. 129, 133 (C.A.A.F. 1991)(questioning whether there is a meaningful distinction between R.C.M. 905 and 906 motions).

In our case, Appellant made a written objection under lack of notice and 404(b). The title of App. Ex. V states "and objection to admission of Evdidence (sic) at Trial." (JA 283). The bolded headers in the Argument section indicate the objection and motion.[14] The motion's Conclusion asks the judge to "Sustain the

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[12] The Government misstates that "On May 10, 2021, prior to appellant entering a plea of not guilty, the military judge indicated a ruling was forthcoming." (Govt. Br. 12). Pleas were entered on May 7th. (JA 064)

[13] The next sentence then notes six motions that must be raised before a plea, but in no way limits other motions the rule applies to.

[14] The first header was: "**The Government Did Not Provide Notice of its Intent to Use Journal Entries Pursuant to M.R.E. 404(b) and Should be Prohibited From Admitting Images of the Journal at Trial**" (JA 288)(original bolded). The third header states "**Evidence of the Journal Should be <u>Excluded</u> As It Fails to**

Defense Objection to the proffered character evidence and deem it inadmissible at trial." (JA 291).

The defense maintained its objection orally to all points in November, and then continued to oppose under MRE 404(b) in the Judge's email and at the "Friday Before" trial hearing. Under RCM 905(b), that is a pretrial "defense, objection, [and] request" so the Judge was required to rule before having Appellant enter pleas or explain "good cause."

E. Prejudice – Different Tests May Apply but Regardless, the Government oversells its case and downplays the Journal.

Since the Government cannot prove the Judge's coaching, late rulings, AWOL good cause, or perfunctory *Reynolds*' analysis did not prejudice Appellant, Appellant need not analyze that this error may rise to the higher standard of a constitutional error since Appellant prevails under any test/standard.

However, Appellant still urges this Court to consider additional factors under *Perez-Tosta* due to the unique nature of the lack of notice and the Judge's intervention/finding new evidence/broadening application.

Likewise, even though a 403 analysis is "*Constitutionally* required," Appellant acknowledges that that *alone* does not change the standard analysis.

Survive the Second or Third prong of the <u>Reynolds</u>['] **Test**" (JA 289)(original bolded).

Berry, 61 M.J. at 95. However, First Amendment implications can raise this to a constitutional level requiring more exacting "harmless beyond a reasonable doubt" (HBRD) scrutiny (and heightened MRE 403 analysis).

In *Chapman v. California*, 386 U.S. 18 (1967), the Court held not all constitutional errors require reversal of criminal convictions "if the constitutional error was [HBRD]." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The Court has applied that doctrine to *multiple* rights including when evidence is admitted that offends a particular right. *Rose v. Clark*, 478 U.S. 570, 577 (1986)(listing rights that require a HBRD analysis)(internal citations removed).

There has been limited application of this rule with First Amendment protected material/activities. In *Dawson v. Delaware*, the Court held the defendant's membership in the Aryan Brotherhood in a sentencing hearing was a violation of his First and Fourteenth Amendment rights to free association. 503 U.S. 159 (1992). The Court remanded the case to determine if the error was harmless but did not state the standard to apply. *Id*. at 169. Justice Blackmun concurred solely to note that the First Amendment, due to its importance, should have a heightened analysis. *Id.* (Blackmun, J. concurring).

The Court also distinguished *Dawson* from *United States v. Abel*, where the government offered evidence of Aryan Brotherhood membership to show bias,

and cautioned that *Dawson* was different because the defendant's membership had no relevance to his conviction. *Id*. at 167.[15]

Regardless of the test/standard, the Government cannot show the compounded errors were harmless. There were several credibility issues which eroded the Government's case. (3DSA 006-024, 026-28). The Government's brief attempts to highlight evidence as it wished the case was presented, not as it was. That is because the journal was a focal point. The journal was the *only* piece of evidence the government sought to pre-admit and that it provided individual copies to the panel members to hold/examine. Further, the Government highlighted the contents of the journal in opening, closing, and rebuttal, as well as multiple witnesses even being in the "call to action" when the government argued it for propensity. (JA 078-79, 130-32, 204-05, 214; SA 006-14; 3DSA 030-31).

The trial team knew the journal's significance in relation to the victims' testimony. The SVP admitted in closing that the neighbor's date was impeached despite her being positive of the date/it being a Friday. (JA 200). Their closing all but admitted that the calendar/judicial notice undercut her testimony (and therefore the "tree photos" relevance as well). (JA 200)("So here's the date, 9 March. The

[15] The *Curtin* court did not analyze the standard since the Government conceded prejudice, however, one concurrence mentioned it may be a harmless analysis.

question is, Friday or Saturday? I don't know. She's homeschooled. I think it's Friday or it's a lot like Saturday."). There was also not one, but two, recantations with a person of trust (a nurse and then CID with her mother out of the room for both). (JA 210-12). The daughter directly impeached the neighbor about if the two of them talked about the allegations. (JA 218). The multiple problems/ inconsistencies is highlighted in Appellant's brief at the CCA (3DSA 006-24, 026-28), the CCA excepting language (JA 002), and the fact that the prosecutor's evidence changed so much between interviews and testimony that it actually charged the Appellant with committing multiple assaults when he was deployed.[16] The journal filled the gaps and assured the panel of Appellant's perversions/deviancy despite any doubts about the victims' stories.

[16] After three interviews that we know of in the record with leading questions (not to mention trial preparation), the Government believed/charged Appellant with assaulting EW during a six-month window that Appellant was in Kuwait (July to December 2018 and January 2019). (JA 008, 010, 069-70).

Conclusion

Based on the foregoing, this Court should set aside appellant's convictions and the sentence.

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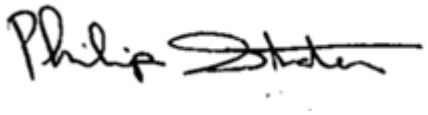

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Certificate of Filing and Service

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Defense Appellate Division and the Government Appellate Division on January 2, 2024.

CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 6,983 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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United States v. Hilliard

United States Army Court of Criminal Appeals

January 17, 2019, Decided

ARMY 20170377

Reporter
2019 CCA LEXIS 21 *

UNITED STATES, Appellee v. Sergeant First Class RONDELL A. HILLIARD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review dismissed by, Without prejudice United States v. Hilliard, 78 M.J. 408, 2019 CAAF LEXIS 162 (C.A.A.F., Mar. 5, 2019)

Vacated by, Remanded by, Review granted by, Without prejudice United States v. Hilliard, 79 M.J. 243, 2019 CAAF LEXIS 632 (C.A.A.F., Aug. 28, 2019)

Reaffirmed, On remand at United States v. Hilliard, 2020 CCA LEXIS 8 (A.C.C.A., Jan. 13, 2020)

Review denied by United States v. Hilliard, 2020 CAAF LEXIS 249 (C.A.A.F., Apr. 29, 2020)

Prior History: [*1] Headquarters, Fort Bragg. Michael Hargis, Military Judge, Colonel Jeffrey C. Hagler, Staff Judge Advocate.

Counsel: For Appellant: Major Todd W. Simpson, JA; Captain Joshua B. Fix, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Major Hannah E. Kaufman, JA; Lieutenant Colonel Karen J. Borgerding, JA (on brief).

Judges: Before WOLFE, SALUSSOLIA, and ALDYKIEWICZ Appellate Military Judges. Judge SALUSSOLIA and Judge ALDYKIEWICZ concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Senior Judge:

In May of 2015, appellant began regularly having sex with his sixteen-year-old biological daughter. About two years later, appellant's misconduct was discovered when his daughter became pregnant and his wife discovered his misdeeds.[1] Appellant's daughter testified that the sexual acts were not consensual and involved coercion, threats and physical violence. A military judge convicted appellant, contrary to his pleas, of two specifications of sexual assault and one specification of adultery in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934 (2012) (UCMJ).[2]

Appellant appeals his conviction and assigns three errors.[3] We address in depth appellant's claim that [*2] the military judge allowed, over appellant's objection, the government to introduce evidence that he had beat his daughter on prior occasions. We agree with appellant that the military judge erred, but do not find the error to have prejudiced appellant.

LAW AND DISCUSSION

At trial the government sought to introduce evidence that appellant had hit his daughter on prior occasions. The defense objected. The military judge overruled the objection, but allowed a recess for the defense to interview appellant's daughter prior to cross-examination.

A. Was there error?

Military Rule of Evidence [Mil. R. Evid.] 404(b) allows the government to introduce evidence of an accused's prior acts for certain purposes. So that we can get to the heart of the issue, we briefly make the following threshold conclusions of law and fact.

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[1] As appellant is both the father and grandfather to his daughter's baby, we will avoid confusion by referring to the victim as appellant's daughter, and the child as appellant's granddaughter.

[2] The military judge sentenced appellant to be dishonorably discharged from the Army, confined for sixteen years, and to be reduced to the grade of E-1. The convening authority reduced appellant's sentence by ten days at action.

[3] Appellant first claims the military judge applied the wrong law in determining the *mens rea* necessary to find appellant guilty of sexual assault. *See generally Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). The central holding in *Elonis* is applicable only in cases where it is necessary to separate wrongful conduct from innocent conduct. *Id.* at 2010-11. We do not decide whether a father having sex with and impregnating his biological daughter is "wrongful" for purposes of *Elonis* when the incestuous nature of the relationship was uncharged. Rather, we find that in this judge alone trial where: (a) the judge made no relevant misstatements of the law; (b) the defense made no motions preserving the issue they now appeal; (c) the defense did not request special findings; and (d) after reviewing the entire record, there was no error that materially prejudiced appellant's substantive rights.

Appellant also claims the military judge erred in not suppressing the results of a DNA test. Three different DNA tests all came to the same result - appellant was the father of his daughter and granddaughter. The first test was questionably conducted. For the second test, the military judge rejected appellant's claim that the results should have fallen within appellant's attorney-client privilege. The government only introduced the results of the third test. The military judge's findings that the third test was independent of any claim of privilege regarding the second test are not clearly erroneous.

First, evidence that appellant hit his daughter on prior occasions was logically relevant[4] to show why, in the context of a parental sexual relationship, his daughter did not consent to the sexual acts.

Second, to be admissible under Mil. R. Evid. 404(b), the government must notify the accused of its intent to use the evidence "before trial." The military judge may excuse the lack of [*3] notice for "good cause."

Third, the government did not answer the military judge's repeated questions as to whether they had provided the required notice to the defense. From this intransigence, it is a reasonable inference that notice was not provided. We so infer, and find as fact that no notice was provided.

Fourth, we assume that the evidence, except for the issue of notice, was otherwise admissible under Mil. R. Evid. 404(b) to show both that appellant's daughter did not subjectively consent, and to demonstrate appellant's intent and awareness of the lack of consent.[5]

Fifth, both parties agree on appeal that the defense team was not surprised by the allegation that appellant had previously hit his daughter. More specifically, descriptions of the prior assaults were contained in the government's pretrial discovery to the defense team and the defense did not claim that they were unaware of the accusations.

With these threshold issues resolved, we must next determine whether there was good cause to excuse the government's failure to provide timely notice.

At trial, the government's only stated excuse for why it did not provide notice was a mistaken belief that the evidence did not fall within Mil. R. Evid. 404(b). The government [*4] did not offer support for its bare assertion. For example, the trial counsel did not point to case law that he had reasonably relied on. The government did not point to any reliance on pretrial rulings by the judge. Nor was the lack of notice due to the evidence being newly discovered.

On appeal, the government asserts that the trial counsel's disclosure of the daughter's pretrial statements to the defense, "can provide a basis upon which a military judge can find good cause [to excuse] a lack of pretrial notice." The government relies on two unpublished cases from our sister courts in support.[6] We respectfully disagree.

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[4] *See* Mil R. Evid. 401-402.

[5] Neither the parties nor the military judge articulated whether the proffered testimony would be admissible under the test established in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

[6] *See United States v. Gerhardt*, ACM 37946, 2013 CCA LEXIS 736 at *16 (A.F. Ct. Crim. App. 14 Aug. 2013); *United States v. Reeder*, NMCCA 9800702, 2005 CCA LEXIS 211 at *6-8 (N.M. Ct. Crim. App. 30 Jun. 2005).

There is a difference between when a rule requires *disclosure* of evidence and when a rule requires *notice*. *Compare* Mil. R. Evid. 304(d) (requiring *disclosure* of an accused's pretrial statements) *with* Mil. R. Evid. 807(b) (requiring *notice* of intent to use residual hearsay exception). An accused should never be surprised when the government seeks to admit the pretrial statements by the accused that were previously disclosed to the defense. However, the defense should expect that a witness's hearsay statement will be inadmissible when they have not received notice under the residual hearsay exception and [*5] no other hearsay exception applies.

Or, put another way, there are two different ways a party can be unfairly surprised at trial. Whether or not the party is aware of the *existence* of the "surprise" evidence, the party may nonetheless be surprised by the *admissibility* of the evidence. Certainly, a party can be surprised when the opposing party offers evidence that they were unaware of and which should have been provided in discovery. But, when the rules of evidence require notice as a condition to admissibility, a party can reasonably expect that absent such notice (and good cause) the evidence will not be admissible. Appellant correctly argues that if the requirements for notice are not enforced, the effect would be to allow a type of trial by ambush. Trial by ambush is highly disfavored in the military. *See United States v. Trimper*, 28 M.J. 460, 468 (C.M.A. 1989); *United States v. Adens*, 56 M.J. 724, 735 (Army. Ct. Crim. App. 2002).

The military judge did not specifically state whether or not there was good cause to excuse the lack of notice; and having reviewed the record we see none. Instead, the military judge sought to cure the lack of notice by providing the defense counsel a recess and the opportunity to interview appellant's daughter prior to cross-examination.

As we discuss below, by providing the [*6] defense additional time before cross-examination, the ruling helped ensure that appellant was not prejudiced by the lack of notice. However, curing prejudice is not the same as preventing an error from occurring in the first instance. If, absent good cause, a rule requires a party to provide notice prior to admitting evidence, upon timely objection *it is error* to admit the evidence if there is neither notice nor good cause. Harmless error is still error.[7] In a trial, both parties may plan the presentation of their case on the assumption that each party will be held to the rules. For example, when the defense files no motions under Mil. R. Evid. 412, and the rule requires pretrial notice, the government may plan the presentation of its case under the assumption that evidence of the victim's sexual behavior or sexual predisposition will not be admitted. *See United States v. Schelmetty*, ARMY 20150488, 2017 CCA LEXIS 445 (Army Ct. Crim. App. 30 June 2017).

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[7] And it goes without saying that judges cannot intentionally commit harmless errors.

In the absence of both notice and good cause, it was error to admit testimony that appellant had previously hit his daughter over the defense objection.

B. Was appellant prejudiced by the error?

Although we find error, we do not find prejudice for several reasons.

First, the erroneously admitted evidence touched on [*7] whether appellant had ever previously hit his daughter in moments unrelated to any sexual assault. However, there was unobjected to and admissible testimony that appellant used physical violence and coercion to compel his daughter's submission to his sexual acts. Appellant's daughter testified that eighty percent of the time appellant wanted sex she would voice her opinion that "this is wrong, and I didn't want to do it anymore." In response, appellant told her he would "stop when I feel like it." On two occasions, after voicing her non-consent more forcefully appellant used physical violence, to include hitting her in the face to cause her submission. In the context of the trial, the erroneous testimony added little to the government's case and was submerged underneath the far more probative (and admissible) testimony that appellant used physical violence directly connected to the sexual assaults.

Second, as mentioned above, the military judge offered a recess for the defense to interview appellant's daughter. The defense did not need the additional time and did not take the military judge up on his offer.

Third, at trial, the defense did not claim any specific prejudice from the erroneous [*8] ruling. The defense did not claim, for example, that they had prepared their case in reliance that the evidence was not admissible; that with additional time they could have objected to the admission of the evidence under *Reynolds*;[8] that they were deprived of the ability to call witnesses to rebut the testimony; or, anything at all. That is, while we can imagine a case where the defense had detrimentally relied on the lack of notice to the prejudice of the accused, this is not that case.

Fourth, this is a case where the victim was both a minor and the daughter of the accused. "To recognize that a parent or authority figure *can* exert a moral, psychological, or intellectual force over a child is merely to recognize the obvious." *United States v. Palmer*, 33 M.J. 7, 10 (C.A.A.F. 1991) (emphasis in original). While lack of consent is an element of sexual assault under Article 120, UCMJ, and as such must be proven by the government, the analysis is different when the victim is the minor child of the accused. *See, e.g.*, Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, para. 3-45-1 n.7 (10 Sep. 2014) (instruction on constructive force for a child in Article 120,

[8] 29 M.J. 105, 109 (C.A.A.F. 1989).

UCMJ, cases). Within the context of the case as a whole, the erroneously [*9] admitted evidence did not contribute to the verdict.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge SALUSSOLIA and Judge ALDYKIEWICZ concur.

United States v. Shuford

United States Army Court of Criminal Appeals

February 19, 2021, Decided

ARMY 20190594

Reporter
2021 CCA LEXIS 72 *; 2021 WL 659527

UNITED STATES, Appellee v. Chief Warrant Officer Two ABDUL M. SHUFORD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Shuford, 2021 CAAF LEXIS 365, 2021 WL 1930667 (C.A.A.F., Apr. 20, 2021)

Petition for review filed by United States v. Shuford, 2021 CAAF LEXIS 362 (C.A.A.F., Apr. 20, 2021)

Review denied by United States v. Shuford, 2021 CAAF LEXIS 567 (C.A.A.F., June 17, 2021)

Prior History: [*1] Headquarters, 1st Cavalry Division. Douglas K. Watkins and Lanny J. Acosta, Jr., Military Judges, Colonel Emily C. Schiffer, Staff Judge Advocate.

Counsel: For Appellant: Captain Alexander N. Hess, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Reanne R. Wentz, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and ARGUELLES,[1] Appellate Military Judges. Chief Judge (IMA) KRIMBILL and Judge ARGUELLES concur.

Opinion by: BROOKHART

Opinion

MEMORANDUM OPINION

BROOKHART, Senior Judge:

[1] Chief Judge (IMA) Krimbill and Judge Arguelles decided this case while on active duty.

Contrary to his pleas, a general court-martial composed of officers found appellant guilty of one specification of attempting to indecently record the private area of Specialist (SPC) [TEXT REDACTED BY THE COURT], in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880 (2016) [UCMJ]. The panel sentenced appellant to a dismissal, confinement for three months, and forfeiture of all pay and allowances. The convening authority approved the portion of the adjudged sentence extending to a dismissal and confinement for three months, but set aside the portion of the adjudged sentence extending to forfeiture of all pay [*2] and allowances.

Appellant raises two assignments of error before this court for our review under Article 66, UCMJ. First, appellant avers the military judge erred by instructing the panel they could consider evidence pursuant to Military Rule of Evidence [Mil. R. Evid.] 404(b). In his second assignment of error, appellant argues the evidence was legally and factually insufficient to sustain his conviction. We find appellant is entitled to no relief on either assignment of error, however, the first assignment of error warrants some discussion.

BACKGROUND

A. Appellant's Misconduct

In November 2018, appellant and SPC [TEXT REDACTED BY THE COURT] were deployed to Poland to participate in a training rotation. Their unit was housed on a base near the city of Skwierzyna. The unit's shower facility consisted of a series of stalls built into two shipping containers, which were set a few feet apart from one another. A slightly raised walkway ran between the two containers. Each shower stall had its own door accessible only from the outside on the raised walkway. The shower doors on the right shipping container were all painted blue, while those on the left shipping container were all painted red. The far end of the [*3] raised walkway was blocked by a fence such that there was only one way to enter and exit from the shower facility. On the inside, each shower stall was separated from the adjacent stall by walls that ran from near the ceiling down to a few inches from the floor.

On the day of the offense, SPC [TEXT REDACTED BY THE COURT] was taking a shower in one of the blue shower stalls. While showering, she looked down and saw her own image reflected on the screen of a cell phone on the floor of her stall. The phone was extended partway through the gap at the bottom of the wall separating her stall from the neighboring stall and a eared to be filming her. She screamed and the phone was retracted. Specialist [TEXT REDACTED BY THE COURT] then bent down and looked through the gap at the bottom of the stall into the neighboring stall. She saw what she described as a skinny brown-skinned ankle and feet wearing black flip flops with blue markings. She

reached through and tried to grab one of the flip flops. While doing so, she heard a voice from the neighboring stall curse at her in what she described as an African accent. Specialist [TEXT REDACTED BY THE COURT] was unable to hold on to the flip flop [*4] and quickly dressed so she could wait outside to confront whomever had attempted to record her.

As Specialist [TEXT REDACTED BY THE COURT] stood outside the shower stall, positioned where she could see the doors to the adjacent shower stalls, she saw Private (PVT) TA, and another soldier walking by and asked them to assist. While she explained to the two soldiers what happened to her in the shower, she turned away from the shower doors. At some point, out of the corner of her eye, she saw a blur of a brown-skinned person running across the raised walkway from a shower stall near hers on the blue side and towards one of the red-doored shower stalls in the opposite shipping container. Private TA testified he saw one of the red doors towards the end of the shipping container open and close as he spoke with SPC [TEXT REDACTED BY THE COURT] Private TA noted which stall the person entered.

At that point, Sergeant First Class (SFC) JF arrived and was guided to the door of the stall in which the individual entered. After knocking on the door for a while, appellant, who is African American, eventually emerged. Appellant denied any wrongdoing; however, he appeared visibly nervous and stammered [*5] as he spoke. He also declined to provide his phone to SFC JF. Both SPC [TEXT REDACTED BY THE COURT] and SFC JF observed that appellant was wearing black Crocs flip flops with blue markings. Both also heard that appellant spoke with an accent.

Appellant's company commander, Captain (CPT) DJ, was notified of the incident and she, in turn, informed Army Criminal Investigation Command (CID). Army CID, however, had only limited manpower in Poland and was already working another case. Therefore, CID advised CPT DJ to obtain appellant's phone and hold it until agents arrived a few days later. Captain DJ asked appellant to provide his phone for CID, but ultimately she allowed appellant to keep it so he could communicate with his family and with the chain of command.

When CID arrived approximately four days after the incident, they contacted CPT DJ to arrange to meet with appellant and retrieve his phone. Captain DJ sent a text message to appellant indicating that CID was there to question him. Appellant did not respond. She then sent a runner to notify appellant that CID wanted to see him. Eventually, two CID agents met with appellant and proceeded to his open-bay living area to retrieve his [*6] phone. However, when the agents arrived to where the phone was supposedly located, nothing was there except for a charging cord. Appellant claimed his phone had just been stolen and insinuated that the CID agents had something to do with its disappearance. Captain DJ attempted to use an application on her phone to locate appellant's missing

phone. However, in order for the application to work, CPT DJ required a username and password from appellant, which he maintained he could not recall. The phone was never located. One CID agent did testify that he saw a pair of black Crocs with blue markings while searching appellant's belongings for the phone. The flip flops were neither seized nor photographed. Following the CID investigation, in April 2019, the government preferred The Charge and its Specification against appellant.

B. Appellant's Court-Martial

In opening statement, trial counsel told the members, "[u]nfortunately, the government will not be providing the cellphone or any digital footprint from that cellphone because shortly after being notified that the accused would have to relinquish that cellphone to CID, and the day that CID arrived to take that cellphone, it was stolen." [*7] Appellant did not object. Instead, in his brief opening statement, appellant's civilian defense counsel focused on the evidentiary standard and highlighted that the government would not present certain evidence, including appellant's phone, and therefore would not be able to meet its burden.

During the trial, CPT DJ testified about her interactions with CID and her communications with appellant about his phone being seized. The two CID agents also testified about their efforts to secure appellant's phone and ultimately being unable to do so. Appellant offered no objection to any of this testimony. However, after the close of evidence, during an Article 39(a), UCMJ, hearing on findings instructions, trial counsel requested a Mil. R. Evid. 404(b) instruction because the government intended to assert consciousness of guilt in its closing argument based on appellant disposing of his phone. Civilian defense counsel objected to the instruction on grounds that the facts did not raise any uncharged misconduct, only that the phone had been stolen. He also argued the government failed to provide proper notice under Mil. R. Evid. 404(b).

After hearing from both parties, the military judge concluded that the government's notice, although [*8] late by his pretrial order, was still timely under the rules of evidence and contained a sufficient proffer to place appellant on notice of admissible prior conduct under Mil. R. Evid. 404(b). The military judge made findings that the evidence met the standard for admissibility under Mil. R. Evid. 404(b) and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Following his ruling, the military judge instructed the panel:

> You may consider the evidence that the accused no longer possessed his phone when CID attempted to locate it for the limited purpose of its tendency, if any, to show the accused's awareness of his guilt to the offense charged. You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the

> accused is a bad person, or had general criminal tendencies, and that he, therefore, committed the offense charged.

In closing argument, trial counsel argued "there's evidence of the accused's consciousness of guilt" before discussing appellant's nervous demeanor outside the showers and "[o]n 7 November 2018, his phone was missing, and he already knew that CID wanted it. He already knew that [SFC F] and [SPC [TEXT REDACTED [*9] BY THE COURT]] had confronted him looking for it. This is evidence that he knew he had done this. That he knew they were looking for him, and then his phone was stolen. When CID went to seize it, his phone was stolen." In his closing argument, civilian defense counsel only once mentioned that the phone was stolen and, in the context of arguing the government's failure to meet its burden of proof, rhetorically asked the panel, "But again, where's the phone?"

LAW AND DISCUSSION

Before this court, appellant argues the military judge erred in three ways: (i) by instructing the panel pursuant to Mil. R. Evid. 404(b) because the government's notice was insufficient; (ii) by providing an unfairly worded Mil. R. Evid. 404(b) instruction; and (iii) by providing the Mil. R. Evid. 404(b) instruction because the evidence that appellant no longer possessed the phone was not admissible Mil. R. Evid. 404(b) evidence. As discussed below, we disagree.

As a threshold matter, we conclude appellant preserved this issue at trial. Although he did not object to any of the evidence forming the basis for the challenged Mil. R. Evid. 404(b) instruction, he did object to the characterization of that evidence as prior conduct under Mil. R. Evid. 404(b) and to the military judge's provision of an instruction to that effect. Accordingly, [*10] we reject the government's argument on brief that this issue was waived at trial.

Having concluded this issue was preserved, we review the military judge's decision to admit the evidence under Mil. R. Evid. 404(b) for an abuse of discretion. *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000) (citing *United States v. Robles-Ramos*, 47 M.J. 474, 476 (C.A.A.F. 1998)). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015); *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) ("[T]he abuse of discretion standard of review recognizes that a judge has a wide range of choices and will not be reversed so long as the decision remains within that range."). We review the content and adequacy of a military judge's instructions de novo. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006).

Military Rule of Evidence 404(b) allows the admission of uncharged misconduct for relevant purposes other than demonstrating a person's bad character and their conformity therewith. The rule provides a non-exclusive list of purposes for which such evidence may be considered. Although not specifically listed in Mil. R. Evid. 404(b), consciousness of guilt is recognized as one of the "other purposes" for which prior conduct may be admitted. *United States v Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010) (citing *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998)).

In order to be admitted, the prosecution must "provide reasonable notice" before trial of the general nature of the evidence being offered. Mil. R. Evid. 404(b)(2)(A). The military judge then admits such evidence only if [*11] it satisfies all three parts of the test established in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). First, the military judge must find that the evidence reasonably supports a finding by the members that the accused committed the prior crimes, wrongs, or acts. *Id.* Second, the military judge must determine that some fact of consequence will be made more or less probable by the evidence in question. *Id.* Finally, the military judge must determine that the probative value of the evidence is not substantially outweighed the danger of unfair prejudice. *Id.*

We first address appellant's argument that the government provided insufficient pretrial notice, which we find to be without merit. Approximately one month before the panel was seated, the government provided appellant with a document titled "Notice of Intent to Offer Evidence under M.R.E. 404(b)." That notice indicated the government would use evidence that appellant knew CID was seeking his phone to suggest appellant had disposed of the phone before CID arrived and was therefore making a false official statement when he told the CID agents and his commander it had been stolen. The notice indicated the uncharged misconduct demonstrated consciousness of guilt. The specific evidence of appellant's [*12] knowledge detailed in the notice was CPT DJ's November 3rd request for the phone on CID's behalf.

At trial, the government offered additional evidence that appellant knew CID was seeking his phone, specifically the text message from CPT DJ and evidence of the runner sent to find appellant the day CID arrived. According to trial counsel, the government learned of this evidence through interviews sometime after providing the written notice. The government also argued to the military judge that the uncharged misconduct could be described as obstruction of justice in addition to false official statements. Appellant claims that the addition of new predicate evidence and different misconduct rendered the government's notice inadequate. However, Mil. R. Evid. 404(b) only requires that the government provide notice of the "general nature" of the evidence. As stated in the government's brief, the notice requirement is treated broadly. *See, e.g., United States v. Blount*, 502 F.3d 674, 678 (7th Cir. 2007). Here, the government's pretrial Mil. R. Evid. 404(b) notice clearly stated how the evidence would be used, to show consciousness of

guilt, and provided a general summary of the predicate evidence known at the time of notice. We are satisfied that this notice was more than sufficient to apprise [*13] appellant of the general nature of the evidence to be offered under Mil. R. Evid. 404(b). The additional predicate evidence and theory were not so outside the scope of the notice as to render it insufficient.

With regards to the *Reynolds* test, we find that the military judge did not abuse his discretion by allowing the government to argue the questioned evidence under Mil. R. Evid. 404(b) and that his instructions were appropriate. The first prong of *Reynolds* asks only whether the evidence reasonably supports a finding by the panel that appellant committed the prior wrong, crime, or act. In assessing this prong, the military judge "neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." *United States v. Rhodes*, 61 M.J. 445, 455 (C.A.A.F. 2005) (Crawford, J., concurring in part and dissenting in part) (quoting *Huddleston v. United States*, 485 U.S. 681, 690, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)). Rather, the military judge simply "decides whether the [panel] could reasonably find the conditional fact" by a preponderance of the evidence. *Id.* (Crawford, J., concurring in part and dissenting in part) (quoting *Huddleston*, 485 U.S. at 690). The standard for establishing this first prong is "quite low" and may rely on circumstantial evidence. *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993); *United States v Levitt*, 35 M.J. 108, 110 (C.M.A. 1992).

Here, the evidence showed that CPT DJ notified appellant that CID wanted [*14] his phone several days before investigators arrived. Appellant resisted providing the phone and CPT DJ allowed him to maintain the phone. Further evidence showed that on the day CID arrived, CPT DJ texted appellant that CID was looking for him and sent a runner to appellant with a similar message. When appellant's phone was found to be missing, appellant claimed he could not recall information which might have helped locate it. This circumstantial evidence was more than sufficient to reasonably support an inference by the panel that appellant knew CID would want his phone and therefore he determined to get rid of it because its appearance or contents might be used against him. As such, we do not find the military judge abused his discretion with regard to the first prong of *Reynolds*.

The second prong of *Reynolds* requires the military judge to find that the evidence sought to be admitted under Mil. R. Evid. 404(b) makes it more likely that appellant committed the charged offense. Although the charged offense here is an attempt, the phone's appearance and potential forensic exploitation were still very relevant because a phone was the instrument of the underlying crime. Therefore, any evidence that appellant [*15] may have made the phone unavailable directly supports his consciousness of guilt. If appellant was conscious of his guilt, then it is far less likely that the phone's appearance in SPC [TEXT REDACTED BY THE COURT] shower stall was an accident or that someone

other than appellant was the perpetrator. Therefore, we find that the military judge did not abuse his discretion in determining the evidence regarding appellant's phone made a fact of consequence more likely.

The third prong in *Reynolds* is a balancing test requiring the military judge to weigh the probative value of the evidence against the danger of unfair prejudice. The evidence must be excluded if the military judge finds the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The probative value of the evidence is in this case is clear as described in the preceding paragraph. If believed by the panel, it would show appellant was conscious that his phone, either through its appearance or contents, was a source of evidence against him. That evidence made the government's version of events more likely. Therefore, consideration of the disposition of appellant's phone was probative for [*16] the proper purpose of showing appellant's consciousness of his guilt.

Potential prejudice is analyzed by determining to what extent the evidence might "mislead, interfere with, or confuse the members in assessing the principal charges." *Rhodes*, 61 M.J. at 456 (Crawford, J., concurring in part and dissenting in part) (citations omitted). As Judge Crawford noted in her separate opinion in *Rhodes*, evidence of consciousness of guilt almost always relates directly to the charged offense, making it difficult to articulate any possible prejudice. *Id.* at 456-57 (Crawford, J., concurring in part and dissenting in part). That analysis holds true in this case where appellant's phone was the instrumentality of the charged offense. If the panel believed appellant committed the charged offense, then evidence that he also might have lied or obstructed justice was unlikely to add much to that determination. On the other hand, under the unique facts of this case, we find it highly unlikely that the panel would conclude that appellant did not commit the charged offense, but still unfairly find him guilty because they believed he obstructed justice or lied about the instrumentality of the offense. To the extent the later contingency was [*17] possible, we find the military judge's instructions adequately protected appellant.[2] *See Staton*, 69 M.J. at 232 (noting the military judge addressed the risk of prejudice through "tailored instruction regarding appropriate use of th[e] information"). Accordingly, we find the military judge did not abuse his discretion in allowing the government's argument and providing the accompanying instructions pursuant to Mil. R. Evid. 404(b).

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[2] Appellant's claim that the instruction was unfairly worded, or otherwise bound the panel to only one consideration of the prior conduct at issue, was waived by his failure to object at trial. *See United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020); *United States v. Rich*, 79 M.J. 472 (C.A.A.F. 2020). Assuming this argument was not waived, we find no error, plain or otherwise, in the military judge's instruction. The military judge's instruction was consistent with that found in the Military Judge's Benchbook and properly advised the panel that they could only consider evidence that appellant might have disposed of his phone to the extent it showed consciousness of guilt and for no other purpose. In the context of how the government argued the phone's disposition, we find the military judge "clearly, simply, and correctly instructed [the members] concerning the narrow and limited purpose for which the evidence may be considered." *Rhodes*, 61 M.J. at 453 (quoting *United States v. Jobson*, 102 F.3d 214, 222 (6th Cir. 1996)).

Finally, even if the military judge abused his discretion, we do not find the error materially prejudiced appellant's substantial rights. UCMJ art. 59(a). Appellant was found in the immediate area right after SPC [TEXT REDACTED BY THE COURT] reported the attempt to wrongfully record her showering. Based on her location and that of the other soldiers, it was not possible for anyone to have come or gone from the showers. Moreover, appellant's physical appearance matched SPC [TEXT REDACTED BY THE COURT] description, he appeared nervous when confronted, and both his accent and shower shoes matched SPC [TEXT REDACTED BY THE COURT] descriptions. Under these circumstances, the evidence against appellant, while circumstantial, was overwhelming. We therefore find that the admission of evidence regarding [*18] appellant's possible involvement with the disposition of his phone and the military judge's accompanying Mil. R. Evid. 404(b) instructions, even if erroneous, did not substantially influence the findings.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge (IMA) KRIMBILL and Judge ARGUELLES concur.
