IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Justin D. STEEN Boatswain's Mate Third Class U. S. Coast Guard, Appellant	4 April 2019 APPELLANT'S ASSIGNMENT OF ERROR AND BRIEF Dkt. 1464 Case No. SP 24978 Before McClelland, Brubaker, Koshulsky Tried at Norfolk, Virginia by a special court-martial convened by Commanding Officer, USCGC FORWARD, from 5 to 9 June 2018.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

Statement of the Case and Jurisdiction

A special court-martial, composed of members with enlisted representation, tried Boatswain's Mate Third Class (BM3) Justin D. Steen, United States Coast Guard. Contrary to his pleas, he was convicted of one specification of wrongful distribution of marijuana and one specification of wrongful introduction of marijuana onto a military installation, both in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2018).

On 9 June 2018, the members sentenced BM3 Steen to a reduction in pay-grade to E-1, fifteen days of confinement, and a bad-conduct discharge. (R. at Vol. IV at 149.) The convening authority approved the sentence as adjudged and, with the exception of the-bad conduct discharge, ordered it executed on 1 October 2018. (CA's Action.)

On 19 December 2018, the Judge Advocate General of the Coast Guard transmitted the case to the Coast Guard Court of Criminal Appeals (CGCCA) for review under Article 66,

Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2018).

Statement of Facts

A. Background

BM3 Steen had been processed for administrative separation for a DUI that occurred while he was sitting in the driver's seat of his friend's parked car. At the time of the court-martial offense, BM3 Steen was awaiting his administrative discharge, had concluded his duties in the deck department on CGC FORWARD, and was on terminal leave packing up his household goods to move to Florida.

SA [redacted] was an E-2 under BM3 Steen's supervision during BM3 Steen's last few months on CGC FORWARD. (R. Vol. III at 9.) On 8 November 2017, local police pulled over SA [redacted] for running a stop sign. (R. Vol. III at 9-10, 44.) When he opened the window the officer smelled a powerful odor of marijuana. In a subsequent interview by CGIS about his possession and use of marijuana, SA [redacted] told the interviewing agent he bought the marijuana from BM3 Steen. As a result of this accusation, BM3 Steen was charged with single specifications of introducing marijuana to a military installation and distribution. SA [redacted] was granted testimonial immunity and the charges against him were dismissed in exchange for his testimony against BM3 Steen.

B. The defense's M.R.E. 404(b) motion.

A search of BM3 Steen's cell phone after SA [redacted] accusation identified no evidence of the alleged drug sale. It did, however, produce a series of text messages between BM3 Steen and his sister and two friends from home, discussing his interest in using marijuana in the future—after returning home from being discharged from the military.

Before trial, the defense moved to exclude the text messages under M.R.E. 404(b). The

defense motion argued that because the message exchange occurred after the alleged drug sale and involved unrelated people, the messages were not relevant to any of the permissible uses under 404(b). The defense argued, the messages were improper propensity evidence of uncharged drug-related misconduct. (App. Ex. VI at 4.)

The government responded that the messages were admissible because they "tend[ed] to show that BM3 Steen needed more marijuana after selling marijuana to SA [redacted] had he not sold marijuana to SA [redacted] he would not need more marijuana two days later." (App. Ex. VII at 7.)

The military judge granted the defense motion on the basis that the danger of unfair prejudice from admitting the messages substantially outweighed their probative value. (R. Vol. I at 32.) The military judge's ruling came with a caveat:

> At this point, I don't, I tend to agree with you that it's not relevant on its face. But if the, for example, if you [trial counsel] were going to argue in your case or through cross examination or if evidence were to come out that Petty Officer Steen doesn't know what marijuana looks like, he's never seen marijuana, he would never touch marijuana, he's, for whatever reason he's morally opposed to possessing, smoking, looking at, associating with people who have, possess, sell, or distribute marijuana, evidence like that potentially opens the door for the Government legitimately using this as rebuttal evidence to show, you know, look, within twenty-four hours of the period of charged misconduct he was reaching out to someone to get more.

(R. Vol. I at 23-24.) Thus the military judge previewed a theory of relevance for trial counsel that later resulted in reconsideration of the ruling in the government's favor. (R. Vol. I at 33.)

C. The Government's Evidence.

The government called three witnesses at trial—SA [redacted] and two CGIS agents involved in the search and seizure of BM3 Steen's cell phone.

SA [redacted] testified that during the time leading up to the alleged drug sale, he smoked

marijuana in a deliberate effort to fail urinalysis drug tests so he would be separated from the Coast Guard. (R. Vol. III at 15-16, 56.) He conscientiously and frequently smoked marijuana so that he would test positive. The command of CGC FORWARD had previously denied his request to separate on the grounds that he felt "incompatible with the Coast Guard" and had not enjoyed the first few months on the cutter and wanted out. (R. Vol. III at 15.) SA [redacted] testified that he had talked to shipmates on CGC FORWARD about smoking marijuana and "one person said that he knew where you could get it in Virginia." (R. Vol. III at 16.) SA [redacted] testified the person who knew where to get it was BM3 Steen. (R. Vol. III at 16.)

On cross-examination SA [redacted] admitted that he had been on leave at home in Alabama just before the alleged drug deal and had smoked marijuana "multiple times" while on leave. (R. Vol. III at 41-42.)

SA [redacted] testified that either on the morning of 4 November or the day before he contacted BM3 Steen about getting marijuana. (R. Vol. III at 17.) Around mid-day on 4 November, SA [redacted] lied to the watch commander about needing to use the head on the pier and snuck off to meet BM3 Steen in a parking lot. (R. Vol. III at 22.)

The government also presented security camera footage. (Pros. Ex. 1.) The footage shows SA [redacted] walking to BM3 Steen's car, getting inside, and the car driving away toward the exchange. SA [redacted] testified that he did not have cash to pay for the drugs and needed BM3 Steen to take him to the ATM at the exchange. (R. Vol. III at 26.) The government also introduced security footage showing SA [redacted] at the ATM. (Pros. Ex. 2.) SA [redacted] testified that he withdrew eighty dollars, but only needed sixty-five to pay BM3 Steen. (R. Vol. III at 28.) According to SA [redacted] BM3 Steen made change and gave him fifteen dollars back. (R. Vol. III at 34.)

SA [redacted] then returned to BM3 Steen's car and the two drove back to his car where he testified he put the marijuana before returning to the cutter. (R. Vol. III at 33-34.) He testified that based on his past experience with marijuana he estimated it to be four grams, or enough for "rolling one blunt." (R. Vol. III at 35.)

According to SA [redacted] testimony, on 8 November 2017 he went to meet a prostitute at a church after having smoked marijuana in his car. (R. Vol. III at 10-11, 44, 46.) On his way, a police officer stopped him for running a stop sign. (R. Vol. III at 44.) SA [redacted] had marijuana and a pipe with him at the time and his car had a noticeable smell of marijuana. (R. Vol. III at 45, 87.) As the police officer approached his car, SA [redacted] began a "factory reset" of his cell phone. (R. Vol. II at 188, Vol. III at 46.) To avoid charges in state court for the possession of marijuana, he agreed to provide the police with the information about the prostitute he was going to meet. (R. Vol. III at 33, 47-49.)

The next morning, SA [redacted] texted his girlfriend about the police stop. He expressed concern that the Coast Guard might find out about it. (R. Vol III at 49.) In his messages to his girlfriend he told her he was on his way to meet a guy from whom he had previously bought drugs. (R. Vol. III at 50.) Later that day, CGIS interviewed SA [redacted] (R. Vol. III at 51.) He told them that when he was pulled over he was on his way to meet a prostitute and that he bought the marijuana from BM3 Steen. (R. Vol. III at 51.)

SA [redacted] testified that the police officer seized about two grams of marijuana during the stop, but the government offered no additional evidence of either the amount or nature of the substance and the Virginia Beach Police Officer was not called as a witness. (R. Vol. III at 58.) SA [redacted] urinalysis tested positive for marijuana.

On direct examination [redacted] testified that he told the Virginia Beach Police Department

that BM3 Steen "gave" him the marijuana in his car. (R. Vol. III at 11.)

D. The defense case at trial.

The defense case focused on presenting evidence that BM3 Steen met with SA [redacted] not to sell drugs, but to drop off a mail order package that a mutual shipmate had sent to BM3 Steen's home.

The defense called Ms. [redacted] who was a member of the crew of CGC FORWARD, and a shipmate of SA [redacted] and BM3 Steen. (R. Vol. III. at 105.) Ms. [redacted] was present when SA [redacted] returned to the Cutter after Virginia Beach police stopped him and after CGIS agents interviewed him. (R. Vol. III. at 106.) She described him as scared and frantic and said that he told her he mentioned BM3 Steen in the interview. (R. Vol. III. at 109.) She testified that on Halloween, SA [redacted] had given her a ride and that when she got inside his car "it smelled like nothing but marijuana." (R. Vol. III at 111.) She testified that based on her experience with family members who used marijuana, she recognized the odor of marijuana smoke, and that it still smelled "new." (R. Vol. III. at 112.)

The defense also called SN [redacted] the recipient of the mail-order package BM3 Steen attempted to deliver to CGC FORWARD. SN [redacted] explained that he had ordered hair care products online and had them shipped to BM3 Steen's off-base residence to avoid the delay associated with the sorting and distribution of mail sent to the ship. (R. Vol. III. at 119-20.) He testified that after returning to port, his parents made a surprise visit and he went home with them. As a result, he would not be around to receive the package before BM3 Steen left town to move to Florida. (R. Vol. III at 120-22.) As discussed in more detail below, BM3 Steen arranged to drop off SN [redacted] package with SA [redacted]

The defense recalled SA [redacted] for purposes of impeachment. At this point, contrary to

his testimony on direct, he stated he never told Virginia Beach Police that BM3 Steen had sold him the marijuana. (R. Vol. III at 138-39.) SA [redacted] also explained that he fabricated several other explanations he told the police to explain his actions before focusing on the prostitute he claimed to be meeting. (R. Vol. III at 142.)

BM3 Steen also testified. He explained that during their last deployment SN [redacted] had found out about a new hair product and asked to have it sent to his off-base residence so that it did not have to wait for the package to make it to the Cutter. (R. Vol. III. at 151.) The box itself, which contained a dated label was admitted into evidence. (R. Vol. III at 161.) He testified that he had been in touch with SN [redacted] several times, but never connected.

On 3 November, the day before BM3 Steen was leaving Portsmouth to move to Florida, SA [redacted] contacted him. BM3 Steen testified that SA [redacted] contacted him to ask if he knew anybody who could get him marijuana. (R. Vol. III at 164.) BM3 Steen responded that there was someone he played basketball with that always smelled like marijuana and that he would pass on SA [redacted] number to that person. (R. Vol. III at 164.) This person never responded to BM3 Steen. (R. Vol. III at 164.)

When SA [redacted] got in touch with BM3 Steen, BM3 Steen testified that he asked SA [redacted] if he could drop off SN [redacted] box to be left on his rack on the cutter since SN [redacted] was unexpectedly away. BM3 Steen planned to leave Portsmouth permanently the next day and did not want to take the package with him. (R. Vol. III at 162-63, 167.) On November fourth, BM3 Steen drove to the cutter to leave SN [redacted] package with SA [redacted] Just before meeting SA [redacted] SN [redacted] contacted BM3 Steen and asked to mail the package to his father's house instead. (R. Vol. III at 173.)

SA [redacted] came out to his car. BM3 Steen testified that he apologized to SA [redacted] for

the change in plans and SA [redacted] told him that he had to go to the exchange anyway. BM3 Steen testified that he offered SA [redacted] a ride to the exchange and then returned him to the parking lot closer to the cutter. (R. Vol. III at 173-75.)

BM3 Steen testified that he did not procure marijuana for or sell it to SA [redacted] (R. Vol. III at 184.) BM3 Steen has been tested for illegal drug use ten to fifteen times in the Coast Guard and never tested positive. (R. Vol. III at 181.)

E. Reconsideration of the Defense M.R.E. 404(b) motion.

Immediately after BM3 Steen's direct examination, trial counsel requested reconsideration of the military judge's ruling on the defense's M.R.E. 404(b) motion. The military judge interrupted trial counsel before he could explain the basis of the reconsideration request, provided no opportunity for argument by the defense, and ruled that the evidence was admissible. (R. Vol. III at 186.) Defense counsel asked to be heard and argued the evidence was not admissible. Rather than allowing trial counsel to respond to the defenses arguments, the military judge responded. (R. Vol. III at 187-193.) After the military judge stated again that he was granting reconsideration in the government's favor, the defense requested an explanation of the non-propensity purpose that justified the ruling. (R. Vol. III at 193.)

Trial counsel put forth two purposes: "First off, as the Court articulated, a fact of consequence to be proved by this is that in the seventy-two hours following the sale to Seaman Apprentice [redacted] BM3 Steen was procuring more marijuana because he was out from [distributing to] Seaman Apprentice [redacted] Additionally, under MRE 609, this, these text messages are fodder for impeachment." (R. Vol. III at 193.) Trial counsel subsequently corrected his reference to M.R.E. 608. (R. Vol. III at 193.)

F. Introduction of the text messages.

On cross-examination, trial counsel confronted BM3 Steen with the messages between him and his sister that post-date the offenses. BM3 Steen testified that the messages were sent on 6 November while he was in Charlotte, North Carolina. In one message he asked a friend if he had any "bud." (R. Vol. III at 210.) Later that day he texted his sister saying that he wanted to "smoke." (R. Vol. III at 211.) BM3 Steen testified that on terminal leave he felt that he was out of the Coast Guard and was, as a result, interested in marijuana. (R. Vol. III at 212.) Despite the messages, BM3 Steen testified that he never got ahold of marijuana. (R. Vol. III at. 223.) In rebuttal, the government called the CGIS agent who conducted the search of BM3 Steen's phone and the messages were introduced. (R. Vol. IV at 33; P.E. 5.)

In his closing, trial counsel addressed the M.R.E. 404(b) evidence and used it as a basis to bolster SA [redacted] telling of the events:

> You also heard and saw some evidence about what Petty Officer Steen did after he left Base Portsmouth. Forty-eight to seventy-two hours after, Petty Officer Steen was seeking out more marijuana. Marijuana which he wouldn't need unless he was out from distributing what he had to Seaman [redacted] on the 4th of November.

(R. Vol. IV at 163-64.)

Summary of Argument

The military judge erred when he admitted the text messages under M.R.E. 404(b) because the there is no authority that allows uncharged misconduct evidence to be admitted for the "resupply" purpose claimed the government claims. The impeachment purpose also relied on was impermissible under both M.R.E. 404(b) and M.R.E. 608. The evidence admitted did not provide a reasonable basis to conclude that BM3 Steen bought marijuana after the alleged sale and even if it did, it did not serve any permissible M.R.E. 404(b) purpose.

Ultimately the military judge's ruling admitted hearsay evidence of bad acts as "rebuttal" to BM3 Steen's testimony that he did not sell marijuana to SA [redacted] (R. Vol. III at 192.) The military judge applied no facts to the seven factors disfavoring admission in his M.R.E. 403 analysis. The ruling was an abuse of discretion and prejudiced BM3 Steen by allowing propensity evidence to tip the scale in a case that otherwise hinged entirely on the incoherent testimony of a single admitted drug user and person who admitted to making false statements to law enforcement officials.

The prejudice is demonstrated by the insufficiency of the government case. It relied entirely on SA [redacted] uncorroborated testimony, which did not satisfy the beyond-a-reasonable-doubt standard and the convictions must, consequently, be set aside.

Issues Presented

I

M.R.E. 404(b) BARS THE ADMISSION OF EVIDENCE OF OTHER ACTS TO PROVE THE ACTOR HAD A PROPENSITY TO ACT SIMILARLY IN THE CIRCUMSTANCES CHARGED. THE MILITARY JUDGE ADMITTED EVIDENCE THAT BM3 STEEN SOUGHT MARIJUANA DAYS AFTER THE ALLEGED SALE. DID THE MILITARY JUDGE ERR WHEN HE ADMITTED PROPENSITY EVIDENCE UNDER THE GUISE OF AN UNFOUNDED AND UNSUPPORTED "RESUPPLY" THEORY?

II

THE GOVERNMENT RELIED ON A SINGLE WITNESS TO ESTABLISH EVERY ELEMENT OF THE OFFENSES. THAT WITNESS WAS AN ADMITTED DRUG USER, TESTIFYING PURSUANT TO A GRANT OF IMMUNITY, AND WAS IMPEACHED AT TRIAL. DID HIS TESTIMONY PROVIDE PROOF BEYOND A REASONABLE DOUBT?

Argument

I

M.R.E. 404(b) BARS THE ADMISSION OF EVIDENCE OF OTHER ACTS TO PROVE THE ACTOR HAD A PROPENSITY TO ACT SIMILARLY IN THE CIRCUMSTANCES CHARGED. THE MILITARY JUDGE ADMITTED EVIDENCE THAT BM3 STEEN SOUGHT MARIJUANA DAYS AFTER THE ALLEGED SALE. DID THE MILITARY JUDGE ERR WHEN HE ADMITTED PROPENSITY EVIDENCE UNDER THE GUISE OF AN UNFOUNDED AND UNSUPPORTED "RESUPPLY" THEORY?

Standard of review

A military judge's decision to admit evidence is reviewed for an abuse of discretion *United States v. Yammine*, 69 M.J. 70, 73 (C.A.A.F. 2010). The military judge's interpretations of the rules of evidence, on the other hand, are reviewed *de novo*. *Id.*

Analysis

The admissibility of uncharged misconduct evidence under M.R.E. 404(b) is determined under a three-prong test the CMA set out in *United States v. Reynolds.* 29 M.J. 105, 109 (C.M.A.1989). The prongs are as follows:

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
> 2. What "fact ... of consequence" is made "more" or "less probable" by the existence of this evidence?
> 3. Is the "probative value ... substantially outweighed by the danger of unfair prejudice"?

United States v. Yammine, 69 M.J. 70, 77 (C.A.A.F. 2010). Each of the three prongs must be satisfied for evidence to be admissible under M.R.E. 404(b). *Id*.

A. The first *Reynolds* prong was not satisfied because the text messages did not establish the alleged act—buying marijuana—occurred.

The military judge's analysis on the first prong of the *Reynolds'* factors failed to consider whether there was sufficient evidence to conclude that the accused committed the alleged act. First, the evidence must reasonably support a finding by the court that appellant committed the prior crimes, wrongs, or acts.[1] *United States v. Tyndale*, 56 M.J. 209, 212 (C.A.A.F. 2001). Although the standard of proof for establishing the alleged bad act is less than a preponderance of evidence, "unsubstantiated innuendo" does not suffice. *Huddleston v. United States*, 485 U.S. 681, 689 (1988).

The military judge's written ruling correctly states the first factor, but his analysis runs askew. The reliability of evidence to establish that the accused discussed future marijuana use is not the end of the analysis under M.R.E. 404(b). Rather, the correct inquiry is whether the communication reasonably supports the conclusion that he actually used or bought drugs. *See United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006) (analyzing whether accused's statements to other airmen about using marijuana reasonably support a finding that he *actually used* marijuana under first prong of the *Reynolds* factors).

The military judge did not consider whether the messages provided a reasonable basis for concluding that BM3 Steen, in fact, bought more marijuana—the fact essential to the government's purported non-propensity use. Instead, he relied on the fact that "messages at issue had been shown to come from BM3 Steen's phone." (App. Ex. VIII at 6.) This incorrectly substitutes the authenticity and foundation of the text messages for the more important question: does the evidence provide a reasonable basis for concluding that BM3 Steen was "resupplying" himself with marijuana.

[1] Both the trial counsel's arguments and military judge's analysis treated the evidence as an

In fact, the evidence adduced at trial did not support the claim that BM3 Steen had "resupplied" himself with marijuana. Rather, the evidence showed that BM3 Steen never did obtain more marijuana as a result of the messages. (R. Vol. III at 223.) This was established directly through his testimony and is also apparent from the text messages. (R. Vol. III at 223.) Finally, the negative urinalysis results for a sample collected days after the messages showed that BM3 Steen did not use marijuana during that timeframe. (R. Vol. III at 181.)

Thus even viewed in the light most favorable to the government, the evidence only showed that he was interested in getting ahold of marijuana to smoke at some point after leaving Portsmouth, Virginia, and that he was unsuccessful in doing so. By considering whether the text messages provided a reasonable basis for finding the fact in isolation from other evidence relevant to the same factual issue, the military judge also parted ways with the prescribed analysis. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988) (explaining that the first factor must not only consider the direct evidence on the point, but also whether it was consistent with related circumstantial evidence). And while the standard of proof is low, this evidence is better characterized as unsubstantiated innuendo than evidence that reasonably supports the conclusion that BM3 Steen was "resupplying" himself with marijuana in connection with the alleged sale to SA [redacted]

B. The ruling was an abuse of discretion because a desire to use marijuana in an unrelated context was not a permissible "fact of consequence" under the second *Reynolds* prong and the message served no legitimate impeachment purpose.

The second *Reynolds* factor considers whether the evidence makes a "fact of consequence" more or less probable. *United States v. Tyndale*, 56 M.J. 209, 212–13 (C.A.A.F. 2001). The "fact of consequence" looks to whether the evidence is "probative of a material issue

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extrinsic, other act, not *res gestae* evidence.

other than character." *United States v. McDonald*, 59 M.J. 426, 429 (C.A.A.F. 2004) (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)). The "fact of consequence" must also be a controverted issue in the case. *United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006).

1. "Being in need of marijuana" in another state, on a later date was not a "fact of consequence" to the alleged one-time sale.

Seeking what appeared to be personal-use quantities of marijuana after the date of these alleged offenses does not make it any more likely that BM3 Steen sold marijuana to SA [redacted] unless the evidence is considered for its tendency to show that BM3 Steen was, generally speaking, interested in marijuana. While this proposition may have certain persuasive value, that persuasive value is as propensity or character evidence—the precise use that M.R.E. 404(b) prohibits.

The military judge's error is apparent when considered alongside the Ninth Circuit's analysis in *United States v. Powell*. 587 F.2d 443 (9th Cir. 1978). *Powell*, like this case, involved the search and seizure of marijuana in the possession of another person, who, in turn, claimed that the marijuana was from Powell. At trial, Powell did not contest that the witness had, in fact, possessed the alleged quantity of marijuana; he claimed that the "source was not he." *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978). Powell, like BM3 Steen, testified in his case to this effect. *Id.* at 446. BM3 Steen did not controvert that SA [redacted] had been found in possession of about two grams of marijuana, or that before smoking some, SA [redacted] had four grams. Rather the defense argued that BM3 Steen was not SA [redacted] source.

In *United States v. Powell*, the government sought to introduce two prior convictions for distribution and possession of marijuana by defendant Powell. Just as in this case, the other acts were not evidence of any common scheme, plan, system, or design. *United States v. Powell*, 587

F.2d 443, 448 (9th Cir. 1978). In such circumstances, where the drug acts are offered to prove identity, the court analyzed the question of whether the evidence was probative to the material fact at issue as follows:

> The probative value of evidence of other crimes where the issue is identity depends upon the extent to which it raises an inference that the perpetrator of the prior offenses was the perpetrator of the offense in issue. Both the existence and the strength of an inference proceeds through an evaluation of the similarities between the prior offense and the charged crime. Thus, if the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise. An inference of identity from prior crimes can only arise when the elements of the prior offenses and the charged offense, singly or together, are sufficiently distinctive to warrant an inference that the person who committed the prior offense also committed the offense on trial.

United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978).

Although *Powell* dealt with prior crimes, the same analysis applies. *See United States v. Matthews*, 53 M.J. 465, 469 (C.A.A.F. 2000) (applying *Reynolds* factors to post-offense drug use evidence). The similarities between the M.R.E. 404(b) conduct and the alleged offense falls far short of even that deemed insufficient in *Powell*. Where *Powell* involved two instances of distribution and an allegation of distribution, this case attempts to create an inference of distribution based on attempts to buy or use. Moreover, the quantities involved do not correlate: BM3 Steen was charged with selling four grams, but the 404(b) evidence sought only a "g" or single gram for personal use. (Pros. Ex. 5 at 8.) And last, the messages involved unrelated people in a different geographic area from the alleged offense. There was nothing distinctive about the interest in marijuana conveyed by the messages that could give rise to an inference that because BM3 Steen had sent the messages, SA [redacted] marijuana was more likely to have come from him than anyone else with an interest in marijuana.

Ultimately, the "resupply" theory rested on a number of unsubstantiated assumptions,

notably that BM3 Steen required a continuous supply of marijuana. Even with these assumptions in place, the theory lacked the factual similarities that could have plausibly provided probative value to the material issue: who sold SA [redacted] the marijuana. Once subject to the sort of logic-based scrutiny outlined in *Powell* the government's theory is exposed as nothing more than a thinly-veiled propensity argument to back-door uncharged misconduct evidence to the members.

2. Military Rule of Evidence 404(b) cannot be used to introduce impeachment evidence and the messages were not admissible under M.R.E. 608.

The government argued, and the military judge agreed, that the messages were admissible as impeachment evidence. Neither counsel nor the judge cited which portion of M.R.E. 404(b) or M.R.E. 608 justified this conclusion. And neither method of impeachment can be applied to BM3 Steen's testimony. The military judge's ruling referenced two aspects of BM3 Steen's testimony in his impeachment analysis. The first was BM3 Steen's testimony that he did not sell marijuana to SA [redacted] the second was that he had never failed a drug test.

Two methods of impeachment fall within M.R.E. 608—reputation or opinion for untruthfulness, and bias. Paragraph (b) of the rule allows witnesses that have given reputation or opinion evidence on truthfulness to be confronted with specific acts probative to that opinion on cross-examination. MIL. R. EVID. 608(b). Because no reputation or character evidence came in on BM3 Steen's truthfulness, paragraphs (a) and (b) did not apply. The military judge's reliance on the defense "opening the door" is thus misplaced. (R. Voll. III at 185-86; App. Ex. VII at 6.) That term refers to the introduction of character evidence by the accused under 404(a)(2)(A), which did not occur. The messages also had no relevance to bias.[2]

[2] The record contains a single reference to M.R.E. 608(c). his appears to be either a misstatement by the military judge or a transcription error since bias was never argued. (R. vol. III at 186.)

Rather, the military judges' ruling appears to have in mind impeachment by contradiction. The messages, however, do not contradict either of these statements. The messages do not contain a contrary statement by BM3 Steen that he did provide SA [redacted] with marijuana. Nor are they counter-proof on his testimony that he passed all of the drug tests during his time in the Coast Guard.[3] Finally, M.R.E. 608(b) does not allow evidence of other acts for other methods of impeachment. *United States v. Banker*, 15 M.J. 207, 210 (C.M.A. 1983).

More specifically, under M.R.E. 608 admission of the messages themselves as evidence is prohibited even if they may be a proper subject of cross-examination. The normal rule of impeachment by contradiction is that a witness may not be contradicted by extrinsic evidence on a collateral matter. *United States v. Banker*, 15 M.J. 207, 211 (C.M.A. 1983). *Banker* also involved drug distribution charges and a government-witness buyer. In that case, the government's cooperating witness testified that he had never bought or attempted to buy drugs from anyone else. The defense sought to call a witness that would testify he saw the cooperating witness buy drugs from someone else. *United States v. Banker*, 15 M.J. 207, 208-09 (C.M.A. 1983). In concluding that extrinsic evidence was inadmissible on the subject, the CMA pointed out that the military rule on the subject is stricter than that in civil federal courts. *Id* at 211. Consequently, admission of the messages—as opposed to examination on the subject—was farther beyond the pale of M.R.E. 608.

A. The military judge's ruling was an abuse of discretion because the balancing test required by the third *Reynolds'* factor referenced probative value for an impermissible use and disregarded countervailing factors.

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[3] Assuming, arguendo, that the messages were considered within the scope of the testimony on the results of the test, the issue is not material and consequently counter-proof is impermissible. *See* THE NEW WIGMORE: A TREATISE ON EVIDENCE § 2.1 (explaining immaterial evidence does not become material simply because it contradicts the opponent's evidence).

The third step in the Reynold analysis mandates a balancing under M.R.E. 403. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). Military Rule of Evidence 403 provides a non-exhaustive list of seven factors baring on the balance. The military judge abused his discretion by only considering the probative value and not weighing it against even one of the seven factors. (Appellate Ex. VIII at 7.) Had he done so, the countervailing considerations would have included the following.

Unfair prejudice. A proper consideration of this issue would have recognized that evidence of involvement with drugs after the charged drug offense is "highly inflammatory" and, therefore, likely to receive undue weight. *United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000); *see also United States v. Holmes*, 39 M.J. 176, 182 (C.M.A. 1994) (finding evidence of prior marijuana use "unduly" prejudicial because it suggests long-term involvement with drugs). The risk of unfair prejudice from this sort evidence is particularly pronounced here because of the dearth of evidence that BM3 Steen possessed or used marijuana at any time leading up the alleged drug sale.

Confusing the issues. The messages involved people who had no part in the events put forth in the Government's case. The messages were phrased in slang that required the members to give attention to interpreting their meaning and effect. Finally, they led the members to devote their attention to the question of whether BM3 Steen ended up getting the marijuana he sought in the messages instead of whether he had provided marijuana to SA [redacted] days prior.

Misleading the members: Admitting the messages, and the accompanying "replenishment" theory put forth in the instruction—in conjunction with instructions about the judge's role as a gate keeper to relevance—led the members to ponder a connection between the

messages and the alleged sale without understanding that the characterization was based only on the logical fallacy *post hoc ergo propter hoc*.[4]

Wasting time: admission of the messages was the sole purpose the government's rebuttal case, which required the recall of the special agent to provide technically-dense foundation evidence on the extraction of the messages from BM3 Steen's phone.

Needlessly presenting cumulative evidence. Setting aside basic cross-examination of BM3 Steen about the messages, their introduction as an exhibit was needlessly cumulative and served only to unduly emphasize a collateral issue.

Only one factor—*undue delay*—does not weigh against admission.

On the other side of the balance, the military judge abused his discretion by determining the probative value with reference to an immaterial question—whether BM3 Steen had ever "used marijuana while on active duty." (Appellate Ex. VIII at 7.) Although the other factual issue considered by the military judge—"why [BM3 Steen] was on the Base" on the day of the alleged drug sale—was more material, the probative value of the messages on this question was naught.

In conducting the balancing analysis, the military judge should determine probative value and unfair prejudice in the context of the entire case. *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010) (citing *Old Chief v. United States*, 519 U.S.172, 183–85 (1997)). That is, the strength of the evidence establishing the similar act for M.R.E. 403 balancing. *Huddleston v. United States*, 485 U.S. 681, 689, n.6 (1988). As already explained, the messages provided weak evidence that BM3 Steen "resupplied" or "replenished." The assertion is conjecture, not a logically drawn conclusion. And when the messages are placed in the context of the entire

[4] After this, therefore because of this.

distribution case, the importance is nominal.

BM3 Steen's testimony admitted that he knew people who used marijuana in the Portsmouth area. His account of events was that he passed off SA [redacted] number to this person. This testimony took out of dispute even the issue of opportunity to obtain marijuana. Rather than conducting the balancing analysis in the context the entire case, the approach in *Yammine*, the military judge abused his discretion by fixating his analysis on the narrow, and arguably irrelevant, question of whether BM3 Steen had smoked marijuana on active duty.

The evidence was admitted to expose the members to uncharged misconduct. This is the essence of M.R.E. 404(b)'s prohibition. Even the military judge's ruling indicates that the context of the messages indicate an interest in getting and "presumably smoking, marijuana"—not maintaining an inventory to support drug dealing. (App. Ex. VIII at 7.) A correct balancing would have recognized this and found admissibility substantially outweighed by the associated unfair prejudice, confusion of the issues, misleading the members, wasted time, and needless presentation of cumulative evidence.

B. The admission of the text messages was highly prejudicial to BM3 Steen's right to a fair trial because the government's case relied entirely on a witness with a motive to fabricate his account who had intentionally wiped his phone before providing his story to law enforcement and was impeached during trial.

Findings reached by an erroneous admission of M.R.E. 404(b) evidence must be set aside if the error materially prejudiced the substantial rights of the accused. *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010). In this context, the findings must be set aside if their consideration of the inadmissible evidence had a substantial influence on the members' verdict in the context of the entire case. *Id.* This Court reviews the question *de novo* based on four factors: (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. *Id.* Applying these factors to BM3 Steen's case demonstrates prejudice.

The government's case was weak. The only evidence that SA [redacted] received his marijuana from BM3 Steen was SA [redacted] accusation. SA [redacted] showed on the stand he was willing to fabricate the truth when it suits his needs. He admitted he fabricated several stories when he was pulled over with marijuana in his car before settling on the account that involved a prostitute. On direct examination, he testified that he told the local police officer that the marijuana came from BM3 Steen. On cross-examination he recanted this position. Finally, he had a strong motive to accuse a fellow Coast Guardsman, rather than a civilian dealer, of selling him the marijuana as it could, and did, result in the withdrawal of his pending court-martial charges in exchange for his testimony.

The defense, on the other hand, presented a cogent case that BM3 Steen did not sell SA [redacted] marijuana and that the purpose of their meeting was to hand off a mail-order package to a shipmate before BM3 Steen left Portsmouth later that day for his permanent move. The defense called the shipmate that ordered the package and the package itself was admitted into evidence. The defense also called another witness who testified that SA [redacted] returned to the ship anxious and frightened after his encounter with law-enforcement. And finally, the defense recalled SA [redacted] and impeached him on the timing of his initial accusation against BM3 Steen.

The strength of the defense case should also be considered with reference to the military judge's initial 404(b) ruling and his warning that a defense case that presented no association with marijuana would open the door. The defense heeded this warning and presented its evidence that BM3 Steen did know someone who used marijuana and that he forwarded SA

Harris's contact information to him. The defense relied on this ruling to their detriment,[5] compounding the prejudice of the erroneous ruling.

The last two factors are interrelated here. The messages were most relevant to an immaterial question: whether BM3 Steen had ever used marijuana. Their relevance to the more material question of whether he sold marijuana was based solely on conjecture. Without it, there was no evidence that BM3 Steen had any association with marijuana. With it, the members were given a basis to convict him of a drug offense because they associate him, through the text messages, with being a drug user. Where the improperly admitted evidence provides members "ammunition" on a factual issue unresolved by other evidence, it is less likely to be harmless. *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010). These messages provided just that.

C. The military judge's instruction on the M.R.E. 404(b) evidence compounded the prejudicial impact of his erroneous ruling.

The prejudicial impact of the ruling is, perhaps, best demonstrated by the military judge's instruction on the point. *See United States v. Matthews*, 53 M.J. 465, 470 (C.A.A.F. 2000) (explaining that the impact of erroneous M.R.E. 404(b) ruling as "compounded" by an instruction to members on its use). The instruction put forth a factual theory based entirely on conjecture and instructed the members that they should consider the messages under this theory. Specifically, he instructed the members "BM3 Steen allegedly needed to replenish his supply of marijuana based on [the government's] allegation that BM3 Steen had sold marijuana to SA [redacted] The instruction prejudiced the members' fact-finding in a number of ways.

First, the entire allegation that BM3 Steen was "resupplying" or "replenishing" himself is

[5] Typically, judicial estoppel is applied against the government, not the judge. *Zedner v. United States*, 547 U.S. 489, 504 (2006).

factually predicated on BM3 Steen having sold marijuana to SA [redacted] If BM3 Steen did not sell to SA [redacted] there is no basis whatsoever to characterize the act of buying marijuana as "replenishing" or "resupplying" rather than supplying or simply buying. Thus the structure of the assertions themselves undermine the presumption of innocence, and the military judge's affirmation of the assertions through his instructions have constitutional implications.

A thoughtful appraisal of how the record facts line up with each word of this instruction reinforces the conclusion. While the messages certainly could be read to suggest that after leaving Portsmouth, BM3 Steen expressed an interest in using marijuana, the purported use of the evidence set out in the instruction went far beyond these facts. Several words and phrases did particular harm:

"Allegedly:" The parallel use of the word "allegedly" in reference to both the theory of "replenishment" and the charged misconduct was confusing and created the potential attach undue parity to the two questions.

"Need:" There was no evidence that BM3 Steen had an ongoing *need* for marijuana and not even the government suggested that BM3 Steen dealt marijuana at any other time.

"To replenish his supply:" No evidence was offered whatsoever that BM3 Steen ever possessed a quantity of marijuana beyond that which SA [redacted] claimed he received. There was no evidence BM3 Steen had a "supply" that he was trying to maintain at a certain level by "replenishing it."

"Based on their allegation that Petty Officer Steen had sold marijuana:" There was no evidence connecting the alleged sale to the messages. To characterize the messages as having been made "based on" having sold marijuana was unfounded.

The CAAF observed in *United States v. Yammine* that cases turning on "dueling facts"

are particularly susceptible to prejudice from an erroneous M.R.E. 404(b) ruling. *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010). That is just the case here. Only the source of SA [redacted] marijuana was in dispute and the only evidence on this question was each's testimony. The description of the evidence in the instruction lacked objectivity and impermissibly tipped the scale on otherwise very close facts.

II

THE GOVERNMENT RELIED ON A SINGLE WITNESS TO ESTABLISH EVERY ELEMENT OF THE OFFENSES. THAT WITNESS WAS AN ADMITTED DRUG USER, TESTIFYING PURSUANT TO A GRANT OF IMMUNITY, AND WAS IMPEACHED AT TRIAL. DID HIS TESTIMONY PROVIDE PROOF BEYOND A REASONABLE DOUBT?

Standard of Review

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may substitute its judgment for that of the trial court. Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).

Analysis

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Factual sufficiency, on the other hand, tests for "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. In exercising this duty, this Court may judge the credibility of witnesses,

determine controverted questions of fact, and substitute its judgment for that of the military judge. Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

There are three fatal shortcomings in the evidence that require this Court to set aside these convictions. First, insufficient evidence was presented identifying the substance seized as marijuana. Second, SA [redacted] was not a credible witness; his testimony was uncorroborated and riddled with inconsistencies. Third, SA [redacted] had a demonstrated motive to fabricate his testimony. For these reasons, the evidence is both factually and legally insufficient to support the conviction.

A. The evidence was factually insufficient because proof of the nature and quantity of the amount came from SA [redacted] who was incompetent to testify on the subject.

The absence of "scientific identification" of the illegal drug, is particularly unsound where the conviction otherwise is "based on nothing more than the highly-suspect testimony of… drug abusers." *United States v. Corbett*, 29 M.J. 253, 257-58 (C.M.A. 1989) (Cox, J. concurring in part and dissenting in part).

The specifications require proof that BM3 Steen introduced and distributed four grams of marijuana. SA [redacted] testified that the marijuana was seized by local police, but the government offered no evidence corroborating this assertion. They did not call the seizing police officer or introduce any evidence regarding the nature or amount of the substance seized. In fact, trial counsel objected to a question by defense counsel about whether the local police had seized anything when SA [redacted] was stopped. (R. Vol. II at 172.) The only evidence identifying the substance as marijuana was in SA [redacted] testimony. (R. Vol. III at 35-36). SA [redacted] basis for identifying the substances was, without further elaboration, his experience "before the Coast Guard." (R. Vol. III at 35). His testimony included no description of the properties of the

substance.

Proof beyond a reasonable doubt must exclude "every fair and rational hypothesis except that of guilt;" if there "is a real possibility" that an accused is not guilty, he must be given the benefit of the doubt. Military Judges' Benchbook, DA PAM 27-9, para 2-5-12 (2010). The Government's evidence was insufficient to prove beyond a reasonable doubt that SA [redacted] ever had marijuana. Without additional information describing the marijuana or evidence confirming the nature of the substance, this Court cannot be convinced, beyond a reasonable doubt that the substance was, in fact, marijuana.

B. The evidence was factually insufficient because SA [redacted] testimony was not credible.

SA [redacted] account of the evening of the police stop was inconsistent on every point that could be cross-checked with other proof. To start, SA [redacted] thwarted any verification of his various accounts of events by initiating a factory reset of his smart phone before the police officer reached his car. (R. Vol. II at 188, Vol. III at 46.)

After the traffic stop, he had a text message exchange with his girlfriend, identified in his phone as "Precious." The text messages indicate that he was going to buy marijuana when he was stopped. SA [redacted] attempted to discredit his own messages by testifying that he misled his girlfriend because he did not want her to know that he was going to a prostitute:

Q. And you exchanged a number of text messages with her; is that correct?
A. That's right.
Q. But you didn't tell her that you were there picking up a prostitute, did you?
A. No, sir, not that night. I ended up telling her weeks later.

(R. Vol. III at 49.) Contrary to this claim, he did discuss the prostitution allegation with his girlfriend.

70	Inbox	From [redacted] Precious * Direction: Incoming	11/9/2017 8:04:09 AM(UTC-5)		Read	Oh okay you were going to get more	
71	Sent	To [redacted] Precious * Direction: Outgoing	11/9/2017 8:02:36 AM(UTC-5)		Sent	I already did babe	
72	Inbox	From [redacted] Precious * Direction: Incoming	11/9/2017 8:02:28 AM(UTC-5)		Read	But you need to email that cop	
73	Sent	To [redacted] Precious * Direction: Outgoing	11/9/2017 8:02:27 AM(UTC-5)		Sent	No babe they got me before I got to the house	
74	Inbox	From [redacted] Precious * Direction: Incoming	11/9/2017 8:02:05 AM(UTC-5)		Read	No babe I thought the guy who had the weed brought it to you	
75	Sent	To [redacted] Precious * Direction: Outgoing	11/9/2017 8:01:14 AM(UTC-5)		Sent	No they found the weed in my truck	
76	Inbox	From [redacted] Precious * Direction: Incoming	11/9/2017 8:00:54 AM(UTC-5)		Read	I thought they brought the weed to you	
77	Sent	To [redacted] Precious * Direction: Outgoing	11/9/2017 8:00:25 AM(UTC-5)		Sent	That's why I don't wanna say anything	
78	Sent	To [redacted] Precious * Direction: Outgoing	11/9/2017 8:00:12 AM(UTC-5)		Sent	Brought what to me	
79	Inbox	From [redacted] Precious * Direction: Incoming	11/9/2017 7:47:12 AM(UTC-5)		Read	I thought they brought it to you	
80	Sent	To [redacted] Precious * Direction: Outgoing	11/9/2017 7:40:47 AM(UTC-5)		Sent	A prostitute lives in that house and so they might say I was going to the house for her	
81	Sent	To [redacted] Precious * Direction: Outgoing	11/9/2017 7:40:16 AM(UTC-5)		Sent	I know but there's more to it	
82	Inbox	From [redacted] Precious * Direction: Incoming	11/9/2017 7:40:01 AM(UTC-5)		Read	They might end up being more mad because you didn't tell them	

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(Defense Ex. I at 2.)

Moreover, the messages, read chronologically from bottom up, indicate that a prostitute lived at the house of the drug dealer, SA [redacted] was going there for more marijuana, and was worried that he maybe accused of patronizing the prostitute there. (Defense Ex. I at 2.) A close review of [redacted] testimony at trial indicates that [redacted] never denied that he was out buying drugs on the night of the stop. (R. Vol. III at 9-11.)

SA [redacted] story is also internally incoherent. He testified that in mid-October, he took leave and went home. Ms. [redacted] testified that SA [redacted] had returned by Halloween and that his car smelled like fresh marijuana smoke when he gave her a ride that day. SA [redacted] testified that he was smoking marijuana every two-to-three days. Against the backdrop of these facts, his claim that BM3 Steen was his only drug source in the Virginia Beach area was implausible: his car smelled like fresh marijuana before the date of the alleged sale and the single, four-gram amount would be insufficient to maintain level of THC in his urine he desired.

In addition to these inconsistencies, his claim that he left $180 in a mail box was unsubstantiated by police who went two blocks away to check. (R. Vol. III at 47.) He also admitted to fabricating several other accounts to the Virginia Beach Police before settling on the prostitute explanation for his activity.

Finally, and perhaps most significantly, SA [redacted] testified that he first told the Virginia Beach police that the marijuana came from BM3 Steen. (R. Vol. III at 11.) He was later recalled by the defense and impeached on this point. (R. Vol. III at 138.) In fact, SA [redacted] only alleged that the marijuana came from BM3 Steen when he was later interviewed by CGIS.

The text messages, on the other hand, cogently fill the gaps in SA [redacted] story by showing that he had a dealer out in town from whom he had bought from before 8 November and from whom he was going to buy again. By 8 November, BM3 Steen had left the area

permanently. The record does not indicate who this source was, but it does exclude BM3 Steen. These gaps and inconsistencies show that SA [redacted] is not a credible witness. This Court should discount his testimony and recognize that SA [redacted] testimony, without consistent, corroborating testimony, is insufficient to meet the "beyond a reasonable doubt" standard.

C. The evidence was factually insufficient because it relied solely on SA [redacted] who had a compelling motive to fabricate his testimony.

Through the course of his interactions with the Virginia Police Department, SA [redacted] learned that he could avoid criminal charges by providing law enforcement with evidence to pursue higher-priority investigations. Thus by providing the police with the contact information of a prostitute, he avoided state charges for possession of marijuana.

Once confronted by CGIS with the possession offense, he again sought to deflect interest from himself. By providing CGIS with the allegation of distribution by BM3 Steen, SA [redacted] avoided charges for use. If, consistent with the text message exchange with his girlfriend, SA [redacted] told CGIS that he bought the marijuana from a local drug dealer, he would have remained the focus of the Coast Guard investigation and prosecution. (Def. Ex. I.) On the other hand, accusing another Coast Guard member afforded him yet another opportunity to evade prosecution.

The requirement for SA [redacted] to testify "truthfully" under his grant of testimonial immunity compounds his motive to testify against BM3 Steen without providing more reason to rely on the ultimate verity of his testimony. Once SA [redacted] accused BM3 Steen in his interview with CGIS, he was committed to that account; any further change in his version of events would have exposed himself to liability for false official statements or obstruction of justice. SA [redacted] was locked into the self-serving accusation against BM3 Steen regardless of its truth, the terms of

the grant of testimonial immunity that accompanied the order requiring him to testify add little to the trustworthiness of his assertions.

When viewing the entirety of the evidence, this Court cannot be convinced beyond a reasonable doubt of BM3 Steen's guilt to the charged offenses. The Military Judge convicted BM3 Steen based on SA [redacted] testimony. Yet SA [redacted] testimony is rife with gaps and inconsistencies. His story is unreliable in light of these inconsistencies and his obvious motive to fabricate. These manifold sources of reasonable doubt that make the convictions under legally and factually insufficient.

Conclusion

The text messages to BM3 Steen's civilian sister and family while he was passing through North Carolina on terminal leave had no logical connection to the alleged drug sale. The admission of the messages based on a logical fallacy and the restyling of a propensity theory under the moniker "replenishment" was an end-run around M.R.E. 404. The military judge abused his discretion by disregarding six on-point factors in the seven-factor M.R.E. 403 balancing test to reach this result. The impact of the improper ruling was decisive in this close case and substantially prejudiced BM3 Steen's right to a fair trial. The insufficiency of the evidence underscores the prejudice and, on its own, requires this Court's intervention.