IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Airman First Class (E-3) ELLWOOD T. BOWEN III, USAF Appellant	BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT Crim.App. No.: 38616 USCA Dkt. No. 16-0229/AF

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

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ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED IN APPLYING THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE IN ALLOWING THE GOVERNMENT TO INTRODUCE THROUGH THE TESTIMONY OF LAW ENFORCEMENT PERSONNEL THAT APPELLANT'S WIFE NODDED HER HEAD IN RESPONSE TO A QUESTION WHETHER HER HUSBAND "DID THIS," AND IN CONCLUDING THAT THE PREJUDICIAL EFFECT OF THIS TESTIMONY WAS OUTWEIGHED BY ITS PROBATIVE VALUE.

STATEMENT OF THE CASE

Amicus Curiae adopts Appellant's Statement of the Case.

STATEMENT OF THE FACTS

Amicus Curiae adopts Appellant's Statement of the Facts.

STATEMENT OF THE MOVANT'S INTEREST

The purpose of this amicus curiae brief, being filed pursuant to the Court's invitation, is to bring relevant matter to the attention of the Court, in particular the correct legal analysis required to evaluate a statement's qualification for the hearsay exception under M.R.E. 803(2). A proper inquiry of the "excited utterance" exception must assess whether the military judge subjectively analyzed the declarant's level of excitement in relation to the triggering event.

SUMMARY OF ARGUMENT

This Court should reverse the lower court's ruling and set aside the findings of guilt because the lower court applied the incorrect standard in

admitting Ms. MB's statement as an excited utterance. Under binding Circuit law, the trial court should have conducted a subjective inquiry, analyzing the declarant's degree of excitement vis-à-vis the startling event in order to determine whether there was an excited utterance. Instead, the lower court incorrectly applied an objective "reasonableness" test in ruling that Ms. MB's statement was an excited utterance. This was error. If the facts of the event are viewed through the eyes of Ms. MB, a woman who was intoxicated, incapable of speaking, and nearly unconscious, they show that she was neither excited nor startled when she nodded her head in response to the law enforcement officer's question. This amicus curiae defers to the Appellant's argument in regards to harmless error of this erroneously admitted evidence.

ARGUMENT

THE LOWER COURT APPLIED THE INCORRECT STANDARD IN ADMITTING MS. MB'S STATEMENT AS AN EXCITED UTTERANCE, AND AS SUCH THIS COURT SHOULD REVERSE THE LOWER COURT'S RULING AND SET ASIDE THE FINDINGS OF GUILT.

Standard Of Review

This Court reviews "a military judge's ruling admitting . . . evidence for an abuse of discretion." *United States v. Grant*, 56 M.J. 410, 413 (C.A.A.F. 2002). "An abuse of discretion occurs when a military judge

either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). But, "When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, 'we typically have pierced through that intermediate level' and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling." *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F 2015) (quoting *United States v. Cabrera-Frattini*, 65 M.J. 241, 246 (C.A.A.F. 2007)) (quoting *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F 2006)) (quoting *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996)) (internal quotation marks omitted).

Law and Analysis

The trial court erred in applying an objective standard when determining whether Ms. MB's statement was an excited utterance, and as such abused its discretion. Viewed subjectively from the declarant's perspective, Ms. MB's intoxication, level of consciousness, and inability to verbally respond show her head nod was not an excited utterance under

M.R.E. 803(2). Accordingly, this Court should overrule the lower court's admission of this evidence and reverse the conviction.[1]

A. The military judge abused his discretion by failing to apply the required subjective analysis when evaluating Ms. MB's statement as an excited utterance.

This Court has established a three-prong test for the admissibility of excited utterances:

> (1) the statement must be spontaneous, excited, or impulsive rather than the product of reflection and deliberation;
>
> (2) the event prompting the utterance must be startling, and;
>
> (3) the declarant must be under the stress of excitement caused by the event.

United States v. Feltham, 58 M.J. 470, 474 (C.A.A.F. 2003) (citation omitted). In *United States v. LeMere*, 22 M.J. 61, 68 (C.M.A. 1986), this Court held that, for a statement to qualify as an excited utterance under Rule 803(2), "the event must be viewed as 'startling' by the declarant, regardless of how it might appear to some other person." The lower courts have interpreted this to "require a subjective analysis of the declarant's degree of excitement vis-à-vis the perceived startling event." *United States v. Ansley*, 24 M.J. 926, 928 (A.C.M.R. 1987). *See also United States v. Armstrong*, 30

[1] For the reasons stated in Appellant's Brief, admission of this evidence was not harmless error.

M.J. 769, 773 (A.C.M.R. 1990) (*LeMere* requires "essentially a subjective analysis of the declarant's degree of excitement"). It follows that this subjective analysis must be applied when evaluating the first and third prongs of the excited utterance test as they deal with the actions of the declarant. *See United States v. Brito*, 427 F.3d 53, 61 (1st Cir. 2005) (excited utterances are determined by "whether the declarant was under the stress of a startling event"); *State v. Wilkerson*, 683 S.E.2d 174, 195 (N.C. 2009) (excited utterances are "determined by the state of mind of the speaker").

But the military judge incorrectly applied an objective test. The military judge stated:

> I think although Ms. MB is in no position to testify about her own mental state at the time and, certainly, was in *no physical condition to manifest outward expressions of excitement*, I think the fact that there were screams heard, shouting and banging heard in the bathroom only a few moments before, combined with Ms. MB's physical condition when law enforcement arrived, I think *it's reasonable*.

JA 212 (emphasis added). In his reasoning, the military judge admitted that Ms. MB did not display expressions of excitement, which is required under the third prong in that "the declarant must be under the stress of excitement." *Feltham*, 58 M.J. at 474. Instead, the military judge plainly applied an incorrect *objective* analysis by concluding that—in light of the surrounding

circumstances—it was "reasonable" that the head nod could be seen as an excited utterance. JA 212. However, as this Court noted in *LeMere*, the proper analysis is not "how it might appear to some other person," but whether Ms. MB was *subjectively* startled or under the stress of excitement when she shook her head. 22 M.J. at 68. The military judge in this case applied *precisely* the analysis forbidden by *LeMere*: he considered the circumstances objectively and concluded that it was "reasonable" for somebody in Ms. MB's position to be under the stress of excitement.

In reaching this conclusion, the military judge failed to account for Ms. MB's subjective condition, including her apparent intoxication, evidenced by the accounts of her "taking shots," JA 124, 126, 203, and her testimony that she blacked out, JA 203-05. Nor did the military judge address how Ms. MB's injuries (including a subdural hematoma, brain craniotomy, and a traumatic brain injury), JA 219, apart from their physical effects, affected her ability to respond in an excited manner. Under the required subjective analysis of Ms. MB's head nod, these considerations should have been paramount. This application of the incorrect legal standard was an abuse of discretion.

B. When viewed subjectively from the perspective of the declarant, Ms. MB was not under "the stress of the excitement caused by the event" when she nodded in response to the SFS personnel's question.

1. It is undisputed in the record that Ms. MB had been drinking the later evening and early morning of 23-24 November, 2013.

The record shows Ms. MB had been drinking, and presumably was intoxicated, on the night in question. SrA BB testified that at the party that evening they were taking shots and playing beer pong. JA at 122-23. And while Ms. MB testified to only remembering taking one shot upon returning home from the party, JA 203, SrA BB testified they took "a few shots," JA 124, 126. Further, the inquiry that led to the head nod in question took place only mere hours after having these taken last shots. JA at 6.

2. The SFS personnel had to bring Ms. MB out of unconsciousness, and even then her only audible responses were grunts and moans.

When the SFS personnel responded to the report of the domestic disturbance, they found Ms. MB unconscious in the bathroom. JA at 234. The SFS personnel were able to get her to respond, but when they asked Ms. MB if she was okay, she responded with "just a groan." JA at 235. After moving her out of the bathtub and onto the bed, TSgt Cabrera testified that Ms. MB appeared "semi-conscious," her "eyes weren't open," and "she wasn't talking." JA at 244. TSgt Cabrera admitted Ms. MB was "pretty

unresponsive" and that "she wasn't able to give … a real meaningful response at that time." While Ms. MB was in this "pretty unresponsive" state, Sergeant Taylor asked her, "did your husband do this?" JA at 245. Ms. MB provided no verbal response and her only reaction was nodding her head up and down. *Id.* Doctors later determined Ms. MB's injuries that night included "a subdural hematoma, brain craniotomy, and a traumatic brain injury, a visual loss up to 70 percent, loss of smell and body concussions." JA at 219.

Exceptions to hearsay are considered reliable because "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness." Fed. R. Evid. 803 Advisory Comm. The central question here is whether the head nod of an intoxicated and battered victim, who was recently brought out of unconsciousness, possesses the required indicia of reliability. Ms. MB's head nod response, viewed in light of all the circumstances, was not made in the "stress of the excitement caused by the event." Ms. MB's intoxication, recent unconsciousness, and lack of verbal communication all demonstrate that she subjectively did not act in any "degree of excitement vis-à-vis the perceived startling event."

CONCLUSION

This Court should reverse the trial court's ruling and set aside the finding of guilt. The military judge abused his discretion by failing to apply the subjective analysis required by *LeMere* and its progeny. Under the required subjective analysis, Ms. MB's response to the SFS officer did not satisfy the criteria of an excited utterance under Rule 803(2).

Dated: October 18, 2016 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

This brief complies with the type-volume limitation of Rule 24(c) because:

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