15 July 2016

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.*	) FINAL BRIEF ON BEHALF OF) THE UNITED STATES)) USCA Dkt. No. 16-0229/AF)) Crim. App. No. 38616))

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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Appellee,	)	FINAL BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 16-0229/AF
Airman First Class (E-3)	)	
ELLWOOD T. BOWEN III, USAF	)	Crim. App. No. 38616
Appellant.	)	

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

ISSUE SPECIFIED

WHETHER THE MILITARY JUDGE ERRED IN APPLYING THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE TO PERMIT 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. *SEE* M.R.E. 802 AND 803(2); M.R.E. 403; UNITED STATES V. DONALDSON, 58 M.J. 477 (C.A.A.F. 2003); UNITED STATES V. JONES, 30 M.J. 127 (C.M.A. 1990); UNITED STATES V. ARNOLD, 25 M.J. 129 (C.M.A. 1987); UNITED STATES V. IRON SHELL, 633 F.2D 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

The facts necessary to the disposition of this issue are set forth in the brief below.

SUMMARY OF THE ARGUMENT

The military judge correctly admitted the affirmative head nod of Appellant's spouse as an excited utterance under the facts of this case and the law. As found by the military judge and supported by the record, the statement in this case directly relates to the appalling attack suffered by Ms. M.B. at the hands of Appellant. Additionally, the factors relating to whether a declarant is suffering from the stress of a startling event at the time that the statement is made, as most recently stated by this Court in United States v. Donaldson, 58 M.J. 477, 483 (C.A.A.F. 2003), support that the statement was appropriately admitted by the military judge. Third, there is no evidence that because the statement was in

response to a question by security forces rather than completely volunteered by Ms. M.B. that it was the product of deception and thought rather than a spontaneous response. Therefore, the statement met all requirements under the law for an excited utterance to be admitted pursuant to Mil. R. Evid. 803(2). Finally, even if the military judge erred, Appellant was not prejudiced.

ARGUMENT

THE MILITARY JUDGE APPROPRIATELY ADMITTED THE STATEMENT OF APPELLANT'S SPOUSE AS AN EXCITED UTTERANCE UNDER MIL. R. EVID. 803(2).

Standard of Review

Appellate courts test a military judge's admission or exclusion of evidence for an abuse of discretion. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009).

Law and Analysis

"[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995). A military judge is afforded "considerable discretion" in admitting evidence. Donaldson, 58 M.J. at 488 (citations omitted).

"An abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a

denial of justice." United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (citations and ellipsis omitted). The "'abuse of discretion' standard is a strict one." Id. "To reverse for an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." Id. (citations and ellipsis omitted).

At trial, the defense moved *in limine* to prevent the government from introducing testimony from two of the responding security forces members. (JA at 23.) Specifically, one of the members, who found the horribly beaten Ms. M.B. in the bathtub of the master bedroom in Appellant's residence, asked Ms. M.B. "if her husband [Appellant] did this to [her]." (JA. at 35, 235.) In response, Ms. M.B. groaned and shook her head "yes." (Id.) During motions practice, the government responded that the statement was admissible under Mil. R. Evid. 803(1) as a present sense impression and Mil. R. Evid. 803(2) as an excited utterance. (JA at 58.) Ultimately, the military judge admitted the testimony of the security forces member that Ms. M.B. confirmed her husband "did this to [her]" as an exited utterance under Mil. R. Evid. 803(2). The military judge also conducted a proper balancing test under Mil. R. Evid. 403 before admitting the evidence.

> An otherwise inadmissible hearsay statement is admissible under M.R.E. 803(2)…if (1) the statement relates to a

> startling event, (2) the declarant makes the statement while under the stress of excitement caused by the startling event, and (3) the statement is 'spontaneous, excited or impulsive rather than the product of reflection and deliberation.'

Donaldson, 58 M.J. at 482 (C.A.A.F. 2003), *citing* United States v. Feltham, 58 M.J. 470 (C.A.A.F. 2003); United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987); and United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980.) Stated another way, the excited utterance exception requires the speaker be "under the sway of a 'startling event' and that the statement be made before there is an opportunity 'to contrive or misrepresent.'" United States v. Winters, 33 F.3d 720, 723 (6th Cir. 1994) (internal citations omitted). "The assumption underlying [the] exception is that a person under the sway of excitement precipitated by an external startling event will be bereft of the reflective capacity essential for fabrication and that, consequently, any utterance he makes will be spontaneous and trustworthy." Haggins v. Warden, 715 F.2d 1050, 1057 (6th Cir. 1983).

A. The military judge appropriately applied the law in making a finding of fact that the statement related to a startling event and his determination is supported by the record.

In this case, the military judge, after personally observing the witnesses testify and hearing the arguments of counsel, appropriately found the statement qualified as an excited utterance. First, the military judge determined that a startling or stressful event occurred and this determination is both supported by the facts and uncontested

by Appellant. (JA at 212–15.) Although the declarant, Ms. M.B., was unable to recall at trial the majority of the event, her neighbors, Ms. E.G. and SSgt A.S., who lived in the duplex next door, "heard screaming from a female in the vicinity of the house only a few moments before law enforcement showed up." (JA at 212.) Ms. E.G. specifically testified that she heard "a very loud, a very loud yell. It sounded like she was in tremendous pain. It was very different from her [normal] arguing …I heard her yelling stop." (JA at 72.) Ms. E.G.'s husband, SSgt A.S., testified that he was woken up shortly after 6:00 A.M. by a "loud bang that kind of shook the house, and a gentleman yelling. Then, [he] heard a woman's voice screaming like she was in pain." (JA at 87.) SSgt A.S. stated that he heard other noises including "slamming on the walls" and water running in the bathtub. (JA at 89.) Ms. E.G. and SSgt A.S. called security forces because they feared they were hearing Ms. M.B. being beaten, and security forces arrived on scene six to eight minutes later. (JA at 91.) Based on this testimony, and that Ms. M.B. was then found unconscious and in a badly beaten state by the responding security forces officers, the military judge determined that a startling or stressful event had occurred. (JA at 414, 416.) Moreover, under the circumstances here, where Ms. M.B. was initially revived from unconsciousness by security forces members in her own home minutes after a vicious assault, there is no

reason to suggest that the intervention by police officers was not part of the startling and stressful event for Ms. M.B.

B. The military judge appropriately applied the law in making a finding of fact that the statement was made while under the stress of the event and his determination is supported by the record.

The military judge also appropriately found that Ms. M.B. made the statement while under the stress of the event and his assessment is supported by the facts. (JA at 212-14). As this Court stated in Donaldson, a variety of factors should be considered in making this judgment, including "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." Donaldson, 58 M.J. at 483, citing Reed v. Thalacker, 198 F.3d 1058, 1061 (8th Cir. 1999).

Here, the "ear" witnesses, who testified to hearing Ms. M.B. screaming in pain, yelling stop, water running, and slamming against a wall, immediately called security forces, and security forces arrived six to eight minutes later. (JA at 89-91.) Once security forces arrived on scene, TSgt V.C. testified that she and another security forces sergeant went to the master bathroom of the house to find Ms. M.B. (JA. at 233-34.) When TSgt V.C. found Ms. M.B., she was unconscious, laying in the bathtub with her head against the faucet. (JA at 234.) There was water on the

floor. (Id.) Both of Ms. M.B.'s "eyes were swollen shut and she had a gash over one eye." (JA at 235.) When TSgt V.C. first saw Ms. M.B. in the bathroom, TSgt V.C. thought Ms. M.B. was dead. (JA at 239.) As TSgt V.C. examined the state of Ms. M.B., Ms. M.B. groaned. (JA at 235.) At that point, TSgt V.C. and the other security forces member moved Ms. M.B. to the bed. (JA at 235.) Then, the second security forces member asked Ms. M.B. "if her husband…did this to her." (Id.) Ms. M.B. nodded her head in the affirmative. (Id.) The security forces members did not ask her any other questions about the events and waited with Ms. M.B. until the EMTs arrived. (JA at 39, 42, 236.) The military judge correctly relied on these factors in determining that the statement was made while Ms. M.B. was under the stress of the event, particularly evidenced by what was heard by her neighbors "only minutes before." (JA at 212, 214.)

C. The military judge appropriately applied the law in making a finding of fact that the statement was not the product of reflection or deliberation by Ms. M.B. and his determination is supported by the record.

Finally, the military judge properly contemplated whether the statement was one of deliberation or fabrication. As evidenced by his inquiry with defense counsel, the military judge considered that "based on the testimony of [TSgt V.C.], the fact that [Ms. M.B.] was beaten and almost nonresponsive… put[s] her in a position where it would be less likely that she would come up with a lie under the

circumstances." (JA at 64.) The idea of whether a statement was made in response to an inquiry, which is one of the factors to consider in whether a statement was made under the stress of an event, is also a consideration in deciding whether a statement is "the product of reflective thought or whether [it was] the result of a startling event." Webb v. Lane, 922 F.2d 390, 394 (7th Cir. 1991).

Donaldson, Arnold, and Jones are clear that the fact that a statement is prompted by a question is but one factor in the analysis. Indeed, the fact that a statement was prompted by a question does not infer that a declarant made the statement as a result of reflection or fabrication. *See* Webb v. Lane, 922 at 394 (the fact that the statements were in response to…questions, although relevant, did not destroy their statements' spontaneity); United States v. Glenn, 473 F.2d 191, 194 (D.C. Cir. 1972) (officer's questions, "What happened? And "Who did it?", did not destroy spontaneity); United States v. Kearney, 420 F.2d 170, 175 n.11 (D.C. Cir. 1969) ("fact that statement made in response to questioning several hours after the precipitating event is not decisive").

Appellant's reliance on United States v. Thomas, 41 M.J. 732, 733-36 (N.M. Ct. Crim. App. 1995) is unpersuasive. In Thomas, the declarant's statements were "made only in response to repeated questioning by members of his family and only after he had time to reflect. In fact he told his questioners to wait and only told

them what happened much later." Id. at 736. In that case, while the declarant may still have been suffering from some pain from the event of being attacked by a tire jack, the other circumstances, including his own intervening statements, weighed against spontaneity and in favor of the proffered statements being made only after deliberation and thought. Id. at 733; 735-36.

Here, the security forces members asked one question of Ms. M.B. relating to the event. While perhaps more pointed than asking "what happened," the question was certainly not of such a leading nature as to destroy the trustworthiness or spontaneity of the response. Ms. M.B. could have just as easily shook her head "no." There is also no reason to believe that her response was made with any "premeditation, reflection, or design." Gross v. Greer, 773 F.2d 116, 120 (7th Cir. 1985.)

It is highly improbable that considering all of the facts of this case, Ms. M.B. would fabricate that it was Appellant who assaulted her when there was another individual, SrA B.B., at whom she could have pointed the finger, as Appellant did during his trial. Additionally, Appellant asserts that "the military judge had…evidence…that [Ms.] M.B. had unexcited interactions with medical providers…but failed to account for this evidence in his ruling." (App. Br. at 22; JA at 405.) (emphasis added). The statements in the medical records, which

Appellant concedes as unexcited interactions, are evidence in themselves that the statement at issue was likely the result of spontaneity relating to the assault, while the others were the result of reflection and deceptiveness. For example, once Ms. M.B. arrived at the hospital approximately an hour after making the first statement, Ms. M.B. denied the "DV" (domestic violence) event, and told providers that she "did it [herself]." (JA at 405.) About three hours after making the statement to security forces, Ms. M.B. stated she "did not know what happened…[her] husband [had] never hit [her] or pushed [her] before." (Id.) However, Ms. M.B. testified at trial that Appellant smacked her in the face when they were in Las Vegas in 2013. (JA at 218.) It is therefore highly improbable that, if Ms. M.B. had the opportunity to fabricate or misrepresent to security forces when she regained consciousness, that she would have indicated that her husband was at fault as opposed to making a statement to protect him.

Finally, the premise behind an excited utterance is that declarant will speak truthfully, not necessarily accurately. Appellant, through his trial defense counsel, explored this concept in detail throughout the trial. For example, on cross-examination of TSgt V.C. and Ms. M.B., he solicited the possibility that Ms. M.B. did not understand the question posed by security forces, that she was very intoxicated, and that she had just suffered head trauma. (JA at 223-24, 244-46.)

Appellant's trial defense counsel also elicited testimony from Ms. M.B. that there was an innocent explanation for her nodding her head given where she was found, because in the past, when she was drunk, her husband had given her a bath and then helped her to bed. (Id.)

The military judge's findings of fact were not clearly erroneous; nor were his conclusions of law incorrect. Ayala, 43 M.J. at 298. Here, based on the facts recited above, the reasons or rulings of the military judge are not clearly untenable nor did they deprive Appellant of a substantial right such as to amount to a denial of justice. Travers, 25 M.J. at 62. Finally, there is nothing about the challenged action that is arbitrary, fanciful, clearly unreasonable, or clearly erroneous. Id.

Lastly, as he was required to do, the military judge applied a balancing test under Mil. R. Evid. 403. (R. at 415.) "When a military judge conducts a proper Mil. R. Evid. 403 balancing on the record, [a reviewing court] will not overturn that decision absent a clear abuse of discretion." United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009).

Thus, the military judge did not abuse his discretion by admitting the testimony regarding the affirmative head nod as an excited utterance under Mil. R. Evid. 803(2).

D. Even if the statement was erroneously admitted into evidence, there is no prejudice to Appellant.

Even if this Court were to agree with Appellant that the military judge abused his discretion in admitting the evidence as an excited utterance, this Court must still address prejudice. Whether prejudice results in the context of an erroneous evidentiary ruling is determined by weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999), citing United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985).

While Appellant's assertion that Ms. M.B.'s statement to security forces "was the only indication that Ms. M.B. accused [Appellant] of an assault," may be true, it was certainly not the only evidence adduced at trial that Appellant was the perpetrator and the cause of Ms. M.B.'s condition when TSgt V.C. walked into the bathroom and thought that Ms. M.B. was dead. (App. Br. at 25.) Ms. M.B. certainly did not testify that someone else caused her injuries.

Appellant continues to attack SrA B.B.'s credibility and offer him as an alternative to the source of Ms. M.B.'s injuries. However, in doing so, he ignores the evidence, including first and foremost the eyewitness testimony of SrA B.B. SrA B.B. testified that after Appellant discovered SrA B.B. and Ms. M.B. naked together in the guest bed, he initially grabbed Ms. M.B. "by her hair and threw

her…then he threw her towards the front area [near the front door]." (JA at 128-29.) A third security forces member testified about photographs that he took of the residence that night, one of which showed a polka dot rug near the front door. (JA. at 191.) Ms. M.B. recalled falling and laying on the floor on the polka dot rug while Appellant and SrA B.B. argued. (JA at 218.) Her testimony corroborated SrA B.B.'s testimony regarding Appellant's initial assault.

Then, Ms. M.B.'s neighbors heard her screaming in pain and Appellant yelling at her, questioning who she was "fucking." (JA at 76, 87, and 89.) Ms. E.G. and SSgt A.S. heard slamming against the walls and water running. (JA at 72, 79, and 89.) SSgt A.S. kept was looking for security forces to arrive and did not notice anyone leaving the residence as he kept watch. (JA at 90.) Finally, security forces arrived and found Ms. M.B. in the bathroom. (JA at 234.) Appellant was the only male in the home at that time. (JA at 233.) Additionally, while acknowledging that SrA B.B. had a motive to conceal the sexual nature of his interaction with Ms. M.B., and that he was not completely truthful in his initial statement to law enforcement, Appellant's theory and the defense case has even less support in the record. Appellant also provided other explanations for Ms. M.B.'s affirmative head nod as discussed above, and that information must be considered in judging the materiality of this challenged evidence. Therefore, even

if the military judge erred in his admission of the statement, considering all of the other evidence in support of the government's case, and the lack thereof for the defense's case, there was no prejudice to Appellant.

CONCLUSION

The United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 July 2016 via electronic filing.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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Date: 15 July 2016