IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JAQUAN Q. GREENE-WATSON,
Senior Airman (E-4),
United States Air Force,
Appellant

USCA Dkt. No. 24-0096/AF

Crim. App. Dkt. No. ACM 40293

BRIEF ON BEHALF OF APPELLANT

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT ERRED IN AFFIRMING THE MILITARY JUDGE'S DECISION TO ADMIT EVIDENCE OF DOMESTIC VIOLENCE OCCURING 17 MONTHS AFTER THE CHARGED OFFENSE TO SHOW A COMMON SCHEME OR PLAN UNDER MIL. R. EVID. 404(b)—USING A DIFFERENT RATIONALE THAN THE MILITARY JUDGE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction to review this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On March 3, 2022, a military judge sitting as a general court-martial convicted Senior Airman (SrA) Jaquan Q. Greene-Watson, contrary to his pleas, of one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915. JA at 188. The military judge sentenced SrA Greene-Watson to a reprimand, reduction to the grade of E-1, confinement for 90 days, and a bad-conduct discharge. JA at 189. On December 27, 2023, the Air Force Court affirmed the findings and sentence. JA at 2.

[1] All references to the punitive articles, UCMJ, the Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

STATEMENT OF FACTS

1. The Government Charged SrA Greene-Watson with Communicating a Threat Against his Wife.

On September 19, 2020, SrA Greene-Watson and M.G.W. were living in a house together in Albuquerque, New Mexico. JA at 62. Things were not great between them. *Id.*

During a disagreement at their residence, M.G.W. picked up her phone and started an audio recording of SrA Greene-Watson. JA at 80. They argued, and M.G.W. was "very angry." *Id.* When asked at trial why she started recording, M.G.W. said, "Just because like I remember – we were talking about like I won't – or like something about work and that they don't believe anything I say. We were just arguing about something like that, so I was like – I just thought it would be best to have proof of what happened." JA at 81.

SrA Greene-Watson and M.G.W. argued about M.G.W. coming back to the house. JA at 190. SrA Greene-Watson told M.G.W., "After you leave that door -- after you leave that door, if it's not with the police -- it is in your best interest if you wish to continue breathing and trying to live a life, to not come back through those -- through that door." *Id*.

SrA Greene-Watson was later charged with communicating to "threat to kill [M.G.W.] if she returned to their shared residence." JA at 29. Based on that charge, the Government had to prove that (1) SrA Greene-Watson "communicated certain

language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future;" (2) that the communication was made known to M.G.W. or to a third person; and (3) that the communication was wrongful. *MCM*, pt. IV, ¶ 53.b.(1).

2. Less than a Month before Trial, the Government Submitted a Notice of its Intent to Offer Evidence of Domestic Violence Occurring 17 Months after the Charged Offense as Evidence of a Common Scheme or Plan.

The Defense filed a motion *in limine* to exclude evidence of an uncharged domestic violence incident that occurred on February 6, 2022, 17 months after the charged conduct. JA at 191-202. The military judge ruled that the following evidence was permissible under Mil. R. Evid. 404(b) as "a common scheme or plan that [SrA Greene-Watson] also followed during the charged offenses after becoming frustrated with his wife":

> 1. On or about [] February [6,] 2022, Albuquerque Police Department responded to a domestic incident involving [SrA Greene-Watson] and his spouse, M.G.W. On [] February [7,] 2022, M.G.W. was interviewed by Security Forces at Kirtland [AFB] regarding the incident.
>
> 2. M.G.W. relayed the following occurred on the morning of [February 6,] 2022:
>
> iii. [SrA Greene-Watson] physically got on top of M.G.W (sic) and twisted her side with his hand, causing a 9 out of 10 pain level, leaving a red mark. The prosecution intends to offer this evidence of [SrA Greene-Watson]'s common plan to perpetuate control over M.G.W.

> iv. [SrA Greene-Watson] balled up his fists and acted like he was going to hit M.G.W. The prosecution intends to offer this evidence of [SrA Greene-Watson]'s common plan to control M.G.W.
>
> v. [SrA Greene-Watson] told M.G.W. he was going to "put a bullet" in her back. The prosecution intends to offer this evidence of [SrA Greene-Watson]'s common plan to control M.G.W.
>
> vi. [SrA Greene-Watson] took M.G.W.'s phone and threw it, stating he did so "since [she's] gonna be a dumb bitch" and record him. The prosecution intends to offer this evidence of [SrA Greene-Watson]'s consciousness of guilt and common plan to control M.G.W.
>
> vii. M.G.W. ran to the vehicle with the couple's child, J.G.W. and locked herself inside. [SrA Greene-Watson] placed his foot behind the wheel so she couldn't reverse the vehicle and pounded on the windows, yelling at M.G.W. The prosecution intends to offer this evidence of [SrA Greene-Watson]'s consciousness of guilt and common plan to control M.G.W.
>
> viii. M.G.W. left the residence with the couple's child and stayed in a hotel for safety. [SrA Greene-Watson] called her approximately seven times, demanding she return their vehicle. [SrA Greene-Watson] turned off all of the couple's credit cards and removed all of the cash from the joint bank account. The prosecution intends to offer this evidence of [SrA Greene-Watson]'s consciousness of guilt and common plan to control M.G.W.
>
> ix. On or about [] February [7 or 8,] 2022, [SrA Greene-Watson] shut off the utilities in M.G.W.'s home. The prosecution intends to offer this evidence of [SrA Greene-Watson]'s consciousness of guilt and common plan to control M.G.W.

JA at 229-30 (referencing 200-01). The military judge noted that "evidence of a domestic dispute that occurred approximately 17 months after the charged misconduct alleged in this case cannot be evidence of [SrA Greene-Watson]'s consciousness of guilt of having committed the charged misconduct." JA at 229.

However, the military judge found "that the similarities in evidence regarding [SrA Greene-Watson]'s behavior between the. . . February [6,] 2022 incident" and the charged incidents "is sufficient to permit the Government to argue that [SrA Greene-Watson] acted with a common scheme or plan." *Id.* The military judge quoted the language of Mil. R. Evid. 403 when conducting the brief analysis on the record concluding the probative value was not substantially outweighed by the danger of unfair prejudice or any other factor. The military judge did not define the nature or magnitude of the probative value or the potential prejudice. JA at 230.

At trial, M.G.W. testified that SrA Greene-Watson verbally and physically assaulted her on February 6, 2022, and described the noticed Mil. R. Evid. 404(b) evidence referenced above. JA at 92-99.

3. The Air Force Court Found the Military Judge did not Abuse his Discretion, but also Found its own Reasoning "was at least implicit . . . even if communicated in slightly different verbiage."

The Air Force Court concluded that the military judge did not abuse his discretion in allowing the introduction of the February 6, 2022, uncharged domestic violence as Mil. R. Evid. 404(b) evidence. JA at 18. The Air Force Court stated that the military judge correctly applied *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), in finding the charged and uncharged incidents were "substantially similar" to qualify as a "common scheme or plan." JA at 20.

The Air Force Court held that the military judge did not abuse his discretion since the fact of consequence was whether SrA Greene-Watson's communication was "wrongful." JA at 20-21. The Air Force Court acknowledged that the military judge did not explicitly state that reasoning. JA at 21 n.18. In justifying its affirmation of the military judge's ruling, the Air Force Court cited *United States v. Bess*, 80 M.J. 1 (C.A.A.F. 2020), stating it may affirm a correct result even when the lower court came to it for the wrong reason. *Id.* The Air Force Court found that "the military judge's ruling essentially combined two permissible forms of Mil. R. Evid. 404(b) evidence: 'controlling and manipulative behavior'[] and 'common plan or scheme.'" JA at 21.

SUMMARY OF THE ARGUMENT

The military judge abused his discretion when he allowed uncharged domestic violence acts occurring 17 months after the charged timeframe in as Mil. R. Evid 404(b) evidence to prove a common scheme or plan that SrA Greene-Watson followed during the charged offenses after becoming frustrated with his wife.[2] In so doing, he effectively permitted consideration of propensity evidence. And the

[2] SrA Greene-Watson was acquitted of the Article 128, UCMJ, charge allegedly initially occurring when he was not aware M.G.W. walked into the room. JA at 65. Trial counsel only argued evidence of the uncharged domestic violence acts as Mil. R. Evid. 404(b) evidence regarding the charged communication of a threat. JA at 163. Similarly, the Air Force Court only considered the Mil. R. Evid. 404(b) evidence as probative to the charged threat as well. JA at 19, 21.

evidence was potent because, as alleged, the uncharged acts were worse than what SrA Greene-Watson is convicted of doing. The evidence included SrA Greene-Watson stating he was going to "put a bullet" in M.G.W.'s back—when M.G.W. was aware he planned to purchase a firearm; getting on top of her and twisting her side leaving a mark and causing a 9 out of 10 level of pain; putting his foot behind the wheel of the vehicle so M.G.W. could not leave with their child while pounding on the windows yelling at her; taking M.G.W.'s phone and throwing it; causing M.G.W. to stay at a hotel for safety while he called her approximately seven times demanding she return the vehicle; turning off all the credit cards and removing all the cash from their joint account; and shutting off the utilities in their home. JA at 229-30 (referencing 200-01). Whereas SrA Greene-Watson was only convicted of communicating to M.G.W. 17 months earlier, "After you leave that door -- after you leave that door, if it's not with the police -- it is in your best interest if you wish to continue breathing and trying to live a life, to not come back through those -- through that door." JA at 190.

The military judge never articulated what fact at issue was made more or less probable by this evidence. The military judge found the "similarities in evidence" between the charged offenses and the uncharged domestic violence incident was sufficient for the Government to argue SrA Greene-Watson acted in accordance with a common scheme or plan—"to draw parallels between the specifics" of

SrA Greene-Watson's behaviors when he was frustrated with M.G.W. JA at 229-30. The military judge then failed to perform a proper Mil. R. Evid. 403 balancing test articulating what the probative value was—and the weight to be given—or the risks of prejudice. The risks of unfair prejudice was great. The broad way the military judge admitted the uncharged domestic violence acts amounted to what is effectively propensity evidence.

In finding the military judge did not abuse his discretion, the Air Force Court used a rationale that the military judge explicitly stated the evidence could not come in for—intent or "wrongfulness," as the Air Force Court stated. *Compare* JA at 229, *with* JA at 21. The Air Force Court found "this reasoning was at least implicit in the military judge's written ruling on this subject—even if communicated in slightly different verbiage." JA at 21. Unlike evidence that is admitted over objection that can be considered for any purpose, evidence admitted under Mil. R. Evid. 404(b) for a specific, non-propensity purpose can only be used for the limited purpose it was admitted for. So, while the Air Force Court substituted a rationale that would have in its view allowed the evidence for another limited purpose, the military judge explicitly did not consider it—as the factfinder—for that purpose.

ARGUMENT

THE AIR FORCE COURT ERRED IN AFFIRMING THE MILITARY JUDGE'S DECISION TO ADMIT EVIDENCE OF DOMESTIC VIOLENCE OCCURING 17 MONTHS AFTER THE CHARGED OFFENSE TO SHOW A COMMON SCHEME OR PLAN UNDER MIL. R. EVID. 404(b)—USING A DIFFERENT RATIONALE THAN THE MILITARY JUDGE.

Standard of Review

When looking past a Court of Criminal Appeal's (CCA) decision, this Court reviews a military judge's decision to admit Mil. R. Evid. 404(b) evidence at trial for an abuse of discretion. *United States v. Wilson*, __M.J.__, 2024 CAAF LEXIS 287, at *13 (C.A.A.F. May 23, 2024) (citing *Hyppolite*, 79 M.J. at 164). Military judges abuse their discretion when: (1) the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) incorrect legal principles are used; or (3) the application of the correct legal principles to the facts are clearly unreasonable. *Id.* (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010)).

Military judges abuse their discretion if the findings of fact are clearly erroneous or the conclusions of law are incorrect. *United States v. McDonald*, 59 M.J. 426, 430 C.A.A.F. 2004) (quotation and citations omitted). This Court reviews issues of law de novo. *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019) (citations omitted).

Law and Analysis

1. The Military Judge Abused his Discretion when Admitting Evidence of Uncharged Domestic Violence 17 Months after the Charged Offenses as Mil. R. Evid. 404(b) Evidence Showing a "Common Scheme or Plan."

This Court utilizes the *Reynolds* test when assessing a military judge's decision to admit evidence under Mil. R. Evid. 404(b). *Wilson*, 2024 CAAF LEXIS 287, at *13 (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)). The three-prong test asks: (1) whether the evidence reasonably supports a finding that the accused committed the act(s); (2) whether the evidence of the act(s) makes a fact of consequence more or less probable; and (3) whether the evidence of the act(s)'s probative value is substantially outweighed by the danger of unfair prejudice? *Id.* at *13-14. All prongs of the *Reynolds* test must be met for the evidence to be admitted. *Id.* at *14 (citing *Reynolds*, 29 M.J. at 109). The military judge was clearly unreasonable when he admitted evidence of uncharged domestic violence as a common scheme or plan occurring 17 months after the charged offenses.

a. <u>The Military Judge Erred When He Failed to Articulate the Relevance of the Uncharged Acts to the Charged Acts and Admitted What is Effectively Propensity Evidence.</u>

The second prong of the *Reynolds* test mirrors relevance as contemplated under Mil. R. Evid. 401 and 402. *Wilson*, 2024 CAAF LEXIS 287, at *14 (citation and quotation omitted). The military judge failed to articulate how evidence of the

uncharged domestic violence acts made any fact of consequence of the charged offenses more or less probable (i.e., relevant). *See* JA at 229-31.

Instead, the military judge found the similarities between the uncharged domestic violence incident and the charged offenses was "sufficient to permit the Government to argue that [SrA Greene-Watson] acted with a common scheme or plan." *Id*. Mil. R. Evid. 404(b)(1) prohibits the use of evidence of a crime, wrong, or other act "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." See also, *Hyppolite*, 79 M.J. at 161 (Under Mil. R. Evid. 404(b)(1) "evidence that an accused committed one offense is not admissible to prove that the accused had the propensity to commit another offense."). The permitted uses of such evidence are to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mil. R. Evid. 404(b)(2). The "non-propensity" purpose that the military judge articulated allowed the Government "to draw parallels between the specifics of [SrA Greene-Watson's] behaviors when he is frustrated with [M.G.W.]." JA at 229-30. This ambiguous statement is exactly what Mil. R. Evid. 404(b)(1) stands to protect against. Parallels between a day of reactions while frustrated with his wife does not establish a common scheme or plan 17 months prior during the charged acts.

This Court considered the common plan analysis under the second prong of the *Reynolds* test in *United States v. McDonald*. 59 M.J. at 430. The question as applied to the facts in that case was whether the uncharged acts established "a plan to commit indecent acts manifested itself on two occasions: first, when [the A]ppellant was 13 years old with his stepsister, and second, 20 years later, with his adopted daughter." *Id.* This Court concluded the military judge did abuse his discretion since the two acts were dissimilar given the relationship between the victims and the appellant, the ages of the victims, the nature, situs, and circumstances of the acts, and the time span. *Id.* (citing *United States v. Morrison*, 52 M.J. 117, 122-23 (C.A.A.F. 1999)). The first involved the appellant at the age of 13 years when he committed the acts in the home of his stepsister where he was visiting, and the stepsister was about five years younger than him. *Id.* The second was when the appellant was a 33-year-old adult when he committed the acts while he was the head of the household, and the adopted daughter was about 20 years younger than him and under his parental control. *Id.*

Here, the uncharged domestic violence acts failed to establish a "plan" of which the charged acts are an additional manifestation of. First, because the uncharged domestic violence acts occurred 17 months *after*, not before, the charged threat. Second, because the two instances cannot "merely share some common elements." *McDonald*, 59 M.J. at 430 (citing *United States v. Morrison*, 52 M.J.

117, 122 (C.A.A.F. 1999) and *United States v. Munoz*, 32 M.J. 359, 363-64 (C.M.A. 1991)). The general similarities outlined by the military judge were that SrA Greene-Watson on both occasions offered or engaged in violence against M.G.W., made threats against M.G.W. and that all the behaviors occurred while M.G.W. was holding or in close proximity to their son. JA at 229. These common elements fall directly under Mil. R. Evid. 404(b)(1) – that SrA Greene-Watson's character was violent and threatening and on the day of the charged threat, he acted in accordance with that character. "[P]arallels between the specifics of [SrA Greene-Watson's] behaviors when he is frustrated with [M.G.W.]" is not sufficient to establish the manifestation of a plan that is common to both especially when retroactively applied.

Turning to the military judge's written ruling, he cited to *United States v. Moore*, 78 M.J. 868 (A.F. Ct. Crim. App. 2019), in the facts section. JA at 228. The military judge in *Moore* did articulate what fact of consequence was made more or less likely, but the military judge in this case failed to do so. Specifically, the military judge in *Moore* admitted evidence of controlling behaviors as relevant to the accused's "motive and intent to repress, instead of respect"' the victim's personal autonomy making the fact that she did not consent to sex acts more probable and the accused's mistake of fact less probable. *Moore*, 78 M.J. at 875.

In *Moore*, the evidence of controlling behavior started occurring in August of 2014, which was a few months into the relationship and continued until the end of the relationship in December 2016. *Moore*, 78 M.J. at 871. The first charged offense occurred in the fall of 2015 and the second occurred on Labor Day weekend in September 2016. *Moore*, 78 M.J. at 872. Unlike in *Moore* where the controlling behaviors were intertwined before, during, and after the charged offenses, the uncharged domestic violence acts occurred 17 months after the charged offenses in SrA Greene-Watson's case.

The military judge also cited to *United States v. Young*, 55 M.J. 193 (C.A.A.F. 2001), wherein this Court acknowledged that it had "applied the [*Reynolds*] test to subsequent acts as well." JA at 228 (citing *Young*, 55 M.J. at 196). However, in *Young*, this Court specifically stated that it did not have to decide whether the military judge's theory that appellant's willingness to sell drugs on 17 January related back to appellant's intent to conspire 23 days earlier passed the *Reynolds* test. *Young*, 55 M.J. at 196. The uncharged misconduct was admissible for a "separate limited purpose, to show the subject matter and context of a conversation in which appellant admitted the charged conspiracy." *Id.* In fact, the question of how much longer after the charged conduct evidence may come in to show a common scheme or plan has not been expressly limited.

In applying the law to the facts, the military judge abused his discretion when he failed to articulate what fact of consequence to the charged offenses was made more or less likely by admission of the extensive uncharged domestic violence acts occurring 17 months later. The military judge did not conduct any analysis on the temporal delay impacting the probative value or why he found it did not. There was no mention on the extent of the gap at all except that he stated several times that a domestic dispute occurring 17 months after the charges could not be used as evidence of consciousness of guilt or intent at the time of the charged offenses. JA at 229.

Other cases where evidence of a common scheme or plan was admitted involved sexual abuse of children wherein the abuse occurred before the charged assault and the similarities were significant—same victims, different victims of similar age, same location, nature of the offenses. *See United States v. Munoz*, 32 M.J. 359, 360 (C.M.A. 1991) (evidence of an accused's acts of abuse on a different daughter than the named victim was allowed to show "a plan whose common factors were the victims' ages and the situs and nature of the offenses"); *United States v. Johnson*, 49 M.J. 467, 468 (C.A.A.F. 1998) (evidence properly admitted under Mil. R. Evid. 404(b) to show a common plan or scheme to sexually abuse both his daughters). In *United States v. Hyppolite*, the motions judge relied on the relationship between each victim and the accused, circumstances surrounding each

offense, and the nature of the misconduct, finding a common plan "to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep." 79 M.J. at 165-66. *Hyppolite*, however, involved five charged offenses spanning a two-year period when the appellant was assigned to the same unit as all five of the alleged victims. No. ACM 39358, 2018 CCA LEXIS 517, at *3 (A.F. Ct. Crim. App. Oct. 25, 2018). Here, there was no evidence of the same conduct occurring consistently or "planned" between the charged offenses and the uncharged acts. They were independently separated by 17 months. The military judge abused his discretion in not articulating how the facts of the uncharged domestic violence acts established a plan that was manifested in SrA Greene-Watson's acts 17 months earlier.

b. <u>The Military Judge Erred when he Failed to Conduct a Thorough Balancing Test Under Mil. R. Evid. 403.</u>

The third prong of the *Reynolds* test reflects the concerns addressed by Mil. R. Evid. 403. *Wilson*, 2024 CAAF LEXIS 287, at *14 (quoting *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010)). When conducting his Mil. R. Evid. 403 balancing test, the military judge broadly found that "the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice or any other factor that might be taken into consideration under [Mil. R. Evid. 403]." JA at 230. Little or no deference should be given to the military judge's Mil. R. Evid. 403 analysis, which is effectively a naked recitation of the test itself without any actual

analysis. The Air Force Court conceded that the military judge did not discuss the risk of prejudice. JA at 23. Instead, the military judge indicated he would only consider the Mil. R. Evid. 404(b) evidence for the limited purpose of establishing a common scheme or plan and not for propensity purposes. JA at 230. This Court should give no deference to the military judge's Mil. R. Evid. 403 balancing analysis given he merely restated the test without conducting an actual analysis. The Air Force Court erred by giving the military judge deference. Compare *Wilson,* 2024 CAAF LEXIS 287, at *14 (noting the military judge's ruling was given full deference due to the "admirably detailed written analysis"). The Air Force Court stated it "independently considered" the risk of prejudice that allowing in allegations of serious misconduct would have on SrA Greene-Watson. JA at 23. The Air Force Court determined that threats to "put a bullet" in M.G.W.'s back along with the other uncharged domestic violence acts were of similar severity to the charged misconduct of a death threat, so it was not unduly prejudicial. *Id.* However, that analysis also failed to address the weight of the probative value—especially given the temporal gap—in comparison to the prejudicial risk.

This Court held in *Wilson* that the military judge did not abuse his discretion when he found the appellant's journal was admissible under Mil. R. Evid. 404(b) as proof of motive and intent to the charged offenses, but two Judges found that he did abuse his discretion on the third prong of the *Reynolds* test in finding the probative

value was not substantially outweighed by the danger of unfair prejudice on the ground of intent. 2024 CAAF LEXIS 287, at *1-2. The prejudicial effect in this case was that more severe and pervasive incidents of domestic violence that were not an isolate incident occurred and were detailed to the factfinder. In *Wilson*, evidence at trial showed the appellant sexually abused his biological daughter over many years. *Id.* at *2. Law enforcement found a journal belonging to the appellant that contained handwritten, graphic, and sexualized stories involving sexual behavior between an adult and child. *Id.* at *3. In a plurality portion of the opinion, this Court found that, due to the probative value of intent being so low and the prejudicial risk being high, the military judge abused his discretion in admitting the evidence under the theory of intent. 2024 CAAF LEXIS 287, at *27-28. The point being the military judge must conduct a proper Mil. R. Evid. 403 balancing test to ensure that evidence for the particular purpose offered under Mil. R. Evid. 404(b) is not unduly prejudicial. Here, the military judge did not: first, voice what the probative value was; second, give weight to that probative value; nor third, weigh the probative value against the articulated risks of unfair prejudice.

c. <u>The Military Judge's Error had a Substantial Influence on the Findings.</u>

In determining prejudice arising from non-constitutional evidentiary errors, this Court weighs: "(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)).

The strength of the Government's case, absent the Mil. R. Evid. 404(b) evidence, rested on the testimony of M.G.W. and the recording. Both charges rested on the credibility of M.G.W., yet, SrA Greene-Watson was found not guilty of Charge II. JA at 188. The strength of the Defense's case was forced to rely more on the subjective intent element given the Government's use of the uncharged domestic violence acts to show SrA Greene-Watson's intent to control her when he made the charged communication making it "wrongful." JA at 163. Specifically, trial counsel stated that SrA Greene-Watson restricting M.G.W.'s ability to "report by taking her phone and throwing it, by being physically violent with her, [and] by physically threatening her" was evidence of SrA Greene-Watson's intent to control M.G.W. on September 19, 2020. *Id.* The uncharged domestic violence acts were worse than what SrA Greene-Watson was convicted of. Further, they were of greater quality and materiality to the Government's case than the charged threat as seen in their weighty use of it in argument. Trial counsel explained that the threat was wrongful because the purpose of it was to control her. *Id.* Given trial counsel's heavy reliance on the uncharged domestic violence incident to prove the wrongfulness element instead of the facts surrounding the actual charged threat, the

admittance of the evidence did materially prejudice SrA Greene-Watson's substantial rights.

Unlike in *Wilson* and *Hyppolite*, the evidence of the uncharged domestic violence acts would not have been before the factfinder absent it coming in under Mil. R. Evid. 404(b). *Wilson*, 2024 CAAF LEXIS 287, at *28-29 (citing *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993) ("[a]ny prejudicial impact based on the shocking nature of the evidence was diminished by the fact [that] the same conduct was already before the court members"); *see also Hyppolite*, 79 M.J. at 166-67 (finding the military judge did not abuse his discretion when he ruled evidence that the appellant committed Specifications 1-3 could come in to show a common scheme or plan in regards to the appellant committing Specifications 4-5). While a plurality of this Court found in *Wilson* that the military judge only abused his discretion when he ruled that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice on the ground of intent, the prong two and three of the *Reynolds* test are not met in this case. 2024 CAAF LEXIS 287, at *28. The prejudicial effect was in the military judge considering the extensive domestic violence acts at all.

2. The Air Force Court Erred in Affirming the Military Judge's Decision while Using a Different Rationale.

The Air Force Court concluded that the military judge discerned the fact of consequence was whether SrA Greene-Watson's communication was "wrongful"

and not made in jest or idle banter. JA at 20-21. The Air Force Court went on to say that "the military judge's ruling essentially combined two permissible forms of Mil. R. Evid. 404(b) evidence: 'controlling and manipulative behavior'[] and 'common plan or scheme.'" JA at 21. Thus, the Air Force Court determined that the military judge simply was inarticulate in finding the evidence relevant to the "wrongfulness" element of the charged Article 115, UCMJ, offense. JA at 21.

However, the military judge specifically stated that he did "not find a basis under these facts to relate this incident, occurring after the charged incident, to the [SrA Greene-Watson's] intent at the time of the charged offenses." JA at 229. Therefore, the military judge explicitly stated he was not considering the evidence for intent purposes, which is specifically what the "wrongfulness" element goes to—the subjective intent of the speaker. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citing *United States v. Rapert*, 75 M.J. 164, 169 (C.A.A.F. 2016)). Given the Air Force Court created a new rationale to affirm the military judge's decision to admit the evidence, the next question is what the standard of review should be for this Court in assessing that new rationale.

a. <u>This is a Question of Law. This Court Reviews Questions of Law De Novo.</u>

The additional rationale provided by the Air Force Court was that the uncharged domestic violence acts made it more likely that SrA Greene-Watson's words were wrongful, i.e. that he subjectively intended for his words to intimidate

M.G.W. JA at 21. This Court analyzes legal aspects of military judge's duties with a de novo standard of review. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (reviewing a military judge's decision to accept a guilty plea with an abuse of discretion standard, but questions of law arising from the guilty plea with a de novo standard).

b. Evidence of Uncharged Domestic Violence Acts should not come in as Evidence of Intent During the Charged Offense Occurring 17 Months Earlier—a Rationale the Air Force Court Interjected into the Military Judge's Ruling.

The military judge at no point indicated what fact of consequence the uncharged domestic violence acts made more or less likely, yet the Air Force Court concluded that the military judge discerned the fact of consequence was whether SrA Greene-Watson's communication was "wrongful" as charged. JA at 21. The Air Force Court quoted *United States v. Colon-Angueira* for the proposition that "*post*-misconduct evidence can be used to prove *prior* intent, motive, or state of mind generally, as [this Court] has reasoned: 'Depending upon the circumstances involved in a particular case, subsequent conduct showing a subsequent state of mind may be relevant to show an earlier state of mind at issue.'" JA at 16 (quoting *Colon-Angueira*, 16 M.J. 20, 25 (C.M.A. 1983)). However, in *Colon-Angueira*, the subsequent conduct showing a subsequent state of mind was that of the prosecutrix, not the accused. 16 M.J. at 25. The issue was not about Mil. R. Evid. 404(b) evidence at all.

i. The Air Force Court Cited Several Federal Cases for the Proposition that Subsequent Conduct May be Used as Mil. R. Evid. 404(b) for the Purpose of Showing Intent, but None are on Point.

The Air Force Court cited multiple circuit court cases permitting post-misconduct evidence under Mil. R. Evid. 404(b) stating that this Court follows in their stead. JA at 16 n.14 (citing *United States v. Nguyen*, 504 F.3d 561 (5th Cir. 2007); *United States v. Peterson*, 244 F.3d 385 (5th Cir. 2001); *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998); *United States v. Latney*, 108 F.3d 1446 (D.C. Cir. 1997); *United States v. Buckner*, 91 F.3d 34 (7th Cir. 1996); *United States v. Procopio*, 88 F.3d 21 (1st Cir. 1995); *United States v. Young*, 906 F.2d 615 (11th Cir. 1990); *United States Morsley*, 64 F.3d 907 (4th Cir. 1995); and *United States v. Bridwell*, 583 F.2d 1135 (10th Cir. 1978)). But each circuit court case cited by the Air Force Court is distinguishable from the facts and circumstances in SrA Green Watson's case.

Both *United States v. Nguyen* and *United States v. Peterson* involve fraudulent schemes. *United States v. Nguyen*, 504 F.3d 561, 565-66 (5th Cir. 2007) (The appellant was involved in the fraudulent sale of four properties in 2002, two of which were not in the indictment, but the court found evidence of the deals demonstrated how the operation established knowledge and intent.); *United States v. Peterson*, 244 F.3d 385, 393 (5th Cir. 2001) (The appellant was involved telemarketing scams and the court found the jury "could consider evidence of similar subsequent conduct

(relatively closely linked in time)" to "draw inferences about the *intent* underlying his conduct."). Those cases involved similar conduct close in time with the same purpose of scamming money out of others. In this case we have two incidents separated by 17 months and no subsequent conduct relatively close in time linking the two. It does not stand to reason that the much later in time uncharged domestic violence acts can purport to establish the subjective intent—wrongfulness—of SrA Greene-Watson at the time of the charged communication.

Both *United States v. Crowder* and *United States v. Latney* are also distinguishable. These cases involved drug offenses that were directly related to the uncharged acts, which came in to show knowledge and intent. *United States v. Crowder*, 141 F.3d 1202, 1203-04 (D.C. Cir. 1998) (The judge admitted evidence under Fed. R. Evid. 404(b) of the appellant—charged with a drug offense—selling crack cocaine to an undercover officer on the same block seven months after his arrest for the charged acts to show knowledge and intent.); *United States v. Latney*, 108 F.3d 1446, 1448 (D.C. Cir. 1997) (The court found evidence of crack cocaine possession eight months after the appellant was charged with aiding and abetting the distribution of crack cocaine was admissible under Fed. R. Evid. 404(b) to show knowledge and intent.).

In *United States v. Buckner*, the appellant was indicted for conspiracy to illegally transfer a machine gun. *United States v. Buckner*, 91 F.3d 34, 35 (7th Cir.

1996). The court reversed the district court's decision to exclude recorded conversations occurring after the conspiracy ended wherein the co-conspirators discussed the transfer of the machine gun in the indictment. *Id.* at 35. This case is not like *Buckner*. There the appellant was discussing details of the charged conduct. Here, there was no discussion during the uncharged domestic violence acts about the charged offenses from 17 months earlier. There is nothing linking the uncharged acts to the charged acts.

In *United States v. Procopio*, the court determined that the seized guns found in an apartment used by both defendants suggested a criminal association, and to some extent, that they had a criminal association two years prior when the Government claimed they collaborated in a robbery. But the Court noted the Fed. R. Evid. 403 balancing test was "undoubtedly a close one on the present facts." 88 F.3d 21, 29 (1st Cir. 1995). There are two important points related to the Air Force Court citing this case. First, this was no intent evidence as the Air Force Court asserted, it was criminal association. JA at 17 n.14. Second, the miliary judge here did not conduct a thorough Mil. R. Evid. 403 balancing test and even in *Procopio* the test was a close call due to the permissible inference (criminal association) being only one small step away from a forbidden one (criminal character). 88 F.3d at 29-30. The military judge in this case did not articulate any risk of prejudice or seemingly weigh it at all.

In *United States v. Young*, 906 F.2d 615, 620 (11th Cir. 1990), the court allowed in evidence that the defendant participated in a later scheme to import marijuana as relevant to him not being an innocent bystander but instead a participant in the enterprise. In *United States v. Bridwell*, 583 F.2d 1135, 1140 (10th Cir. 1978), the court allowed in the uncharged conduct of purchasing drugs as probative of the defendant's motive, intent, knowledge, and plan as it occurred soon after the charged conspiracy to purchase drugs ended and used a similar method. *Young* was about association to the criminal group. *Bridwell* involved uncharged conduct (buying drugs) occurring soon after the charged conduct (conspiracy to buy drugs). In both cases, the appellants used similar methods. Neither case is helpful here as there is no association with a criminal group nor does the uncharged conduct occur soon after the charged conduct. Instead, the uncharged domestic violence acts were not connected to the charged offenses. Further, they were more egregious than the charged offense of communicating a threat while not heavily probative of the state of mind SrA Greene-Watson had 17 months earlier.

The Air Force Court also mentioned *United States Morsley*, in its position that post-misconduct evidence is permitted under Mil. R. Evid. 404(b). 64 F.3d 907, 910 (4th Cir. 1995). In *Morsley*, the court held evidence of the uncharged drug activity after the charged timeframe was relevant as "sufficiently related to the charged offense" in that it established the identity of the defendants. There is no identity

issue in this case. In fact, the court in *Morsley* rejected the probative fact being motive and intent, because it was "abundantly clear" from the charged conduct alone that the defendant acted intentionally. *Id.* at 911. Here, the military judge had an audio recording of SrA Greene-Watson communicating the charged threat and the testimony from M.G.W. regarding the surrounding circumstances. JA at 190, 62-83. The military judge could hear the inflection used and in what context.

ii. The Uncharged Domestic Violence Acts were Far too Remote to be Considered as Evidence of SrA Greene-Watson's Intent while making the Charged Threat 17 Months Earlier.

Ultimately, the question of how much time may pass between charged and uncharged acts before the uncharged acts can no longer be admitted showing intent at the time of the charged acts is unsettled. While *United States v. Harrington*, 83 M.J. 408, 415 (C.A.A.F. 2023), was not a Mil. R. Evid. 404(b) case, it did involve the charge of communication of a threat. There, this Court "decline[d] to adopt a bright-line rule as to when later-in-time conduct may be considered" but found that displaying a gun so soon—less than thirty minutes—after making an alleged threat via texts meant such conduct could be used to prove the subjective intent—"wrongfulness." *Id.*

Understanding the military judge did not consider the evidence as it related to intent, this Court made clear in *Wilson* that intent is always at issue in a criminal case regardless of whether the Defense argues lack of intent. 2024 CAAF LEXIS

287, at *21-22. However, that question goes to the second prong of the *Reynolds* test. *Id.* There still must be a Mil. R. Evid. 403 balancing test if the evidence survives the second prong of the *Reynolds* test. 2024 CAAF LEXIS 287, at *23. Even if the evidence had met the second prong, which it must move to the third prong, the uncharged domestic violence acts should not have come in due to failing the third prong.

The probative value of the uncharged domestic violence acts from 17 months later was low and the prejudicial value was very high. Those acts included SrA Greene-Watson: (1) getting on top of M.G.W. and twisting her side with his hand, which left a mark and caused a 9 out of 10 level of pain; (2) stating he was going to "put a bullet" in M.G.W.'s back; (3) taking M.G.W.'s phone and throwing it; (4) putting his foot behind the wheel of the vehicle so M.G.W. could not leave with their child while pounding on the windows yelling at her; (5) calling M.G.W. approximately seven times demanding she return the vehicle while she was staying at a hotel for safety; (6) turning off all the credit cards and removing all the cash from their joint account; and (7) shutting off the utilities in her home. JA at 229-30, referencing JA at 200-01. There was no evidence presented that SrA Greene-Watson had removed money or shut off utilities before. There was no evidence that M.G.W. was scared and stayed in a hotel in between the charged timeframe and the later uncharged domestic violence acts. The temporal delay and lack of connection

between those two days eliminated the possibility that these uncharged acts offer any proof of subjective intent when SrA Greene-Watson communicated the words he did on the day of the charged offenses. Even if the uncharged domestic violence acts were probative of intent, the probative value would have been low and the prejudicial risk high. Therefore, the evidence should have failed the Mil. R. Evid. 403 balancing test.

3. Conclusion.

The military judge failed to articulate how evidence of uncharged domestic violence acts occurring 17 months after the charged offenses made any fact of consequence more or less likely, nor did he conduct a thorough Mil. R. Evid. 403 balancing test. This was error. In an attempt to affirm the military judge for getting to the correct result albeit for the wrong reasons, *see Bess*, 80 M.J. at 12, the Air Force Court substituted its own rationale being that the uncharged domestic violence acts were probative of the "wrongfulness" element of the Article 115, UCMJ, offense and that both days had equally severe misconduct so there was no prejudice. JA at 21-23. Whether the uncharged domestic violence acts could be used to show intent—the additional rationale provided by the Air Force Court—under Mil. R. Evid. 404(b) is a question of law this Court reviews de novo. The facts and circumstances in this case demonstrate the later in time alleged acts should not have been used to prove a common scheme or plan followed by SrA Greene-Watson after

becoming frustrated with his wife nor to prove the subjective intent at the time of the charged threat as the events were separated by 17 months of intervening time.

WHEREFORE, SrA Greene-Watson respectfully requests this Court set aside his conviction.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on June 26, 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE
WITH RULES 24(b) AND 37

This brief on behalf of appellant complies with the type-volume limitation of Rule 24(b) because it contains 7,334 words. This brief on behalf of appellant 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.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
heather.bruha@us.af.mil

Counsel for Appellant