IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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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 STATUTORY JURISDICTION

The Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10. U.S.C. § 862 [UCMJ]. This Honorable Court has jurisdiction over this matter pursuant to 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 specification of Article 134 involved Master JH, appellee's son, while the specification of Article 128 involved Mrs. KH, appellee's wife.

On October 15, 2019, the military judge sustained the defense's objections to the government's repeated efforts to enter into evidence two out-of-court statements attributed to Master JH and two out-of-court statements attributed to Mrs. KH. (JA 107–08, 111, 114, 118–19, 131, 135). The government requested reconsideration of the rulings, which the military judge denied on October 16, 2019. (JA 180). The same day, the government filed notice of appeal under Rule for Court-Martial [R.C.M.] 908. (JA 180).

On January 13, 2020, the Army Court denied the government's appeal pursuant to Article 62, UCMJ. (JA 24–31). On January 31, 2020, the government moved for reconsideration and reconsideration *en banc*. The Army Court granted reconsideration, but denied reconsideration *en banc*. (JA 9). On June 3, 2020, the Army Court again denied the government's appeal. (JA 1–8). On August 3, 2020, the Judge Advocate General of the Army certified the instant case to this court pursuant to Article 67(a)(2), UCMJ.

STATEMENT OF FACTS

1. Hearsay Statements.

The government attempted to enter three groups of hearsay statements into evidence: (1) Master JH's statements to appellee's neighbor, Staff Sergeant (SSG) Derek Carson; (2) Mrs. KH's statements to SSG Carson; and (3) Mrs. KH's audio recorded statements to a 911 operator. (JA 106–07, 113–14, 117–18, 132–35). Mrs. KH and Master JH themselves never testified at trial. Instead, trial counsel repeatedly attempted to enter this evidence into the record through the testimony and sworn statement of SSG Carson. (JA 106, 110, 113).

SSG Carson testified that around 0200 on the morning of December 29, 2018, he awoke to Master JH, age ten, at his door. (JA 105). According to SSG Carson, Master JH was dressed in his pajamas, looked scared, and yelled, "[h]e beat my mom. He beat my mom." (JA 106, 134). According to SSG Carson's sworn statement, Master JH then ran back towards his house saying "[y]ou better not hit her again." (JA 139, 163–64). Approximately fifteen to twenty minutes later, Mrs. KH, fully dressed and wearing a jacket, ran over to SSG Carson's house. (JA 109, 139).

Staff Sergeant Carson testified that Mrs. KH initially said to him, "something like, 'he hit me.'" (JA 142, 158, 163–64). However, he stated that her claim was not supported by her appearance, as he saw no injuries on her. (JA 119).

Staff Sergeant Carson testified that he heard what sounded like her vomiting in the bathroom right. (JA 119). He also testified his wife told him Mrs. KH's breath smelled of alcohol. (JA 119).

Staff Sergeant Carson asked if Mrs. KH wanted him to call the Military Police (MPs); he contacted the MPs after she indicated she wanted him to do so. (JA 112). Mrs. KH told the 911 responder that her husband "beat me a couple of times over the past few hours . . . and someone needs to come here and get him." (Gov't Br. at 6). When the MPs arrived, Mrs. KH told the responding police officers that she had been drinking that evening. (JA 121). While the responding officers noticed redness on Mrs. KS's cheeks and a lone scratch on her neck, they did not identify any other injuries. (JA 122, 166). Mrs. KH did not disclose any additional injuries.

2. The prosecution's attempts to admit the hearsay statements.

Trial counsel repeatedly attempted to introduce Master JH and Mrs. KH's statements and the 911 recording. (JA 106, 113–14, 131, 135–36). The military judge sustained defense's objections in each instance due to a lack of foundation and evidentiary support. (JA 106, 113–14, 131, 135–36). After further attempts to enter the evidence, the military judge provided an expanded ruling. (JA 140).

3. The military judge's ruling.

a. Analysis of the Excited Utterance Exception.

The military judge cited the Army Court's decision in *United States v. Henley*, 2019 CCA LEXIS 384 (A. Ct. App. Sep. 27 2019) (mem. op.), addressing the excited utterance standard established in *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987) and *United States v. Bowen*, 76 M.J. 83, 88 (C.A.A.F. 2019). (JA 140).

The military judge found, "the government has not shown when the alleged startling event occurred," and it was "unclear from the evidence whether the alleged assault served as the startling event." (JA 140). Drawing guidance from the factors enumerated in *United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003), the military judge found the government had not proven that the statements were made under the stress of excitement from a startling event. (JA 141). Quoting *Henley*—"[n]ot every statement a person utters while crying is safe from the dangers of hearsay"—the military judge held that "[w]ithout evidence of when the alleged assault occurred, I cannot make a determination that the alleged victim was acting under the stress and excitement, caused by the event or condition." (JA 142).

The military judge further noted that based on the lack of specific information as to when the alleged assault occurred and the alleged victim's lack of fresh injuries, "it is possible the assault occurred earlier in the day or even the day before." (JA 142). Thus, the military judge found, as a factual matter, that Mrs.

KH's claim that her husband was "beating her for the last couple of hours," did not match her injuries, which "undercuts the argument that the startling even was close in time to the purported excited utterance." (JA 142). The military judge also found that Mrs. KH may have been intoxicated, as she smelled of alcohol and vomited close in time to making these statements, which may have affected her statements more than any startling event. (JA 143). Additionally, the military judge noted Mrs. KH's calm demeanor during the 911 call, and that it was unclear how much time had elapsed from the alleged startling event to the 911 call. (JA 142–43).

The military judge could not determine that Master JH was "reacting to a startling event as opposed to just repeating what he . . . had been told by his mother." (JA 143). The military judge noted that it was "unclear what exactly [Master JH] said," and that it was possible he was saying that "at some point, the accused had assaulted [Mrs. KH], as opposed to an assault close in time to the statement." (JA 143).

Additionally, the military judge found that nothing offered by the government could demonstrate that Master JH had personally observed the alleged assault. (JA 143). The military judge also noted SSG Carson was not familiar with Mrs. KH or Master JH and thus could not determine whether "their behavior was out of character or based on an excited state." (JA 144). Even if excited, the

military judge cited *Henley's* holding that "[a]n emotional state is insufficient to admit a statement as an excited utterance." (JA 144).

b. Analysis of Present Sense Impression Exception.

The military judge focused on "the contemporaneousness of the statement" and "whether the declarant had an opportunity to reflect on her thoughts and thereby modify them." (JA 145). Based on the evidence, he found, "the court cannot make a determination when the alleged assault occurred." (JA 145). As such, "the government cannot show that the statements were made while or immediately after the declarant perceived them." (JA 145). Since Mrs. KH did not make the statements immediately after the alleged assault, "it appeared she had an opportunity to reflect on whatever event happened." (JA 145). Regarding Master JH, the military judge again found it was unclear if he personally observed the event that formed his statements. (JA 145).

STANDARD OF REVIEW

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020). A military judge abuses his discretion if the findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Kohlbek*, 78 M.J. 326, 333 (C.A.A.F. 2019). "The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision

remains within that range." *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). "[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted;" however, "[i]f the military judge fails to place his findings and analysis on the record, less deference will be accorded." *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).

SUMMARY OF THE ARGUMENT

The military judge properly excluded the hearsay statements of both Master JH and Mrs. KH. As the proponent of the evidence, the government provided insufficient evidence to establish the proper evidentiary foundation for either the present sense impression or excited utterance exceptions under Military Rule of Evidence [Mil. R. Evid] 803(1) or (2).

First, the government failed to establish that Master JH had personal knowledge of any of the events he purportedly described the evening of December 29, 2018. The government argues personal knowledge is self-evident simply because he made the statements. This tautology defies logic and federal jurisprudence.

Second, the government also failed to demonstrate when the alleged assault occurred. On appeal, the government contends this court should accept statements untethered in time as excited utterances. But the United States Supreme Court

points to "the immediacy [of excited utterances] that gives the statement some credibility; the declarant has not had time to dissemble or embellish." *Navarette v. California*, 572 U.S. 393, 408 (2014). While the rule does not impose a precise time requirement between the statement and the startling event, the rule's foundational predicates of spontaneity and the declarant's excited state of mind require a demonstration of when the startling event occurred. Furthermore, while contemporaneity is not written into the excited utterance exception, it is mandated by the present sense impression exception. Because the government failed to establish the time of the alleged assault, the military judge properly excluded the statements of Master JH and Mrs. KH as excited utterances, and Master JH's statements as present sense impressions.

The government asks for this court to adopt an "ends justify the means" approach and depart from foundational requirements of the rules of evidence simply because this case involves alleged domestic violence. The United States Supreme Court, however, has made clear that courts "cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States v. Salerno*, 505 U.S. 317, 322 (1992). The question before this court is whether the military judge erred in excluding hearsay statements that did not meet the strictures of present sense impression or excited utterance exceptions, not whether this court should lower admissibility thresholds when the case involves

alleged victims of domestic violence. A court must not concern itself with whether one party wins or loses, but "whether the evidentiary Rules have been satisfied." *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Here, the government failed to meet the requirements of both present sense impression and excited utterance exceptions. Because the military judge correctly applied the law when he excluded the hearsay statements of Master JH and Mrs. KH, this court should uphold his rulings.

LAW AND ARGUMENT

While out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible, certain exceptions apply. Mil. R. Evid. 803. The excited utterance exception permits admitting "a statement relating to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition." Mil. R. Evid. 803(2). Such statements are admissible if (1) the statement is spontaneous, excited, or impulsive rather than the product of reflection and deliberation; (2) the event is startling; and (3) the declarant makes the statement while under the stress of excitement caused by the event. *Bowen*, 76 M.J. at 88 (citing *Arnold*, 25 M.J. at 132 (internal quotations omitted)). In analyzing whether a declarant was under the stress or excitement caused by the event, this court has looked to the lapse of time of time between the startling event and the statement, whether the statement was made in response to

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 (internal citations omitted).

A. The military judge properly excluded the statements of Master JH and Mrs. KH when the government failed to establish the foundational requirements of the excited utterance exception to the hearsay rule.

1. As the government failed to prove Master JH's personal observation of the alleged startling event as well as the timing of the alleged assault, the military judge properly excluded Master JH's statements.

a. The government failed to establish that Master JH had personal knowledge of his declarations.

A declarant must generally possess personal knowledge of the matters of which he or she is testifying. Mil. R. Evid. 602. Firsthand knowledge is a predicate of admissibility for a hearsay statement. Advisory Comm. Note to Fed. R. Evid. 803; see *Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995). A declarant of an excited utterance thus must personally observe the alleged startling event. *Miller v. Keating*, 754 F.2d 507, 511 (3d Cir. 1985) (citing *McLaughlin v. Vinzant*, 522 F.2d 448, 451 (1st Cir. 1975)). The burden of proving this requirement falls on the proponent of the evidence. *Id*. (citing *David v. Pueblo Supermarket of St. Thomas, Inc.*, 740 F.2d 230, 235 (3d Cir. 1984)). While direct proof is not required, circumstantial evidence "must not be so scanty as to forfeit the 'guarantees of trustworthiness' which form the hallmark of exceptions to the hearsay rule." *Id.* (citing Advisory Comm. Note to Fed. R. Evid. 803). "When

there is no evidence of personal perception, apart from the declaration itself, courts have hesitated to allow the excited utterance to stand alone as the declarant's opportunity to observe." *Id*. (internal citations omitted).

In this case, the government contends this court should simply satisfy itself that Master JH's statement proves the existence of a startling event. (Gov't Br. 16). In other words, because he said something occurred, he therefore must have witnessed the occurrence. This premise defies logic, as personal observation of an event is a condition precedent to establishing its existence in evidence. It also defies federal jurisprudence.

In *Miller*, moments after witnessing a car accident, bystanders overheard an unidentified declarant exclaim, "the bastard tried to cut in" as well as "the s.o.b. . . . tried to cut in," ostensibly referring to the plaintiff's vehicle. 754 F.2d at 510. The Second Circuit determined insufficient evidence existed to support the admission of the purported excited utterances. *Id*. at 511. While acknowledging that some statements may render personal knowledge self-evident,[1] the court found the "disputed declaration itself d[id] not proclaim it." Furthermore, the statements themselves did not make it more likely than not that the declarant observed the

[1] "A statement such as, 'I saw that blue truck run down that lady on the corner,' might stand alone to show perception if the trial judge finds, from the particular circumstances, that he is satisfied by a preponderance of the evidence that the declarant spoke from personal perception." *Miller*, 754 F.2d at 511.

events: "[t]he declarant might have been drawing a conclusion on the basis of what he saw as he approached the scene of the accident. He might have been hypothesizing or *repeating what someone else had said*." *Id*. at 511. (emphasis added).

Here, the military judge properly recognized that there was no evidence that Master JH actually witnessed the alleged assault. (JA 143). Staff Sergeant Carson repeatedly stated that he had not been in the house and as such, made numerous assumptions. Nothing in his testimony made it more likely than not that Master JH observed the alleged assault. Based on SSG Carson's "uncertain testimony" and outright absence of Master JH's testimony, the military judge legitimately questioned whether Master JH had merely "hear[d] a commotion or repeat[ed] something his mother told him while she was having an intoxicating (sic) argument with the accused." (JA 143–44).

In *Bemis*, a neighbor relayed to a 911 operator police officers' alleged use of excessive force in the course of appellant's arrest. 45 F.3d at 1371. While accepting the neighbor's proximity to the scene of arrest as circumstantial evidence of personal knowledge, the Ninth Circuit concluded there was an articulable suspicion[2] that the neighbor had not observed the events he described, but was

[2] "Not only did [the neighbor] admit at one point that he could not describe what was happening outside, but he could also be heard repeating the words of an unidentified voice in the background." *Bemis*, 45 F.3d at 1374.

instead repeating what others had conveyed to him. *Id*. at 1373. The court further noted that while the neighbor was available to testify, Bemis—the person who allegedly experienced the excessive use of force and thus had firsthand knowledge—declined to testify. *Id*. at 1374. Because the record contained evidence that cast doubt on the neighbor's personal knowledge of the events, the Ninth Circuit upheld the trial judge's decision to exclude the purported excited utterances. *Id*.

In this case, the military judge concluded there was reason to suspect that Master JH lacked personal knowledge of the purported startling event. (JA 143). Just like *Bemis*, while SSG Carson was available to testify to what Master JH conveyed to him, Master JH declined to testify. It was the government's burden to establish that Master JH personally observed the alleged assault. Because it failed to do so, the military judge properly excluded Master JH's statement.

b. The government failed to establish the time of the alleged assault.

Excited utterances are admissible because "'persons are less likely to have concocted an untruthful story when they are responding to the sudden stimulus of a startling event.'" *Henley*, 2019 CCA LEXIS 384, *6 (quoting *United States v. Feltham*, 58 M.J. 470 (C.A.A.F. 2003)). "This premise becomes more tenuous where the exciting influence has dissipated and one has had the opportunity to deliberate or fabricate." *Donaldson*, 58 M.J. at 483. Courts have generally

accepted intervals of a few seconds to a few minutes between the startling event and the excited utterance. *See United States v. Taveras*, 380 F.2d 532 (1st Cir. 2004). In some "extreme cases," courts have allowed intervals of several hours. *Id*. "As a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under Mil. R. Evid. 803(2)." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990). "In cases where a time lapse of several hours or more has occurred between the startling event and the statement, circumstances have included continuing physical pain after beatings or shootings, continued or renewed insecurity, or young children who were sexually abused. *United States v. Jahagirdar*, 466 F.3d 149, 155 (1st Cir. 2006) (internal citations omitted). When the record is "silent as to the time of the traumatic event," courts have declined to favor admissibility of excited utterances (*United States v. Keatts*, 20 M.J. 960, 963 (A.C.M.R. 1985)), as such records leave appellate courts with "no way of divining what 'close enough' means when reviewing the testimony and evidence adduced at trial." *Henley*, 2019 CCA LEXIS 384 at *9–10.

The government contends the military judge insisted the government prove *precisely* when the assault took place. (Gov't Br. 27–28). This overstates his position. 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. While noting that a "lapse in time between the exciting event and the excited utterance creates a strong presumption against admissibility," the military judge recognized, "the critical determination is whether the declarant was under the stress of the event while uttering her statement[,] not the amount of time that lapsed between the event and the statement." (JA 141).

Staff Sergeant Carson had no idea when the alleged assault occurred; he repeatedly stated he was not in the house when the alleged assault occurred. Moreover, his account of Master JH's statements themselves vacillated. Master JH—the person the government argues has knowledge of when the assault occurred—failed to testify. Simply put, *no one* that testified knew when the alleged assault occurred. The military judge offered multiple opportunities for the government to establish an approximate time of the event. (JA 106, 108, 113–14, 117, 131, 134–36). It was not incumbent upon the military judge to cobble together a timeline from a bald record—it was the government's burden to establish the temporal proximity between the alleged assault and Master JH's statements, and it failed to do so. When presented with an unknown length of time, the military judge was left unable to determine whether the victim was acting under the stress and excitement of the event, and thus properly excluded Master JH's statements.

2. As the government failed to prove that Mrs. KH's statements were made while under the stress of a startling event, the military judge properly excluded Mrs. KH's statements.

a. The government failed to establish what the startling event was and when it occurred.

The government failed to meet its burden of establishing the existence of a startling event. Staff Sergeant Carson was not in the Henrys' house. He specifically testified Mrs. KH did not describe what had allegedly happened to her. (JA 132–33).

Once again, the government requests this court to skip its legal analysis and apply "common sense" to determine what the startling event was. (Gov't Br. 35). The government claims the circumstances of Mrs. KH's pre-dawn visit to SSG Carson's home while "injured" and upset in and of itself proves the startling event. (Gov't Br. 35–36). This circular logic only proves Mrs. KH *claimed* she was assaulted sometime earlier that evening –it does not, and cannot, be used to show that she *was* assaulted, which is why the government offered the evidence. The government's reading of *United States v. Smith*—that there was an "obvious nexus" between the outcry and the startling event of sexual assault—neglects to mention the startling event in that case was clear due to the witness' testimony and the accused's confession. 606 F.3d 1270, 1280 (10th Cir. 2010). It was not the hearsay statement of the witness alone that elucidated the situation. *Id*. The government also contends the "simple act of calling 911" is enough based on the

ruling in *United States v. Arnold*, 486 F.3d 177, 185 (6th Cir. 2007). However, that court noted numerous supporting factors regarding the 911 call that spoke to the trustworthiness of the statement.[3] The Government cites several cases where Federal courts have relied on some indicia of trustworthiness or corroboration to find a starling event—but all such supporting factors are absent here.

The government also failed in its burden of establishing when the alleged assault took place. As discussed, courts are leery of admitting statements as excited utterances when the statements are made outside of the initial seconds or moments following a startling event. *See Jahagirdar*, 466 F.3d at 155. A victim's sustained pain following an assault or a victim's continued or renewed sense of insecurity are reasons courts have condoned longer durations between the startling event and the excited utterance. *United States v. Cruz*, 156 F.3d 22, 30 (1st Cir. 1998) (excited utterance properly admitted when appellant arrived at battered woman's shelter four hours after she was severely beaten because she had been prevented from leaving her apartment); *United States v. Scarpa*, 913 F.2d 993, 1006, 1016–17 (2d Cir. 1990) (excited utterance properly admitted when "savagely

[3] This included: "(2) the fear and excitement exhibited by the tenor and tone of [her] voice during the 911 call; (3) [her] distraught demeanor personally observed by [officers] upon their arrival at the scene; (4) [her] renewed excitement upon seeing Arnold return; and (5) the gun matching [her] description found underneath the passenger seat in which Arnold was sitting." *Arnold*, 485 F.3d at 185.

beaten" declarant made statement six hours after his assault while hospitalized and in fear for his life).[4] Likewise, because of the unique nature of the offense and its corresponding trauma, courts afford children greater latitude between instances of sexual abuse and their excited utterances. *See Donaldson*, 58 M.J. at 484 (concluding three-year-old victim of sexual abuse still under the stress of the startling event twelve hours later); *cf. Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999) (purported excited utterance properly excluded when court could not conclude whether sexual abuse of two-year-old occurred over a weekend or several months). The only seemingly relevant consideration the government points to is Mrs. KH's alleged concern that SFC Henry would return to the home. (Gov't Br. at 36). Unlike *Chandler*,[5] no evidence existed that a deadly weapon was used in the alleged assault. Unlike *Cruz*[6] or *Scarpa*[7], where it was clear the victims suffered severe injuries, testimony conflicted as to whether Mrs. KH experienced any injuries.[8] The military judge concluded Mrs. KH lacked "fresh injuries or

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[4] Unlike the case at bar, the courts in *Cruz* and *Scarpa* were able to ascertain the approximate time of the startling events.
[5] 39 M.J. 119, 120 (C.A.A.F. 1994), discussed *infra*, p. 22.
[6] The trial judge described photographs of the injuries inflicted upon the victim as "unpleasant." *Cruz*, 156 F.3d at 30.
[7] In *Scarpa*, the Second Circuit described the victim as being "savagely beaten" by several people with fists, brass knuckles, and a baseball bat. 913 F.2d at 1006.
[8] Staff Sergeant Carson testified he "didn't notice any injuries" to Mrs. KH's person. (JA 119). Absent a red mark on Mrs. KH's cheek, Officer Brashear didn't notice any other injuries. (JA 120). Mrs. KH herself denied that the scratch on her neck came from the alleged assault. (JA 102).

cuts" and "the only evidence regarding injury showed redness of the cheeks and a scratch on the neck." (JA 142). Furthermore, the government presented no evidence that Mrs. KH expressed concern for her or her children's safety to SSG Carson, the person who she allegedly ran to for help and who lived across the street from her alleged abuser. Thus, any argument that Mrs. KH feared for her safety is unavailing and does not explain Mrs. KH remaining in an excited state for an extended period of time between the alleged assault and the purported excited utterance.

b. The government failed to establish Mrs. KH was under the stress of the startling event at the time of her statement.

The "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. *Henley*, 2019 CCA LEXIS 384, *9 (citing *Feltham*, 58 M.J. at 475). The military judge relied on the Army Court's ruling that while a tearful demeanor is *a* consideration in determining whether an individual is still under the stress of a starling event, it is not alone a sufficient factual basis for the military judge to have concluded that [the] utterance was 'close enough in time' to the startling event." *Id*. at *10. As such, the military judge properly concluded that, without sufficient proof of when the event occurred, it was impossible to determine whether Mrs. KH was acting under the stress of it. (JA 142).

When a lapse in time exceeds a few seconds or moments following the startling event, courts look to additional factors to determine whether the declarant is still under the stress of the event. In *Chandler*, the victim returned home to find the appellant in the bedroom with another woman. 39 M.J. at 120. The appellant wrestled the victim to the ground, then duct taped pantyhose into her mouth and restrained her on the bed with handcuffs and an electrical extension cord. *Id*. He then put a loaded gun to her head. *Id*. at 121. When the appellant finally left the house, the victim called her friend, Mrs. RQ. When Mrs. RQ arrived two minutes later, she found the victim "really upset" with "stuff all around her neck and she was in handcuffs." *Id*. at 121–22. Mrs. RQ drove the victim back to her house immediately. *Id*. at 122. The victim testified at trial, as did Mrs. RQ. *Id*. at 120. Mrs. RQ testified it took about thirty minutes for the victim to tell her what happened "'because she was real upset and crying and she was in a panic' and 'was worried that her husband was going to come back through the door and get her.'" *Id*. at 122. This court's predecessor upheld the military judge's admission of the victim's statements to Mrs. RQ as excited utterances because despite the thirty-minute time lapse, the victim made the statement when she was clearly under the stress of a startling event. *Id*. at 123.

In this case, unlike *Chandler*, Mrs. KH—the person who was allegedly assaulted—declined to testify. While Staff Sergeant Carson "assumed" the alleged

assault had happened recently, he was not present in the house and thus could not identify if or when the alleged assault occurred. Unlike *Chandler*, Mrs. KH only appeared as though she had been crying, and the offering witness (SSG Carson) did not have to untie her from the assailant's bonds. Unlike *Chandler*, Mrs. KH did not tell SSG Carson what happened. In this case, the government presented the military judge with an indeterminate period of time between the alleged assault and the purported excited utterances. Based on the lack of temporal evidence, the military judge noted that it was "entirely possible the assault occurred earlier in the day, or even the day before." (JA 143). The military judge properly declined to speculate as to how much time actually transpired between the hours of alleged beatings and Mrs. KH's statements. Because the government failed to demonstrate the time of the alleged assault, the military judge properly excluded Mrs. KH's statements.

c. While the government ignores this court's precedent in Bowen*, the military judge properly applied it when he evaluated Mrs. KH's mental and physical condition.*

When evaluating whether Mrs. KH was under the stress of a startling event, the government relied solely on non-precedential authority while ignoring this Court's holding in *Bowen*. While the government argues the military judge's consideration of Mrs. KH's intoxication was error, this court has previously found error where the military judge failed to do so. *Bowen*, 76 M.J. at 89.

In *Bowen*, this court confronted graphic evidence of the victim's vicious beating at the hands of her spouse. *Id*. at 85–86. Shortly after law enforcement discovered the barely conscious victim, they determined her blood alcohol content to be 0.221. *Id*. at 86. Despite overwhelming evidence establishing a startling event and the spontaneity of the statement, this court determined the victim's purported excited utterance was improperly admitted because the military judge failed to adequately account for her mental and physical condition at the time the statement was made. *Id*. at 89.

While the government ignored this court's precedent in *Bowen* (Gov't Br. 34–35), the military judge did not. (JA 140, 142). The record contained sufficient evidence to establish Mrs. KH was intoxicated, to include Mrs. KH's own admissions that she had been drinking. (JA 115, 119, 122, 164, 171–72). Thus, the military judge determined Mrs. KH "had been drinking and threw up close in time to the making of the[] statements." (JA 142). He found the evidence of Mrs. KH's intoxication "undercut[] a finding that her demeanor was caused by a startling event;" furthermore, he determined her statements were inconsistent with her injuries, which supported a finding that she may have been "making exaggerated statements." (JA 142). The military judge properly considered Mrs. KH's intoxication as one factor in evaluating the admissibility of, her hearsay statements.

B. The military judge properly excluded Master JH's statements because the government failed to establish those statements fell within the present sense impression exception.

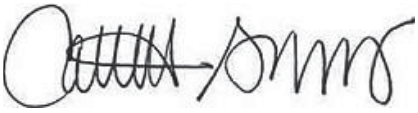
Unlike the excited utterance exception, Mil. R. Evid. 803(1) has a strict contemporaneity requirement: it must be made while in the act or perceiving an event or immediately thereafter. Mil. R. Evi.d 803(1). Master JH failed to testify. Likewise, Staff Sergeant Carson's testimony failed to establish what alleged startling event occurred or when it occurred. The government left Master JH's statements untethered in time. It is therefore impossible to prove the statements were made contemporaneously with the purported startling event. As such, the military judge properly excluded Master JH's statements, as they failed to meet the foundational predicate of the present sense impression exception.

CONCLUSION

The exceptions to the general rule against hearsay exist because there are certain aspects of the statements, or circumstances around the making of the statement, that lend the statement credibility it would not ordinarily enjoy. The rationale undergirding the excited utterance exception "is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." *Idaho v. Wright*, 497 U.S. 805, 820

(1990). In the absence of these circumstances, such statements are classic hearsay which cannot underpin a conviction. The government's argument boils down to a conclusory assertion that because Master JH and Mrs. KH said there was abuse, that statement alone satisfies all of the hearsay exception requirements.

From the outset, the government failed to prove Master JH had any personal knowledge of the alleged event. The government then failed to establish what the startling event was or when it occurred. These failures made it impossible for the military judge to determine both the spontaneity of the statements or whether Mrs. KH and Master JH were under the stress of a startling event when they made their statements. Furthermore, the government's inability to establish when the alleged assault occurred precluded Master JH's statements from being present sense impressions, as the government could not demonstrate the required contemporaneity. The military judge properly excluded the statements of Master JH and Mrs. KH. Because the military judge did not abuse his discretion, this court should leave his rulings undisturbed.



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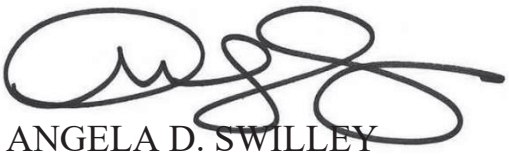

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Henry, Crim. App. Dkt. No. 20190688, USCA Dkt. No. 20-0342/AR, was electronically filed with the Court and Government Appellate Division on September 1, 2020.

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