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**UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES
Appellee

v.

Jerin P. MENARD, Senior Airman
United States Air Force, Appellant

No. 25-0173
Crim. App. No. 40496

Argued February 10, 2026—Decided September 28, 2026

Military Judge: Michael A. Schrama

For Appellant: *Captain John M. Fredericks* (argued);
Captain Jocylin N. Webster (on brief).

For Appellee: *Major Kate E. Lee* (argued); *Colonel
Matthew D. Talcott* and *Mary Ellen Payne, Esq.* (on brief);
Lieutenant Colonel Jenny A. Liabenow.

Judge HARDY delivered the opinion of the Court, in which Chief Judge MAGGS and Judge SPARKS joined. Judge OHLSON filed a separate opinion concurring in the judgment. Judge JOHNSON filed a separate opinion concurring in the judgment.

Judge HARDY delivered the opinion of the Court.

After Appellant and RH, a fellow airman and the victim in this case, ended their romantic relationship, they continued to live in the same apartment. Appellant set up a hidden camera in the apartment's bedroom, which he used to remotely watch RH without her knowledge or consent. After RH discovered the camera, the Government charged Appellant with one specification of indecent viewing in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018).

Prior to Appellant's court-martial, the Government proffered otherwise inadmissible evidence of Appellant's uncharged mistreatment of RH to demonstrate that Appellant had a common plan or scheme of monitoring and controlling RH under Military Rule of Evidence (M.R.E.) 404(b)(2).¹ The military judge admitted some of the proffered M.R.E. 404(b)(2) evidence over Appellant's objection, enabling the Government to present evidence of the misconduct to the panel and to reference the misconduct in its closing arguments. The panel found Appellant guilty of violating Article 120c, UCMJ, and the United States Air Force Court of Criminal Appeals (AFCCA) affirmed. *United States v. Menard*, No. ACM 40496, 2025 CCA LEXIS 137, at *53, 2025 WL 985360, at *18 (A.F. Ct. Crim. App. Mar. 28, 2025) (unpublished).

Before this Court, Appellant argues that the military judge erred by admitting the M.R.E. 404(b)(2) evidence, and he urges us to adopt a more stringent test for the admission of common plan or scheme evidence under M.R.E. 404(b)(2). We see no need to revisit our "common plan or scheme" jurisprudence in this case, but we agree with Appellant that the military judge erred in admitting the uncharged acts because no common plan or scheme existed. However, despite the military judge's error in admitting Appellant's uncharged conduct, we find that its

¹ Unless otherwise noted, all references in this opinion to the UCMJ and the Military Rules of Evidence (M.R.E.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

admission did not materially prejudice Appellant. We therefore affirm the decision of the AFCCA.

I. Background

In 2020, Appellant was a senior airman in the United States Air Force. He began an on-again, off-again relationship with fellow Senior Airman RH after they matched on a dating application. While they were dating, Appellant obtained passwords to RH's phone and social media accounts and used that access to monitor her online activity. Appellant read RH's private messages, questioned RH about her friends and past relationships, and blocked several male contacts from RH's social media accounts without her knowledge.

In July 2021, Appellant and RH ended their relationship. Despite the breakup, RH and Appellant remained in their shared apartment, working opposite shifts and alternating who slept in the bedroom. After the breakup and unknown to RH, Appellant hid a camera in the bedroom with a direct line of sight to the bed. The camera was connected to an application on Appellant's phone that gave him live access to the camera feed.

Appellant sent RH multiple messages that made RH suspicious that Appellant was monitoring her in the bedroom. Most relevant here was one instance that occurred while Appellant was out of state. RH showered, removed her towel, laid on her bed, and engaged in a private intimate act. During this time, Appellant texted her: "Did you make any videos today?" Appellant continued sending questions to RH: "Any videos? Bring the toy out?" When RH asked Appellant why he was asking such questions, he replied: "Just figure that's what you'd be up to with me gone." RH stopped responding to Appellant. She began trying on several outfits and took photos of herself to send to a friend. One outfit included RH wearing a blue top and blue pants. Appellant then texted her: "You want to take pictures of your butt in your blue outfit. Yea okay." Alarmed by Appellant's text and with the support of her friend Staff Sergeant BS over FaceTime, RH inspected her room and discovered

the hidden camera. As soon as RH unplugged the camera, Appellant texted her: “Oh look you caught on. Bravo.”

Investigators from the Air Force Office of Special Investigations (OSI) interviewed Appellant who admitted to placing the camera in RH’s bedroom. Appellant stated:

Obviously what I did was wrong. I’m wrongful for it. I shouldn’t have done that. I didn’t know it was a law. We’re allowed to have cameras in our own house in Louisiana. It’s different in New Jersey I guess you could say. Yes, the video . . . it was videoing her without her knowledge, I’m aware of that.

Appellant conceded that he placed a camera in the bedroom without RH’s knowledge and checked the camera’s live feed three separate times but denied seeing RH in the nude.

The Government charged Appellant with one specification of indecent viewing in violation of Article 120c, UCMJ. Appellant’s main defense at trial was that, because the camera only had a broadcasting and not a recording function, the Government could not confirm and thus failed to prove that Appellant viewed RH’s private area. To strengthen the prosecution’s case, prior to trial, the Government notified trial defense counsel of its intent to introduce six items of evidence under M.R.E. 404(b)(2), each bearing on Appellant’s controlling behavior toward RH and offered as proof of intent, knowledge, and a common scheme to control RH. The defense moved to exclude all six items of uncharged acts from being admitted as evidence.

The military judge suppressed three of the proffered items, and admitted the remaining three which were: (1) evidence that Appellant demanded RH’s social media passwords; (2) evidence that Appellant, on multiple occasions, took RH’s phone and reviewed her messages while she slept; and (3) evidence that Appellant accessed RH’s social media applications and blocked her male friends and ex-boyfriends.² The military judge found that the admitted

² The items that were not admitted as M.R.E. 404(b) evidence by the military judge were: (1) Appellant’s jealousy of RH’s friendship with two other men during their relationship;

evidence served multiple, non-propensity purposes, including that Appellant “had an *intent and motive to dominate and control RH*,” and that the evidence was probative of his desire, motive, and plan or scheme to monitor RH without her consent. (Emphasis added.)

Despite identifying multiple non-propensity purposes in his ruling on Appellant’s motion to exclude evidence, the military judge only instructed the panel on a single non-propensity purpose: common plan or scheme. The military judge instructed the members as follows:

You may consider evidence that the accused engaged in a course of conduct with Senior Airman [RH] that establishes a scheme to monitor her for the limited purpose of its tendency, if any, to prove a common scheme of the accused to commit the alleged misconduct.

You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged.

The Government did not object to these instructions or request any additional instructions on other non-propensity purposes such as motive or intent.

The panel of officer members sitting as a general court-martial subsequently convicted Appellant, contrary to his pleas, of one specification of indecent viewing in violation of Article 120c, UCMJ. Appellant elected to be sentenced by the military judge, who sentenced Appellant to six months of confinement, reduction in grade to E-1, a reprimand, and a bad-conduct discharge. The convening authority took no action on the findings or sentence.

(2) Appellant’s forbidding RH from talking to other men or having male friends during their relationship; (3) Appellant’s false accusations that RH was cheating on him during their respective deployments, which were made to see if she would admit to infidelity.

Before the AFCCA and as relevant here, Appellant argued that the military judge abused his discretion by admitting the uncharged conduct as M.R.E 404(b)(2) evidence of a common plan or scheme to monitor RH. *Menard*, 2025 CCA LEXIS 137 at *2, 2025 WL 985360 at *1. The AFCCA rejected Appellant’s contention that the “*almost identical* to the charged acts” standard from this Court’s decision in *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999), governed admissibility, concluding instead that this Court’s more recent decision in *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), supplied the controlling framework. 2025 CCA LEXIS 137, at *24-25, 2025 WL 985360 at *9 (internal quotation marks omitted).

Applying *Hyppolite*, the AFCCA identified three commonalities between the uncharged and the charged misconduct: “(1) the parties were the same; (2) the timeframe was proximate and with no major intervening events which changed any motivations to implement the scheme to monitor RH; and (3) the similarity of the invasions of privacy in the charged and uncharged misconduct were substantially similar.” *Id.* at *31-32, 2025 WL 985360 at *11. The lower court reasoned that these common factors went to “the heart of an Article 120c, UCMJ, indecent viewing offense,” which involves an “invasion of privacy without the knowledge or consent of the victim,” and thus satisfied *Hyppolite* by “engag[ing] in an ongoing scheme to monitor RH without her knowledge.” *Id.* at *32, 2025 WL 985360 at *11. Finding no error, the AFCCA affirmed Appellant’s finding of guilty and the sentence except for the reprimand. *Id.* at *35-38, *53, 2025 WL 985360 at *12-13, *18.³

We granted review of the following issue:

³ Because the adjudged reprimand was omitted from the entry of judgment, the AFCCA determined that it was beyond the scope of its authority under Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A) (2024), to affirm the reprimand as it could only “act with respect to the findings and sentence as entered into the record.” *Menard*, 2025 CCA LEXIS 137 at *2 n.4, 2025 WL 985360 at *1 n.4 (internal quotation marks omitted).

Whether the Air Force court erred by applying the *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), “common factors” test too broadly, while also declining to apply this Court’s “almost identical to the charged acts” standard from *United States v. Morrison*, 52 M.J. 117 (C.A.A.F. 1999), thereby improperly admitting propensity evidence.

United States v. Menard, 86 M.J. 242 (C.A.A.F. 2025) (order granting review).

II. Standard of Review

This Court generally reviews a military judge’s evidentiary ruling for an abuse of discretion. *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024). “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.* However, where the issue on appeal involves a pure question of law, our review is de novo. *United States v. Watson*, 71 M.J. 54, 56 (C.A.A.F. 2012).

This Court reviews a military judge’s decision to admit M.R.E. 404(b) evidence under a three-part test first articulated in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). When applying that test, we ask: (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 M.R.E. 403. *Id.* “If the admitted evidence fails to meet any of the factors laid out in *Reynolds*, the military judge will have erred, [and we] must then assess the prejudice, if any, resulting from that error.” *Wilson*, 84 M.J. at 391. We review an evidentiary error’s prejudicial effect de novo. *Id.* (citations omitted).

III. Discussion

A. M.R.E. 404(b)(2) Evidence

M.R.E. 404(a)(1) establishes the general rule that “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.” M.R.E. 404(b)(1) further prohibits the admission of “[e]vidence of a crime, wrong, or other act” when said evidence attempts to show “that on a particular occasion, the person acted in accordance with the [person’s] character.” This is commonly referred to as propensity evidence, i.e., a generally impermissible form of character evidence by which the prosecution proves that the defendant tends to behave a certain way to show that the defendant is likely to engage in that behavior again. *Propensity Evidence*, *Black’s Law Dictionary* (12th ed. 2024); *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021).

M.R.E. 404(b)(2), however, carves out several exceptions to the restriction on the admission of evidence of crimes, wrongs, and other acts. Such evidence may be admissible for another purpose, including “proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or lack of accident.” M.R.E. 404(b)(2). When evidence is offered for a permissible, non-propensity purpose under M.R.E. 404(b)(2), the military judge “must conduct a M.R.E. 403 balancing test and exclude this otherwise admissible evidence ‘if its probative value is substantially outweighed by a danger of . . . unfair prejudice.’” *Wilson*, 84 M.J. at 390 (alteration in original) (quoting M.R.E. 403).

Evidence of a common plan or scheme has long been recognized as a legitimate, non-propensity purpose under M.R.E. 404(b)(2). *See, e.g., Reynolds*, 29 M.J. at 110; *United States v. Munoz*, 32 M.J. 359, 363-64 (C.M.A. 1991) (citations omitted); *United States v. Johnson*, 49 M.J. 467, 474-75 (C.A.A.F. 1998). Previously, this Court seemed to suggest that uncharged acts “must be almost identical to the charged acts” to be admissible as evidence of a common

plan or scheme under M.R.E. 404(b)(2). *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A 1984); *see also Morrison*, 52 M.J. at 122 (stating that the Court’s subsequent cases were consistent with the holding in *Brannan*). But more recently, this Court has clarified that there must only be “common factors” between the uncharged acts and the charged misconduct for a military judge to admit evidence to prove a scheme or plan. *Hyppolite*, 79 M.J. at 165-66 (first citing *Munoz*, 32 M.J. at 359; and then citing *Johnson*, 49 M.J. at 467).

In his briefs before the AFCCA and this Court, Appellant initially argued for a return to the “almost identical” standard from *Brannan* and *Morrison*, noting the concern expressed by multiple judges on this Court that the “common factors” standard from *Hyppolite* is too permissive.⁴ But prior to oral argument and pursuant to C.A.A.F. R. 36A, Appellant advised the Court that he intended to depart from his briefs and make a different argument. Specifically, Appellant intended to argue that other uncharged acts qualify as evidence of a common plan or scheme only if they share common factors with the charged acts that demonstrate a conscious commitment to a specific premeditated course of conduct. Appellant’s Citation to Supplemental Authorities at 1-2, *United States v. Menard*, No. 25-0173 (C.A.A.F. Jan. 20, 2026) (first citing *Becker v. ARCO Chem. Co.*, 207 F.3d 176 (3d Cir. 2000); then citing 22B Wright & Miller’s *Federal Practice and Procedure* § 5252 (2d ed. 2025); and then citing 1 Edward J. Imwinkelried & Tamara R. Lave, *Uncharged Misconduct Evidence* §§ 3:24-25 (2025)). At oral argument, Appellant urged the Court to adopt this refinement of the *Hyppolite* “common factors” standard and argued that—under that

⁴ *See Hyppolite*, 79 M.J. at 167 (Ohlson, J., dissenting); *United States v. Greene-Watson*, 85 M.J. 340, 349 (C.A.A.F. 2025) (Sparks, J., concurring in part and in the judgment); *id.* at 351-52 (Hardy, J., joined by Sparks, J., concurring in part and in the judgment).

revised standard—the military judge erred by admitting the M.R.E. 404(b)(2) evidence in this case.

We commend Appellant’s counsel for notifying the Court *prior* to oral argument about Appellant’s change in strategy and for doing so in accordance with the Court’s rules. But we decline to adopt Appellant’s proposed refinement of the *Hyppolite* “common factors” standard in this case. Under our existing jurisprudence, the military judge erred by admitting the M.R.E. 404(b) evidence because that evidence failed to prove that any plan or scheme existed.

The military judge admitted three categories of evidence under M.R.E. 404(b)(2): (1) evidence that Appellant demanded RH’s passwords; (2) evidence that he reviewed her communications; and (3) evidence that he blocked her contacts from her social media accounts. The military judge admitted this evidence for a single limited purpose: to determine whether Appellant’s course of conduct with RH established a “scheme to monitor her” consistent with the charged offense of indecent viewing. A faithful application of the second prong of this Court’s test from *Reynolds* demonstrates that the proffered evidence should not have been admitted for this purpose.⁵

The second prong of the *Reynolds* tests asks whether the proffered evidence makes a fact of consequence more or less probable. 29 M.J. at 109. The Government charged Appellant with knowingly and wrongfully viewing the private area of RH without her consent and under circumstances in which she had a reasonable expectation of privacy. The admitted M.R.E. 404(b)(2) evidence—which describes Appellant’s jealous and controlling behavior toward RH—does not make any element of the charged offense more or less probable. Therefore, it is only admissible if it establishes

⁵ We offer no opinion whether the evidence could have been admitted for some other non-propensity purpose under M.R.E. 404(b)(2).

the single non-propensity purpose instructed by the military judge: that Appellant had a scheme to monitor RH.

Here, we find no evidence that Appellant had a plan or scheme to monitor RH. None of the evidence of uncharged acts admitted under M.R.E. 404(b)(2) involved Appellant secretly viewing RH—or any other person—without consent or otherwise invading RH’s expectation of privacy. When we pressed the Government to explain how the admitted M.R.E. 404(b)(2) evidence established such a plan or scheme at oral argument, the Government pivoted to motive, suggesting that the evidence could have been admitted to prove that Appellant’s jealousy and desire to prevent RH from seeing other men established a motive for his remote viewing. Indeed, motive is a valid non-propensity purpose under M.R.E. 404(b)(2), and the military judge did identify motive in his ruling on Appellant’s motion to exclude the M.R.E. 404(b)(2) evidence. But the military judge did not authorize the panel to consider the evidence as proof of Appellant’s motive in his instructions. To the contrary, the military judge expressly instructed the panel: “You may not consider this evidence for any other purpose” other than “to prove a common scheme of the accused to commit the alleged misconduct.” We therefore cannot uphold the military judge’s ruling on this ground.

The Government also argued that the military judge did not err because the M.R.E. 404(b)(2) evidence provided meaningful context for the charged indecent viewing offense. In his ruling on Appellant’s motion to exclude, the military judge concluded that withholding the evidence from the panel “would deprive the members of critical context that might serve to explain the motivations and intent of [Appellant] and RH.” But context is not an approved non-propensity reason for admitting evidence of other uncharged acts under M.R.E. 404(b)(2), and thus providing context is not a lawful reason for admitting evidence that would otherwise be barred under the rule.

The uncharged conduct cannot satisfy the second *Reynolds* prong because it fails to make a fact of consequence in this case more or less probable. We therefore answer the

assigned issue in the affirmative and hold that the military judge erred when he admitted the evidence of Appellant's uncharged acts under M.R.E. 404(b)(2).⁶

B. Prejudice

Having concluded that the military judge erred in admitting the three instances of uncharged conduct as M.R.E. 404(b)(2) evidence, we must assess whether that error materially prejudiced Appellant. For nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings. *United States v. Kohlbeek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citation omitted). In conducting that analysis, we weigh: “(1) [t]he 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.” *Id.* (internal quotation marks omitted) (first quoting *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015); and then quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Here, the Government’s case against Appellant was strong. Appellant admitted to OSI investigators that he placed a camera in RH’s bedroom without her consent, viewed RH on at least two occasions through the live camera feed, and shared the motives and suspicions that led him to do so. His contemporaneous text messages to RH appear to independently corroborate that he indecently viewed her.

The defense’s case was comparably weak. Appellant argues that it was mere coincidence that the suspicious texts he sent RH arrived immediately after she engaged in a private intimate act. He further claims that texts were not about RH’s act at all but instead about RH’s actions from a week earlier. Appellant also suggests that the camera’s view of the private act could have been obstructed, even

⁶ Because the second prong of the *Reynolds* test is not satisfied, we need not decide whether the proffered evidence meets the first or third prong.

though he admitted to remotely viewing RH earlier that week.

As to the materiality and quality of the uncharged evidence, this Court considers “how much the erroneously admitted evidence may have affected the court-martial.” *United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020). Although the uncharged conduct enabled the Government to impugn Appellant’s character, it was not necessary to prove that Appellant viewed RH’s private area. As we noted above, the M.R.E. 404(b)(2) evidence did not make any fact of consequence more or less likely.

Weighing all four factors, we agree with the conclusion of the AFCCA: “By [Appellant’s] own admissions to law enforcement and contemporaneous texts to RH, he essentially demonstrated that he [committed the offense].” *Menard*, 2025 CCA LEXIS 137 at *37, 2025 WL 985360 at *12. We therefore conclude that the erroneous admission of Appellant’s uncharged acts as M.R.E. 404(b)(2) evidence did not substantially influence the findings nor materially prejudice Appellant.

IV. Judgment

The judgment of the United States Air Force Court of Criminal Appeals is affirmed.

Judge OHLSON, concurring in the judgment.

Unlike the majority, I do not believe the military judge abused his discretion when he admitted the contested evidence to show a common plan or scheme under Military Rule of Evidence (M.R.E.) 404(b) (2019 ed.).¹ Although I may have denied admission if in his position, I cannot say from *this* position that his ruling constitutes reversible error. Indeed, any question here about the proper application of M.R.E. 404(b) appears attributable to the muddled state of the law as expressed by this Court rather than to any deficiencies in the military judge's ruling. To address this concern, I believe we should return our focus to the fundamental inquiry articulated by this Court almost forty years ago in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989), which would better aid military judges in exercising their discretion when assessing common plan evidence. And because the military judge's admission of the contested evidence here comports with *Reynolds*, I would affirm Appellant's conviction. Therefore, I concur in the judgment.

M.R.E. 404(b), like its civilian counterpart, governs admission of prior acts evidence. It prohibits introducing such evidence at trial if its purpose is to merely demonstrate propensity, that is, "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." M.R.E. 404(b)(1). Prior acts evidence may nonetheless be "admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." M.R.E. 404(b)(2). The rule is broad, with this Court noting that "Mil. R. Evid. 404(b) is a rule of inclusion rather than exclusion" permitting "admission of relevant evidence of other crimes or acts unless the evidence tends to prove only criminal disposition." *United States v. Browning*, 54 M.J. 1, 6 (C.A.A.F. 2000) (internal quotation marks omitted) (citation omitted).

¹ Like the majority opinion, all references to the M.R.E. are to the *Manual for Courts-Martial, United States* (2019 ed.) unless otherwise noted.

In *Reynolds*, this Court adopted a three-part test for gauging the admissibility of evidence under M.R.E. 404(b): (1) Does the evidence reasonably support a finding that the appellant committed the prior crimes, wrongs, or acts; (2) Does the evidence make a “fact of consequence” more or less probable; and (3) Is the probative value of the evidence substantially outweighed by danger of unfair prejudice or by another factor under M.R.E. 403. 29 M.J. at 109 (citation modified).

The problem encountered here arises from the fact that in regard to the second *Reynolds* prong, this Court has used various descriptions of the standard that applies when deciding whether evidence is admissible for a common plan or scheme. At times, we have stated prior conduct “must be almost identical to the charged acts” to be admissible. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (internal quotation marks omitted) (citation omitted); *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984). But at other times we have focused on whether sufficient “common factors” exist between the charged conduct and the uncharged conduct. *United States v. Hyppolite*, 79 M.J. 161, 166 (C.A.A.F. 2019); *United States v. Munoz*, 32 M.J. 359, 363 (C.M.A. 1991). Needless to say, there is quite a difference between these two approaches.

The confusion we have sown over the decades is reflected in the evolving arguments of Appellant. Before this Court, Appellant initially argued that *Hyppolite* and *Morrison* represent distinct tests, with *Hyppolite*’s common factors test “reserved for cases where the government can demonstrate a genuine, recurring scheme” while the *Morrison* test governs in “the absence of a genuine, recurring scheme”—as he insists was the case here. Military judges are then obligated to “select the appropriate test based on the facts presented” in a given case. However, Appellant pivoted on the eve of oral argument to a new, hybrid standard, arguing that for uncharged conduct to be admissible as part of “a common plan or scheme, common factors must show the other acts and charged acts constitute a conscious commitment to a specific premeditated course of conduct.” The Government, on the other hand, maintains that despite differing language between *Morrison* and *Hyppolite*,

the two cases actually represent the same framework, as in *Morrison* “this Court ended up applying the common factors” test.

Unfortunately, the military judge’s ruling in this case did not bring clarity to this legal situation. It cites neither the *Morrison* nor the *Hyppolite* strands of case law, and it omits an explicit account of the commonalities between the prior acts and the charged offense. However, because this Court “review[s] a military judge’s admission of evidence under Mil. R. Evid. 404(b) for abuse of discretion,” *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000), the military judge’s decision must “be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal,” *Hyppolite*, 79 M.J. at 166 (internal quotation marks omitted) (quoting *United States v. Johnson*, 49 M.J. 467, 473 (C.A.A.F. 1998)). I do not think this hurdle is met here.

For its part, the majority in essence concludes that there is “no evidence that Appellant had a plan or scheme to monitor RH” and thus the military judge abused his discretion by admitting the evidence for this purpose. *United States v. Menard*, __ M.J. __, __ (11) (C.A.A.F. 2026). The majority supports this conclusion by stating that “[n]one of the evidence of uncharged acts . . . involved Appellant secretly viewing RH . . . without consent or otherwise invading RH’s expectation of privacy.” *Id.* I, however, have a different view of the evidence.

To begin with, I note that Appellant went through RH’s phone while she slept, without “RH’s knowledge or consent.” *United States v. Menard*, No. ACM 40496, 2025 CCA LEXIS 137, at *19, 2025 WL 985360, at *6 (A.F. Ct. Crim. App. Mar. 28, 2025) (unpublished). That seems like “monitor[ing]” and “invading RH’s expectation of privacy” to me. Even Appellant, arguing that the admitted conduct was insufficiently similar to the charged acts, characterized his own behavior as “digital monitoring.”

Further, the charged conduct and prior acts involve the same victim, the same situs, and the same purpose—monitoring RH. Appellant specifically told investigators that he “decided to hook up the [camera] in [RH’s] room,” leading

Judge OHLSON, concurring in the judgment

to the charged offense, because he “wanted to see if [RH] was still [contacting others] behind [Appellant’s] back.” This was the same reason why Appellant had been secretly checking RH’s phone. Thus, Appellant’s uncharged acts in furtherance of his plan to surreptitiously monitor and supervise RH could reasonably be seen as evidence making the fact of his illegal viewing of RH more probable.²

Although the military judge in his ruling did not enumerate the common factors involved here, he did outline the *Reynolds* test (as the military judge in *Hyppolite*, 79 M.J. at 162, had done) before conducting his M.R.E. 404(b)(1) analysis. We presume military judges know and correctly apply the law absent a clear indication to the contrary. *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007). And the factors noted above suffice as a matter of law to find a common plan existed here, even if reasonable minds may differ as to this conclusion. The military judge’s reasoning and statements do not otherwise reveal any misunderstanding of the law or its clear misapplication to the facts of this case, and consequently admission was not “arbitrary, fanciful, clearly unreasonable, or clearly erroneous” so as to constitute an abuse of discretion. *Hyppolite*, 79 M.J. at 166 (citation modified); accord *United States v.*

² On a related note, I am concerned by the majority’s statement that “context is not an approved non-propensity” purpose under M.R.E. 404(b)(2). The majority cites nothing in support of what could be perceived as a blanket prohibition. *Menard*, __ M.J. at __ (12). Although I concede that context is not among the non-propensity purposes listed in 404(b)(2), “[t]his list is illustrative, not exhaustive.” *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989). Moreover, other courts have found prior act evidence providing context to be a proper purpose. See, e.g., *United States v. Collins*, 90 F.3d 1420, 1428 (9th Cir. 1996) (noting “evidence of other criminal activity may be used for the purpose of providing the context in which the charged crime occurred”); *United States v. Faulls*, 821 F.3d 502, 508 (4th Cir. 2016) (noting admissibility of “prior act evidence” where “it furnishes part of the context of the crime” (citation modified)); *United States v. Fleck*, 413 F.3d 883, 890 (8th Cir. 2005) (noting an “exception[] to the general rule that evidence of other [acts] committed by a defendant is inadmissible” where this evidence “provides the context in which the charged crime occurred”).

Judge OHLSON, concurring in the judgment

Downing, 56 M.J. 419, 420, 422 (C.A.A.F. 2002) (noting the “military judge’s analysis falls qualitatively short” and did not provide “a clear signal that the military judge applied the right law,” but nonetheless affirming because “appellant did not carry his burden at trial or on appeal of establishing facts that would warrant” relief). Therefore, I would affirm in this case on that ground.

There is, however, a broader issue at play here. Our pronouncements in *Hyppolite* and *Morrison*, beyond their mutual tension, offer little assistance to military judges when they fulfill their important task of determining whether prong two of *Reynolds* is satisfied. To be sure, it is doubtful that any test—no matter how objectively stated and no matter how well intentioned or meticulously researched—will magically enable military judges to divine the boundaries of M.R.E. 404(b) and the common plan or scheme exception. But rather than seeking to further refine existing articulations or announce additional standards, I believe this Court should return its focus to the *Reynolds* inquiry itself. In my view, this approach is best suited to putting into practical effect the language and intent of M.R.E. 404(b) and, importantly, would best serve the field and our trial judiciary. Thus, military judges determining admissibility of common plan evidence should: (a) mind the fundamental point that evidence is not admissible simply to prove propensity—i.e., that the accused is a bad person or was acting in accordance with his bad character; (b) determine whether the proffered evidence supports a finding that the accused committed the prior acts; (c) identify a relevant “fact of consequence” in the case that is made more or less probable by this proffered evidence; and (d) perform a *robust* balancing test under M.R.E. 403 to determine whether the probative value of this proffered evidence is substantially outweighed by the danger of unfair prejudice or another listed factor.

When military judges engage in such an analysis on the record, appellate courts reviewing for an abuse of discretion must provide substantial deference to the trial court’s determination. Because the military judge’s admission of the contested evidence here appears to comport with these requirements, I would decline to find an abuse of

Judge OHLSON, concurring in the judgment

discretion. Nevertheless, because—like the majority—I would affirm Appellant’s conviction, I concur in the judgment in this case.

Judge JOHNSON, concurring in the judgment.

The Court holds that the military judge abused his discretion by admitting evidence of uncharged acts under M.R.E. 404(b)(2) (2019 ed.) because that evidence failed to prove a common plan or scheme existed. Nevertheless, the Court affirms the decision of the United States Air Force Court of Criminal Appeals, concluding the admission of the uncharged conduct did not materially prejudice Appellant.

I agree that the findings and sentence in this case should be affirmed, but I reach that result for a different reason. Like Judge Ohlson, I conclude the military judge did not abuse his discretion by admitting uncharged conduct as evidence of Appellant's common plan or scheme to monitor RH without her consent. I therefore respectfully concur only in the judgment of the Court and do not concur in the Court's opinion.

Discussion

As the Court notes, the military judge in this case admitted three categories of evidence under M.R.E. 404(b)(2) to prove a common plan or scheme to monitor RH: (1) evidence that Appellant demanded her social media passwords; (2) evidence that he reviewed and sometimes deleted messages on her cell phone; and (3) evidence that he blocked contacts from males on her social media accounts.

The Court concludes this evidence does not make any element of the charged offense of indecent viewing more or less probable and does not establish that Appellant had a scheme to monitor RH. Therefore, the Court holds that this evidence fails the second prong of the *Reynolds*¹ test and is not admissible under M.R.E. 404(b)(2).

¹ *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). The *Reynolds* factors are: "(1) does the evidence reasonably support a finding the accused committed a specific act; (2) is a fact of consequence made more or less probable by the existence of this evidence; and (3) is the probative value of the evidence substantially outweighed by the danger of unfair prejudice."

Like Judge Ohlson, I view the evidence differently. In my view, the record is replete with evidence of Appellant's surreptitious digital monitoring of RH. When viewed in its totality, the evidence supports the conclusion that he had a common plan or scheme to monitor RH.

With respect to the charged conduct, Appellant admitted that while searching RH's phone he found a "video of her, you know, where she's exchanging videos to another guy." This prompted him to secretly install the doggie camera in a stuffed toy sitting atop the television stand. The camera was positioned to face the bed, making it more likely that the Appellant could view RH's private area. The near-simultaneous text messages support the conclusion that Appellant was monitoring RH while she performed a private intimate act and tried on clothes. The charged conduct occurred in RH's bedroom, a place where she had a reasonable expectation of privacy.²

To determine whether the evidence of uncharged conduct makes a "fact of consequence" more or less likely (the second *Reynolds* factor), this Court considers whether sufficient "common factors" exist between the prior conduct and charged conduct, i.e., same victim, same situs, or same purpose. *United States v. Hyppolite*, 79 M.J. 161, 166 (C.A.A.F. 2019). Here, the uncharged conduct involved the same victim (RH), the same situs (the apartment shared by Appellant and RH), and the same pattern of behavior (using technology to monitor RH), for the same purpose (to limit/control RH's interaction with other men). *Id.* Therefore, I conclude there are sufficient common factors between the uncharged conduct and the charged conduct to establish a common plan or scheme to monitor RH without

United States v. Greene-Watson, 85 M.J. 340, 346 (C.A.A.F. 2025) (citing *Reynolds*, 29 M.J. at 109).

² As the majority explained, after the breakup, Appellant and RH used the same bedroom, but never at the same time. Thus, I conclude that when RH occupied the bedroom, she had a reasonable expectation of privacy in that room.

her consent, and this scheme made it more likely that Appellant surreptitiously viewed RH's private areas.

First, both the uncharged conduct and the charged conduct were designed to monitor RH's movement and activities using digital means so that Appellant could maintain power and control in the relationship. The medium was merely a means to an end: whether demanding her passwords, checking her location, logging her out of social media, reading her texts and social media posts, blocking and deleting posts he thought were from males (and therefore a threat to his relationship), or surreptitiously viewing her in her bedroom, Appellant sought to monitor her activities in order to control her.

Moreover, both the uncharged conduct and the charged conduct were forceful, invasive, and meant to intimidate RH. RH testified that Appellant demanded her social media passwords and threatened to end their relationship if RH failed to provide them; Appellant seized RH's phone, went through it while she slept, and deleted messages; and Appellant accessed RH's social media accounts and blocked males from contacting her. The charged conduct was similarly designed to intimidate. Appellant did not just set up the hidden camera; he sent near simultaneous messages to indicate to RH that he was watching her. Specifically, with the charged conduct, Appellant admitted that he wanted her to know that he knew what she was doing.³ The charged conduct is very similar in that respect to a similar incident a week earlier, when Appellant viewed RH on the

³ Appellant was charged with indecent viewing based upon events that occurred on August 21, 2021. On that date, RH was masturbating in her bed when she received a text from Appellant, "[d]id you make any videos today." RH responded by texting Appellant "what?" to which Appellant wrote back "[a]ny videos? Bring the toy out?" Eventually, RH put on a blue outfit, after which Appellant texted RH "oh, you want to take pics of your butt in that blue outfit. Yeah okay." After RH unplugged the hidden camera Appellant messaged RH "[o]h look you caught on. Bravo," and after not receiving a response texted "[n]othing to say?"

bed on her phone and texted her, “[s]napping guys again I see.” Unbeknownst to Appellant, RH was talking with her father.

Appellant’s behavior is a well-recognized tactic which the literature considers “coercive control,” a subset of domestic abuse which differs from domestic violence because it does not necessarily involve a violent offense.⁴ The Department of Defense defines domestic abuse, in part, as “[d]omestic violence, or a pattern of behavior resulting in emotional or psychological abuse, economic control, or interference with personal liberty that is directed toward a person who is a[c]urrent or former intimate partner with whom the alleged abuser shares or has shared a common domicile.”⁵ The same publication recognizes “the use of technology or other electronic means” as part of the definition of a psychological threat “intended to intimidate, control, or isolate the victim and inflict emotional harm.”⁶

The uncharged conduct demonstrated that the charged conduct was not merely a singular event but the last stop along an odyssey of digital control, surveillance, and intimidation. Viewed in this context, the question whether Appellant knowingly and wrongfully viewed RH’s private

⁴ See Susanne Lohmann et al., *The Trauma and Mental Health Impacts of Coercive Control: A Systematic Review and Meta-Analysis*, 25 *Trauma, Violence, and Abuse* 630, 630 (2024) (defining “coercive control” as a subset of intimate partner violence in which the abuser seeks “to degrade, isolate, and deprive a person of their rights to physical security, dignity, and respect, which puts the victim in a state of terror and entrapment, and includes tactics such as monitoring movements, social isolation, and restriction of access to financial resources, employment, education, or medical care”).

⁵ Dep’t of Defense, Instr. 6400.06, DoD Coordinated Community Response to Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, Glossary G.2 Definitions, at 80 (Dec. 15, 2021, incorporating Change 4, Aug. 29, 2025).

⁶ *Id.* at 84.

area without her consent and under circumstances in which she had a reasonable expectation of privacy, is made “more or less probable,” by the uncharged conduct. Therefore, I would hold the military judge did not err by admitting the uncharged acts under M.R.E. 404(b)(2).