IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40293
Senior Airman (E-4) **JAQUAN Q. GREENE-WATSON** United States Air Force *Appellant.*	)	USCA Dkt. No. 24-0096/AF

BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT ERRED IN AFFIRMING THE MILITARY'S 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 (AFCCA) 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 Court has jurisdiction under Article 67(a)(3), 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

STATEMENT OF THE FACTS

Appellant pled not guilty to unlawfully suffocating his son, JGW, in violation of Article 128, UCMJ. He pled not guilty for communicating a threat to kill his wife, MGW, in violation of Article 115. The military judge sitting alone, found Appellant guilty of the threat and not guilty of suffocating his son.

MGW Catches Appellant in the Act

On 19 September 2020, MGW witnessed her husband trying to suffocate their child. (JA 065.) To complete a Zoom interview for a new job, MGW briefly left JGW alone with Appellant while she stepped outside. (JA 063.) Born three months earlier, JGW was the son of both MGW and Appellant. (JA 061.) Concerned that JGW may not be "okay," MGW returned into the home. (Id.)

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1. Unless otherwise noted, all references to the UCMJ and the Military Rules of Evidence (Mil. R. Evid.) are to the Manual for Courts-Martial, United States (2019 ed.).

Initially, the house was silent, and she presumed the baby was sleeping. (JA 064.) As she entered the baby's room, MGW witnessed Appellant holding a washcloth over the baby's face. (JA 065.) The baby cried. (JA 066.) Appellant pushed down with the washcloth covering the baby's entire face. (JA 067-68.) The baby continued crying "just not as loud." (JA 069.) "Horrified" by what she saw, MGW responded in shock: "I never thought this would ever happen." (JA 071). MGW immediately attempted to save the baby. (JA 071.)

Appellant Responded With Anger

MGW grabbed Appellant by the arm and tried to pull his hand off the baby. (JA 071.) Appellant got angry when confronted this way. (JA 071.) Appellant yelled "get off me," "get off me." (Id.) "He just kept saying 'get off me.'" (Id.) Appellant grabbed the baby by the shoulders and began to shake the baby. (JA 072). The baby's head "was going back and forth, and [Appellant] just kept shaking him." (Id.) After he shook the baby, he flipped the baby over and continued to shake the baby now by the ankles. (Id.) Eventually, Appellant stopped. (Id.) After momentarily locking MGW out of the baby's room, he let MGW into the room. (Id.) He held the crying baby in the air and told her, "if you come near me again, I'm going to throw him." (JA 075).

MGW Gets Her Baby Back

Appellant then sat at the computer desk in the room holding the screaming

baby. (JA 076.) MGW approached the desk and grabbed the baby away from Appellant. (JA 077.) Appellant rose from the desk chair and began "acting like he was going to punch" MGW. (Id.) Appellant swung at MGW. (Id.) He missed, but his fist grazed the top of the baby's head. (Id.) At some point Appellant threw MGW's phone down the stairs. (Id.) He feigned a punch at her. (Id.) She flinched, and Appellant said, "that's why you are scared." (Id.) As the incident escalated, MGW took the baby out of the room and went down the stairs. (JA 080.) He yelled, "they don't believe anything [you] say" referring to his military supervisors. (JA 081.) With that comment in her mind, MGW turned on her phone to record. (Id.) At the bottom of the stairs and out Appellant's reach, MGW confronted him about what he had done. (JA 052.)

The Threat Is Recorded

When initially confronted about suffocating the baby on the recording, Appellant told MGW that no one would believe her over him. (JA 052.) He stated, "It's going to be my word against yours, and I already – and I already got them to know that you're a psychopathic, bipolar bitch." (Id.) "They already know that you're a bipolar bitch and to not believe anything you say." (Id.) He told MGW, "I'm going to be like, 'Yes, sir. She's lying as usual.'" (Id.) MGW again confronted Appellant, "your deadass just put something around his fucking mouth. Like fuck out of here." (Id.) Appellant responded similarly as before.

(Id.) "How you gonna prove it? You can't." (Id.) MGW confronted Appellant a third time: "[The baby] could've died right there." (JA 053) Appellant responded "I don't give a fuck. And if he did, then I'd be happy. If you keep trying me, I swear to God, you better not come back in this house." (Id.) MGW reminded Appellant it was her house too. (Id.) Appellant then communicated the threat that formed the basis of Charge I and its specification. (JA 054.) Appellant said, "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.)

On 6 February 2022 Appellant Responded With Anger Again

The Mil. R. Evid. 404(b) evidence arose from a subsequent incident between Appellant and MGW. On 6 February 2022, MGW asked Appellant to watch his son. (JA 093.) On 19 September 2020, MGW asked Appellant to watch their son so she could complete a job interview. (JA 065.) On 6 February, she asked him to watch his son, so she could run an errand with her mom. (Id.) He responded angrily. (Id.) Appellant stated, "like that is not an errand, and you just want -- you are just making an excuse to not watch your son." (Id.) Appellant approached his wife. (Id.) MGW was holding their son, as before. (JA 077.) He pinned MGW to the bed and pinched and twisted her skin causing pain. (Id.) Appellant released MGW and she attempted to leave their home. (JA 094.) As she walked out of the

house, Appellant again threatened to physically beat her. (Id.)

On 19 September, Appellant scared MGW with a feigned punch stating, "That's why you are afraid." (JA 077.) On 6 February, Appellant said he would "beat the shit out of her." (JA 094.) Just as before, Appellant took MGW's phone from her and threw it. (JA 076; JA 093). Soon thereafter, he again threatened to kill MGW. On 19 September, he threatened "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 053.) On 6 February, Appellant threatened "I'll put a bullet in your back." (JA 095.)

As MGW left the home and began to place her son in the car seat, Appellant followed her outside. (JA 096.) Appellant punched, elbowed, and yelled at the car with MGW and his son in it. (JA 097.) He informed MGW that he was not allowing her to leave. (Id.) He placed his foot under the tire and informed her, "my foot is behind the tire. If you leave you will be running over my foot." (Id.) Thereafter, just as before, Appellant dialed 911. (JA 097.) Upon arrival, the police advised MGW to leave the home. (Id.) She did. (Id.) Thereafter, Appellant terminated the home heating and the home internet services. (JA 099.)

Appellant's Trial Defense Counsel Challenged MGW's Behavior

During the trial, Appellant's counsel suggested that MGW's behavior -- remaining in the house-- in response to the recorded threat was evidence that

Appellant had not actually threatened her. (JA 058.) In opening statement, trial defense counsel stated:

> "You will also hear that based on the fact that she and her son remained in a house with Senior Airman Greene-Watson for 14 months after the alleged incident. Simply put, Your Honor, her behavior belies someone who is not afraid[2] of him and does not interpret his words as a threat."

(JA 058.) Continuing with this strategy, trial defense counsel cross examined MGW. (JA 117.) Trial defense counsel asked, "You told OSI that you did not have any concern for your own safety?" MGW responded that "Yes, I lied about many things." (Id.) "[I lied] just about things to protect [Appellant] and not really get him in trouble because I heard that he went to jail." (Id.) Trial defense counsel continued, asking about lies to the doctors: "Does that include the doctors?" (Id.) MGW tried to explain that she felt the need to try and help Appellant, especially when it came to his treatment of her:

> I just tried to make things seem a little bit better than the bad thing that happened, so there's like – everything was true, as in everything that happened, but if they asked cer[sic] – other questions as has he done this before, has he done that before, those were the things that I would lie about to help. Because I didn't – what's her name? Detective Wagner told me that he went to jail. I was on and off the phone with [Appellant's] mother and grandmother, and I felt the need to try to say things to help.

[2] Although "not afraid" appears in the transcript, in context, it appears, the double negative of "belie" and "not afraid" conveys the opposite meaning from what trial defense counsel intended. It seems trial defense counsel was suggesting the victim's behavior belies someone who ***is*** afraid.

(Id.)

Trial defense counsel persisted with this strategy, highlighting that MGW had recanted her allegation. (JA 120.) "You reached out to [Detective Wagner.]" (Id.) "On that call you told her that a no point did you see Airman Greene-Watson shaking the baby." (Id.) "You said that you didn't believe [Appellant] intentionally tried to harm your son." (Id.)

Referring to MGW's testimony at a civilian court hearing regarding confinement release of Appellant, trial defense counsel asked, "You were asked if you believe that [Appellant] was trying to calm the child down, and you believed that [Appellant] was not trying to harm his son. Is that correct? (Id.) MGW admitted, "Yes." (Id.) MGW further admitted in cross examination that she had testified that: "He has been nothing more than extremely helpful," "He loves his son very much," "He's a good provider," "He'll do anything for his son." (JA 122.)

In closing argument, trial defense counsel argued, "she never told anybody that she was scared . . . she did not say anything to 911 about threatening her life. She didn't say anything to 911 about being scared." (JA 169-170.) After suggesting that MGW was not threatened because of the way she responded, trial defense counsel suggested Appellant did not intend his words as a threat.

In closing argument, trial defense counsel also suggested that the recorded threat failed to prove Appellant's wrongful intent. (Id.) To minimize the threat,

trial defense counsel argued, "It was a toxic relationship . . . even though it wasn't necessarily normal banter, this was unfortunately the way that they communicated with each other. And she testified that he talked to her like this regularly, that he wasn't always the way that he should be." (JA 170.) Trial defense counsel then argued Appellant was "saying things to get under her skin, to upset her. That, Your Honor, does not mean he committed these offenses. It does not mean that he threatened her" (JA 167.)

The Government Attempted to Rebut the Defense Strategy

Trial defense counsel filed a motion to exclude Mil. R. Evid. 404(b) evidence that Appellant had again threatened, yelled at, and assaulted MGW on 6 February 2022. (JA 191). The Government's response argued that Appellant's controlling behavior should be admitted as evidence that Appellant had a plan to control the behavior of MGW. (JA 207.) Trial defense counsel, argued, that the 404(b) evidence was inadmissible for two reasons. First, it occurred 17 months after the charged offense: "planning is a prospective activity, not a retrospective one." (Id.) Second, citing United States v. Morrision, 52 M.J. 117, 122 (C.A.A.F. 1999), trial defense counsel claimed that the 404(b) evidence "must be almost identical to the charged acts." (JA 194.)

The Trial Judge Found Appellant's Plan Admissible

The trial judge issued a written ruling regarding the 404(b) evidence.

(JA 224.) After making key findings of fact and describing the appropriate legal framework, the trial judge granted the Defense's request in part. (JA 229-31.) The trial judge found the February incident did not have any relevance as consciousness of guilt evidence. He also "[did] not find a basis under these facts to relate [the February incident], occurring after the charged incident, to the appellant's intent at the time of the charged offenses." (JA 229.)

He also denied the Defense request in part. (Id.) He found the February incident relevant to demonstrate Appellant's "plan or scheme" to "mak[e] credible threats against MGW," "reduce MGW's willingness to report these incidents," and demonstrate Appellant's "behaviors when he is frustrated with his wife." (JA 230-31.)

Regarding the admissible 404(b) evidence, the trial judge found the Government had met their burden on all three steps of the Reynolds test. (JA 227.) Regarding the first step in the Reynolds test, the trial judge found that "the Government had submitted sufficient evidence to reasonably support a finding by a preponderance of the evidence that each of these events occurred." (JA 229.) The judge specifically noted that the Government had offered "the police report," "interview statements of MGW," and "an oral stipulation of expected testimony from MGW." (JA 229.)[3]

[3] Appellant did not challenge this determination on Prong 1 of the Reynolds test at

For the second step of the Reynolds analysis the trial judge started by noting "numerous similarities between the appellant's alleged behavior in connection to the charged offenses and the uncharged offenses." (Id.) Each allegation involved (1) violence, (2) threats, (3) a proximity to the JGW, and (4) 911 calls by Appellant. (Id.) Additionally, the trial judge concluded that in both the charged incident and the uncharged incident, Appellant's actions "frustrated MGW's ability or willingness to report these allegations by taking actual steps to prevent her from reporting and to increase his control over her so as to deter her from making a report." (JA 229.) The trial judge then held that the evidence was sufficient "to permit the Government to argue that the appellant acted with a common scheme or plan." (Id.)

After finding Appellant had acted with a common scheme or plan, the trial judge promised to follow the law. (JA 229.) Regarding the third step of the Reynolds test, the trial judge stated he would only consider the evidence "for the limited purpose that it may establish a common scheme or plan and not for reasons prohibited by M.R.E. 404(a) or for propensity purposes." (JA 230.)

AFCCA Affirmed the Trial Judge's 404b Decision

At AFCCA, Appellant argued that the trial judge erred for three reasons.

AFCCA, nor has Appellant attempted to do so here. As a result, this brief does not address that issue.

(JA 013.) AFCCA considered and rejected each of Appellant's three bases for attacking the admissibility of the 404b evidence. (Id.) First, AFCCA noted that both CAAF and federal circuit court opinions contradict Appellant's position that "subsequent acts" cannot be evidence of a "common scheme or plan." (JA 019-020.) Second, AFCCA highlighted that the "almost identical" language seized upon by Appellant from United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999) predated this Court's more recent decision on the same issue: United States v. Hyppolite, 79 M.J. 161 (C.A.A.F. 2019.) (JA 016). And, importantly, the Hyppolite decision endorsed a different standard than Morrison: a "substantial similarity" test. (JA 016). Finally, AFCCA addressed Appellant's argument that the trial judge did only a cursory Mil. R. Evid. 403 balancing. AFCCA noted that "a cursory" 403 balancing only means that less deference is afforded the judge. (JA 017). Thereafter, AFCCA concluded that they were "convinced that the probative value of the challenged evidence [was] not substantially outweighed by the danger of unfair prejudice." (JA 022.) In sum, AFCCA carefully offered a point-by-point rebuttal to each of Appellant's concerns—rejecting all three. (Id.)

SUMMARY OF THE ARGUMENT

Regarding Appellant's threat, the only genuine issue in dispute was Appellant's "subjective intent." What did Appellant intend when he said "after you leave that door . . . if you wish to continue breathing and trying to live a life to

not come back through" that door? If Appellant *planned* to accomplish some "legitimate purpose that contradicted the expressed intent," he was not guilty. If on the other hand, Appellant *planned* to "intimidate" MGW, he was guilty.

The trial judge admitted evidence that Appellant had a *plan* when he made the threat. The judge determined that Appellant's plan to "frustrate MGW's ability or willingness to report," and to "increase his control over her," and to "undercut . . . MGW's report to authorities" was admissible. That determination was not an abuse of discretion.

The military judge based his ruling on facts supported by the record which he applied reasonably to the correct legal principles. In line with both this Court's precedent and other federal courts, the trial judge's ruling reflected the broad consensus that 404(b) incidents occurring after the charged incident may still be relevant to establish an ongoing plan.

The trial judge did not act unreasonably by permitting "plan" evidence to be admitted on a key fact of consequence. Appellant's plan provided relevant evidence regarding the disputed factual issue: what Appellant intended when he threatened MGW. "Plans" under 404(b) potentially provide relevant evidence of intent, motive, modus operandi, and context. E.g. Hyppolite, 79 M.J. at 161 ("plan or scheme was intent"); United States v. Green, 2023 U.S. App. LEXIS 8602 (11th Cir. 2023)("scheme was admissible because it went to [appellant's] motive or

intent to commit the charged offenses); United States v. LaFlora, 146 Fed.Appx. 973 (10th Cir. 2005)(common plan used to prove identity); United States v. Akpa, , 2005 U.S. App. LEXIS 12302 (9th Cir. 2005)(scheme evidence used to prove absence of mistake.) At a minimum, "plans" provide evidence of some sort of intent on the part of the planner. One cannot execute a plan by accident. The evidence of Appellant's plan revealed Appellant's intent as he made the threat – that is, his intent to exert control over MGW and keep her from reporting him.

Plan evidence can be proven by acts committed after the charged incident. This Court and federal courts have consistently held that 404(b) does not preclude subsequent act evidence. Subsequent act evidence of a plan can reveal that the plan has been ongoing. United States v. Young, 55 M.J. 193, 196 (C.A.A.F. 2001); United States v. Dorsey, 38 M.J. 244, 246 (C.M.A. 1993); United States v. Singleton, 458 F. App'x 169 (3d Cir. 2012); United States v. Berckman, 971 F.3d 999 (9th Cir. 2020).

Appellant incorrectly suggests that evidence of intent as demonstrated by a plan cannot be revealed by acts subsequent to the charged incident. (App. Br. 23-27.) Generally, evidence of plan presents as separate –standalone—episodes demonstrating the plan. The similarity between the separate episodes connects them as one ongoing plan. They do not, necessarily, have to be committed in any particular order or charged in any particular order. The similarity between the

episodes creates the relevance—not the order they occur in nor the time between them.

The subsequent incident in February shared many key similarities with the earlier September incident. It revealed Appellant's continuous plan for intimidating his wife. Federal courts have long recognized the important similarities involved in any repeated instances of domestic violence: same victim, same relationship, same situs, shared history, etc. Berckman, 971 F.3d at 1002. In addition to those key similarities, both episodes shared the following, a contentious (1) argument triggered by parental responsibilities led to Appellant (2) assaulting his wife, (3) scaring his wife with harm to their child, and (4) threatening to kill her. Directly thereafter, Appellant (5) proactively called 911 to provide his version of events. These two episodes of domestic violence demonstrate Appellant's ongoing plan; the order they occurred in does not change that fact.

The February incident was not so far separated from the September incident as to remove its relevance. This Court and federal courts have consistently approved of time gaps between 404(b) evidence much longer—years longer. United States v. Munoz, 32 M.J. 359 (C.M.A. 1991)(6 years); United States v. Mann, 26 M.J. 1 (C.M.A. 1988)(5 years); United States v. Johnson, 49 M.J. 467 (C.A.A.F. 1998)(12 years); United States v. Wacker, 72 F.3d 1453 (10th Cir. 1995) (thirteen years); see also, e.g., United States v. Luger, 837 F.3d 870 (8th Cir.

2016) (twenty-five years); United States v. Sterling, 738 F.3d 228 (11th Cir. 2013) (fifteen years); United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000) (fifteen years) The key issue for resolving whether a time gap between episodes is too long: similarity. So long as the key circumstances linking the episodes have not changed, the episodes of 404(b) remain relevant. United States v. Munoz, 32 M.J. 359 (C.M.A. 1991). Here, not a single significant fact of similarity changed in the intervening 17 months. For two episodes as similar as these two, a 17-month gap between them would not eliminate their relevance.

Keeping in mind that the judge's decision is reviewed under an abuse of discretion standard--the probative value of this "plan" evidence was not substantially outweighed by the danger of unfair prejudice. The danger here was zero. Appellant elected to be tried by a military judge alone. The judge repeatedly promised to not use the 404(b) evidence for an improper purpose. There is no evidence he did otherwise.

Even if this Court determines the 404(b) evidence should not have been considered, it made no difference in the result. The government's evidence was powerful. MGW recorded Appellant making the threat. Appellant's only--weak--defense was to suggest his intent was not wrongful. Listening and reading the threat, in context, there can be no doubt the Appellant's intent was indeed, wrongful.

Appellant elected to plead not guilty. He placed upon the Government the burden to prove the communicating a threat specification beyond a reasonable doubt. He had that right. Despite the powerful evidence contained on the recording, his counsel suggested Appellant's "subjective intent" was not wrongful. The Defense argued that when Appellant threated his wife, he was not *planning* to intimidate her or to harm her. Accordingly, the Government marshalled, and the judge admitted the available evidence of Appellant's actual *plan*: to control his wife and intimidate her into not reporting his conduct. There is no error in that, and this Court should affirm the decision of the Air Force Court.

ARGUMENT

Standard of Review

A military judge's decision to admit Mil. R. Evid. 404(b) evidence at trial is reviewed on appeal for an abuse of discretion. United States v. Wilson, No. 23-0225, 2024 CAAF LEXIS 287 (C.A.A.F. May 23, 2024) (citing United States v. Hyppolite, 79 M.J. 161, 164 (C.A.A.F. 2019)). Military judges abuse their discretion (1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if they use incorrect legal principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable. Id. (citing United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010)). A trial judge has a "wide range of choices and will not be reversed so long

as the decision remains within that range." Id. (quoting United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004).

Law

Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct. Article 115, UCMJ.

The offense of communicating a threat under Article 115 has three elements that must be proved:

> (1) The accused 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 that person or to a third person; and
> (3) That the communication was wrongful.

Manual for Courts-Martial, United States, Part IV, 53.(b) (2019 ed.)(the "Manual"). For the purpose of that offense "Threat" is defined:

> A "threat" means an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage or destroy is not required.

Id. at 53.(c)(1). The term "wrongful" is also defined for the purpose of

that offense.

> Wrongful. A communication must be wrongful in order to constitute this offense. The wrongfulness of the communication relates to the accused's subjective intent. For purposes of this paragraph, the mental state requirement is satisfied if the accused transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. A statement made under circumstances that reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act is not wrongful. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving a threat.

Id. at 53.(c)(2).

Mil. R. Evid. 404(b)(1) prohibits evidence "of any other crime, wrong, or act" to prove a person's character in order "to show that on a particular occasion the person acted in accordance with the character."

Mil. R. Evid. 404(b)(2) permits evidence of another crime, wrong, or act so long as it is admitted for any "other purpose." Motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake [and] lack of accident are examples of other such purposes specifically mentioned in the rule. Id.

In reviewing a military judge's decision to admit evidence under Mil. R. Evid. 404(b), the Court uses a three-part test from United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989). The three-parts of that test ask: (1) does the evidence reasonably support a finding that appellant committed a specific act; (2) does evidence of this act make a fact of consequence more or less probable; and (3) is the probative value of

the evidence of this act substantially outweighed by the danger of unfair prejudice? Id. at 109. Stated another way, "the test for admissibility of evidence of uncharged crimes is 'whether the evidence of the misconduct is offered for some purpose other than to demonstrate the appellant's predisposition to crime.'" United States v. Young, 55 M.J. 193, 196 (C.A.A.F. 2001)(quoting United States v. Taylor, 53 M.J. 195, 1999 (C.A.A.F. 2000)).

Analysis

The trial judge admitted evidence that Appellant, essentially, had a *plan* to intimidate his wife when the only issue was whether Appellant intended to intimidate her. This cannot be error. In this case, to demonstrate an error, Appellant must overcome a high obstacle. Keeping in mind, the low standard for relevance under Mil. R. Evid. 401, Appellant must demonstrate that the trial judge (1) abused his discretion and that there was (2) *essentially* no relevant use for the 404(b) evidence. Appellant cannot demonstrate either. Both the trial judge and the AFCCA correctly found the 404(b) evidence relevant for a non-propensity purpose: common plan or scheme.

I. The Trial Judge Followed Guidance of his Superior Courts

The standard for reversing a trial judge on abuse discretion is high. The high standard is not met here. As explained below, (1) the trial judge in this case based

his findings on evidence supported by the record, (2) applied the correct legal standards, and (3) his application of the legal standards to the facts was reasonable.

a. The Military Judge's Factual Findings Were Supported

First, as his ruling demonstrates, the trial judge made findings of facts supported by the record. (JA 224-225.) Appellant wisely does not challenge the military judge's factual findings. (App. Br. 10.) He did not abuse his discretion on his factual findings, and this Court should adopt them.

b. ***The Legal Framework He Applied Was Correct***

Second, before conducting his legal analysis, the trial judge outlined the relevant case law from this Court and the Supreme Court. (JA 227-230.) He identified the correct legal test for admitting 404(b) evidence: the Reynolds test. (JA 227.) The trial judge specifically highlighted this Court's decision in United States v. Diaz, 59 M.J. 79, 94 (C.A.A.F. 2003) noting that the government "cannot merely lump together a series of incidents" as 404(b) evidence. (JA 228.) Regarding evidence of plan or scheme, the judge observed that plan evidence must not simply "share some common elements," but rather must "establish a 'plan' of which the charged act is a manifestation." (Id.) The trial judge correctly identified the appropriate legal standards.

c. The Application of the Law to The Facts Was Reasonable

Since the military judge used the proper legal standards, unless his application of the law to the facts was "unreasonable," he did not abuse his discretion. A trial judge's application of the facts to the law is only unreasonable if the judge's decision goes beyond the "wide range of choices" available. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004). In describing the "wide range of choices available," this Court has held that to "reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. Hyppolite, 79 M.J. 161, 166 (C.A.A.F. 2019). In sum, the standard for being "unreasonable" is high.

The trial judge's approach in reviewing controlling superior authority demonstrated his reasonableness. After reviewing the relevant facts and correct legal standards, the trial judge carefully analyzed a similar case: United States v. Moore, 78 M.J. 868 (A. F. Ct. Crim. App. 2019). In Moore, 78 M.J. at 871, AFCCA found the trial judge had not abused his discretion by admitting evidence that an appellant's scheme of "controlling behaviors" towards his girlfriend over a two-year relationship were relevant as to consent and mistake of fact for a sexual assault. Id. at 872. The trial judge here correctly applied the law to the facts and

determined, just as in Moore, that Appellant's scheme or plan was admissible for similar reasons.

The AFCCA decision in Moore offered useful parallels to this case. 78 M.J. at 868. As the trial judge described, the Appellant in Moore, 78 M.J. at 868, committed several acts consistent with this scheme of controlling the victim. In Moore, just as here, the scheme of controlling behaviors informed the appellant's state of mind. Id. Specifically, the 404(b) evidence informed the analysis of consent and mistake of fact. Id. As the Court held, the appellant's scheme supported the fact that "he had the motive and intent to repress, instead of respect, [the victim's] personal autonomy and thus was probative of her lack of consent." Id. at 870. Additionally, the appellant's conduct "made it much less probable" that he was mistaken regarding her lack of consent. Id. at 871. The appellant's "controlling behaviors" in Moore revealed his state of mind.

Guided by the decision in Moore, the trial judge made a reasonable choice among the "wide range of options." Just as the appellant's controlling behaviors in Moore provided evidence of his state of mind, here the trial judge found Appellant's plan provided evidence of his desire to "frustrate MGW's ability or willingness to report," and to "increase his control over her," and to "undercut . . . MGW's report to authorities." (JA 229). Just as in Moore, here, the judge

determined that the 404(b) evidence potentially revealed Appellant's state of mind. Id. at 871.

Having carefully applied the facts to the law in a similar fashion as a superior court, the trial judge's determination cannot be described as "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Hyppolite, 79 M.J. at 166. Indeed, the trial judge's determination reflected this Court's clear direction to trial judges --for relevant non-propensity evidence-- "Mil. R. Evid. 404(b) is a 'rule of inclusion.'" United States v. Young, 55 M.J. at 196.

d. Appellant's Plan Provided Relevant Evidence on the Key Disputed Fact

Contrary to Appellant's argument, the trial judge did not abuse his discretion by failing to identify a fact of consequence. (App. Br. 10.) The trial judge considered multiple theories for the admissibility of the February incident evidence. (JA 229). Two of those theories relied directly upon the order the events occurred. First, the judge considered whether the incident could demonstrate Appellant's "consciousness of guilt." (JA 229.) He found it did not. (Id.) Second, he considered Government counsel's "revenge" theory. (Id.) Government counsel argued that Appellant had threatened MGW in February as "revenge on her for making the report." (JA 229.) Although this theory would have explained Appellant's intent "to get revenge," the trial judge found "no evidence before this court makes that connection." (Id.) Considering the "revenge theory" of intent, the trial judge held he

would not consider the accused's intent. (Id.) "Revenge," of course, is not the only reason to intentionally threaten someone. The judge proceeded to consider other reasons someone might intentionally threaten someone, namely: as part of a plan. (Id.)

After rejecting those two theories, the judge considered one additional theory suggesting Appellant's intent—did Appellant have a plan or scheme when he threatened MGW. (JA 229.) Appellant's argument that the trial judge failed to identify a fact of consequence must fail. (App. Br. 6.) While, as Appellant noted, the trial judge did not state "I hereby rule that Appellant's plan proves a fact of consequence." He did not have to. He only needed to correctly make that determination. Reynolds, 29 M.J. at 109. The judge knew that; he correctly quoted the three-part test from Reynolds. Id. Given the offense in question, the judge knew that the Government's intended use of the "plan" evidence must have been to prove the threat was wrongful. The plan evidence could not possibly prove the other two elements. Article 115, UCMJ. The other two elements directly deal with communicating the actual threat: "(1) the accused communicated . . ." and "(2) the communication was made known…" Id. Before determining the "plan" evidence was admissible, the military judge necessarily must have determined it made it more likely Appellant's threat was (3) wrongful.

The key disputed fact was Appellant's wrongfulness. The admitted evidence

directly related to that fact of consequence. Specifically, the judge held that the 404(b) evidence could demonstrate Appellant's plan "to mak[e] credible threats against MGW," "to reduce MGW's willingness to report these incidents," and to "increase his control over her." (JA 229-31.) Each of those uses of the plan would rebut any implication that Appellant's threat to kill his wife was not wrongful, making them relevant under the second prong of Reynolds. Despite Appellant's assertion, there is no evidence in the record suggesting the trial judge ignored the law or failed to follow the exact law he quoted. This Court should find the trial judge did not abuse his discretion.

II. Appellant's Plan Provided Relevant Evidence of a Fact of Consequence

Evidence of Appellant's *plan* mattered, because Appellant's *plan* while threatening his wife mattered. Plan evidence can prove more than just--a plan. Notably, unlike "intent" or "knowledge," no crime in the UCMJ requires proof of "plan or scheme." As a result, the "fact of consequence" proven by a plan or scheme must be something else. In any particular case, a common plan or scheme can provide evidence of intent, knowledge, motive, modus operandi, or context. E.g. Hyppolite, 79 M.J. at 161 ("plan or scheme was intent"); United States v. Green, 2023 U.S. App. LEXIS 8602 (11th Cir. 2023)("scheme was admissible because it went to [appellant's] motive or intent to commit the charged offenses); United States v. LaFlora, 146 Fed.Appx. 973 (10th Cir. 2005)(common plan used to prove

identity); United States v. Akpa, , 2005 U.S. App. LEXIS 12302 (9th Cir. 2005)(scheme evidence used to prove absence of mistake.) For a few examples, consider: A plan to rob a bank could provide evidence supporting a *motive* to possess a firearm inside that bank; a plan to rob a bank could provide evidence that the taking from the bank was with the *intent* to permanently deprive it; a plan to rob a bank wearing the costumes of dead presidents with fully automatic firearms in a windowless get-away white van could be *modus operandi* evidence of identity. Understood in that way, plan or scheme evidence represents an umbrella term under which many potential facts of consequence can be proven depending on the case. Appellant's plan offered evidence of his state of mind when he threatened to kill his wife—namely what was he planning.

a. The Scheme Demonstrated His "Wrongful" Intent

This Court has repeatedly recognized the connection between planning and intent. In Hyppolite, 79 M.J. at 167, this Court addressed the fact of consequence related to the Appellant's plan or scheme. The Appellant in Hyppolite sexually assaulted four different victims. Id. In each instance, several key similarities linked the offenses. Id. On the question of fact of consequence, the Court held that the plan evidence demonstrated "intent:"

> The **common plan and scheme evidence was intent evidence** because mistake of fact was the only issue in controversy. . . trial counsel's argument on findings makes clear that the position of the Government was that proof of

> a common plan or scheme showed that [the appellant] 'knew what he was doing' when he committed the charged offenses.

Id. at 167 (emphasis added). Despite this Court's clear guidance that "common plan and scheme evidence [is] intent evidence." Id. Appellant, incorrectly, argued the opposite. (App. Br. 21.) In Reynolds similar to Hyppolite, the trial judge admitted 404(b) evidence that the appellant had sexually assaulted a second victim "to prove a plan or design of the appellant." Reviewing that decision this Court held that the appellant's "plan or design" "to accomplish his sordid purpose on other occasions was extremely probative" of his "*mens rea*." Id. at 109 (emphasis original). Just as the appellants' plans in Hyppolite and Reynolds revealed their intent, here, Appellant's plan to "frustrate MGW's ability or willingness to report," and to "increase his control over her," and to "undercut . . . MGW's report to authorities" revealed his wrongful intent.

The 404(b) evidence of the common scheme or plan demonstrated Appellant's "wrongful" intent. Just as in Reynolds and Hyppolite, Appellant's "plan" provided evidence of his intent. Hyppolite, 79 M.J. at 167; Reynolds, 29 M.J. at 109. As AFCCA held, Appellant's common scheme or plan evidence could demonstrate Appellant's intent or state of mind in threatening MGW:

> Appellant's common plan or scheme to use threats against MGW to dissuade her from reporting his misconduct to law enforcement bears upon whether Appellant's charged communications to MGW were "wrongful." . . . Any

> common plan or scheme formed by Appellant for the purpose of manipulating MGW into silence by virtue of threats and histrionics is relevant to proving or disproving that Appellant's charged communications were "in jest" or for some other "innocent" or "legitimate purpose."

(JA 021). Like Reynolds, evidence that Appellant used the same scheme "to accomplish his sordid purpose on [an]other occasion[]" would be extremely probative of his *mens rea*. Reynolds, 29 M.J. at 109.

b. Appellant's Repeated Acts Are Textbook Admissible 404(b) Evidence

Federal courts have recognized that "other acts of domestic violence involving the same victim are textbook examples of evidence admissible under Rule 404(b)." United States v. Berckman, 971 F.3d 999 (9th Cir. 2020). In summarizing the case law across multiple circuit courts of appeal, the court in Berckman, 917 F.3d at 1002, described the enormous importance of 404(b) evidence to domestic violence cases:

> Some [courts] have explained that additional assaults are admissible as a "critical part of the story[4]" that clarifies the

[4] One potentially legally relevant use of 404(b) evidence in the domestic violence context is to explain the victim's state of mind. United States v. Faults, 821 F.3d 502 (4th Cir. 2016). Trial defense counsel repeatedly highlighted MGW's reaction and response as relevant matters for consideration. (JA 169-170.) By implication, Defense suggested MGW's reaction was evidence that Appellant's threat was not wrongful. Essentially, Defense argued MGW could tell he was not really trying to intimidate her. The Government's response to this argument was to highlight Appellant's control over his wife. The 404(b) evidence could also have been probative for that purpose. Based solely on the September incident, the fact finder may have been unconvinced that Appellant's behaviors were controlling MGW. The second occurrence could have revealed Appellant's continuing plan to control the behavior of MGW. Stated another way, the second incident makes the ongoing and continuing plan to control MGW more likely to have occurred in the first place.

> motive behind the charged crimes. Other courts have allowed this evidence to illustrate the "history of [the] relationship" between the defendant and victim, which speaks to a defendant's intent. These cases say essentially the same thing—prior (and subsequent) acts of violence towards the identical victim can shed light on the mindset of the defendant during the charged crime, such as whether there was a grudge between the two, a desire for payback of some sort, or that the defendant had the intent to exert control over this particular victim through violence.

Given the robust recognition for the relevance of 404(b) evidence of additional instances of domestic violence, not surprisingly, Appellant's repeated instances of domestic violence – repeated threats to kill and assaults -- provide "textbook" examples of admissible 404(b) evidence.

III. His Actions "Subsequent To" The Charged Incident Are Admissible Under 404(b)

Although, generally, Mil. R. Evid. 404(b) plan evidence predates the charged offenses, neither law nor reason requires it. Appellant broadly claims that the Mil. R. Evid. 404(b) evidence failed to establish a plan because the evidence occurred "*after*, not before, the charged threat." (App. Br. 12.) (emphasis original). Despite Appellant's broad assertion, this Court has disagreed. Young, 55 M.J. at 196. In Young, this Court observed that it had "applied the Reynolds test to subsequent acts as well." Id. (citing United States v. Dorsey, 38 M.J. 244, 246

(C.M.A. 1993)). Following this observation the Court reviewed the approach of other federal courts. Young, 55 M.J. at 198.

After the review, the Court concluded that both Young and Dorsey, reflected "prevailing federal practice." Id. Indeed, they do. In addition to the six cases cited in Young, 55 M.J at 196, the AFCCA identified an additional five cases permitting "subsequent act" evidence. See United States v. Greene-Watson, 2023 CCA LEXIS 542, *28 n.14 (A.F. Ct. Crim. App. 2023). Although the AFCCA noted that "a majority of the federal circuit courts . . . permit post-misconduct evidence," they understated the consensus. Id. (citing cases from the 1st, 4th, 5th, 7th, 10th, 11th, and the D.C. Cir.) Examples of subsequent act evidence used as 404(b) evidence abound. Although not cited to by the AFCCA, the Third, Sixth, Eighth, and Ninth Circuit Courts of Appeal also permit "subsequent acts" under rule 404(b). United States v. Singleton, 458 F. App'x 169 (3d Cir. 2012) (subsequent act evidence permitted to show intent and knowledge related to a plan to defraud); United States v. Alford, 1999 U.S. App. LEXIS 11864 (6th Cir. 1999)(subsequent act of possessing cocaine relevant to appellant's intent to have distributed cocaine previously); United States v. Grady, 88 F.4th 1246 (8th Cir. 2023) ("the fact that [404(b) evidence] occurred later is of no consequence because Rule 404(b) embraces not only prior acts by subsequent conduct."); United States v. Bibo-Rodriguez, 922 F.2d 1398 (9th Cir. 1991) (subsequent acts used to show

knowledge of cocaine possession in earlier scheme to import cocaine illegally "404(b) does not distinguish between "prior" and "subsequent" acts.") It turns out every federal circuit court of appeals to address the issue has uniformly found that Rule 404(b) permits both prior and subsequent acts. Indeed, the Federal Rules of Evidence Manual includes a section titled "Acts Committed After the Act Charged." 2 Federal Rules of Evidence Manual § 404.02[17] (2024). The section describes how subsequent acts remain admissible under Rule 404(b) and that the common name for the rule "Prior Bad Acts" is a "misnomer, because it seems to imply that to be admissible . . . the acts must have preceded . . . the subject of the lawsuit." Id. Tellingly, appellant provided no case supporting the position that subsequent acts were inadmissible under Mil R. Evid. 404(b). The Government similarly found none.

a. The "Plan" Evidence Revealed What Had Been Going on All Along

Subsequent acts evidence may reveal that an earlier act was not an isolated incident but rather part of a preexisting plan. As a result, rather than focusing on "prior to" or "subsequent to," courts simply apply the Reynolds test or the similar federal circuit test. Dorsey, 38 M.J. at 246; Berckman, 971 F.3d at 1002. The facts of Dorsey demonstrate how later actions can constitute a plan that is relevant to earlier charged conduct. Id. at 245. Appellant was alleged to have committed larceny and obstruction of justice. At trial, the issue was whether the appellant had

intended to obstruct justice. Id. Just as the issue here is Appellant's "intent." The Government sought to introduce 404(b) evidence that *after* the charged obstruction, the appellant obstructed justice again. Id. Similarly, Appellant in this case assaulted and threatened once again. The Court noted that the appellant's "later conduct . . . paralleled his [earlier] action" Id. Just as in this case Appellant's actions paralleled his *earlier* actions; he again assaulted, threatened, and scared MGW. While not explicitly referring to the appellant's actions as a plan or scheme, the Court held that his scheme to pay people for false testimony to escape responsibility revealed his ongoing intent to obstruct justice on the *earlier* occasion. Id. Just as subsequent acts can reveal a plan to suborn perjury, they can also reveal a plan to intimidate a wife.

The Ninth Circuit Court of Appeals explained in Berckman that it does not matter whether 404(b) instances of domestic violence occur "prior to" or "subsequent to" the charged offense. Berckman, 971 F. 3d at 999. The appellant assaulted his wife while camping at a national park in Hawaii. Id. at 1001. The court considered two incidents of 404(b) evidence, one before the charged assault and one after. Id. Twelve months earlier, the appellant assaulted his wife. Id. The appellant also assaulted his wife *after* the charged incident. Finding both the "prior to" and "subsequent to" assaults admissible, the court began its analysis suggesting "other acts of domestic violence involving the same victim" are nearly always relevant for some purpose. Id. at 1004.

Specifically, in Berckman, the court held that the 404(b) evidence demonstrated the appellant's state of mind. Id. Reminiscent of the AFCCA holding in this case, the court, held that the 404(b) evidence demonstrated the appellant "was not joking around or simply trying to frighten his wife." Id. at 1004. Similarly, the "subsequent to" evidence, in this case, demonstrated Appellant's ongoing state of mind. When he threatened to kill his wife, he was not making the threat "in jest." Manual, 53.c.(1). Both 404(b) evidence before and *after* the charged conduct revealed the appellant's state of mind at the time of the earlier charged conduct. Id.

Distinguishing cases raised by appellant in that case, the court explained why domestic violence cases are, often, different. Id. Generally, evidence of an appellant's attacks on different victims cannot "help the jury understand the relationship between the defendant and a particular victim." Id. Such evidence, outside the domestic violence context, often "characterize[es] the defendant as someone who has a propensity to be violent." Id. at 1004. Assaults on the same victim in the domestic violence context present the opposite situation. Id. at 1003. This distinction between crimes committed against the same victim and crimes committed against different victims drives home why domestic violence 404(b) analysis is different. With one repeated victim, the similarities are baked in.

b. Appellant's Two Incidents Are Similar Enough to Be Evidence of a Plan

Appellant's emphasis on the chronological order of the plan evidence suggests

Appellant is only familiar with incremental plan evidence. (App. Br. 12.) An analysis of case law reveals two ways evidence of a plan might exist - incrementally or in episodes. Incremental evidence of a plan deals with the evidence of a step-by-step plan. For example, "an uncharged larceny of an automobile, which is subsequently used as a getaway vehicle in a charged kidnapping or robbery, may be separate acts in the same drama and thus probative of a larger plan." United States v. Jenkins, 48 M.J. 594, 600 (A. Ct. Crim. 1998). Episodic evidence of a plan provides standalone "episodes" of the plan acted out. Incremental evidence of a plan need not be similar, but it must be in the right order. Notice there is no "substantial similarity" between the larceny of the vehicle and the kidnapping. They are very different crimes. Yet they may both be "acts in the same drama and thus probative of a larger plan." Jenkins, 48 M.J. at 594. For incremental evidence of a plan the evidence must have occurred in the correct order. Taking the example from Jenkins, if the uncharged larceny of the automobile occurred two weeks after the robbery and kidnapping are completed—it cannot be part of the plan to steal a getaway vehicle. For incremental evidence of a plan, the order the events occur matters, but their similarity does not. Conversely, episodic evidence need not be in order, but they must be similar.

Appellant's two episodes of yelling, abusing, and threatening his wife reveal episodes in his continuing plan to control his wife. Episodic evidence of a plan

provides standalone "episodes" of the plan acted out. Episodic evidence of plans appears to be far more common under the case law. Indeed, every case cited so far have included episodic plan evidence. Hyppolite, 79 M.J. at 167 (multiple episodic sexual assaults under similar circumstances); Reynolds, 29 M.J. at 109 (multiple sexual assault under similar circumstances); Dorsey, 38 M.J. at 246 (two episodes of paying for false testimony); Moore, 78 M.J. 868 (multiple episodes of controlling behavior); Faults, 821 F.3d at 502 (multiple episodes of domestic violence); Berckman, 917 F.3d at 1002 (multiple episodes of domestic violence). Appellants' two similar incidents represent classic episodic evidence of a plan.

While order matters for incremental evidence of a plan, similarity matters for episodic evidence. Episodic plan evidence gets its relevance from the similarity between and among the episodes. Hyppolite, 79 M.J. at 167. To the extent that the episodes are dissimilar, somewhat obviously, they are not episodes in a common scheme or plan. Id.

Episodic evidence of a plan requires substantial similarity, but it does not require that the evidence be "almost identical" or "like a signature marking the offense as 'the handiwork of the appellant.'" Hyppolite, 79 M.J. at 167. *Cf.* United States v. Morrison, 51 M.J. 117 (C.A.A.F. 1999)(quoting United States v. Brannon, 18 M.J. 181 (C.M.A. 1984). Somewhat confusingly the Morrison decision included two quotes appearing to require plan evidence to be "almost identical" or "a

signature." Id. The first and most confusing quote "almost identical" comes from Brannon, 18 M.J. at 193. Unfortunately, the language in Brannon is simply an—out of context—quote from another opinion: United States v. Danzey, 594 F.2d 905 (2d Cir. 1979). The language being quoted in Danzey comes from a discussion of modus operandi evidence. Id. at. 913. The second confusing quote in Morrison is less confusing when read in context. Morrison, 51 M.J. at 120. The language that the similarity "must be so great that it is 'like a signature marking the offense as 'the handiwork of the appellant'" follows appropriate limiting language: "where evidence is offered to show modus operandi." Id. Read correctly, Morrison, Brannon, and Danzey hold only that evidence offered "to show modus operandi" must be more similar than other evidence of plan. Morrison, 51 M.J. at 120. The law does not require "almost identical" circumstances for all plan evidence. This court's more recent opinion in Hyppolite made this clear. Hyppolite, 79 M.J. at 167. The standard is "substantially similar." Id.

This Court previously considered how similar would be similar enough for a "plan." United States v. Munoz, 32 M.J. 359 (C.M.A. 1991). Munoz dealt with varying degrees of sexual abuse committed by a father against his daughters. 32 M.J. at 363. The sexual abuse was different in some ways. Id. They happened years apart, the victims were different, and the sexual abuse between the daughters was different in kind and severity. Id. at 362. The Court, however, noted important

similarities. Id. The factors in common included: the age of the victims, the situs of the offenses, and the surrounding circumstances. Id. at 363-64. The Appellant argued on appeal that these similarities seem to be little more than those anticipated in "a generic description of familial sexual abuse." Id. at 363. Emphasizing the similarities, the Court rejected that argument, finding the trial judge "did not abuse his discretion in concluding that all of the uncharged misconduct was "probative of a plan on appellant's part" to sexually abuse his children. Id. at 364.

The trial judge understood the importance of similarities for establishing a plan. (JA 228.) Appellant suggested the trial judge abused his discretion when he determined the two incidents were sufficiently similar to establish a plan. (App. Br. 12.) In support, Appellant quoted McDonald's admonition that plan evidence cannot "merely share some common elements." McDonald, 59 M.J. at 430. The judge, here, did not abuse his discretion. Indeed, the judge considered that exact quote from that exact same case, before determining the 404(b) evidence was admissible at trial. (JA 228.) Armed with the proper legal standard, the judge considered the similarities. (Id.)

Appellant's two episodes demonstrating his plan to control MGW share several similar relevant facts. On both occasions, a contentious (1) argument triggered by parental responsibilities led to Appellant (2) assaulting his wife, (3) scaring his wife with harm to their child, and (4) threatening to kill her. Directly

thereafter, Appellant (5) proactively called to 911 to provide his version of events. As noted, the trial judge realized the importance of identifying similarities prior to determining relevance for episodic plan evidence. He identified "numerous similarities" linking the two incidents and establishing the relevance:

> In each instance, the appellant is (1) alleged to have offered or engaged in violence against MGW. Additionally, he is alleged (2) to have made threats against MGW. Further all of these behaviors on both occasions, are (3) alleged to have taken place while MGW was holding or in close proximity to JGW, (4) causing fear on the part of MGW that their child would be involved or injured somehow in their altercation. Moreover, in both . . .the appellant is (5) alleged to have engaged in certain acts to frustrate MGW's ability or willingness to report these allegations by taking actual steps to prevent her from reporting and increase his control over her so as to deter her from making a report. Finally, evidence exists that the appellant, in each case, (6) took steps to call 911 . . . to undercut what he anticipates MGW's report to authorities.

Unlike the similarities in McDonald, 59 M.J. at 430, that merely shared "common elements," the similarities identified by the trial judge directly suggest the common scheme or plan. On both occasions Appellant responded to his frustrations with threats and violence involving MGW and their son causing fear. Additionally, as the judge found, on both occasions Appellant engaged in acts to frustrate MGW's willingness to report, to increase his control over her, and that Appellant took steps to undercut her report to authorities by calling 911. These similarities go far beyond those described in McDonald and even surpass those approved of in Munoz. McDonald, 59 M.J. at 430; Munoz, 32 M.J. at 363. Guided by the law, the trial judge

correctly decided from among the "wide range of options." United States v. Gore, 60 M.J. 178, 187.

c. The 17 Months Between the Incidents Does Not Make Them Irrelevant

This Court has consistently approved of 404(b) "plan" evidence with multi-year gaps between the incidents. In United States v. Johnson, 49 M.J. 467 (C.A.A.F. 1998), the appellant's sexual abuse of his two daughters was separated by 6 years. Id. at 473. In Munoz, 32 M.J. at 359, the appellant's sexual abuse of his two daughter was separated by 12 years. There, the Court explained the similarity between the offenses was the "critical concern" and "not the period of time between" them. Id. at 364. Finally, in United States v. Mann, 26 M.J. 1 (C.M.A. 1988), the Court found that five years was not too long. The Court again focused on the similar facts and not the time between them. Id.

Federal courts also tend to focus on the similarity of the episodes and not the time between them. The case of United States v. Henthorn illustrates how the similarities between acts can overcome a significant gap in time between the acts, rendering the 404(b) evidence still relevant. 864 F. 3d. 1242 (10th Cir. 2017.) The Henthorn case addressed a time gap of 17 years between the oldest 404(b) evidence and the charged misconduct. Id. at 1250. In Henthorn, the appellant was charged with murdering his second wife who died in 2012 after falling from a cliff in a national park. Id. at 1250. The Government sought to prove the appellant

planned and killed his wife by pushing her off the cliff to collect the insurance proceeds. Id.

The 404(b)-evidence dealt with two previous incidents. First, the death of the appellant's first wife. Id. at 1250. In 1995, seventeen years before the charged misconduct, the appellant's first wife died when a car crushed her. Id. Second, prior to her death in 2012 the appellant's second wife was injured. Id. at 1250. A year before her death, she was struck in the head by a board dropped or tossed by the appellant. Id. at 1249. The government sought to use these two incidents to demonstrate the appellant's continuing plans to kill his wives for the insurance proceeds—over a 17-year time gap. After describing several key similarities, the Court permitted the 404(b) to be considered. Id.

While the passage of time must be considered, the similarity matters more. After noting the importance of the passage of time, the court emphasized that even acts "quite remote to the crime charged have frequently been deemed by us and our sister circuits to be relevant if they were sufficiently similar." Id. at 1249 (quoting United States v. Watson, 766 F.3d 1219, 1240 (10th Cir. 2014). The court included a footnote summarizing several lengthy gaps between 404(b) plan incidents approved of by other federal courts:

> See, e.g., United States v. Watson, 766 F.3d 1219 (10th Cir. 2014) (ten to seventeen years); United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) (sixteen years); United States v. Meacham, 115 F.3d 1488 (10th

> Cir. 1997) (twenty-five to twenty-nine years); United States v. Wacker, 72 F.3d 1453 (10th Cir. 1995) (thirteen years); see also, e.g., United States v. Luger, 837 F.3d 870 (8th Cir. 2016) (twenty-five years); United States v. Sterling, 738 F.3d 228 (11th Cir. 2013) (fifteen years); United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000) (fifteen years); United States v. Hernandez-Guevara, 162 F.3d 863 (5th Cir. 1998) (eighteen years); United States v. Hadley, 918 F.2d 848 (9th Cir. 1990) (fifteen years).

Id. at 1251 n.7 (10th Cir. 2017). Concluding the review of other federal courts, the court observed that there is "no absolute rule regarding the number of years that can separate offenses." Id. at 1249. The relevance 404(b) evidence turns on the "unique facts of each case" emphasizing the importance of the similarity between them. Id. at 1249.[5]

Appellant case presents a relatively short gap in time—only 17 months. As the case law demonstrates, for intra-familial incidents, the time gaps between 404(b) episodes can be lengthy: 4 years, 6 years, even 17 years. Munoz, 32 M.J. at 359; Johnson, 49 M.J. at 467; Mann, 26 M.J. at 1; Henthorn, 864 F. 3d. at 1242. The length of the gap becomes even less significant when one considers the robust and

[5] The Munoz, Johnson, and Mann, cases implicitly make the point, again, that the order of the 404(b) evidence does not matter. In each sexual abuse case, the younger child was the subject of the charged offense and the older child's assaults were 404(b) evidence. Setting aside statute of limitations concerns, presumably, the older child could have been the subject of the charged offenses. In which case, the more recent and continuing sexual abuse of the younger child would be admissible as 404(b) evidence. There is no logical reason the timing would matter.

consistent similarities. Here the key similar facts related to Appellant's two episodes did not change. The two incidents with MGW occurred in the same home, same victim, regarding the same subject matter, within the same marriage. These are exactly the key similarities that federal courts suggest make domestic violence cases "textbook" cases for admissible 404(b) evidence. Berckman, 917 F.3d at 1002.

The similarities between the incidents in this case far exceed those in most "plan" cases. *Cf.* Munoz, 32 M.J. at 359; Johnson, 49 M.J. at 467; Mann, 26 M.J. at 1; Henthorn, 864 F. 3d. at 1242. Additionally, the 17-month gap between the episodes falls well below the length of time approved of by this Court and the federal court examining similar cases. Accordingly, the –relatively—short passage of time does not render the plan evidence irrelevant.

IV. Any Probative Value Could Have Outweighed the Danger of Unfair Prejudice Because the Judge Reiterated That He Would Not Use the Evidence for Propensity Purposes

The military judge did not abuse his discretion when he concluded "the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice." (JA 230.) The military judge found the 404(b) evidence admissible to prove Appellant had a plan. As discussed above, what the Appellant planned when he threatened to kill his wife appeared to be the only fact of consequence in dispute.

The probative value was not substantially outweighed by the danger of unfair

prejudice. The judge thoroughly ensured there would be no unfair prejudice. (JA 230-31.) At three separate places in his ruling the judge made clear the evidence would not be used for a propensity purpose—by him:

> This is distinguishable from a propensity argument . . . the court will consider this M.R.E. 404(b) evidence only for the limited purpose that it may establish a common scheme or plan and not for reasons prohibited by M.R.E. 404(a) or for propensity purpose . . . As the finder of fact in this military judge alone case, the Court will consider this M.R.E. 404(b) evidence only for the limited purpose that it may establish a common scheme or plan and not for reasons prohibited by M.R.E. 404(a) or for propensity purposes.

Id. Having repeatedly stated he would not use the 404(b) evidence in an unfair way, the military judge conducted the balancing test. Having determined that danger of unfair prejudice was essentially -zero- he easily concluded the probative value of the "plan" evidence was not substantially outweighed. It could not have been.

Appellant cites to Wilson, 2024 CAAF LEXIS 287. (App. Br. 27.) This case is not like Wilson, 2024 CAAF LEXIS 287. In Wilson, the penetrative acts which the appellant was accused of committing "overwhelmingly demonstrated Appellant's intent." Id. at *19. The issue in dispute was whether the appellant had committed the acts, not why. Id. Evidence of intent would add little probative value and add only to the danger of unfair prejudice. This is the opposite case. The only factual dispute that existed related to Appellant's "state of mind" when communicating the threatening language. Evidence of his planning went directly to that. Although the

military judge's consideration of the Mil. R. Evid. 403 balancing may have been cursory, for a military judge in a military judge alone case the analysis can be relatively straightforward: if there is any probative value, it's not substantially outweighed by the danger of unfair prejudice where the military judge will not use the evidence for an improper purpose. The military judge did not abuse his discretion here.

V. The 404(b) Evidence Did Not Substantially Influence the Verdict

The quality, materiality, and strength of the Government's evidence of the threat ensures the 404(b) evidence, even if improperly admitted, did not influence the result. In evaluating prejudice for nonconstitutional 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). The Government simply did not need the 404(b) evidence—Appellant's threat was recorded.

First, there is no chance that the military judge used this evidence for an improper purpose, such as to convict Appellant because he was a bad person. The military judge reiterated that he would not use the evidence for such a purpose.

Next, the recording of the threat was material, strong, and high-quality evidence. The recording was admitted into evidence. As the AFCCA noted,

"Appellant does not dispute he communicated the language captured in MGW's audio recording." (JA 005). On the recording, Appellant stated, "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 054.) MGW responded, "This is my house. My name is on this house. This is my house." (Id.) Her response demonstrated her genuine concern that Appellant was denying her access to her home on threat of death. Appellant reiterated his seriousness: "Guess what? Guess what, try and come back through." (JA 055.) MGW challenged Appellant back, "So, if I want to come back, I am." (Id.) To which Appellant made clear his threat of death if she returns to her own home, "Try and come back through that door without the police and see what happens." (Id.) MGW, apparently convinced the threat was real, forecasted her testimony to the police, "It's fine. I will let them know what the fuck you did, so…" (Id.) Analyzing that conversation the AFCCA found "the language used is menacing on its face." (JA 010.) "The literal meaning of those words, particularly the phrase 'if you wish to continue breathing,' is a death threat.'" (Id.)

Appellant contested the evidence of the threat weakly. Appellant's weak case attempted to negate the "subjective intent element." (App Br 19.) Despite the recording, trial defense counsel attempted to suggest Appellant's intent was not wrongful. (Id.) "Wrongful" in this context only requires "the appellant transmitted

the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat." Manual, 53.c.(1). To be guilty, Appellant only needed the determination to "intimidate." Id. at c.(2). A threat is not wrongful if it is in "a jest" or a statement made for "legitimate purpose that contradicts the expressed intent." Id. at c.(1). Context matters here.

On the recording Appellant's wrongfulness is patent. He was angrily talking down to MGW. (JA 109.) The recording demonstrates that Appellant had just been accused of suffocating his own child. (Id.) He did not deny it. (Id.) Instead, he called his wife a liar, a dumbass, a bitch, and a bipolar bitch. (Id.) When confronted with the possibility that his son could have died, he responded, "I don't give a fuck." (Id.) He followed that up by threatening "If you keep trying me, I swear to God, you better not come back in this house." (Id.) Directly after this, he started the "death threat." (Id.) In context, Appellant was not joking around or making a "jest," nor was his "expressed intent contradicted by some legitimate purpose." Appellant's case was exceedingly weak, and the Government's was compellingly strong. The 404(b) evidence whether admitted or not did not substantially influence the result of this case. Appellant was guilty. Since Appellant suffered no prejudice from the admission of the Mil. R. Evid. 404(b) evidence, this Court should not disturb AFCCA's decision below.

Conclusion

For these reasons, the United States requests that this Honorable Court affirm the decision of the AFCCA finding the trial judge did not abuse his discretion.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Appellate Defense Division on 26 July 2024.

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