IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT IN SUPPORT OF CERTIFICATE FOR REVIEW
v.	)	
Sergeant First Class (E-7) **DASHAUN HENRY** United States Army, Appellee	)	Crim. Ap. No. ARMY Misc. 20190688 USCA Dkt. No. _____/AR

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

Certified Issue

DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN EXCLUDING THE FOUR STATEMENTS ON WHICH THE PROSECUTION SOUGHT INTERLOCUTORY APPELLATE REVIEW, PURSUANT TO ARTICLE 62, UCMJ?

Introduction

A battered woman and her pre-teen child each made unsolicited statements regarding a then-occurring assault, and the government presented overwhelming evidence that the declarants' spoke while in extraordinarily excited states. (JA 106–107, 110, 112, 117–18, 132–33, 151). Both the mother and child subsequently stopped cooperating with prosecutors, (JA 102), a circumstance fully consistent with evidence suggesting "that 80 to 85 percent of battered women will recant at some point." Tom Linger, *Prosecuting Batterers After Crawford*, 91 Va.

L. Rev. 747, 768 (2005). Domestic violence survivors stop cooperating with prosecutors at nine times the frequency of those assaulted by anyone other than an intimate partner. Celeste Byrom, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409, 410 (2005). This phenomenon occurs because of "physical retaliation by the abuser, a temporary diminishment of abuse in the relationship, and concerns regarding the loss of financial support. Furthermore, pressure from a batterer may cause a victim to refuse to testify, to change his or her account of the incident of violence when testifying in court, or to recant altogether." *Id*.

Fortunately for prosecutors (and the safety of battered women), military courts may admit excited utterances and present sense impressions, their hearsay character notwithstanding. Mil. R. Evid. 803(1), (2); *see also People v. Connolly*, 942 N.E.2d 71, 75 (Ill. App. 2011) ("Given the studied psychological dynamics of domestic violence," prosecutors frequently rely upon hearsay exceptions in proving their cases because "domestic violence is a type of crime that is very susceptible to intimidation of the victim to ensure the victim does not testify against the abuser."). However, in this case, the military judge erred and sustained hearsay objections to all four statements offered, notwithstanding the overwhelming evidence that the declarants were distraught when reporting the

abuse. This application of the "hearsay rule that excludes the reliable initial report of abuse by the domestic violence victim mocks the truth-finding process because victims' false recantations or failure to appear at trial . . . are the norm in domestic violence cases." Douglas Beloff and Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Columbia J. of Gender & L. 1 (2002). This Court should reverse the judgment below.

Statement of Statutory Jurisdiction

The Army Court reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2016) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(2), UCMJ, which mandates review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to [this Court] for review."

Statement of the Case

On August 20, 2019, the convening authority referred charges against Appellee under Articles 90, 107, 128, and 134, UCMJ. (JA 96–98). The assault and child endangerment charges under Articles 128 and 134, UCMJ, relate to Appellee's alleged assault of his wife, KH, in the presence of their children, JH and DH. (JA 96–98). A panel with enlisted representation, sitting as a general court-martial, began hearing testimony on October 15, 2019. (JA 100–01). On the first

day of trial, the military judge sustained hearsay objections to two statements made by KH and two statements made by JH, all of them relating to and regarding the alleged assault. (JA 107–08, 111, 114, 118–19, 131, 135). The government moved for reconsideration and presented additional evidence on October 16, 2019, but the military judge adhered to his original ruling. (JA 140–45, 147–58). That day, the government filed a notice of appeal under Rule for Courts-Martial (R.C.M.) 908. (JA 180).

The Army Court denied the government's Article 62, UCMJ, appeal on January 13, 2020. (JA 24–31). The government moved for reconsideration and reconsideration en banc on January 31, 2020, and the Army Court granted reconsideration while denying the suggestion for en banc consideration on June 2, 2020. (JA 9). On June 3, 2020, the Army Court again denied the government's appeal. (JA 1–8). In accordance with Article 67(a)(2), UCMJ, The Judge Advocate General of the Army—after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps—certified this case to this Court.

Statement of Facts

Staff Sergeant (SSG) Derek Carson lived next door to Appellee for less than two years prior to December 2018. (JA 103–04, 159–60). At "around 2 o'clock in the morning" on December 29, 2018, Appellee's ten-year-old son, JH pounded on

SSG Carson's front door, waking SSG Carson up. (JA 105). Before this evening, no child had ever pounded on SSG Carson's door in the middle of the night. (JA 112). When SSG Carson answered the door, JH "appeared scared" and "was kind of screaming[.]" (JA 106). JH told SSG Carson, "He's beating my mom. He's beating my mom" [JH's outcry]. (JA 148). Staff Sergeant Carson described JH as "frightened" and "afraid" when they spoke. (JA 107, 117, 136). Although the temperature was approximately 25 degrees, JH only wore pajamas. (JA 123, 147). JH was "yelling," "appeared startled," and indicated "that something had just happened." (JA 118). JH spoke "in the present tense" about the assault. (JA 149).

Staff Sergeant Carson invited JH inside his house and went upstairs to change his clothes. (JA 107). SSG Carson returned downstairs just as JH ran back to his house, yelling, "You better not hit her again" [JH's admonition]. (JA 107, 149). Staff Sergeant Carson stayed outside of his home and watched Appellee's home for "about 10, 15 minutes[,] . . . went back inside the house for a few minutes, and then came back outside again" in time to see Appellee chase JH and his little sister towards SSG Carson's home. (JA 108–09). Staff Sergeant Carson also observed KH run out of Appellee's home and toward his home. (JA 110). She was wearing short sleeves and this was at "[a]bout the same time" as the children. (JA 110). Staff Sergeant Carson and KH were not well acquainted; he did not even know her name. (JA 111, 150). According to SSG Carson, KH

appeared "afraid," "scared," "frightened" and was crying. (JA 110, 150). KH cried out to SSG Carson, "He hit me, he hit me" [KH's outcry] as she ran towards SSG Carson's house. (JA 132–33, 151). KH told SSG Carson that Appellee's abuse had been going on for "the last couple of hours." (JA 158).

When SSG Carson brought KH inside his home, she appeared "afraid" and "cowered" by a coat closet while her children sat on SSG Carson's couch. (JA 112). KH indicated to SSG Carson that she wanted him to call the military police. (JA 112). As SSG Carson called 911, KH went to the bathroom and SSG Carson heard what "sounded to [him] like throwing up." (JA 152). SSG Carson relayed to the 911 operator, "My neighbor just came running over here with her kids, and . . . she said something about her husband was hitting her or something." (Pros. Ex. 1 at 0:32). Staff Sergeant Carson then handed the phone to KH, who was visibly upset as she spoke to the operator. (JA 152). When SSG Carson comparing KH's state at the time she first arrived—when she "cowered" by the closet—to the time of the 911 call, SSG Carson explained that she had calmed down "maybe just a little bit," and that "she wasn't back to a complete state of calm." (JA 153).

KH told the 911 operator that, "My husband has hit me a couple of times over the past few hours." (Pros. Ex. 1 at 1:17). The military police arrived mere minutes after the 911 call ended. (R. at 191). The responding officers noticed red marks on one of KH's cheek and a scratch on her neck. (JA 121, 124–29, 161–

62).[1] They also noted that KH did not appear intoxicated, did not smell of alcohol, did not exhibit signs of impairment, and she expressed concern that Appellee was going to go back to their house. (JA 120, 122, 130).

The government offered to introduce JH's statements, "He's beating my mom, he's beating my mom" and, "You better not hit her again," and KH's statements, "He hit me, he hit me," and "My husband has hit me a couple of times over the past few hours" as excited utterances and present sense impressions. The military judge denied admission as the government sought to introduce them. (JA 107–08, 111, 114, 118–19, 131, 135). In an Article 39(a) session on October 16, 2019, the military judge placed his ruling on the record. The military judge relied extensively on the Army Court's unpublished memorandum opinion in *United States v. Henley*, 2019 CCA LEXIS 384 (A. Ct. Crim. App. 2019). (JA 140). He relied upon *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), and *United States v. Bowen*, 76 M.J. 83 (C.A.A.F. 2017), for the three-prong test (*Arnold* test) for admission as an excited utterance: 1) the statement must be spontaneous; 2) the event prompting the utterance must be startling; and 3) that the declarant must be under the stress of excitement at the time of the utterance. (JA 140).

[1] One responding officer observed that the injury on KH's cheek appeared "a lot redder" in person than what Prosecution Exhibit 4 captured. (JA 125).

As to KH's statements, the military judge found "there was insufficient evidence to show when the alleged assault occurred or the circumstances surrounding that statement in order to determine whether it was spontaneous as opposed to being the product of reflection." (JA 140). In analyzing the second *Arnold* prong, the military judge found that "being assaulted by one's spouse might be startling. However, it is unclear from the evidence presented whether the alleged assault served as the startling event that prompted [KH]'s statements to Staff Sergeant Carson and her 911 call." (JA 140). As to the third *Arnold* prong, the military judge found that "the only evidence regarding injury showed redness of the cheeks and a scratch on the neck." (JA 142). "There was limited evidence presented about [KH's] level of intoxication" which the military judge found to "undercut[] a finding that her demeanor was caused by a startling event." (JA 142). The military judge discounted KH's statement to SSG Carson that Appellee had been "'beating her for the last couple of hours'" because it did not match the level of injuries he would have expected and believed that she "was intoxicated and making exaggerated statements." (JA 137, 142). The military judge elaborated on the extent of the injuries: "It strikes me that [KH] – if the accused's wife was actually being beaten by the accused over a several hour period of time, that she would have had more visible injuries than some redness on her face and a scratch on her neck." (JA 139).

As to JH's statements, the military judge found that the government did not prove that [JH] "observed an alleged assault" and speculated that JH might have simply "hear[d] a commotion or repeat[ed] something that [KH] told him while she was having an intoxicated argument with the accused." (JA 143). The military judge found there to be insufficient evidence that JH made the statement in an excited state in reaction to a startling event because it was possible that it was a reaction to something his mother might have told him. (JA 143–44). Similarly, the military judge found that the government did not meet its evidentiary burden to admit the statements as present sense impressions because he could not determine when the assault occurred. (JA 145). The military judge adhered to this ruling after additional evidence was presented by the government. (R. at 291–92).

Summary of Argument

The military judge abused his discretion by excluding four, quite literally, textbook examples of excited utterances under Military Rule of Evidence (Mil. R. Evid.) 803(2). First, the record demonstrated that a scared ten-year-old ran out of his home at 0200 into below-freezing weather wearing only pajamas, pounded on his neighbor's door, and twice screamed "he's beating my mom." Moments later, the child ran to the home where his mother remained with her abuser (Appellee) and shouted, "you better not hit her again." A few minutes later, Appellee chased the ten-year-old and the child's little sister out of the house, providing KH an

opportunity to escape; she took that opportunity and, while frightened and crying, screamed "he hit me" to the neighbor she had never met before. Once safely inside her neighbor's house, KH "cowered" and was "maybe just a little bit" calmer than before when she told a 911 operator "my husband has hit me a couple of times over the past few hours."

When the government called the witness who heard all four outcries and testified to the demeanor of the two declarants, the military judge used leading questions suggesting that he did not believe the assault occurred. Notwithstanding the military judge's advocacy, this approach did not erode the evidentiary foundation. The preponderance of the evidence still established each prong of admissibility. Yet, the military judge still denied the admission of each statement as an excited utterance, relying extensively on a non-precedential Army Court opinion. The Army Court affirmed the military judge's ruling with an analysis belied by the facts and that muddled who declared what and when. Each of the four statements offered by the government depicts a quintessential excited utterance, and the military judge's suppression of those statements represents an abuse of discretion.[2] His ruling improperly raised the bar to admissibility and

[2] Although the foundational evidence overwhelmingly established that all four statements qualified as excited utterances, JH's two statements—"he's beating my mom" and "you better not hit her again" also satisfy the present sense impression exception of Military Rule of Evidence 803(1).

shrank the excited utterance exception into uselessness, yet the Army Court inexplicably found that "the military judge correctly applied the law and did not abuse his discretion[.]" 2020 CCA LEXIS 195 at *2. It is not within a judge's discretion to get a ruling this wrong, and this Court should reverse.

Standard of Review

This court reviews a military judge's evidentiary rulings for an abuse of discretion. *Bowen*, 76 M.J. at 87. A military judge abuses his discretion "when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2007). A military judge's application of the law to the facts is an abuse of discretion when "the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and law." *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citing *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Lewis*, 78 M.J. 602, 611 (A. Ct. Crim. App. 2018) (quoting *United States v. United Sates Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Law and Analysis

Out-of-court statements offered for the truth of the matter asserted constitute hearsay. Mil. R. Evid. 801(c). Courts-martial do not admit hearsay in the absence of an exception to this general rule against hearsay. Mil. R. Evid. 802. The proponent of hearsay must establish that it meets an exception by a preponderance of the evidence. *United States v. Mehanna*, 735 F.3d 32, 56 (1st Cir. 2013); *United States v. Dababneh*, 28 M.J. 929, 934 (N.M.C.M.R. 1989). The Supreme Court explained that federal courts use this standard because evidence should go "before the jury when it satisfies the technical requirements of the evidentiary Rules[,]" and that "the inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied." *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

A. The Military Judge Abused His Discretion By Denying Admission Of Each Of The Four Statements As Excited Utterances.

Military courts admit hearsay "relating to a startling event or condition, made while the declarant was under the stress of the excitement that caused it." Mil. R. Evid. 803(2). Courts admit excited utterances because "persons are less likely to have concocted an untruthful statement when they are responding to the sudden stimulus of a startling event." *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003) (internal quotation marks omitted). As the Supreme Court of

Washington explained, when interpreting Washington Rule of Evidence 803(a)(2)—which has identical wording to Military Rule of Evidence 803(2)—that the

> determination that excited utterances are reliable enough to be admissible is not intended to, and does not, establish that the underlying crime occurred[;] it merely permits the admitted statements to be considered in conjunction with the other evidence presented at trial. Imposing an independent corroborative proof requirement confuses the admissibility of evidence with the weight to be given to that evidence, which is properly a determination for the trier of fact. By holding that the statement alone is insufficient to corroborate the occurrence of a startling event but that circumstantial evidence, independent from bare words, can corroborate that a startling event occurred, [courts] maintain the integrity of the excited utterance exception and respect the philosophy underlying the rules of evidence to promote the discovery of truth by admitting all relevant evidence.

State v. Young, 161 P.3d 967, 975 (Wash. 2007) (admitting a victim's excited utterance notwithstanding her subsequent recantation).

In order for hearsay to constitute an excited utterance: "(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.'" *Bowen*, 76 M.J. at 88 (quoting *Arnold*, 25 M.J. at 132). A statement that satisfies those elements "meets the threshold for admissibility under Rule 803(2), even though its reliability might be subject to challenge on grounds such as inconsistency with subsequent statements or the speaker's motive to fabricate."

United States v. Hadley, 431 F.3d 484, 498 (6th Cir. 2005) (finding the statements of a visibly upset declarant that her husband had threatened her with a gun constituted excited utterances).

A statement satisfies the first prong when it is "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *Arnold*, 25 M.J. at 132. "'Spontaneity' refers to the state of mind of the person making the statement." 31A C.J.S. Evidence § 493 (footnote omitted). "If the statement occurs while the exciting event is still in progress, courts have little difficulty finding that the excitement prompted the statement[.]" 2 McCormick on Evid. § 272 (footnote omitted). However, "there is no 'absolute spontaneity' requirement to the excited utterance requirement to the hearsay rule." *United States v. Joy*, 192 F.2d 761, 767 (7th Cir. 1999).[3] Answers to questions—even questions posed by a 911 operator—can still satisfy the spontaneity requirement. *Id*.

With respect to the second prong—the occurrence of a startling event—"the declaration itself may establish that a starling event occurred." *United States v. Moore*, 791 F.2d 566, 570 (7th Cir. 1986). Further, the "appearance, behavior, and condition of the declarant may establish that a startling event occurred." *Id.*; *see also Young*, 161 P.3d at 973 (explaining that "circumstantial evidence, such as the

[3] The wording of Federal Rules of Evidence 803(1) and (2) mirrors that of Military Rules of Evidence 803(1) and (2).

declarant's behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made" can corroborate "that a startling event or condition occurred and that the declarant made the statement while under the stress thereof") (internal quotation marks and citation omitted).

Finally, to determine whether a declarant remained under the stress of the startling event, military courts look to "'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.'" *United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003) (quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)).

1. *No Judge Has The Discretion To Conclude That A Child's Screams Of "He's Beating My Mom"—Made In The Middle Of The Night While The Child Is Frightened And Afraid—Do Not Constitute An Excited Utterance.*

The preponderance of the evidence establishes all three *Arnold* factors, notwithstanding the Army Court's conclusion that the record failed to establish any of the factors.[4] 2020 CCA LEXIS 195 at *8. A child running into below-freezing

[4] The Army Court's analysis conflates the declarants. For example, the Army Court saw fit to compliment the military judge for his analysis of the *Donaldson* factors when analyzing the admissibility of JH's outcry. *See* 2020 CCA LEXIS 195 at *7–8 & n.4. However, the military judge conducted a *Donaldson* analysis for KH's outcry – not JH's. (JA 141–44). Further, the Army Court claimed that

temperatures in the middle of the night to a neighbor (the closest safe harbor) while frightened and screaming, "He's beating my mom" speaks "excited[ly.]" *See Arnold*, 25 M.J. at 132. The circumstances make it evident that JH made a "spontaneous utterance while [his] mind was under the influence of the event, and was in the nature of an exclamation," 31A C.J.S. Evidence § 493 (footnote omitted). The scared boy referred to the event in the present tense, while running, in the middle of the night, to a stranger's home, in the winter cold, while wearing nothing more than his pajamas.

That the triggering event itself should be found to be startling is beyond dispute. Very simply stated, the physical assault of one's mother by one's father—whether seen or only heard—undoubtedly constitutes a startling event. *See People v. Merriman*, 332 P.3d 1187, 1238 (Cal. 2014) (finding that because a declaration "described a physical assault by defendant, it clearly satisfied the requirement that the statement in question relates to an occurrence that was startling enough to cause nervous excitement").

Finally, when one reports an ongoing assault with no prompting while "scared," "frightened," "afraid," and "startled," (JA 106–07, 117–18, 136, 148), he

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KH uttered the words that JH spoke to SSG Carson. 2020 CCA LEXIS 195 at *8, n.5. This brief analyzes the statements and circumstances as they actually appear in the record.

remains under the stress of the event. Staff Sergeant Carson testified unequivocally in his description of JH's demeanor and appearance.

In concluding that JH's statement, "He's beating my mom, he's beating my mom" did not constitute an excited utterance, the military judge found that: (1) the government did not demonstrate that JH observed the assault; (2) that he could not make a determination that JH was reacting to a startling event as opposed to repeating what he had been told by his mother; and (3) that the that the government did not present sufficient evidence for him to determine that JH was in an excited state when making his outcry. (JA 143–44). The record rebuts each of these findings and conclusions.

i. Circumstantial Evidence Rebuts The Military Judge's Conclusion That No Evidence Demonstrates That JH Observed The Assault.

The military judge failed to recognize and appropriately weigh the circumstantial evidence that demonstrated that JH had personal knowledge of the assault. This court can "draw an inference" that JH had firsthand knowledge of the alleged assault "not only from the force of the statement itself but from the fact that []he was . . . somewhere in the immediate vicinity" of the alleged assault.[5] *McLaughlin v. Vinzant*, 522 F.2d 448, 451 (1st Cir. 1975); *see also* Advisory Comm. Note to Fed. R. Evid. 803 (explaining that personal knowledge "may

[5] Even the military judge's cross-examination of SSG Carson presupposes that JH would have been in the immediate vicinity of the assault.

appear from his statement or be inferable from the circumstances"). A declarant's "proximity to the scene at the time of the incident provided some circumstantial evidence of firsthand knowledge, which ordinarily may be sufficient to satisfy the foundational requirement in the context of a statement by a phone caller." *Bemis v. Edwards*, 45 F.3d 1369, 1373 (9th Cir. 1995).

Rather than analyze the evidence in the record, the military judge further hypothesized, without *any* factual basis, that it was possible JH "heard a commotion[.]" (JA 143). As an initial matter, if JH heard the assault, he would still have observed it. *See United States v. Boman*, 810 F.3d 534, 540 (8th Cir. 2016) (allowing an excited utterance where the declarant heard, but did not see, the startling event) *vacated on other grounds by* 580 U.S. __, 137 S. Ct. 87 (2016). If this Court accepted the military judge's inappropriate exaltation of sight over hearing, the visually impaired could not perceive a startling event. While seeing one's mother get assaulted might be more startling than merely hearing it, listening to the abuse of one's mother certainly produces enough excitement to provoke a response. The military judge also speculated, again without *any* factual basis, that JH might have "repeated something his mother told him while she was having an intoxicated argument with the accused." (JA 143). Even though this theory lacks any factual support in the record, if a ten-year-old child's mother tells him in the middle of the night that his father is beating her, that communication certainly

constitutes a startling event.[6] *See United States v. Napier*, 518 F.2d 316, 318 (9th Cir. 1975) (finding that being shown a picture of an assailant two months after the assault qualified as a startling event).

When the government presented additional foundational evidence, the military judge used leading questions in an unsuccessful attempt to undermine the foundation and provide a basis for his flawed theory:

> MJ: So, is it possible that he heard something that sounded like somebody was being beaten?
> SSG Carson: I mean, I wasn't in the house. So, it is possible, ma'am -- sorry, sir.
> MJ: And is it possible that his mom just said, "Hey, your dad hit me. Go tell a neighbor?" I mean, is that possible?
> SSG Carson: Again, I wasn't in the home. So it could have happened, Your Honor.
> MJ: And is it possible that he was talking about something that happened a long time ago, like, "My dad," as a general behavior, "beats my mother?"

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[6] If this Court were to indulge the military judge's speculation, the second level of hearsay—KH's statement to JH that she is being beaten—would also be admissible as a present sense impression or an excited utterance. *See* Mil. R. Evid. 805 ("Hearsay within hearsay is not excluded . . . if each part of the combined statements conforms with an exception"); *see also* Advisory Comm. Note to Fed. R. Evid. 805 ("it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception"). If JH ran outside of his home in freezing temperatures in the middle of the night based upon a communication from his mother in order to yell to SSG Carson "He's beating my mom," KH's communication to her son would have been: (1) excited; (2) related to the startling event of being abused; and (3) made under the stress of excitement of being abused. Moreover, a statement by KH that she was presently enduring an assault constitutes a present sense impression. As described in the body of the brief, JH's ultimate communication to SSG Carson satisfies the excited utterance exception.

> SSG Carson: I don't -- that could be, Your Honor. I mean, I'm not sure. Like -- I mean, I wasn't in the home. So I don't . . . ."

(JA 156). Although the military judge attempted to bolster the record to undermine the circumstantial evidence of JH's personal perception of the assault, the record still contains no "articulable basis to suspect that [JH] did not witness the events he described." *Bemis*, 45 F.3d at 1373 (finding no abuse of discretion where the record contained such an "articulable basis"). The military judge's hunt for alternative theories as to JH's knowledge without any factual basis in the record—rather than simply ruling based upon the preponderance of the evidence in the record—was error.[7]

Here, the preponderance of the evidence established that JH yelled, "He's beating my mom, he's beating my mom" in the present tense as he fled away from the house where his mother and Appellee were located, ostensibly seeking help from a neighbor to stop the ongoing assault on his mother. Although proximity alone provides a sufficient basis for personal knowledge, here much more supports the inference of JH's knowledge. The record also reflects "the force of the

[7] The military judge's approach to this evidentiary ruling seems altogether misdirected. When one is observed running around a corner excitedly screaming "Fire! Fire!," it is counterintuitive to think the declarant is referring to the Great Chicago Fire of 1871. Indeed, the preponderance of the evidence based on these circumstances—the content of the utterance, the exclamatory nature, and the fact that the declarant is running while shouting—indicate that the declaration relates to an ongoing fire rather than a historical fire.

statement itself" which was yelled rather than spoken in a conversational tone. *McLaughlin*, 522 F.2d at 451. Beyond the words of JH's statement and the force with which he screamed, the circumstantial evidence—including his petrified demeanor, the urgency which required him to run outside in below-freezing weather in pajamas at 0200 to get help, and the fact that he went back and warned Appellee to not hit KH again—establish JH's personal perception. *See* 5 Weinstein's Fed. Evid. § 803.04, ¶ 3 ("circumstantial evidence and the statement itself may supply" the requisite evidence of personal perception). These facts provide circumstantial evidence that JH had firsthand knowledge of the facts in his statement. *See Miller v. Keating*, 754 F.2d 507, 511–12 (1st Cir. 1985) (finding that declarant's personal knowledge was not established by preponderant evidence where the declarant was unknown, he may have been drawing conclusions, and the tone of the declaration suggested potential bias).

As to the military judge's finding that he could not make a determination that JH was reacting to a startling event as opposed to simply repeating what he had been told to by his mother, SSG Carson testified unequivocally that JH and KH made unprompted statements alleging Appellee hit KH. Those statements indicated that the alleged assaults were either ongoing, as in JH's statement (JA 148–49), or had just occurred within the past few hours and up until moments before, as KH indicated to SSG Carson and the 911 operator (JA 132–33, 151;

Pros. Ex. 1 at 1:17). Each of the four statements at issue in this appeal provide additional foundational evidence that the assault occurred. *See* Mil. R. Evid. 104(a) (allowing consideration of inadmissible evidence when ruling on an evidentiary foundation); *see also* 5 Weinstein's Fed. Evid. § 803.04, ¶ 2[a] (explaining "hearsay may be used as the foundation for a hearsay exception. Any other approach would greatly undermine the utility of the exception by causing valuable evidence to be excluded."). Thus, independent of each statement's individual admissibility, these four utterances statements cross-corroborate each other, providing additional foundational evidence that the declarants spoke from personal knowledge.

ii. JH's Use Of The Present Tense Rebuts The Military Judge's Conclusion That No Evidence Demonstrates The Timing Of The Assault.

Rather than analyze the evidence in the record, the military judge again hypothesized, again without *any* factual basis, that when JH said, "He's beating my mom, he's beating my mom," he could have been referring to a past assault and not one close in time. (JA 143). The factual circumstances surrounding the statement belie this finding. Specifically, SSG Carson testified that JH—a ten-year-old boy—ran to his home at 0200, pounded on his door, and screamed, using the present tense, "He's beating my mom." (JA 148). Irrespective of the highly unlikely chance that JH decided to run to the neighbor's home at 0200 to report an assault he witnessed hours prior, his use of the present tense indicates that the assault was

ongoing at the time of the utterance. The evidence presented of the circumstances surrounding the statement easily demonstrated that JH had no opportunity to reflect and/or deliberate prior to screaming his mom was currently being beaten. *See United States v. Schreane*, 331 F.3d 548, 564–65 (6th Cir. 2003) (finding that the trial court properly admitted the statement as an excited utterance when the declarant ran away from the defendant—with whom the declarant just committed a burglary—and yelled to a police officer that the defendant has a gun). The military judge's dismissal of the government's evidence based upon the pure speculation that "it is possible that [JH] was saying that, at some point, the accused assaulted [KH] as opposed to an assault close in time to the statement" is incongruent with the factual circumstances surrounding JH's statement.

In his final testimony about JH's outcry, SSG Carson testified that JH said "He's beating my mom. He's beating my mom. . . . As in the present tense." (JA 148–49). Staff Sergeant Carson's earlier testimony that JH said "he beat my mom," (JA 134)—as opposed to "he's beating my mom," (JA 148)—does not alter the fact that the preponderance of the evidence supports that JH made his outcry in the present tense. Appellee used his subsequent cross-examination of SSG Carson to only explore KH's appearance, not JH's outcry. (JA 154–55). During his colloquy with SSG Carson—occurring shortly after SSG Carson testified that JH made his outcry "in the present tense," (JA 149)—the military judge elicited that

SSG Carson made the sworn statements in Prosecution Exhibit 10 for identification closer in time to the assault, and that those statements would be the most accurate reflection of what occurred. (JA 158). In Prosecution Exhibit 10 for identification—upon which the military judge relied for portions of his ruling excluding the statements, (JA 142)—SSG Carson indicated that JH said "he's beating my mom," as in the present tense. (JA 163); *see also* Mil. R. Evid. 104(a) (allowing consideration of otherwise inadmissible evidence in making foundational rulings). Prosecution Exhibit 10 for identification accordingly provides additional evidence that JH made his outcry in the present tense. Finally, it is unlikely that a historic assault caused a ten-year-old child to run outside in below-freezing weather at 0200 to get help. Thus, the preponderance of the evidence shows the assault occurred contemporaneously with JH's outcry; the military judge abused his discretion in finding otherwise.

iii. The Military Judge Unreasonably Concluded That A Child Screaming "He's Beating My Mom" At 0200 While Afraid Was Not Excited.

The military judge also erred in finding that there was "insufficient evidence to support the[e] conclusion" that JH's "statement was made in an excited state." (JA 143). This Court's predecessor, the Court of Military Appeals, was "convinced by the facts and circumstances of" *Arnold* – where twelve hours after that appellant molested and attempted to penetrate his thirteen-year-old daughter – "the *girl's unsolicited, spontaneous statements to her school counselor at the first*

available opportunity while she was 'very, very agitated' were indeed 'excited utterances.'" 25 M.J. at 131, 133 (emphasis in original). Likewise, JH—who was three years younger than the *Arnold* declarant—and KH made their statements to SSG Carson while in palpable distress at the very first opportunity they had. At various times in describing JH's demeanor while yelling that his mother was presently being beaten, SSG Carson used the adjectives "scared," "frightened," "afraid," and "startled" to describe the screaming child. (JA 106–07, 117–18, 136, 148). It is of no moment that the military judge speculated that the low temperature in the middle of the night could have caused JH to shake, (JA 144), in light of the litany of adjectives that SSG Carson used to describe his actual observation of JH that morning. The dictionary defines "excite" as "to call to activity; to rouse to an emotional response; [or] to arouse (something such as a strong emotional response) by appropriate stimuli." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/excite, (last visited Jul. 29, 2020). Staff Sergeant Carson's description of JH meets this definition.

The government need only meet its burden to satisfy the *Arnold* factors by a preponderance of the evidence. When the government presents evidence that a young boy fled his house in clothing ill-suited for cold weather in the middle of the night screaming, "He's beating my mom, he's beating my mom," to the closest neighbor, all while appearing frightened, this burden has been met. Accordingly,

the military judge erred by not admitting JH's statements, "He's beating my mom, he's beating my mom" as an excited utterance.

2. No Judge Has The Discretion To Conclude That—When A Child Shouts "You Better Not Hit Her Again" As The Child Runs Towards The Home In Which His Mother Was Then-Suffering An Assault—The Child's Admonition Does Not Constitute An Excited Utterance.

The military judge further abused his discretion in finding that JH's scream of "you better not hit her again"—which JH yelled loud enough that SSG Carson could understand what JH shouted even though he ran in the opposite direction into the cold night (JA 107, 149)—did not constitute an excited utterance. As an initial matter, it is unclear whether the military judge made independent findings of fact or conclusions of law unique to JH's admonition.[8]

JH pounded on SSG Carson's door in the middle of the night while "scared," "frightened," "afraid," and "startled;" disclosed the abuse of his primary caregiver; and in the time it took SSG Carson to put on additional clothing, JH ran home and yelled toward Appellee "you better not hit her again," referring to his mother KH.

[8] The military judge expressly addressed the statement "he's beating my mom." (JA 143). The judge further speculated that JH could have been repeating what his mother had told him. (JA 143). This finding does not appear to be relevant to JH's admonition as he ran back to his home, "you better not hit her again." Despite the confusion, the military judge's decision on both statements relies on his finding that the government did not prove the temporal proximity of the crime to the statements. Thus, it seems that the military judge concluded both statements were inadmissible because the government did not prove when the assault occurred. Regardless of the possible analytical intersection, the Appellant addresses each statement independently.

The brief delay while SSG Carson put on additional clothes did not provide JH much, if any, of an opportunity to calm down, particularly in light of the fact that he ran back towards the ongoing assault of his mother. *United States v. Chandler*, 39 M.J. 119 (C.M.A. 1994) (admitting statement made to friend which occurred a half-hour after the friend drove the declarant away from the startling situation). Any claim that JH no longer operated under the stress of excitement at the time he admonished Appellee lacks merit: JH ran away from the ongoing assault of his mother to report the abuse to the closest adult, and after his outcry, he could not wait the short amount of time it took the adult to get dressed before running back home, while yelling at Appellee to cease the assault, and disappearing into the house in which Appellee was assaulting KH. The military judge's ruling—void of particularized findings or analysis—exemplifies an abuse of discretion.

3. No Judge Has The Discretion To Conclude That A Victim's Unsolicited Outcry Of "He Hit Me"—Made While Afraid, Scared, And Frightened As She Fled Her Attacker—Does Not Constitute An Excited Utterance.

In concluding that he could not make a determination that KH's statement to SSG Carson was spontaneous and that KH was acting under the stress of the startling event, the military judge found that the government did not show when the alleged assault occurred. (JA 140–43). The military judge erred by misconstruing the Army Court's unpublished memorandum opinion in *Henley* to require the government prove when the startling event occurred. Indeed, the

military judge inexplicably seemed to require that the government independently prove Appellee's alleged assault through direct evidence and to a chronometric exactness before he was willing to admit excited utterances about the assault. (JA 138) (questioning "Which witness told me during the course of the testimony, 'we believe that the assault happened at this specific time?'"); (JA 140, 142) (noting "The government has not shown when the alleged assault occurred.").[9] The heightened burden imposed by the military judge is not rooted in the Military Rules Evidence or case law. Further, in his search for direct evidence, the military judge failed to give due weight to the circumstantial evidence that the alleged assault occurred immediately preceding or a short time before KH's outcry.

In *Henley*,[10] the Army Court found that a military judge erred in admitting a statement as an excited utterance made by Captain (CPT) Henley's wife. 2019 CCA LEXIS 384, at *5–11. Captain Henley stood beside his wife as she made the phone call using his phone and, while crying, told the listener that CPT Henley hit her. *Id*. at *6. As to the first *Arnold* prong, the lower court found that there was an

[9] The government notes that JH's use of the present participle verb form "beating" does in fact show precisely when the alleged assault occurred: at the exact time JH made that statement.

[10] The United States does not concede that the unpublished *Henley* opinion correctly analyzed the admissibility of excited utterances or correctly concluded that the statements in that case were inadmissible. However, this brief includes and distinguishes *Henley* because of the degree to which the military judge relied upon it. Even if this Court finds *Henley* persuasive and applies it—which it should not—the much stronger record in this case still establishes an abuse of discretion.

insufficient factual basis to conclude that the wife's statements were spontaneous because that record lacked evidence "the government failed to present *any evidence* as to when the alleged assault occurred . . . *or the circumstances surrounding the statement* in order to determine that it was spontaneous as opposed to being the product of reflection[.]" *Id*. at *6, *9 (emphasis added). As to the second *Arnold* prong, the *Henley* court found that it was unclear whether the alleged assault served as the startling event that prompted the phone call. *Id*. at *7. Lastly, as to the third *Arnold* prong, the lower court found the military judge's finding that the fact that the wife was tearful during the phone call, without any evidence of when the alleged assault occurred, was an insufficient factual basis for the military judge to conclude that her utterance was "close enough in time" to the startling event. *Id*. at *10–11. The error in CPT Henley's court-martial—according to the Army Court—that "without any evidence of *when* the assault occurred," appellate courts "have no way of divining what 'close enough' means when" evaluating whether a statement constitutes an excited utterance. *Id*. at *10. The Army Court held that this "factual finding that [CPT Henley's wife]'s statement was close enough in time to the startling event that she was still under the stress of the startling event" lacked *any* evidentiary support and therefore clearly erroneous. *Id*.

Here, the military judge erred by requiring that the government prove the precise time of the assault in order to satisfy the first and third *Arnold* prongs—spontaneity and remaining under the stress. *See United States v. Arnold*, 486 F.3d 177, 185 (6th Cir. 2007) (en banc). Although the temporal proximity of the startling event to the utterances may be relevant to determining whether the utterance is spontaneous and made while under the stress of the event, it is not determinative. The military judge's steadfast requirement for the government to prove the precise time of the assault in order to satisfy its burden of meeting the *Arnold* test misapplies this Court's *Arnold* test and distorts the Army Court's already-shaky analysis in *Henley*. "Since the key to the rule is lack of capacity to fabricate, not lack of time, the lapse of time between the startling event and the statement is not outcome-determinative." *United States v. Keatts*, 20 M.J. 960, 963 (A.C.M.R. 1985). In fact, an "unspecified interval between the startling event and the [declarant]'s statement to [the witness] does not automatically preclude [the declarant]'s statement from being an excited utterance, if the lack of capacity to fabricate is adequately established." *Id.* While a lengthy "lapse of time creates a strong presumption against admissibility[,]" the time between the startling event and the utterance is but one factor in the analysis. *Feltham*, 58 M.J. at 475 (quotations omitted). A victim's statement to police about an assault can still

qualify as an excited utterance six hours after an assault. *See United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990).

This case is easily distinguishable from *Henley*. In *Henley*, the record lacked any direct or—in the Army Court's estimation, even circumstantial—evidence to show that the declarant's statement was uttered as a result of the startling event, particularly in light of the fact that she made the phone call using CPT Henley's phone while he stood beside her. Conversely, the statement made by KH satisfies the threshold requirements for admissibility because KH and JH made unsolicited statements to SSG Carson "immediately after . . . flight from the scene of the assault." *See United States v. Golden*, 671 F.2d 369, 371 (10th Cir. 1982) (admitting a statement made after a 12-mile drive as an excited utterance); *see also United States v. Cruz*, 156 F.2d 22, 30 (1st Cir. 1998) (admitting a statement made by declarant when she arrived at a battered women's shelter at 8:00 a.m. although the beating stopped four hours earlier). In stark contrast to the circumstances of the utterance in *Henley*, where the declarant called a trusted friend, as her abuser remained calmly beside her, KH made her outcry in the middle of the night to a neighbor with whom she was not well acquainted, without prompting, as she ran away from Appellee while crying and frightened. (JA 110, 132–33). KH's outcry that Appellee hit her came minutes after her son, wearing only pajamas in below-freezing weather, ran from the house where KH and

Appellee were to SSG Carson's home; yelling, "He's beating my mom, he's beating my mom" and returned to the house shouting for his father, Appellee, not to hit his mother again. (JA 108–10). Additionally, KH indicated to SSG Carson and the 911 operator that the physical abuse had been going on for "the last couple of hours." (JA 158). This evidence shows that the government demonstrated by any evidentiary standard that KH's outcry to SSG Carson was spontaneous. Accordingly, the record here—which includes significantly more circumstantial evidence than the *Henley* record—rebuts the military judge's finding that the government did not provide sufficient evidence "to show when the alleged assault occurred or the circumstances surrounding the statement" in order to determine the spontaneity requirement and the timing of the assault. Contrary to the military judge's finding, the record amply shows that KH was under the stress caused by the alleged assault at the time she made her outcry.

Furthermore, the military judge erroneously read the Army Court's holding in *Henley*—that a tearful demeanor, with nothing more, is insufficient to establish that a statement meets the requirements of Military Rule of Evidence 803(2)—to require that he find that the government had presented credible evidence that the crime charged had occurred before ruling that a statement offered to prove the charge was admissible. As such, the military judge's ruling impermissibly

suggests that excited utterances are admissible only to the extent they corroborate other evidence of the crime. Such limitation on admissibility is inappropriate.

Because the military judge was not himself convinced that Appellee had assaulted his wife, KH, he limited the government's ability to admit evidence to prove the very crime the judge was not yet convinced had occurred. The military judge's analysis is completely backwards. As part of his analysis that the government did not demonstrate the precise time of the assault, the military judge found that KH "did not have fresh injuries or cuts" despite the evidence that KH had noticeable redness on her cheek, a scratch on her neck, and that both KH and JH's statements clearly indicated that the assaults were ongoing. (JA 122, 124, 128, 161–62). Rather, the military judge found that KH's description of the assault occurring over the past few hours was undercut by the nature of her injuries, and he speculated that (1) the visually-apparent injuries should have been more severe if what KH said were true and (2) the injuries could have occurred at any given time.[11] (JA 137–38, 142).

These findings are afield of the *Henley* court's conclusion that a tearful demeanor, with no other circumstantial evidence, was insufficient to base a conclusion of the timing of the assault and satisfy the third *Arnold* prong. To

[11] None of the four statements at issue in this appeal indicate where Appellee "hit" KH. The military judge erred by assuming that KH could only have been injured in an area not covered by clothing.

bolster his conclusion that the government did not show the specific time of the assault in order to satisfy the *Arnold* test, the military judge crossed a line by judging both KH's credibility and the merits of the case, and he effectively required that the government prove the actual occurrence of the *corpus delicti*. This was error. There is "no requirement for independent evidence to corroborate the startling event which prompted the excited utterance." *United States v. Armstrong*, 30 M.J. 769, 774 (A.C.M.R. 1990). The Supreme Court made clear that even if the judge thinks the proponent of hearsay loses on the merits, the evidence should be admitted if they establish a hearsay exception. *See Bourjaily*, 483 U.S. at 175.

Additionally, the military judge found that KH "was intoxicated and making exaggerated statements," and that her intoxication "undercuts a finding that her demeanor was caused by a startling event." (JA 142). However, "a declarant's intoxication . . . affects only the weight of the evidence, *not its admissibility*." *Simmons v. United States*, 945 A.2d 1183, 1191 (D.C. 2008) (emphasis added); *see also Commonwealth v. Brown*, 602 N.E.2d 575 (Mass. 1992) (admitting an excited utterance where the declarant spoke under the influence of morphine). Contrary to the military judge's conclusion, given KH's "intoxication and emotional state it is not clear that she had the capacity . . . to reflect or fabricate." *State v. Watts*, 938

A.2d 21, 24 (Me. 2007). The military judge erred by relying on KH's purported intoxication as the basis for exclusion.[12]

The military judge also erred when he found, under the second *Arnold* prong, that it was "unclear" from the record that the alleged assaults served as the startling event. (JA 140). The military judge's conclusion notwithstanding, common sense dictates that KH hollering, "He hit me, he hit me," in the middle of the night while fleeing the house she shared with Appellee, crying and showing physical signs of injury, the "hit" which she is yelling about is the source of her excitement. *See United States v. Smith*, 606 F.3d 1270, 1280 (10th Cir. 2010) (finding an "obvious nexus between the content of the statement—Jane Doe's utterance—'Help me, help me. He raped me.'—and the startling event, her sexual assault"). It is clear from the following facts that the alleged assault served as the startling event for KH's statement to SSG Carson: 1) KH, with her children, fled away from Appellee the middle of the night and to a neighbor who did not even know her name; 2) KH was frightened and said that Appellee hit her as she ran away from Appellee; 3) KH had facial and neck injuries; 4) KH "cowered" by a

[12] Even if intoxication were a proper basis for excluding an excited utterance, the record does not contain sufficient evidence to find that KH was intoxicated. The only evidence of KH's intoxication was SSG Carson's testimony that his wife told him that KH smelled of alcohol and that Appellee told him a few days after the alleged assault they were drinking the night of the incident. (JA 115, 119). Officers responding to the scene testified that KH did not smell like alcohol and did not appear to be intoxicated. (JA 120, 122).

closet as soon as she entered SSG Carson's home; 5) KH tearfully indicated to SSG Carson that she wanted to him call 911 after telling him that the abuse occurred over the past few hours; and 6) KH indicated to the military police that she was afraid Appellee would return to their house.[13] *See Arnold*, 486 F.3d at 185 (finding that the declarant's simple "act of calling 911" corroborated the startling nature of the event). Accordingly, the record demonstrates that Appellee's alleged physical assault of KH served as a qualifying startling event.

A judge's "evaluation of the complaining witness' credibility and hence ultimately of the [statement]'s reliability . . . has no place in the excited utterance rule." *Young*, 161 P.3d at 971. Yet the military judge extensively analyzed KH's credibility when denying admission of her outcry. The record in this case should leave this Court firmly convinced that the military judge erroneously and unreasonably determined that the government did not meet its evidentiary burden to satisfy the *Arnold* test. KH's statement to SSG Carson, "he hit me, he hit me" as she fled, crying and frightened, from Appellee in the middle of the night with evidence of injuries on her face and neck, while later indicating to SSG Carson and the 911 operators that Appellee repeatedly hit her over the past few hours, was an excited utterance.

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[13] These facts also demonstrate that the assault caused KH's statement to the 911 operator.

4. No Judge Has The Discretion To Conclude That—When A Domestic Violence Survivor Tells A 911 Operator "My Husband Has Hit Me A Couple Of Times Over The Past Few Hours" While Visibly Upset And "Maybe Just A Little Bit" Calmer Than When She "Cowered" After Initially Disclosing The Abuse—The Statement Does Not Constitute An Excited Utterance.

KH's statement to the 911 operator, "my husband has hit me a couple of times over the past few hours," was not the product of reflection. This statement is admissible as an excited utterance because the alleged domestic assault that prompted the statement was startling, and KH—who was "maybe just a little bit" calmer than when she "cowered" in the corner (JA 153)—remained under the stress of the assault at the time of the call. The Sixth Circuit, sitting en banc, explained that the excited utterance "exception may be based solely on testimony that the declarant still appeared nervous or distraught and that there was a reasonable basis for continuing to be emotionally upset." *Arnold*, 486 F.3d at 185 (internal quotation marks omitted). Staff Sergeant Carson's testimony established the requisite foundation by a preponderance of the evidence.

The military judge first erred by finding that "it is unclear from the evidence presented whether the alleged assault served as the startling event that prompted [KH]'s statements . . . [in] her 911 call." (JA 140). The evidence established nothing else that could have "served as the startling event" other than the alleged abuse. Further, the 911 operator's "open-ended and nonleading" question to KH did not make her response a non-spontaneous product of reflection. *United States*

v. Naprstek, 2001 CCA LEXIS 392 at *23 (A. Ct. Crim. App. 2001) (affirming the conclusion that a statement constituted an excited utterance "one-and-a-half days" after the startling event even though it was made in response to questioning); *see also United States v. Glenn*, 473 F.2d 191, 194 (D.C. Cir. 1972) (holding that a victim's excited utterance "may be admissible although made in response to an inquiry" because the "decisive factor is that the circumstances reasonably justify the conclusion that the remarks were not made under the impetus of reflection"); *United States v. Pearson*, 33 M.J. 913, 915 (A.F.C.M.R. 1991) (explaining just because a declaration "was obtained through questioning is not a barrier to its admission" as an excited utterance). "[E]ven if prompted by questioning, a statement may still be admissible [as an excited utterance] if the questions are *somewhat* open-ended." *United States v. Frost*, 684 F.3d 963, 974 (10th Cir. 2012) (emphasis added).

The 911 operator's only question to KH could not have been more open-ended. He simply asked, "Can you tell me what's going on?" (Pros. Ex. 1 at 1:14). The federal courts uniformly agree that a "general question like 'what happened?' may serve as a nudge that elicits an excited utterance, whereas responses to detailed questioning lack the characteristic spontaneity of an excited utterance." *Frost*, 684 F.3d at 975; *accord Joy*, 192 F.3d at 767 (finding a statement made in response to a 911 operator's questions constituted an excited

utterance); *Glenn*, 473 F.2d at 193–195 (reversing the trial judge's pre-trial ruling which suppressed an excited utterance made in response to a police officer's question, "What happened?"). Here, when asked what happened, KH reiterated the same thing that she told SSG Carson minutes earlier: that "My husband has hit me a couple of times over the past few hours." (Pros. Ex. 1 at 1:17; JA 152, 158). The consistency in the level of detail between KH's statements to SSG Carson and on the 911 call demonstrate that she did not use this time to reflect and/or embellish her story. Additionally, the alleged assault served as the startling event prompting KH's statement in the 911 call for all of the same reasons it served as a startling event prompting her statement to SSG Carson.

Second, the military judge erred in concluding that KH did not remain under the stress of excitement of the alleged assault at the time of the 911 call and finding that KH was "calm" during the phone call. Staff Sergeant Carson testified that KH "was afraid" as she spoke to the 911 operator. (JA 152); *see also United States v. Green*, 125 Fed. App'x 659, 662 (6th Cir. 2005) ("the trauma and anxiety produced by a spousal assault – which form the predicate for calling something an excited utterance – do not suddenly dissipate when the assailant leaves the scene"). He further elaborated that KH was tearful and "visibly upset [while] speaking to the operator[.]" (JA 153); *see Frost*, 684 F.3d at 975 (affirming the decision to admit an excited utterance where the declarant's "statements to the officers came

while she was still visibly upset" even though the "statements were the product of police questioning approximately an hour after the" startling event). It appears from the audio of the call that KH struggled to tell the operator that her husband hit her over the past few hours. (Pros. Ex. 1 at 1:17). When trial counsel asked SSG Carson to compare KH's state at the time she first arrived to the time of the 911 call, SSG Carson responded that she had calmed down "*maybe* just a little bit" from when she "cower[ed] in the corner," and he agreed that "she wasn't back to a complete state of calm." (JA 153) (emphasis added). The record thus rebuts the military judge's finding that KH did not remain under the stress of excitement when she reported Appellee's abuse to the 911 operator.

The "spontaneity of the statements" rather than "the degree of excitation is the key to admissibility." *United States v. Urbina*, 14 M.J. 962, 965 (A.C.M.R. 1982) (allowing an excited utterance where the declarant was "a little upset"). The military judge erred when he found that the government did not demonstrate by a preponderance of the evidence that KH remained under the stress of the alleged assaults. Accordingly, the military judge abused his discretion by not admitting KH's 911 call as an excited utterance.

B. The Military Judge Abused His Discretion By Denying Admission Of JH's Statements As Present Sense Impressions.

Military courts admit hearsay "describing or explaining an event or condition, made while or immediately after the declarant perceived it." Mil. R.

Evid. 803(1). Under this Rule, "in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable." Advisory Comm. Note to Fed. R. Evid. 803. There is no per se rule indicating how much time must pass before a statement is no longer "immediately after" the event. Mil. R. Evid. 803(1) analysis at A22-63. Although this Court has never determined the outside parameters of what constitutes "immediately after" the event, service courts have found "as a general matter, that five minutes will usually be within the present sense impression exception and twenty minutes is at the outer edge of the exception." *United States v. Brown*, 77 M.J. 638, 651–652 (A. Ct. Crim. App. 2018);[14] *see also* Saltzburg's Mil. R. Evid. Man. § 803.02[2][b] (7th ed. 2011) ("Generally, a statement must be made as soon as the opportunity to speak arises or immediately thereafter."). Federal courts of appeals permit an even greater period of time than the service courts. *See United States v. Blakely*, 607 F.2d 779, 786 (7th Cir. 1979) (allowing a present sense impression made twenty-three minutes after the event).[15]

The government met its burden to demonstrate the admission of their statements as present sense impressions by a preponderance of the evidence. JH

[14] Although *Brown* is a published opinion of the Army Court, LexisNexis has not associated the Military Justice Reports citation with the opinion. However, the opinion is available at 2018 CCA LEXIS 107.
[15] *Idaho v. Wright*, 497 U.S. 805 (1990) undermines *Blakely*'s unrelated Confrontation Clause analysis but does not affect its hearsay analysis.

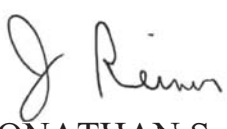
fled to his next door neighbor's home in the middle of the night and used the present tense to report a then-occurring assault. (JA 148). Because JH made his outcry immediately after running next door, it satisfies any definition of "immediately after." Further, because JH ran home and warned Appellee in the short amount of time that it took SSG Carson to get dress, JH's admonition satisfies the *Brown* standard as well. To the extent that the court has any concerns about JH's basis of knowledge, it can be—as argued above—gleaned from the circumstances or, at a minimum, relayed from KH through JH as an excited utterance and/or present sense impression.

JH's outcry to SSG Carson and admonition to Appellee are admissible as present sense impressions. The military judge's finding that he could not conduct the legal analysis for present sense impression because the government did not show when the statements were made as related to the alleged assault and that JH personally observed the alleged assault, (JA 145), is incorrect for all of the same reasons as noted above in the excited utterance analysis.

The record reflects the short time between the JH's perception of the assault, his outcry to SSG Carson, and his admonition to Appellee. Therefore, the military judge abused his discretion in not admitting their statements as prior consistent statements.

Conclusion

The United States respectfully requests that this Honorable Court reverse the judgment of the Army Court and the military judge.



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

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2. This brief complies with the typeface and type style requirements of Rule 37 because:

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on August 3, 2020.

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