IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
Sergeant First Class (E-7) **DASHAUN HENRY** United States Army, Appellee	)	Crim. Ap. No. ARMY Misc. 20190688 USCA Dkt. No. 20-0342/AR

JONATHAN S. REINER
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0793
jonathan.s.reiner.mil@mail.mil
U.S.C.A.A.F. Bar No. 35862

ALLISON L. ROWLEY
Captain, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36904

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
Sergeant First Class (E-7) **DASHAUN HENRY** United States Army, Appellee	)	Crim. App. No. ARMY Misc. 20190688 USCA Dkt. No. 20-0342/AR

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?

Statement of the Case

On August 3, 2020, the United States filed a certificate for review and supporting brief with this Court. Appellee responded on September 1, 2020. The United States' reply follows.

Argument

A. Appellee's Analysis Avoids Important Facts.

Appellee's analysis wholly ignores that: (1) JH made his outcry at 0200; (2) he ran into below-freezing weather wearing only pajamas; (3) JH's petrified

demeanor; and—most significantly—(4) that JH spoke in the present tense. (JA 105, 107, 117, 116, 148–49, 163; R. at 177). Although Appellee's statement of the facts uses the word "scared" and acknowledges the early morning hour, (Appellee's Br. 3), his brief does not even contain any of the words Staff Sergeant (SSG) Carson used to describe JH: "startled," "frightened," "screaming," and "afraid." (JA 118, 148). The descriptors use by SSG Carson provide important foundational evidence to demonstrate that JH's statements qualify as excited utterances.

Not only do these circumstances indicate that JH labored under the stress at the time he spoke, they also indicate he personally perceived the substance of his declarations. The question before the military judge was not whether the foundation proved beyond a reasonable doubt that JH personally perceived the event. Instead, the military judge needed to decide only whether—based upon the evidence in the record—it is more likely than not that JH personally perceived the events he described when "startled," "frightened," and "afraid," while running outside at 0200 in below-freezing weather, and screaming to the closest adult that his father was then-beating his mother. The preponderance of the evidence suggests that JH personally perceived the abuse because—had JH *not* perceived the terror of Appellee beating his mother—JH would *not* have fled his home in the middle of the night and he would *not* have exuded a petrified demeanor. Although

the evidence is circumstantial, it satisfies, by a preponderance of the evidence, that JH personally perceived the events he described. Indeed, SSG Carson's testimony amply satisfies the three-pronged test that this Court articulated in *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), and JH's outcry depicts a text-book example of an excited utterance.

Further, Appellee does not acknowledge, let alone analyze, the evidence that KH was "afraid," "scared," "frightened," and "cower[ing]" at the time of her statements. (JA 110, 112, 150). Rather, Appellee cloaks himself in the military judge's finding that KH was intoxicated.[1] (Appellee's Br. 22–23). Put simply, KH's purported intoxication is but a minor consideration in the greater analysis of the full circumstances surrounding her utterances. The Appellee avoided discussion of the totality of the circumstances, which included that KH was described as afraid, scared, frightened, and cowering. (JA 110, 112, 150). Appellee's avoidance of the same evidence the military judge ignored highlights that the military judge's ruling fell well outside of the bounds of his discretion.

[1] Appellee claims that Appellant ignored this Court's holding that a military judge should consider a declarant's level of intoxication. (Appellee's Br. 22). However, Appellant's opening brief squarely addresses the military judge's faulty analysis regarding the impact of any intoxication. (Appellant's Br. 34–35). Specifically, Appellant pointed out that intoxication (1) reduces the capacity to fabricate and (2) affects the weight to be given to a statement rather than its admissibility. *Id*. (citing *Simmons v. United States*, 945 A.2d 1183 (D.C. 2008); *State v. Watts*, 938 A.2d 21 (Me. 2007); *Commonwealth v. Brown*, 602 N.E.2d 575 (Mass. 1992)).

B. The Evidence Established When The Startling Event Occurred, And Appellee Over-Relies On A Purported Absence Of Such Evidence.

Appellee concedes that "[t]he 'critical determination' is whether the declarant was still under the stress of the startling event while uttering her statement, *not the amount of time that lapsed between the event and the statement*." (Appellee's Br. 20 (quoting *United States v. Henley*, 2019 CCA LEXIS 384 at *9 (A. Ct. Crim. App. 2019) (emphasis added)). Published decisions also support Appellee's claim. *See United States v. Keatts*, 20 M.J. 960, 963 (A.C.M.R. 1985) ("the lapse of time between the startling event and the statement is not outcome-determinative"). Yet the very first subheading of Appellee's argument section tells this Court that military judge properly excluded the hearsay because "the government failed to prove . . . the timing of the alleged assault[.]" (Appellee's Br. 11). Indeed, Appellee spends several pages advancing this argument in an additional sub-subsection entitled "[t]he government failed to establish the time of the alleged assault." (Appellee's Br. 14–16). Further, Appellee argues against admissibility claiming that "the record is silent as to the time of the traumatic event[.]" (Appellee's Br. 20) (quotation marks omitted). The military judge lost focus on the pivotal analysis of whether the statements were made while still under the stress when he became preoccupied with the precise timeline of when Appellee assaulted KH. Accordingly, he abused his discretion when he denied the admissibility of the statements based almost exclusively on this factor.

With respect to the timing of the assault vis-à-vis JH's outcry—notwithstanding the evidence that JH spoke in the present tense—SSG Carson testified that JH indicated "that something had just happened." (JA 118). The very most this Court has said about the timing of a starting event in relation to the excited utterance is that "that 'a lapse of time between the event and the utterance creates a strong presumption against admissibility.'" *United States v. Feltham*, 58 M.J. 470, 475 (C.A.A.F. 2003) (quoting *United States v. Jones*, 30 M.J. 127, 128 (C.M.A. 1990) (finding that a statement made in response to questioning about the declarant's emotional state twelve hours after the startling event did not satisfy the *Arnold* test)).[2] As SSG Carson testified that JH told him "that something had just happened," (JA 118), the statements here are closer than any of the ones cited by the *Feltham* court.

Even if this Court assumes for the sake of argument that the government did not prove the timing of the event—even though JH spoke in the present tense and KH told the 911 operator that Appellee abused her "over the past few hours"—the evidence still would not demonstrate a lapse in time. In that case, the record would simply lack evidence of the precise time of the assault rather than affirmatively create evidence of the "lapse of time" this Court contemplated in *Feltham*.

[2] *Feltham* relied upon a series of this Court's precedents allowing admission as excited utterances of cases with far greater delays than the delay the military judge speculated occurred. 58 M.J. at 475 (citing cases).

Appellee claims that the "military judge merely sought a point of reference from which he could anchor Master JH's statements in order to determine whether he was under the stress of the alleged assault when he made the offered statement." (Appellee's Br. 15–16). Staff Sergeant Carson provided that evidence when he testified before the military judge that JH spoke "in the present tense," (JA 149). Staff Sergeant Carson's sworn statement to the police—which the military judge relied upon for his ruling—indicates the same. (JA 142, 163). The petrified demeanor of the declarants further corroborates that they remained under the stress when they spoke. Preponderant evidence demonstrates when the assault occurred.

C. Appellee Over-Relies On JH & KH's Refusal To Cooperate.

Appellee's brief leans heavily on the notable absence of testimony from JH and KH, repeatedly reminding this Court that the declarants did not testify. (Appellee's Br. 13 (questioning perception based upon the "outright absence of Master JH's testimony"), 14 (same because "Master JH declined to testify"), 16 ("Master JH . . . failed to testify. Simply put, *no one* that testified knew when the alleged assault occurred.") (emphasis in original), 21 ("KH—the person who was allegedly assaulted—declined to testify")). Appellee's reliance on the declarants' refusal to cooperate ignores the Supreme Court's acknowledgement that a battered woman is "notoriously susceptible to intimidation or coercion . . . to ensure that she does not testify at trial." *Davis v. Washington*, 547 U.S. 813, 833 (2006).

Once a vulnerable victim—such as a domestic violence survivor—reports her assailant, "abusers shift their tactics, using psychological domination to interfere in investigations and stymie prosecutors. Abusers' ability to interfere with prosecutions has been documented in a growing body of social science research." (*Amici Curiae*'s Br. 7). Here, KH initially cooperated with law enforcement. By the time of trial, the government's opening statement acknowledged that "there are two notable absences from the government's witness list: [KH] and [JH]. They are not government witnesses. *They're his witnesses*." (R. at 136) (emphasis added). This development is consistent with social science.

This Court previously acknowledged that "continu[ing] to reside at home and . . . see[ing] first-hand the stress placed on the family unit by Appell[ee]'s arrest and forthcoming trial . . . could, by itself, cause a [declarant of an excited utterance] to bolt as this one did." *Arnold*, 25 M.J. at 133 n.4. As well-explained in the *amici curiae*'s brief, the dynamics of family offenses explain why JH and KH—just like the *Arnold* declarant—did not testify at trial. Appellee's attempts to leverage their nonparticipation to justify the military judge's decision to preclude admission of the JH and KH's statements, fails to address these concerns. For example, Appellee argues "*no one* that testified knew when the assault occurred" because SSG Carson "repeatedly stated that he was not in the house when the

alleged assault occurred."[3] (Appellee's Br. 16) (emphasis in original). Appellee also claims that JH's decision not to testify against Appellee, his father, inhibits a finding of personal perception. (Appellee's Br. 14). Staff Sergeant Carson's testimony fills the gaps and provides the necessary foundation. If courts could not consider evidence offered by the hearer of an excited utterance who did not himself perceive the startling event, then the hearsay exception would have no value; if the declarant testified, the hearer's testimony would frequently be cumulative.

D. The Rules of Evidence Remain Constant Regardless of The Charge Sheet.

Appellee claims that the United States asks this Court to "depart from the foundational requirements of the rules of evidence simply because this case involves domestic violence."[4] (Appellee's Br. 9). Appellant has not asked this Court to ignore the Military Rules of Evidence. Appellant will not ask this Court to ignore the law. Rather, the government merely requests that this Court *apply* the Rules of Evidence in a manner consistent with the text of the Rules, this Court's precedent, and other persuasive authorities. The Supreme Court explained that "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the [law] does not require courts to acquiesce." *Davis*, 547 U.S. at 833. Appellant simply asks this Court to acknowledge that

[3] As explained above and in Appellant's Brief 22–24, 28, this assertion lacks support in the record.
[4] Appellee did not offer a citation to support this assertion.

context in applying, not lessening, the Military Rules of Evidence. Although Appellant chose to ignore large swaths of the record, this Court should appreciate the context of domestic violence cases—just as the Supreme Court did in *Davis*.

Conclusion

When this Court weighs the evidence in the record—rather than ignore it as Appellee chose to—it should find that each of the four hearsay statements qualify as excited utterances because each satisfies all elements of the *Arnold* test. Further, this Court should find that both of JH's statements qualify as present sense impressions. The United States respectfully requests that this Honorable Court reverse the judgment of the Army Court and the military judge.

JONATHAN S. REINER
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35862

for ALLISON L. ROWLEY
Captain, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36904

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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

This brief contains 1,965 words.

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

This brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

JONATHAN S. REINER
Major, Judge Advocate
Attorney for Appellant
September 8, 2020

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 September 8, 2020.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate General, United States Army
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822