IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
Staff Sergeant (E-6) **MICHAEL L. WILSON,** United States Army, 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).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866 (2018). This court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2018).

Statement of the Case

On May 13, 2021, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of rape of a child,

three specifications of sexual abuse of a child, and one specification of sexual assault of a child, all in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012, 2016, 2019). (JA 017). The military judge sentenced appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, to be confined for three life sentences plus fifty years, and a dishonorable discharge. (JA 017).[1] On August 11, 2021 the convening authority took no action on the findings and approved the adjudged sentence, and the military judge entered judgment on August 13, 2021. (JA 017–18).

The ACCA affirmed the findings, with excepted language from three specifications of The Charge, and affirmed the sentence.[2] (JA 002, 006–07). This court granted appellant's Petition for Review on the above stated issue on September 26, 2023. (JA 001).

[1] Appellant's sentence to confinement was divided into three parts. For the first part (Specifications 1, 2, 4, and 5 of The Charge), appellant was sentenced to life with the possibility of parole for Specification 1, life with the possibility of parole for Specification 2, confinement for 10 years for Specification 4, and confinement for 10 years for Specification 5, to run concurrently with each other. For the second part (Specifications 3 and 6 of The Charge), appellant was sentenced to one life sentence with the possibility of parole for Specification 3, and confinement for 10 years for Specification 6, to run concurrently with each other. Finally, appellant was sentenced to confinement for 20 years for Specification 7 of The Charge. The three sentencing parts were ordered to be served consecutively. (JA 016).

[2] The ACCA modified the findings to "except the word 'anus' from Specifications 4, 5, and 6 of The Charge, and to except the words 'inner thighs' from Specification 5 of The Charge." (JA 007).

Statement of Facts

Appellant's biological daughter, Miss EW, reported that on multiple occasions appellant orally and anally penetrated her with his penis as well as touched her breasts, genitals and pubic area in two houses on Fort Leonard Wood, Missouri and Richmond Hill, Georgia. The allegations occurred between 2012 and 2019. (JA 008–10). Miss EW was five years old when she moved to Fort Leonard Wood, Missouri, was ten years old when she made the report, and was twelve years old when she testified at trial. (SA 071–72).

In July 2019 Miss EW left a distraught voicemail message with a friend indicating that her mother, LW, was making her lie. (JA 172–73). Miss EW was called as a witness for the government at appellant's court-martial and explained that LW told her that if she did not lie, the family would be homeless, would not have money, and would be torn apart. (JA 161). Prior to trial, LW pled guilty in federal court to tampering with a victim or witness. (JA 247–48).

One of Miss EW's friends and neighbors in Richmond Hill was Miss SB. (JA 086–87). Miss SB began interacting with appellant in March 2018. (JA 088). Appellant asked Miss MB to have sex with him and she agreed after he assuaged her pregnancy concerns by telling her he had "a surgery."[3] (JA 102–03). Appellant then met Miss SB at a partially constructed house and penetrated her

[3] Appellant had a bilateral vasectomy in 2009. (SA 075).

vulva with his penis from multiple sexual positions, eventually ejaculating onto her back and using her underwear to clean it off. (JA 103–05). Miss SB was twelve years old at the time of the assault. (JA 106).

After the incident, appellant and Miss SB continued to have a relationship via telephone conversations while Miss SB was at her grandparents' home. (JA 111). Phone records indicate there were ten phone calls between appellant and Miss SB's grandparents' number between 10 March and 13 March 2019. (JA 130). During one of these conversations, appellant confirmed to Miss SB that he had been attracted to children "forever." (JA 112).

While executing a search of appellant's house agents from the Federal Bureau of Investigation (FBI) found a journal in a bedside table in the master bedroom. (JA 027). Upon review of the journal the FBI agents discovered evidence they believed relevant and accordingly seized the journal. (JA 027). When questioned by the FBI about the journal appellant admitted to writing the stories contained in it. (JA 029). When pressed by the FBI agent about the contents of the stories, specifically the depiction of children engaging in sex acts, appellant stated the stories were about his wife. (JA 031–32). The journal contained eight stories about sexual acts between adults which could be read in a typical "front-to-back" fashion. (JA 316). The journal also contained stories about sexual acts between adults and children that could be read in a "back-to-front"

manner. (JA 316).

The government provided Section III disclosures, including the journal, to appellant on October 22, 2020. (JA 288, 300).[4] On November 16, 2020, the government submitted a motion for a preliminary ruling on the admissibility of the journal written by appellant. (JA 257–61). The journal contained stories involving sexual intercourse and other sexual activities with minors. (JA 220–46, 257–61).[5] In its motion, the government indicated the journal is "direct evidence of [appellant's] intent to engage in sexual behavior with minors." (JA 260). On November 23, 2020 appellant objected to the government's motion on the basis of

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[4] The record contains the Section III disclosure as an enclosure to appellant's motion at trial to exclude evidence under Mil R. Evid. 404(b). (JA 300). That enclosure has redacted out the journal – but combining the redacted disclosure with the concession at trial that "The Government provided notice in its Section III filings of alleged property seized from [appellant] it may attempt to admit at trial, to include the journal entries at issue in this motion," it is clear that appellant was given Section III notice of the journal on this date. (JA 288, 300).

[5] The military judge found that the three journal entries at issue depicted female minors engaging in sexual intercourse with adult males. (JA 322). One such story in appellant's journal features a child under the control of her parents. (JA 220–46). Although the other stories do not include explicit reference to the female being a minor, a reasonable inference that the characters are children can be drawn from their descriptions. These include being described as school-aged and "young" or "little sister," and the illegality of the sexual acts in the United States. (JA 220–46). Further, the girls' physical features are described consistent with a child, including descriptions of pre-pubescent features and small bodies. (JA 220–46). *See generally United States v. Lyons*, 33 M.J. 88, 90 (C.A.A.F. 1991) (stating "a permissible inference was lawful where it can . . . be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (citing *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Military Rules of Evidence [Mil. R. Evid] 402, 403, and 404(b). (JA 283–91). The military judge held an Article 39(a) session on November 30, 2020 and dealt, in part, with the motion to pre-admit the journal. (JA 023). The government sought to admit the entire journal, which appellant admitted he had written, as a non-hearsay statement of the accused. (JA 040–42, 257–61). At that hearing the military judge determined the evidence was covered by Mil. R. Evid. 404(b). (JA 040–41). At the military judge's request, the government then identified intent as the permitted use for the evidence under Mil. R. Evid. 404(b)(2). (JA 040–41). Conversely, appellant objected on notice grounds and argued the evidence failed to satisfy the requirements of the test set forth in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). (JA 044–47). Should the court not exclude the evidence, appellant asked the court to reserve its ruling until trial, "when a proper foundation could possibly be laid." (JA 047). The military judge ruled on the motion to pre-admit, telling the trial counsel, "you haven't met your foundation, and the government's motion is, at this time, denied." (JA 051). The military judge did, however, permit the government to discuss the evidence in opening statement, provided counsel had a good faith basis to believe it would be admissible at trial. (JA 051). On December 29, 2020 appellant requested to continue the trial due to lack of expert contracting. (JA 315). The government did not oppose that motion and the parties agreed to a new trial date of May 10 to 13, 2021. (JA 315).

Roughly one month prior to trial appellant's primary defense counsel emailed his expert consultants. (SA 019–020). In that email he asked Dr. KR, a forensic psychologist, to review the journal entries, noting, "I anticipate the Government will attempt to utilize them to show our client's intent." (SA 019).

Prior to trial, the military judge emailed the parties with further questions regarding, in part, the journal evidence. (JA 054). In those emails, the military judge asked "what specific entry or entries in the journal […] does the government intend to present during its opening statement and offer into evidence during the trial?" and for theories of admissibility of those entries. (JA 309–13). The government specified three stories from the journal that had similarities to the charged offenses and identified intent and motive as permitted uses under Mil. R. Evid. 404(b). (JA 309–13).[6] Appellant raised several objections to the evidence, most notably that they were not substantially similar to the charged offenses and that the stories did not explicitly describe children. (JA 309–13).

On May 7, 2021 a second Article 39(a) session was held. (JA 317). At the hearing appellant again raised the fact that "child" was not mentioned in the stories, and also raised a Mil. R. Evid. 403 concern that the conduct in the journal was "very different from the alleged conduct." (JA 058–59). During the Article

[6] The military judge's questions are at labeled with a "Q," the government's response is labeled "A," and the defense's response is italicized. (JA 309–13).

39(a) hearing the military judge indicated that he would make a written ruling on the issue. (JA 063). The military judge issued an extensive written ruling, with findings of fact and conclusions of law, allowing the journal entries to be used to show motive, intent, and to rebut a mistake of fact as to age defense. (JA 320–24).

Summary of Argument

Appellant was on notice of the journal entries and for what purpose the government intended to use them well before trial. Further, the military judge did not abuse his discretion when he admitted the journal entries as evidence of appellant's motive and intent to commit the charged offenses. *Reynolds*, 29 M.J. at 109. Even if the military judge abused his discretion, appellant was not materially prejudiced by that error. Article 59(a), UCMJ.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Frost*, 79 M.J. at 109 (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)). "[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." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). "Mere disagreement with the conclusion of the military judge . . . is not enough to overturn his judgment." *United States v. Dooley*, 61 M.J. 258, 262 (C.A.A.F. 2005).

Law

Evidence of "a person's character in order to show that on a particular occasion the person acted in accordance with that character" is inadmissible at courts-martial. Mil. R. Evid. 404(b)(1). However, it can be admitted for other purposes, including those listed in Mil. R. Evid. 404(b)(2). *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010). The government must "provide reasonable notice" before trial of the general nature of the evidence being offered. Mil. R. Evid. 404(b)(2). The notice requirement is construed broadly. *United States v. Blount,* 502 F.3d 674, 678 (7th Cir. 2007).[7] "The purpose of notice is to allow the

[7] The Government was unable to find precedent from this Court directly on point, however the Army Court has written on the issue. *United States v. Shuford*, 2021 CCA LEXIS 72, Army Ct. Crim. App. 2021) at *13 (finding one month's notice sufficient stating "Mil. R. Evid. 404(b) only requires that the government provide notice of the "general nature" of the evidence […] the notice requirement is treated broadly.) *see also; United States v. Watson*, 366 U.S. App. D.C. 188, 409 F.3d 458, 465–66 (D.C. Cir. 2005) (48 hours' notice may be sufficient); *Blount*, 502 F.3d at 678 (one week's notice is sufficient); *United States v. Preciado*, 336 F.3d 739, 745 (8th Cir. 2003) (several days' notice is sufficient); *United States v. Perez-Tosta*, 36 F.3d 1552, 1561 (11th Cir. 1994) (six days' notice was sufficient). *United States v. Erickson*, 75 F.3d 470, 478 (9th Cir. 1996) (general disclosure of pre-trial statements satisfies the notice requirement.); *United States v. Russell*, 109 F.3d 1503, 1507 (10th Cir. 1997) (courts have not required more than the "general

parties the opportunity to know on what basis they should be prepared to argue the admission of evidence." *United States v. Czachorowski*, 66 M.J. 432, 438 (C.A.A.F. 2008).

Military courts evaluate the admissibility of evidence under Mil. R. Evid. 404(b) using a three-pronged test: (1) whether the evidence reasonably supports a finding by the court members that appellant committed prior crimes, wrongs, or acts; (2) what fact of consequence is made more or less probable by the existence of this evidence; and (3) whether the probative value is substantially outweighed by the danger of unfair prejudice. *Reynolds*, 29 M.J. at 109. If the evidence fails any of these three prongs it is inadmissible and should be tested for prejudice. *United States v. Cousins*, 35 M.J. 70, 74 (C.M.A. 1992); Article 59(a), UCMJ.

Argument

A. Appellant was on notice of the journal and its intended uses.

The reasonable notice requirement of Mil. R. Evid. 404(b)(2)(A) was satisfied in this case well in advance of trial. Appellant was put on notice, at the very latest,[8] on November 16, 2020, nearly six months before trial, when the government gave notice to the appellant of the general nature of the evidence and

nature" of the evidence).

[8] The government included the journal entries in its October 22, 2020 Section III disclosure as property seized from appellant that it may admit at trial. (JA 288, 300).

the intended purpose through its motion for a preliminary ruling on admissibility. (JA 257–61). The government described the journal entries, their general content, and specifically noted the evidence was relevant to appellant's "intent to engage in sexual behavior with minors." Mil. R. Evid. 404(b)(2); (JA 257–61). Appellant demonstrated he was on notice when he objected to the evidence on Mil. R. Evid. 404(b) grounds in writing on November 23, 2020. (JA 283–91).

Appellant was again put on notice of the general nature of the evidence at the November 30, 2020 motions hearing. Although the government initially sought admission of the full journal as a statement of the appellant under Mil. R. Evid 801(d)(2) trial counsel then asserted that it was admissible under Mil. R. Evid. 404(b) to show intent. (JA 041, 043). Appellant argued the government had failed to satisfy the *Reynolds* factors and the intent basis had not been established. (JA 044–45). Appellant then asked the military judge, should he not exclude the evidence, to reserve his ruling until trial. (JA 047). Although the military judge denied the government's motion to pre-admit for lack of foundation, the ruling on admissibility was reserved until trial.[9] (JA 051).

[9] Appellant's assertion that the military judge excluded the evidence at the November 30, 2020 Article 39(a) session is unsupported by the record. (JA 051; Appellant's Br. 17). The military judge clearly indicated that the evidence may be admissible at trial. (JA 051). The military judge went so far as to say the government's motion to pre-admit was denied "at this time" due to lack of foundation. (JA 051, 052). This is consistent with appellant's request that the ruling be deferred. (JA 047, 291).

Appellant was put on notice a third time when the military judge asked for further details prior to the May 7, 2021 Article 39(a) session. (R. at 71). In an email exchange, the government specified in detail the three stories it wished to enter into evidence, its theory of admissibility, and case law to support its position. (JA 309–13). Appellant responded to each of the government's arguments. (JA 309–13). In neither appellant's e-mail responses nor at the May 7, 2021 Article 39(a) session did appellant object to the journal on the basis of lack of notice.[10] (JA 057–59; 309–13). On May 10, 2021, prior to appellant entering a plea of not guilty, the military judge indicated a ruling was forthcoming. (JA 063, 065). In that ruling, issued in writing and orally prior to trial, the defense's Mil. R. Evid. 402, 403 and 404(b) objections to the three journal entries were overruled, provided the government could lay the proper foundation. (JA 066).

Appellant knew of the evidence and government's theory of admissibility, at a minimum, almost six months prior to trial, and his lack of surprise is further supported by his prepared defense. One month prior to trial, appellant's defense attorney emailed his expert consultants and stated, in part, "I also have some of our client's journal entries I would like you to review as I anticipate the Government

[10] In both the email exchange and at the 7 May 2021 Article 39(a) session appellant only objected to the lack of similarities between stories and the charged offenses. (JA 57, 309–13). At the Article 39(a) appellant also raised a Mil. R. Evid. 403 concern. (JA 059). He did not re-raise a notice objection at that time.

will attempt to utilize them to show our client's intent."[11] (SA 019). Appellant pre-marked Def. Ex. D, the first two pages of the journal, and admitted the same at trial. (JA 132). Those pages dedicate the journal to appellant's wife, LW, which appellant claimed in closing, showed marital role playing and not an intent to sexually assault minors. (JA 132, 214).

As appellant notes, "the policy of 404(b)'s notice provision is to protect the defendant by reducing surprise." (Appellant's Br. 13 (quoting. *Perez-Tosta*, 36 F.3d at 1561)). It is clear from the record of trial that appellant was aware of the general nature of the evidence, the government's theory of admissibility, and that the evidence may be admissible well before, and up to, trial.[12] The government provided reasonable notice, not once but three times, prior to trial. Due to the clear and repeated notice, this court can be certain that appellant was not denied a fair trial. *See Shuford*, 2021 CCA LEXIS 72 at *13; *Blount*, 502 F.3d at 678;

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[11] Despite this email appellant repeatedly makes unsupported claims that his defense counsel "had been preparing for trial in accordance with the evidentiary landscape" based on his belief that the evidence had been excluded, that the defense "did not have reason to believe this evidence would be admitted" and "the judge sustained the defense's motion leading any reasonable practitioner to believe the evidence was not coming in at trial." (Appellant's Br. 23, 24, 43). Equally confounding in light of this email is appellant's argument that "the defense could have sought different types of expert assistance to help put the journal in context" had they been given sufficient time to prepare. (Appellant's Br. 43).

[12] Appellant's argument that he was unable to ask for a continuance due to his defense counsel's impending resignation from the Army is immaterial as he and his counsel were on notice of the evidence and the government's intent to use it since at least November 2020. (Appellant's Br. 30; JA 257.).

Preciado, 336 F.3d at 745; *Perez-Tosta*, 36 F.3d at 1561; *Erickson*, 75 F.3d at 478; *Russell*, 109 F.3d at 1507.

B. The military judge properly adjudicated appellant's Mil. R. Evid. 404(b) objection.

The issue of the journal entries showing intent and the admissibility of that evidence was put before the court by the parties, not the military judge. (JA 257–61; 283–91). The government first presented the evidence in its Section III disclosures and then again in its motion to pre-admit the journals. (JA 259-61, 288, 300). In that motion the government stated, explicitly, that the entries could show appellant's intent. (JA 260). When appellant objected to the admission on Mil. R. Evid. 404(b) grounds the military judge correctly acted in his role as gatekeeper to determine if the evidence was admissible. (JA 040–44; 283–91). *See United States v. Kaspers*, 47 M.J. 176, 178 (C.A.A.F. 1997) ("the judge's role is to screen all evidence for minimum standards of admissibility and to let the factfinder determine which evidence is more persuasive"). Although the government initially did not believe the evidence implicated Mil. R. Evid. 404(b), the theory that it showed appellant's intent did not originate "after the concession" but predated appellant's objection. (Appellant's Br. 27–28; JA 260). Far from pushing them "towards 404(b)" the military judge simply summarized government's argument by asking counsel, "you said in your motion, and just now, moments ago, that it is evidence of intent. Isn't that one of the permitted uses in

[Mil. R. Evid.] 404(b)(2), assuming you meet the *Reynolds* test?"[13] (JA 040) *Cf. United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001) (where the military judge's actions, including out of court confrontation of witnesses, raised concerns about his impartiality). The military judge was not acting as a proponent of the government's evidence in agreeing with appellant that Mil. R. Evid. 404(b) applied and then asking the government to argue why it was nevertheless admissible; rather he was fulfilling his role as gatekeeper. (JA 042–43). *Kaspers*, 47 M.J. at 178; *see also United States v. Foster*, 64 M.J. 331, 337 (C.A.A.F. 2007) (noting the test for impartiality is an objective test from the position of a reasonable observer and taken as a whole in the context of this trial).

Unlike the court in *United States v. Sineneng-Smith*, the military judge did not abandon in his role as a neutral arbiter to settle an evidentiary dispute raised by the parties. 140 S. Ct. 1575 (2020). There, the circuit court identified new arguments on appeal, invited briefing from multiple *amici*, offered those *amici* more time for oral argument than the parties, and based its decision on the *amici* arguments. *Id*. at 1580–81. A unanimous Supreme Court found such actions represented a "radical transformation" that "departed . . . drastically from the principle of party presentation." *Id.* at 1578, 1582. The issue in *Sineneng-Smith*

[13] Appellant leaves out the majority of the first sentence in his brief, thus removing the needed context of the military judge's statement. (Appellant's Br. 27)

was not a court settling a dispute between parties regarding admissibility of evidence, but rather was the appellate panel "[e]lecting not to address the party-presented controversy" before it. *Id.* at 1581. Any fair reading of *Sineneng-Smith* would demonstrate that the military judge's actions in this case in no way implicated the party presentation principle.

C. The military judge was not required to show good cause as notice was given before trial.

Appellant's claim that the military judge was required to articulate good cause for this purported deviation from the notice requirement is misplaced. (Appellant's Br. 31). Mil. R. Evid. 404(b) requires good cause be found if notice of evidence is not given a reasonable amount of time/reasonably *before* trial. Mil. R. Evid. 404(b)(2) (emphasis added). The military judge need only determine good cause if the evidence is noticed *during* trial. Mil. R. Evid. 404(b)(2)(B) (emphasis added). As discussed *supra,* notice was given through both the Section III disclosures and the motion to pre-admit, both of which were provided to appellant well before trial. (JA 260, 288, 300). Appellant appears to conflate the military judge's decision to defer ruling until trial with government notice of Mil. R. Evid. 404(b) evidence occurring during trial. (Appellant's Br. 14, 31). While the military judge was right to defer ruling of the objection until trial, that does not mean the notice requirement was not met, nor does it make that notice untimely. *Watson*, 366 U.S. App. D.C. at 465–66; *Preciado*, 336 F.3d at 745; *Blount*, 502

F.3d at 678; *Perez-Tosta*, 36 F.3d at 1561; R.C.M. 906(b)(13). Ultimately, it is Mil. R. Evid. 404(b), not the military judge's pretrial order, which determines when good cause need be shown.

D. The military judge did not err when admitting the journal entries.

The military judge did not abuse his discretion in admitting the journal entries in accordance with Mil. R. Evid. 404(b), and he properly instructed the panel. The military judge properly applied all three prongs of the *Reynolds* test and did not make any erroneous findings of fact, was not influenced by an erroneous view of the law, and his decision was well within the range of reasonable choices. *Reynolds*, 29 M.J. at 109; *Frost*, 79 M.J. at 109.

1. The First Reynolds Prong

The first *Reynolds* prong is "whether the evidence reasonably supports a finding by the court members that appellant committed prior crimes, wrongs, or acts." *Reynolds*, 29 M.J. at 109. The standard for satisfying the first prong of the *Reynolds* test is "quite low." *United States v. Dorsey*, 38 M.J. 244, 246 (C.A.A.F. 1993); *see also United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). "[D]irect evidence is not necessary, and *circumstantial evidence may be utilized* to meet the preponderance-of-evidence standard . . . ." *United States v. Levitt*, 35 M.J. 108, 110 (C.A.A.F. 1992) (emphasis added). The military judge considered the low threshold for the first prong, the evidence that appellant's admission to FBI

Special Agent SS that the journal belonged to and was written by him, and the fact that the stories described sexual acts with minors, and properly determined the first *Reynolds* prong was met. (JA 320–21). *Reynolds*, 29 M.J. at 109.

2. The Second Reynolds Prong

In evaluating the second *Reynolds* prong the court must determine "what fact of consequence is made more or less probable by the existence of this evidence." *Id*. The military judge properly determined the evidence supported appellant's motive to engage in sexual behavior with minors.[14] (JA 322). He specifically found "that a reasonable factfinder could easily determine that the [appellant] graphically penned three 'stories' describing explicit sexual activities between children and adults" and therefore constitutes some evidence of that "which incites or stimulates [appellant], that is, sex between adults and children." (JA 322). The military judge based this determination on the similarities between the child characters in the stories and appellant, as well as the incestual intercourse captured in the stories and Specifications 1 through 6. (JA 322–23).

Likewise, the military judge properly determined that the evidence also supported appellant's intent to commit acts similar to those described in the stories.

[14] The military judge correctly cites *People v. Weiss*, 300 NYS 249 (1937) for this definition and expounded on *United States v. Lips*' proposition that possession of graphic and explicit material can show motive to engage in an act. 22 MJ 679 (AFCMR 1986). (JA 321–22).

(JA 324). The military judge based this determination on the same reasons as above, and an application of "a minimal degree of common sense when reading the journals." (JA 324). The military judge noted that Specifications 4 through 6 of the charge require a showing of specific intent. (JA 324). He further correctly concluded that in cases involving sexual exploitation of children an accused's intent to engage in those acts is probative. (JA 323).[15] Ultimately, the military judge properly determined that "a reasonable factfinder may find that a journal author's state of mind when writing graphic and detailed stories regarding sex between children and adults may possess a sufficiently similar state of mind during the commission of the alleged offenses."[16] (JA 324). Clearly, the military judge made a determination that appellant's intent, both specific and general, was made more probable by the existence of this evidence. *Reynolds*, 29 M.J. at 109.

The military judge did not abuse his discretion in applying this court's holding in *United States v. Hays*, in which evidence of the appellant's emails

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[15] The military judge cited *United States v. Lieu*, 298 F. Supp 3d 32, 52, (D.D.C. 2018) to support his position. (JA 323). Appellant attempts to distinguish *Lieu* by noting that the evidence in that case (child pornography) was admitted under both Federal Rules of Evidence 404(b) and 414. (Appellant's Br. 33). The court, however, conducted separate analyses for each rule and found the evidence to be admissible under either. *Id.* at 51–54, 58.

[16] Although the military judge notes the specific intent required to prove Specification 4 through 6 of the charge, his ruling indicates that this evidence may be used to show intent "during the commission of the alleged offenses" and does not seem to limit the evidence to Specifications 4 through 6 but rather applies it to all specification of the charge. (JA 323-34).

containing child pornography, requests for child pornography, and discussions about underage girls showed his intent to solicit the sexual assault of a child, to present case. 62 MJ 158, 162 (C.A.A.F. 2005) (JA 323). Although *Hays* dealt with an inchoate attempt, the applicability of prior bad acts to show intent is equally applicable – and certainly not an erroneous view of the law. *Frost*, 79 M.J. at 109; *see also United States v. Harrow*, 65 M.J. 190, 202 (C.A.A.F. 2007) ("The Supreme Court, examining [whether intent evidence is admissible], unequivocally determined that evidence of intent and lack of accident may be admitted regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution.") (citing *Estelle v. McGuire*, 502 U.S. 62, 69 (1991)).

Appellant's assertion that in *United States v. Orsburn* this court held "evidence regarding intent was *inadmissible* when intent was not at issue" and was only admissible "*after* the defense raised the issue of intent and the victim's truthfulness" is based on an inaccurate reading of the case. 31 M.J. 182, 185 (C.M.A. 1990).[17] (Appellant's Br. 18) (emphasis in Appellant's brief). The appellant in *Orsburn* presented a similar argument to appellant here – specifically, "if he engaged in sexual intercourse or sodomy with his daughter as alleged, there would be no question of his intent in doing these acts." *Id.* at 188. The court held

[17] *Orsburn* predates both *Estelle* and *Harrow*.

"[w]e disagree with this argument […] for several reasons." *Id.* The *Orsburn* court then noted "there is a legitimate disagreement not only in the various United States Courts of Appeals, but also in the state courts, on whether the intent must be actually disputed before evidence of prior bad acts may be admitted by the Government to show intent." *Id.* Further, the court noted that while the judge offered to wait until after the presentation of the cases-in-chief, that did not actually occur as defense asked for the ruling to be made prior to the presentation of its evidence. *Id*. The admitted evidence was thus introduced *prior* to intent being placed "at issue" in *Orsburn* and the court's ruling reinforces the fact that the military judge did not abuse his discretion here. *Id. See also United States v Whitner*, 51 M.J. 457, 460 (C.A.A.F. 1999) ("We have repeatedly recognized that an accused's possession of pornographic books, magazines, or videos concerning a particular sex partner or sexual act, at or near the scene of an alleged sex crime, around the time of that alleged offense may be relevant evidence of his intent or state of mind at that time, depending upon the circumstances of a particular case.")

The determination that "a reasonable factfinder may find that a journal author's state of mind when writing graphic and detailed stories regarding sex between children and adults may possess a sufficiently similar state of mind during the commission of the alleged offenses to make the evidence of the prior acts relevant on his intent during the commission of the alleged offenses" was therefore

proper. (JA 323). Contrary to appellant's claim, the military judge made clear distinctions regarding the individual specifications. (JA 322–24). As such, the military judge appropriately determined journals met the second prong of the *Reynolds* test. 29 M.J. at 109. (JA 322–24).

3. Third Reynolds Prong.

Appellant's argument that the military judge failed to properly apply the balancing test under Mil. R. Evid. 403 is not supported by the record. (Appellant's Br. 21). The military judge did not abuse his discretion in determining that the evidence in this case met the third *Reynolds* prong.[18] Appellant relies on *United States v. Curtin*, where the trial court's Mil. R. Evid. 403 analysis failed because the judge did not review all of the evidence admitted. 489 F.3d 935, 957 (9th Cir. 2007). After an extensive discussion regarding why the evidence was relevant to Curtin's intent, the 9th Circuit stated, "[o]ur principle problem . . . is that the district court did not read every word of the five disputed stories in preparation for making its balancing decision. . . . This troubling circumstance raises a question primarily of procedure or process rather than substance." *Id.* at 956–57. Ultimately, the court held the district court did not abuse its discretion "in concluding that the stories . . . contained relevant evidence pursuant to Rule 404(b)

[18] The military judge should receive widest discretion in conducting his Mil. R. Evid. 403 balancing because he articulated that analysis on the record. *United States v. St. Jean,* 83 M.J. 109, 113–14 (C.A.A.F. 2023).

[which] had probative value with respect to the intent element of the specific intent crime for which he was prosecuted" but did abuse its discretion by failing to "carefully to limit the evidence," specifically unread descriptions of bestiality. *Id.* at 967–69.

That is not the case here, as the content of the journal entries all dealt with sexual molestation and exploitation of minors and were very similar to the charged offenses. (JA 321). All three stories dealt with a minor child engaging in sex acts with either family members or adult men. (JA 321). One such story featured a man who shared appellant's surname, and another featured an American soldier who shared appellant's occupational field. (JA 220–246, 321). Additionally, contrary to appellant's claim, the story of the Afghan girl being taught by her parents how to engage in sexual acts, including anal intercourse, in preparation for her encounter with an American soldier, is relevant to appellant's intent as he engaged in similar acts with his daughter and Miss SB and, perhaps most importantly, requested anal intercourse from Miss SB. (JA 112, 140, 222–25, 321; Appellant's Br. 37.)

Appellant likewise stretches the holding of *United States v. Grimes* in order to have the 5th Circuit's decision support his argument. (Appellant's Br. 38). In *Grimes* the appellant was charged with possession of "images of young, naked girls . . . with pixel boxes over their 'private areas.'" 244 F.3d 375, 377 (5th Cir.

2001). The court held that narrative depictions of "violent rapes and moderate torture" offered to show appellant's intent were so dissimilar to the possession of non-violent child pornography that the probative value of these "vile" stories was substantially outweighed by the risk of unfair prejudice. *Id.* at 384. In other words, the "graphic and disturbing" torture tales represented a fundamental difference from the "more neutral" charged offense of possessing child pornography. (Appellant's Br. 38). In the present case, like the application of *Curtin*, there is no such concern. The journal entries, though graphic, are remarkably similar to the vile acts appellant undertook with his daughter and Miss SB and are consistent with both victims' graphic testimony.

Further, military judge reviewed the three stories and thoroughly analyzed the evidence under the Mil. R. Evid. 403 balancing test. (JA 322–24). The court noted:

> Although the language used in the three journal stories is offensive, that is the nature of much of the evidence in cases involving alleged child predation offenses. In light of the nature of the alleged offenses and the evidence likely to be admitted, the prejudicial impact of these stories does not substantially outweigh their probative value in demonstrating [appellant]'s intent and motive to molest children. . . .

(JA 322). This determination is in line with the analysis of case law, as outlined in the military judge's ruling. Most notably, this finding is consistent with *United States v. Acton*, where the court determined, in an incest case, that "[a]ny

prejudicial impact based on the shocking nature of the evidence was diminished by the fact the same conduct was already before the court members." 38 M.J. 330, 334 (C.A.A.F. 1993).[19] This case is similar—offensive, graphic acts similar to those contained in the stories were already described in great detail by Miss SB by the time the journal entries were admitted into evidence.

The military judge did a proper Mil. R. Evid. 403 analysis in this case, he made no clearly erroneous factual findings, he was not influenced by an erroneous view of the law, and his determination that the prejudicial affect did not outweigh the probative value is not outside the range of choices reasonably arising from the applicable facts and the law. *Frost*, 79 M.J. at 109; *United States v. White*, 69 M.J. 236 (C.A.A.F. 2010) (holding that mere difference of opinion does not rise to an abuse of discretion). The military judge correctly applied all three prongs of the *Reynolds* test and did not abuse his discretion in determining the evidence was admissible.

[19] While the evidence at issue in *Acton* was appellant's confession, the "shocking nature" of the information contained within that confession is similar to that of the present case. 38 M.J. at 334. *See also Hays*, 62 MJ at 158 (images of minors engaging in sexually explicit conduct, images of adults engaging in bestiality, and requests for sexually explicit pedophilia content were not more prejudicial than probative) and *United States v. Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986) (in cases of child pornography there is an unavoidable risk of the introduction of evidence that would offend the average juror).

E. The military judge properly instructed the panel regarding this evidence.

Finally, consistent with his ruling, the military judge properly instructed the panel. (JA 191–92, 236–28). Before closing argument, the military judge instructed the panel that the journal entries could only be used for the "limited purpose of its tendency, if any" to determine if appellant intended, or had a motive, to commit the charged offenses. (JA 191–92). He then properly warned the panel: "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 has general criminal tendencies and that he therefore committed any of the charged offenses." (JA 192). *See Huddleston v. United States*, 485 U.S. 681, 681 (1988); *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)(noting "[a]bsent evidence to the contrary, court members are presumed to comply with the military judge's instructions"). There were no objections to the instruction at trial. (SA 073–74).[20]

F. Even if the military judge erred, appellant suffered no material prejudice to a substantial right.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial

[20] It is noteworthy that appellant did not object to the instruction, waiving the issue, but now claims for the first time on appeal to this court the instruction was inadequate. (Appellant's Br. 11, 23, 35–36; SA 073-074). *See United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) ("expressly and unequivocally acquiescing to the military judge's instructions, appellant waived all objections to the instructions.")(internal quotations omitted).

rights of the accused." Article 59(a), UCMJ. An erroneous admission of evidence under Mil. R. Evid. 404(b) is not of constitutional magnitude. *See Harrow*, 65 M.J. at 203 ("any error stemming from the admission of [Mil. R. Evid. 404(b)] evidence did not substantially prejudice Appellant"). As such, the government has the burden of demonstrating that the error did not have a substantial influence on the findings. *United States v. Pablo*, 53 M.J. 356, 359 (C.A.A.F. 2000).

The government meets this burden by showing there is no "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Tovarchavez*, 78 M.J. 458, 464 n.10 (C.A.A.F. 2019) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 1343 (2016)). Reviewing courts consider four factors in evaluating whether the erroneous admission of government evidence is harmless, weighing: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Here, the government's case was very strong. *Kohlbek*, 78 M.J. 326, 334. Both Miss SB and Miss EW testified in great detail about the sexual acts committed on them by appellant. (JA 099–112, 133–159). Details from Miss SB's testimony were independently corroborated, including appellant's vasectomy and

the photos of the construction site. (JA 103–04, 127, SA 064–69). Miss SB's testimony was corroborated by phone records. (JA 111–12, 130). Miss EW testified about the sexual abuse she suffered for years, including disturbing descriptions of the look, feel, and taste of her father's ejaculate. (JA 137). Miss EW also testified how she distracted herself by watching Barbie or toy unboxing videos on her phone as her father anally penetrated her. (JA 146–47). The two victims described appellant's behavior similarly, including the sexual position he often used. (JA 104–05, 146–47).

In contrast, the defense case was weak. *Kohlbek*, 78 M.J. at 334. Appellant's emphasis in cross examination was that the victims were angry or lying, which the panel heard and considered. (JA 184). Appellant never connected that underdeveloped theory to why either Miss SB or Miss EW would have been angry or lied. Appellant did elicit that Miss EW recanted and did not fully report the allegations at first. (JA 166–68). However, the recantation evidence's effectiveness was completely blunted by the distraught voicemail Miss EW left on her friend's phone, Miss EW's testimony that her mother manipulated her to recant with threats of poverty and homelessness, and her mother's federal conviction for victim tampering. (JA 161, 172–74, 247–48). Further, Miss EW's piecemeal reporting of the abuse was explained by child forensic psychiatrist Dr. MS'

testimony on why children may recant or disclose details differently or in stages. (JA 175–184).[21]

As to the third and fourth *Kohlbeck* factors, while the quality may be neutral the materiality of the evidence was low. The journals were not the only evidence of appellant's intent and motive to have sexual intercourse with children. (JA 112). Miss SB testified that when she asked appellant how long he "liked little kids," appellant replied "forever." (JA 112). This evidence is stronger and more material than the stories contained in the journal, as it is an expression of an actual intent and motivation that existed prior to any of the charged acts. (JA 112). Most importantly, testimony was elicited from Miss SB, pursuant to Mil. R. Evid. 414, that appellant attempted to entice her to engage in future sexual acts with him—acts for which appellant was convicted in civilian district court and sentenced to fifteen years confinement. (JA 112). As the military judge correctly instructed the panel, such evidence is indicative of a propensity to engage in child sex offenses and this testimony was elicited prior to the journal stories being introduced at trial.

[21] Dr. MS, a forensic child psychologist, testified that it is not atypical for children to delay reporting. (JA 177). He explained that a variety of factors influence reporting, including the child's age, their ability to understand what has occurred, the possible ramifications to reporting, and, critically, the relationship the child has with the non-offending parent. (JA 177–78). Dr. MS also testified that a "pact of secrecy" between the abuser and the victim is "the second step" of sexual abuse. (JA 180). Finally, Dr. MS testified that recantation is influenced by factors such as age of the victim, relation to abuser, and non-support or non-protection by the non-offending parent post disclosure. (JA 182).

(JA 112, 192). This permissible propensity evidence, by its nature, is stronger and more compelling than the non-propensity evidence admitted in the form of appellant's journal. *See, e.g., United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000) (holding that the prohibition against propensity evidence, as explicitly intended by congress, does not extend to Mil. R. Evid. 413 evidence).[22]

The overwhelming evidence, including but not limited to, testimony of an expert witness in child psychology, extrinsic corroboration of Miss SB's testimony, the evidence of appellant's prior sex offense with a child, and most especially the detailed testimony of Miss EW and Miss SB, proves appellant's guilt by itself beyond a reasonable doubt. (JA 100–12, 127, 133–59, 160–61, 175–83, SA 064-70). Therefore, even if the Mil. R. Evid. 404(b) evidence was erroneously admitted, appellant suffered no material prejudice to any substantial right.

[22] While the *Wright* court is discussing Mil. R. Evid. 413, its logic can be applied to Mil. R. Evid. 414 as well. 53 M.J.. See *also Michelson v. United States*, 335 U.S. 469, 476 (1948) (superseded by statute) (explaining the traditional prohibition of propensity evidence is based on the evidence "weigh[ing] too much with the jury and to so overpersuade them as to prejudge").

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains **8,938** words.

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

PATRICK S. BARR
Captain, Judge Advocate
Attorney for Appellee
December 19, 2023

APPENDIX

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.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on December 19, 2023.

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