IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Cross-Appellant*	**ANSWER TO CROSS-APPEAL ON BEHALF OF CROSS-APPELLEE**
v.	Crim. App. Dkt. No. 39358
Staff Sergeant (E-5) **RALPH J. HYPPOLITE II** United States Air Force *Cross-Appellee*	USCA Dkt. No. 19-0197/AF

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

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Pursuant to Rule 19 of this Court's Rules of Practice and Procedure, Cross-Appellee hereby replies to Cross-Appellant's Brief in Support of the Certified Issue, filed on April 1, 2019.

STATEMENT OF THE CASE

Cross-Appellee generally accepts Cross-Appellant's statement of the case.

STATEMENT OF FACTS

On March 13, 2017, the government notified the defense that it intended to introduce evidence of the charged acts under one of the Mil. R. Evid. 404(b) exceptions or as propensity evidence pursuant to Mil. R. Evid. 413 if any of the specifications were dismissed prior to trial. JA at 584.

On March 17, 2017, the defense submitted a joint motion to sever Specifications 1-3 from Specifications 4 and 5 and to preclude the government from admitting the charged acts under Mil. R. Evid. 404(b). JA at 584.[1] The government responded to the motion on March 23, 2017, and argued that the charged misconduct would be admitted to show a pattern of misconduct. JA at 652. The parties litigated the motion on March 28, 2017. JA at 79 et seq.[2]

During argument on the motion, the government acknowledged that it could not introduce evidence of the charged sexual misconduct as propensity evidence to

[1] The government also notified the defense of its intent to introduce evidence of uncharged misconduct involving Cross-Appellee and another airman who ultimately decided not to participate in Cross-Appellee's court-martial, thereby rendering the issue moot regarding that airman. R. at 481; JA at 619, 684-87.

[2] Neither party introduced any evidence but relied on argument for the motion. JA at 79.

commit other charged sexual misconduct pursuant to *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). JA at 111. The trial counsel asserted that the charged misconduct would be introduced to show a pattern of conduct and a common scheme. JA at 127, 129.

The military judge denied the defense motion in an undated ruling. JA at 695. The military judge acknowledged that *Hills* precluded the use of one charged offense as proof of another charged offense under Mil. R. Evid. 413. *Id*. Regarding the government's intent to offer the charged offenses as proof of each other under Mil. R. Evid. 404(b), the military judge analyzed the issue pursuant to *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), and concluded that a reasonable member could find by a preponderance of the evidence that Cross-Appellee committed each alleged act; that each specification is relevant and probative as to the other specifications regarding Cross-Appellee's common plan to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep; and that, under Mil. R. Evid. 403, each specification is probative as to the others on the issue of a common plan by Cross-Appellee and that the danger of unfair prejudice is low; and that the probative value of the evidence is not substantially outweighed by the risk of confusion of the issues, misleading the members, or any other factor listed in Mil. R. Evid. 403. *Id*. Regarding the common plan, the military judge stated:

> In this case, the common factors were the relationship of the alleged victims to the accused (friends), the circumstances surrounding the alleged commission of the offenses (after a night of drinking when the alleged victim was asleep or falling asleep), and the nature of the misconduct (touching the alleged victims' genitalia). The nature of the misconduct alleged in [S]pecification 5 is different than the other allegations but is alleged to have occurred in connection with the alleged touching of SrA [JD]'s genitalia. This court finds that each specification is relevant and probative as to the other specifications regarding the accused's common plan to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep.

Id.

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session to discuss instructions on findings, Cross-Appellee's trial defense counsel essentially asked the second military judge to reconsider the first military judge's ruling on Mil. R. Evid. 404(b) evidence. JA at 445. The trial counsel opposed the defense counsel's request and maintained that the charged acts were evidence of a common scheme or plan. JA at 447.

The military judge denied the request. JA at 447-48. He discussed the first military judge's ruling on the issue and stated that he would not disturb the first

military judge's ruling because of the finality of rulings, pursuant to R.C.M. 801(e)(1)(A).[3] *Id*. The military judge added:

> And specifically, on page 9, he does lay out the common factors with the relationship of the alleged victims to the accused. They were friends. The circumstances surrounding the alleged commission of the offenses: after a night of drinking when the alleged victim was asleep or falling asleep. And the nature of the misconduct: touching the alleged victim's genitalia. And, then he goes into a further discussion that I'm not going to read into the record, but it seems like the evidence that came out at trial is similar to the evidence that was initially presented to Judge Wiedie when he was detailed to this case and when he made this ruling. So, it doesn't seem like anything has changed that would cause me to disturb that ruling.

Id.

Finally, the military judge stated that, for purposes of Mil. R. Evid. 404(b), he would consider the evidence for a scheme instead of a common plan. JA at 448.

In the second paragraph of her closing argument, the trial counsel described the charged offenses:

> This case is about an NCO who preyed upon his friends, who took advantage of his friends when they were in vulnerable positions, when there [sic] were asleep, had been drinking, were unaware and unable to protect themselves from him. On various occasions, over the course of his time at Seymour Johnson Air Force Base,

[3] Rule for Courts-Martial 801(e)(1)(A) states: "Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final."

> the accused went after individuals who trusted him the most.

JA at 450.

She also argued that the "commonality" among the alleged victims was that "the accused actually did do something to them when they were asleep" and that "[i]n August 2014, the accused saw [SrA JD] asleep and he acted in the exact same manner that he had previously." JA at 494, 496. Toward the end of her argument the trial counsel asserted:

> The last thing I want to talk about Your Honor is [Mil. R. Evid.] 404(b), and the fact that you do look at all of these, they stand on their own. Got it. But, you look at them and you see are there commonalities in each of them that are too unusual? You look at the fact the relationships between the accused and his victims, you look at the vulnerable position that each of the victims was in, that they had been drinking, that they had gone to sleep, every single one of them; that's strange. You look at the fact that the accused took that opportunity to molest them. You look at the fact how he reacted in the situations. [SrA JD]'s a bit different. Basically, he went as far as he could, right? [Staff Sergeant RW] woke up in the middle of it and the accused ran away. [STK] woke up while it was happening and the accused ran away. [Staff Sergeant] SAK didn't wake up, so the accused was able to do what he wanted. And, [SrA JD] didn't fight back, so he was able to do what he wanted. He took it as far as he could with each of these vulnerable men, and that exactly is the scheme that the accused used across all of these men, across all of these instances. And, you can absolutely use these commonalities as you're looking at each of these fact patterns and deciding exactly what happened, as you're

> deciding if the accused is, in fact, guilty; that's what was going on.
>
> The accused knew what he was doing, he knew. He knew what he was doing when he was doing it. He knew what he was doing after he did it. . . .

JA at 498-99.

Additional facts necessary to resolve the assigned error are contained in the argument below.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR WHEN IT FOUND THE MILITARY JUDGE ABUSED HIS DISCRETION BY RULING THAT THE EVIDENCE REGARDING SPECIFICATIONS 1, 2, AND 3 COULD BE CONSIDERED AS EVIDENCE OF A COMMON PLAN OR SCHEME FOR SPECIFICATIONS 4 AND 5.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Hukill*, 76 M.J. 219, 221 (C.A.A.F. 2017); *see also United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). "The meaning and scope of M.R.E. 413 is a question of law that is reviewed de novo." *Id*. (quoting *Hills*, 75 M.J. at 354) (citation omitted).

Law

Military Rule of Evidence 413 is an exception to the ordinary rule that evidence of uncharged misconduct or prior convictions is generally inadmissible and may not be used to show an accused's propensity or predisposition to commit charged conduct. *See* Mil. R. Evid. 404(b). Military Rule of Evidence 413(a) states:

> In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

In *Hills*, this Court held that, pursuant to Mil. R. Evid. 413, the use of charged misconduct to establish an accused's propensity to commit other charged misconduct in the same case was error. 75 M.J. at 352. In *Hukill*, this Court clarified that "the use of charged conduct as M.R.E. 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected. Whether considered by members or a military judge, evidence of a charged and contested offense, of which an accused is presumed innocent, cannot be used as propensity evidence in support of a companion charged offense." 76 M.J. at 222. In a judge-alone trial, when a military judge uses charged conduct as propensity evidence under M.R.E. 413," such error raises constitutional concerns. *Id*. This error is tested for

prejudice under the harmless beyond a reasonable doubt standard." *Id*. (citing *Chapman v. California*, 386 U.S. 18, 22-24 (1967)). An "error is not harmless beyond a reasonable doubt when 'there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *Hills*, 75 M.J. at 357-58 (alteration in original) (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. at 24)).

Military Rule of Evidence 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts to prove the "character of a person in order to show action in conformity therewith." Mil. R. Evid. 404(b). Such evidence may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id*. If such evidence is offered for a proper purpose other than to demonstrate propensity, then it may be admissible. *United States v. Bressler*, 2016 CCA LEXIS 746, *16-17 (A.F. Ct. Crim. App. Dec. 16, 2016) (citing *United States v. Acton*, 38 M.J. 330, 333 (C.M.A. 1993) (citing *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989))) (emphasis added).

In *United States v. Reynolds*, the Court of Military Appeals adopted a three-part test for determining admissibility of evidence offered under Mil. R. Evid. 404(b):

(1) Whether the evidence reasonably supports a finding by the court members that appellant committed the prior crimes, wrongs, or acts;

(2) Whether the evidence makes a "fact of consequence" more or less probable; and

(3) Whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403.

29 M.J. 105, 109 (C.M.A. 1989).

The Courts have rejected "broad talismanic incantations of words such as intent, plan, or modus operandi, offered to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil. R. Evid. 404(b)." *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010) (citing *United States v. Brannan*, 18 M.J. 181, 185 (C.M.A. 1984)). *See United States v. Ferguson*, 28 M.J. 104 (C.M.A. 1989); *United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988). *See also United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974) ("[T]his Court has never hesitated to approve the admission of other-crimes evidence when that evidence has been relevant under one of the exceptions to the general rule. We have recognized, however, and we must continue to recognize, that the various categories of exceptions – intent, design or plan, identity, etc. – are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names. To the contrary, each exception has been

carefully carved out of the general rule to serve a limited judicial and prosecutorial purpose").

Analysis

This was an abuse of discretion and not a difference of opinion.

A military judge's ruling pursuant to Mil. R. Evid. 404(b) will not be disturbed absent a clear abuse of discretion. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (citation omitted). A military judge abuses his discretion when the findings of fact upon which he bases his ruling are not supported by the record, he relies on incorrect legal principles, or if his application of the correct legal principles to the facts is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)) (emphasis added).

The government argues that the Air Force Court of Criminal Appeals ("CCA") did not give the trial court the deference afforded it under abuse of discretion review because the lower court "relied on the same facts and the same law as the trial court, but determined that the commonalities were not quite sufficient to qualify as a common plan or scheme." *See* Gov't Cert. Br. at 22. In calling the divergence between the military judge's ruling and the CCA's conclusion "a difference of opinion, not an abuse of discretion," the government fails to acknowledge that the military judge's application of the correct legal

principles to the facts is clearly unreasonable. *See* Gov't Cert. Br. at 22. In other words, an abuse of discretion occurs where, as here, the military judge and the CCA consider the same facts and rely on the same correct caselaw, but the military judge's application of the caselaw to the facts is incorrect. Thus, the military judge's misapplication of the law is an abuse of discretion and not a difference of opinion.

The evidence concerned Cross-Appellee's common plan or scheme, not his intent.

The government spills much ink arguing that where Cross-Appellee's intent, and not the *actus reus* is at issue, the degree of similarity between the evidence in Specifications 1-3 and Specifications 4-5 need only be "significantly similar" and not "almost identical." Gov't Cert. Br. at 21, 25-26, 29 (quoting *Reynolds*, 29 M.J. at 110; *Morrison*, 52 M.J. at 122). At trial, however, the government sought, and the military judge permitted, the use of evidence in Specifications 1-3 as proof of a common plan or scheme for the acts alleged in Specifications 4-5. In other words, the government did not seek, nor did the military judge permit, the evidence to be used as proof of Cross-Appellee's intent. Today the government argues that the evidence was really proof of intent to engage in a common plan or scheme when that theory was not presented at trial, it was not the basis of the military judge's decision, and the panel was not instructed on its use as proof of intent.

The government also argues that "when the commonalities of a plan are not similar enough to prove the *actus reus*, they may still be relevant to disprove mistake of fact." Gov't Cert. Br. at 29 (citing *Reynolds*, 29 M.J. at 110). Just as the government did not move or argue for the admission of the Mil. R. Evid. 404(b) evidence to be used as evidence of an intent to engage in a common plan or scheme, it similarly did not advocate for the evidence to be used to disprove Cross-Appellee's mistake of fact nor did the military judge admit the evidence for this purpose.

The acts charged as Specifications 1-3 and the acts charged as Specifications 4-5 were not sufficiently similar to prove a common plan or scheme.

In arguing that the acts need be only significantly similar and not almost identical, the government acknowledges that the acts charged in Specifications 1-3 were insufficiently similar to the acts charged in Specifications 4-5 to prove a common plan or scheme. The government repeatedly described Cross-Appellee's common plan as him taking sexual advantage of his unsuspecting friends, only after they had been drinking, while the hour was late and the lights were off, and while his friends were asleep or had fallen asleep. Gov't Cert. Br. at 21, 22, 32, 39. This argument ignores the clear and distinct dissimilarities between the two sets of offenses, as described by the CCA:

> In Specifications 1-3, Appellant acted secretively while his friends slept, whereas in Specifications 4 and 5, Appellant initiated sexual contact with SrA JD while SrA

> JD was awake and aware of Appellant's presence and Appellant communicated Appellant's desire to engage in sexual activity with SrA JD.

JA at 11.

The CCA acknowledged that there were some common factors but these factors were insufficiently similar to prove a common plan or scheme. JA at 11-12. As the CCA noted, many incidents share the common factors articulated by the government – airmen assigned to the same unit, airmen who sometimes worked together, all the relevant parties were young adult men, the sexual activity occurred at night after drinking alcohol and falling asleep in the same general location as Cross-Appellee, and the sexual nature of the acts – and do not result in sexual abuse or assault. *See* JA at 12. The government cannot overcome the CCA's reasoning that it could not conclude that the factors were sufficiently distinctive to establish a common plan or scheme under Mil. R. Evid. 404(b) and Mil. R. Evid. 403 – particularly when the charged acts themselves were infrequent and the "common" factors were enduring (e.g. friendship) and recurring (e.g. drinking alcohol) over a prolonged period of time (e.g. as long as two years). JA at 11-12.

Furthermore, Cross-Appellee reinforces the point previously made that in Specification 3, STK testified that he woke to see Cross-Appellee's hand reach over the back of the couch to touch his penis over his pants and that he affirmatively swatted Cross-Appellee's hand away several times. Thus, STK was

awake and not asleep and the evidence in Specification 3 was not sufficiently dissimilar to the evidence underpinning Specification 4 where SrA JD was awake when Cross-Appellee touched his penis over his clothing. (App. Br. at 22-23).

WHEREFORE, Cross-Appellee respectfully requests that this Honorable Court affirm the CCA's holding that the evidence was not properly admitted under Mil. R. Evid. 404(b).

//s//
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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on and served on the Appellate Government Division on April 9, 2019.

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Certificate of Compliance with Rule 24(d)

This Brief complies with the type-volume limitation of Rule 24(c) because this Brief contains approximately 3281 words. Additionally, this Brief complies with the typeface and type style requirements of Rule 37.

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