IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

CALEB A.C. SMITH
Airman (E-2), USAF
Appellant.

Crim. App. No. 40013

USCA Dkt. No. 22-0237/AF

BRIEF ON BEHALF OF APPELLANT

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II. WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT BECAUSE THE ALLEGED VICTIM WAS CAPABLE OF CONSENTING AND WHERE, EVEN IF SHE WAS NOT CAPABLE OF CONSENTING, AMN SMITH REASONABLY BELIEVED THAT SHE DID CONSENT.

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Caleb A.C. Smith (Appellant) hereby replies to the Government's Answer (Gov. Ans.) concerning the granted issues, filed on December 20, 2022.

Argument

I. THE MILITARY JUDGE ERRED IN ADMITTING TEXT MESSAGES AND TESTIMONY AS AN EXCITED UTTERANCE RELATED TO THE ALLEGED VICTIM'S BELIEF THAT SHE WAS RAPED WHERE SHE HAD NO MEMORY OF THE EVENTS IN QUESTION.

1. The Statement "I think he raped me" was not an Excited Utterance.

A. Arnold Test: Prong One (Reflection/Deliberation).

Appellant's *primary* argument on this issue is that SrA H.S.'s statement ("I think he raped me") was the "the product of reflection and deliberation," and therefore fails the first prong of the *Arnold* test. *See United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987); *see also* Brief on Behalf of Appellant, dated November 21, 2022 at 18-19 (App. Br.). In support of this contention, Appellant argues that, because SrA H.S. had no memory of allegedly being assaulted, the statement that she believed she had been assaulted *had to be* "the product of reflection and deliberation." Similarly, SrA H.S. directly acknowledged "reflection and deliberation" during the Article 39a on this issue, agreeing that she was "taking these observations," "putting them all together," "[a]nd then drawing a conclusion as to something that [she] had no memory of." (JA at 87). Even the Government described her thought process as "*piecing together* that she believed that she had been sexually assaulted." (JA at 75) (emphasis added).

The Government barely addresses these issues, merely offering a conclusory statement that, "SrA HS's statement was not the result of reflection and deliberation because it was made within three minutes of the startling event."[1] Gov. Ans. at 16;

[1] As discussed below, the Government defines the "starting event" as SrA H.S.'s discovery of bruising the day after the sexual encounter, rather than the sexual encounter itself.

See also Id. at 17, 19-20. The Government fails to explain how a deductive conclusion about an event SrA H.S. did not remember could be anything other than the result of reflection and deliberation. Further, the Government never addresses that SrA H.S. explicitly acknowledged that she was "taking these observations," "putting them all together," "[a]nd then drawing a conclusion as to something that [she] had no memory of." *See* (JA at 87). The Government also fails to address the fact that the Government itself, at trial, described SrA H.S.'s thought process as "*piecing together* that she believed that she had been sexually assaulted." *See* (JA at 75) (emphasis added).

Relatedly, as Appellant wrote in his opening brief, "the concept of memory is interwoven with the rationale behind the excited utterance exception" and "this rationale cannot be satisfied when the declarant has no memory of the event." App. Br. at 19. Again, the Government fails to address this issue in its answer.

These arguments, relating to the first prong of the *Arnold* test, are Appellant's primary arguments on the excited utterance issue, but the Government does not even address them.

B. Arnold Test: Prong Three (Stress of the Startling Event).

The Government's Answer provides a more substantive response on the question of whether SrA H.S. was under the stress of the startling event at the time of sending the text message. Appellant's position is that an excited utterance about

a sexual assault must occur while the declarant is under the stress *of the sexual assault*. The Government counters with a theory that the startling event can be *a subsequent event*. Gov. Ans. at 17-20. In this case, the Government contends that the "startling event was SrA H.S.'s discovery of bruising on her body" *the day after* the sexual act in question. Gov. Ans. at 18. Whether an excited utterance about an assault can be made while under the stress *of a subsequent startling event* appears to be an issue of first impression within the military justice system.

As an initial matter, the Government misstates Appellant's view, alleging that Appellant would "require the startling event be the criminal offense at issue in a court-martial." Gov. Ans. at 19. This is inaccurate. Appellant has never argued that an excited utterances may only be triggered by a charged offense. Where, as here, however, the statement in question is directly *about the charged event,* it would have to be made while under the stress thereof. Illustrative of its misunderstanding, the Government gives the example of a third-party witness being startled by a man with a bloody knife and exclaiming, "He has a knife!" *Id.* The Government inserts a strawman argument, contending that Appellant's interpretation would require the witness to see the crime itself to allow this excited utterance. *Id.* This example is misplaced. To accurately reflect the present case, the witness in the Government's example (who did not see the crime) would have said, "I think he just committed a murder!" In that instance, the witness's statement would be inadmissible, *inter alia*,

because (1) it was the result of deductive reasoning and (2) it would be incompetent evidence.[2] The Government's example might be apt if SrA H.S.'s statement upon discovering bruising was limited to "I discovered bruising." However, that is not the statement at issue.[3] The statement at issue is "I think he raped me." In sum, the Government's example confuses the issue, mistakes Appellant's position, and is completely inapplicable.

Returning to the actual question presented (whether an excited utterance *about a prior event* may be made while *under the stress of a subsequent event*) the, Governmenthas found a 2005 unpublished order and judgement from a panel of the 10th Circuit on point. *United States v. Lossiah*, 129 F. App'x 434, 436-38 (10th Cir. 2005) (unpub. op.).[4] The panel in *Lossiah* endorsed the Government's expansive view, allowing a statement from a child victim ("he raped me") to qualify as an

[2] Even that example would not match the present facts, as the declarant in the present case had preexisting knowledge of portions of the events in question, based on her intermittent memories of the night before and her observations throughout the morning.

[3] To be thorough, SrA H.S. *did* make similar statements later in the text message thread, about noticing injuries on her body. (JA at 480-83). Appellant noted in his opening brief that these later statements posed additional problems because they were sent in response to questions from Amn M.H., the other participant in the text message conversation. App. Br. at n.2. However, the primary statement under examination is "I think he raped me."

[4] Of note, the Government never discloses that *Lossiah* is an unpublished opinion, lacking precedential authority. *See Lossiah*, 129 F. App'x at n.* ("This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments.").

excited utterance even though it was made under the stress of a subsequent event (seeing her rapist at a later date) rather than the event in question (the actual rape). Both the Government and the *Lossiah* panel cite also to a state case that endorsed the same view, allowing a statement from a child ("uncle Sam raped me") to qualify as an excited utterance even though it was made under the stress of a subsequent event (returning to the scene of the prior rape) rather than the event in question (the actual rape). *Esser v. Commonwealth*, 38 Va. App. 520, 525, 566 S.E.2d 876, 879 (2002). The Government does not cite, and Appellant cannot find, any military case law or published federal case law endorsing this expansive view. It certainly does not appear that this unpublished case from nearly twenty years ago represents a consensus view of the law. To the contrary, this view seems to be very much an outlier, applied (as far as the parties have found) only twice – both times to child declarants – and never to an adult declarant.[5]

While military courts do not seem to have directly addressed this novel view of the excited utterance exception, Appellant submits that military precedent precludes such an interpretation in this case. As this Court has articulated, a core rationale behind the excited utterance exception is that the declarant has not yet "had the opportunity to deliberate or fabricate." *Donaldson*, 58 M.J. at 483 (C.A.A.F.

[5] It is well understood that the excited utterance exception is applied more liberally to child declarants, particularly with respect to a lapse in time. *See, e.g., United States v. Donaldson*, 58 M.J. 477, 484 (C.A.A.F. 2003).

2003) (citing *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990)). This rationale only makes sense if the statement *is about* the currently startling event. If the statement is about a past event, then, by definition, there has been "opportunity to deliberate or fabricate." Such opportunity is not magically expunged by a subsequent startling event. Along these same lines, this Court has explained that, "where a statement relating to a startling event does not immediately follow *that event*, there is a strong presumption against admissibility under M.R.E. 803(2)." *Id.* at 484 (citing *Jones*, 30 M.J. at 129). The Government's approach simply does not fit within this rule's rationale. As such, Appellant interprets the Government's argument as a request for this Court to expand the existing excited utterance exception.

Adopting the Government's expansive interpretation would have significant implications. Rather than limiting excited utterances to relatively short periods of time following the event in question (the current state of the law), the Government's approach would allow excited utterances for an indefinite period, as long as they were prompted by an intermediate startling event. For example, any time a victim is startled by a subsequent encounter with her assailant,[6] the Government's approach would presumably restart the excited utterance clock and provide a new opportunity

[6] Certainly a common occurrence within the military – where assaults are often committed between co-workers, who will continuously re-encounter each other after the events in question.

for admissible excited utterances. Similarly, as in the present case, anytime a victim is startled by learning of new evidence relating to their victimization (for example in a discussion with Government lawyers or his/her own lawyer), it would provide another opportunity for excited utterances about the underlying event, even if the assault itself had happened a long time ago. As another example, victims often experience "flashbacks" to their assaults. Would such occurrences, which are certainly startling/stressful, provide perpetual ongoing opportunities for admissible excited utterances? Would any subsequent startling event that *reminded* the victim of the prior assault allow for additional excited utterances? Would a victim being "triggered" by a true-crime TV show or a sensory memory (legitimately stressful occurrences for victims) allow for additional excited utterances? It is difficult to foresee to the limits of such an expansive rule.

This Court should not adopt such a far-reaching expansion of excited utterance doctrine. Doing so would open a veritable Pandora's Box of excited utterances that would be particularly difficult to define and apply, would substantially erode the general prohibition against hearsay, and would decimate the rationale behind the excited utterance exception.[7]

[7] By proposing this new rule, the Government has seemingly transformed a question of application into a question of statutory interpretation. To the extent this Court finds ambiguity in the language of Mil. R. Evid. 803(2), it should be resolved in Appellant's favor under the rule of lenity. It would be unfair to

Finally, while the nature of the qualifying starling event is an interesting question, it is not material to the outcome of this case. Even if SrA H.S. could permissibly make an excited utterance about a prior event while under the stress of a subsequent event, this would not cure the defects presented by, *inter alia*, (1) the inherent reflection/deliberation involved in making a deductive conclusion about an event she had no memory of, (2) SrA H.S.'s direct endorsement of reflection/deliberation in coming to her deductive conclusion, (3) the significance of memory to the rationale behind the excited utterance exception – which cannot be satisfied when the declarant has no memory of the event, and (4) the incompetency of the evidence.

C. Arnold Test: Interplay Between Prongs One and Three.

While providing little analysis of the first prong of the *Arnold* test, the Government's Answer conflates the first prong with the third prong. The Government intermixes conclusory statements throughout its Answer to the effect that SrA H.S. could not have engaged in reflection or deliberation because she made the statement in temporal proximity to the stressful event (which it defines as the

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Appellant to affirm his conviction based on a novel interpretation of the rules of evidence that neither he nor his trial team had prior notice of. If the President wants to drastically expand the reach of Mil. R. Evid. 803(2), as proposed by the Government, he is free to amend the rule using clear and unambiguous language. In the absence of such executive action, this Court should decline to do so.

discovery of the bruising) and therefore had no opportunity to reflect or deliberate. *See* Gov. Ans. at 16-17, 19-20. In other words, the Government ties its analysis under prong one of the *Arnold* test directly to its novel analysis under prong three.

This is not a proper application of the multi-prong test. While there is certainly some overlap between reflection/deliberation (prong one) and the amount of time that passes between the stressful event and the declaration (prong three), these are separate tests. The Government's Answer would subsume the first prong into the third prong, by simply saying that there could be no reflection/deliberation when a statement is made while under the stress of the starting event (presumably because there was insufficient time for reflection/deliberation).

This is not the state of the law. The prongs, while related, are clearly separate and distinct. The first prong here is particularly problematic given the memory issues and SrA H.S. (and the Government at trial) expressly endorsing that she had deliberately pieced together observations to draw a conclusion. *See* (JA at 75, 87). The Government cannot waive away these problems simply by arguing temporal proximity to a startling event. This is doubly so when, under the Government's novel theory, the startling event at issue *happened long after* the event the statement related to. As discussed above, a rationale for the excited utterance exception is that there is no time for reflection/deliberation when a statement is made directly after *the event the statement is about*. However, when the statement is made *many hours*

after the event it is about, while under the stress of some subsequent startling event, the opportunity for reflection/deliberation is not magically extinguished. The Government does not address this dynamic in its Answer.

D. Competency of the Evidence in Question.

In his opening brief, Appellant argued that "SrA H.S. was only competent to testify to factual events she experienced, observed, and remembered."[8] Appellant's position was, and remains, that SrA H.S. was not competent to testify as to the sexual act itself, because she had no memory of it. Similarly, she was not competent to testify as to her conclusion/belief about the sexual act ("I *think* he raped me"). Whether via in-court testimony, or an out-of-court excited utterance, SrA H.S.'s evidence about events she did not remember was improper.

The Government addresses this argument on pages 20-21 of its Answer, but fundamentally misconstrues Appellant's argument. The Government seems to be under the impression that Appellant is objecting to the competency of SrA H.S.'s testimony about the events surrounding the sexual act (the events she actually observed/remembered). This is not Appellant's argument. Appellant is objecting to the competency of the hearsay statement "I think he raped me" (i.e. the statement under discussion/Granted Issue I).

The Government fails to address Appellant's contention: That SrA H.S. was

[8] App. Br. at 21-22.

not competent to give evidence about her conclusory belief about events she did not remember. For illustrative purposes, imagine if, after testifying about her memory of surrounding events, the trial counsel asked SrA H.S.: "So, what do you think happened during your gap in memory?" And SrA H.S. responded from the witness stand: "I think he raped me." This would be improper evidence.[9] That this same statement was admitted (for the truth of the matter asserted) via a hearsay exception rather than via in-court testimony does not change its competency.

E. Appropriate Level of Deference.

Finally, the Government argues that this Court should afford significant deference to the military judge's ruling given, *inter alia*, the wide discretion afforded military judges on evidentiary issues, the "abuse of discretion" standard of review, and the level of analysis the military judge articulated. Gov. Ans. at 21-23.

This Court is, of course, aware of the appropriate standards of review, but Appellant respectfully highlights two points. First, there is no colorable argument that the military judge placed anything resembling a thorough analysis on the record with respect to the issue under examination (foundation for an excited utterance). To the contrary, the military judge made no findings of fact and articulated no analysis beyond the written and conclusory statement that he believed the foundation

[9] The Government apparently disagrees, arguing in their brief that SrA H.S. *could have* testified to her speculative conclusion about a sexual act she had no memory of. Gov. Ans. at 25.

for an excited utterance had been laid. (JA at 90). The Government tacitly acknowledges as much, limiting its argument on the relevant issue to "the military judge stated he found the foundational elements were met for an excited utterance. . . ." Gov. Ans. at 23. Simply stating that the foundation has been laid is not an analysis at all. This lack of analysis does not allow an examination of the military judge's findings of fact (as he made none) nor his conclusions/application of law (as he articulated none). As such, reduced deference is certainly warranted. *See United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020).

Second, regardless of the level of deference applied, the admission of this evidence as an excited utterance was objectively and indisputably erroneous. This was not a mere difference of opinion or a judgement call. It is erroneous under any standard of review to admit a deductive conclusion about an event the declarant has no memory of as an excited utterance.

2. Prejudice.

The Government concludes that, even assuming error, there was no prejudice under the four *Kerr* factors. Gov. Ans. at 23-37 (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)). Portions of the Government's argument warrant response.

A. Strength of the Government's Case.

With respect to the strength of the Government's case, Appellant disagrees that it was strong. Indeed, the second granted issue deals with the legal sufficiency of the evidence. For the sake of judicial economy, a lengthy analysis of the evidence will not be repeated here, but it is worth noting that the Government lists all the inculpatory evidence in its prejudice analysis while wholesale omitting all the exculpatory evidence. The Government's evidence will always look strong when one omits all the problems with it.

B. Strength of the Defense's Case.

With respect to the strength of the Defense's case, the Government summarily points out that the Defense did not present a case-in-chief or call an expert witness. While this is true, the Government cites no authority for the proposition that the strength of the Defense's case (as one of the four prejudice factors) is limited to evidence presented in a defense case-in-chief. To be fair, it is not even clear that this is the Government's contention. Here, as is often the case, the Defense's strongest evidence came out during the Government case-in-chief, both through evidence admitted by the Government directly and via cross-examination. For example, the Government introduced Appellant's statements to the Air Force Office of Special Investigations (AFOSI) in which he repeatedly averred that (1) SrA H.S. consented, (2) he perceived her to be consenting, and (3) he stopped the sexual

activity over SrA H.S.'s objection. *See* App. Br. at 28-31 (detailing Appellant's exculpatory statements to AFOSI). Similarly, SrA H.S. acknowledged via direct and cross-examination that she was able to make and act on decisions during the periods of the evening she remembered, and her testimony was consistent with Appellant's exculpatory version of events. *See Id.* (detailing SrA H.S.'s testimony and its consistency with Appellant's version of events). The fact that this evidence was presented during the Government case-in-chief as opposed to the Defense's case-in-chief is irrelevant for purposes of analyzing prejudice. Notable by its absence, the Government never acknowledges any of the voluminous exculpatory evidence in its prejudice analysis.

C. *Materiality of the Evidence.*

With respect to the materiality of the evidence, the Government downplays its significance, arguing it "was not particularly material" and "peripheral to the main contested issue . . . ." Gov. Ans. at 24-25. Before this issue was under appellate scrutiny, the Government had a very different view. The Government began its opening statement with this evidence, began and ended its closing statement with this evidence, began its closing slideshow with this evidence, and even began its sentencing case with this evidence. (JA at 23-24, 412-13, 451, 478, 512-13); *see also* (JA at 417) (further invocation of this evidence in closing). Three times the Government directly invoked SrA H.S.'s statement ("I think he raped me") as a

proxy for the ultimate issue of guilt, explicitly telling the panel that SrA H.S.'s conclusion was correct and that the panel should adopt the same conclusion that she did and vote guilty. (JA at 412-13, 417, 451). As this Court has recently stated, the materiality and quality of evidence to the Government's case may be illustrated by the Government's use of that evidence. *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F. 2022). In the present case, it is no exaggeration to say that the Government made the statement "I think he raped me" *the central theme* of its case at trial. The Government cannot credibly make a piece of evidence the central theme of its case at trial and then turn around on appeal and argue that the same evidence was of minimal significance. Finally, as discussed in Appellant's opening brief, the "I think he raped me" statement was particularly material on this record because it filled the glaring gap in the Government evidence: the lack of any actual evidence of non-consent. *See* App. Br. at 11, 22-26.

D. Quality of the Evidence.

With respect to the "quality" of the evidence, the Government states without elaboration that "the quality of SrA [H.S.'s] statement was low compared to the rest of the Government's evidence." Gov. Ans. at 26. The argument that the quality of the evidence was low, while convenient for the Government at this procedure posture, is again belied by the Government's near-constant invocation of this evidence at trial. Beyond that, the Government seems to largely conflate this factor

with the first factor, devoting the rest of the paragraph to a discussion of the strength of *other* Government evidence. *Id.* at 26-27.

E. Scope of the Granted Issue.

Finally, the Government argues that the text message containing the "I think he raped" me text message (JA at 480) (Pros. Ex. 2) was cumulative with SrA H.S.'s preceding testimony, in which she testified that she had sent the "I think he raped me" message. Gov. Ans. at 25; (JA at 67). The Government points out that trial defense counsel did not object until the exhibit was offered, at which time trial defense counsel objected on hearsay grounds. (JA at 67, 69). The Government frames this as a prejudice issue, apparently viewing the granted issue as only relating to the admission of the text message. This is not Appellant's understanding of the granted issue, which specifically questions whether the military judge erred by admitting "text messages *and testimony*" relating to SrA H.S.'s belief she had been raped. While trial defense counsel failed to object to the initial testimony, in the heat of trial, he objected moments later on the same issue (hearsay as to SrA H.S.'s prior "I think he raped me" statement). This objection was equally applicable to her testimony about the text message (JA at 67) as it was to the text message itself (JA at 69). Had the military judge sustained the hearsay objection – as he should have – inevitably the trial defense counsel's very next sentence would have been to ask the judge to instruct the panel to disregard the testimony from moments before. As the

legal analysis was the same, the military judge would clearly have granted this request. Indeed, even in the absence of the inevitable trial defense counsel's request to strike, the military judge would have a *sua sponte* duty to strike the hearsay testimony after sustaining an objection to the legally hearsay identical text message.[10] As such, the military judge's decision on the hearsay objection *was dispositive as to both the testimony and text messages* under examination within the granted issue. In sum, the question of the prior testimony (JA at 67) is not part of the prejudice analysis, but part and parcel to the granted issue.

3. Conclusion: Issue I.

Allowing a statement like "I think he raped me," made after deliberation and reflection over an entire morning, into evidence as an excited utterance would represent a significant expansion of the exception. This Court should maintain and reinforce its existing precedent, which this evidence clearly fails. This Court should find error and prejudice.

WHEREFORE, this Honorable Court should reverse the Air Force Court's decision and set aside the findings and the sentence.

[10] Even prior to Pros. Ex. 2 being offered, Appellant would submit it was plain error to admit the prior testimony.

II. THE EVIDENCE WAS LEGALLY INSUFFICIENT BECAUSE THE NAMED VICTIM COULD CONSENT, AND EVEN IF SHE COULD NOT HAVE CONSENTED, AMN SMITH REASONABLY BELIEVED THAT SHE DID CONSENT.

The Government's legal sufficiency argument largely consists of a recitation of the evidence that SrA H.S. was intoxicated. Gov. Ans. at 31-38. It is uncontested that the evidence showed SrA H.S. was intoxicated. *See* App. Br. at 35 (". . . the Government undeniably had evidence of intoxication. . . ."). The crucial point, however, is to differentiate intoxication from incapacity, with the latter being the relevant legal standard. *See United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016). To this crucial point, all affirmative evidence shows that SrA H.S. was able to understand her surroundings and make decisions in the relevant timeframe. Appellant's statements confirmed that she was actively interacting/participating during the charged acts. SrA H.S.'s testimony, meanwhile, (1) was consistent with Appellant's statements and (2) independently confirmed that she was able to make decisions close in time to the charged events (upon arriving in the hotel room). *See* (JA 150). The only change in SrA H.S.'s state thereafter was that her memory lapsed, which she testified was consistent with her history of memory loss while drinking, even during memorable events. *See* (JA at 128). There is no reason to believe that SrA H.S. lost her ability to make and execute decisions between entering the hotel room and the sexual activity in question, especially as all drinking seems

to have stopped quite some time before. Crucially, the Government does not point to any affirmative evidence of incapacity, as that term has been legally defined in *Pease*, on the part of SrA H.S. in the relevant timeframe.

Relatedly, the Government argues that SrA H.S. demonstrated a lack of control over her "mental faculties." Gov. Ans. at 32. However, this is not supported by the record. After making this assertion about "mental faculties," the Government lists signs of physical impairment that SrA H.S. demonstrated. *Id.* But nothing in the record supports the conclusion that SrA H.S. lost control of her "mental faculties." To the contrary, the last memories SrA H.S. endorsed – which were close in time to the sexual activity and seemingly long after all drinking had stopped – show that she was demonstrating mental awareness and executive function at this time. *See* (JA 150). The only "mental faculty" – if it could be termed such – that SrA H.S. lost control over was her memory, which, as she testified, was consistent with her history of memory loss while drinking, even during memorable events. *See* (JA at 128).

Throughout its legal sufficiency argument, the Government highlights statements Appellant made to AFOSI to the effect that he stopped the sexual activity in question because SrA H.S. was too intoxicated. Gov. Ans. at 33, 37. The Government seeks to demonize Appellant with his own words, and essentially argue that he confessed by acknowledging that SrA H.S. was intoxicated. A few points

are worth noting here. First, on simply a factual basis, Appellant's statements were more nuanced than the Government portrays. His most thorough explanation for why he stopped the sexual activity was: "We were too drunk, and she has a boyfriend, and I was -- I just didn't want to continue after thinking that." (JA 957). Second, to the extent Appellant stated that he felt it would be "wrong" to continue because, *inter alia*, SrA H.S. was "drunk", these were not legal conclusions under the *Pease* standard, but candid colloquial statements by a young junior servicemember. Finally, on a more fundamental level, while the Government wants to twist his words to make Appellant look opportunistic and predatory, that is really the exact opposite of what he expresses. Appellant was cognizant of SrA H.S.'s state of intoxication, as well as her other interests (such as her relationship with another man), and consciously choose to stop the sexual activity over her express objection and repeated requests to continue. Appellant was continuously evaluating the wisdom of persisting in a course of conduct and, at the point he consciously felt it was in his partner's best interests to desist, he did so, even while she asked him to continue. Appellant exercised the self-control to disengage from a passionate encounter even as SrA H.S. begged him to keep going. These are hardly the actions of an opportunistic predator. Additionally, while Appellant acknowledged that he felt it was wiser to stop, he consistently explained that SrA H.S. was an active participant throughout.

Finally, recognizing that legal insufficiency is a high standard, it is important to again highlight the overlap between the weaknesses in the Government's evidence and the improper hearsay evidence discussed in issue I, above ("I think he raped me."). The Government's evidence had a significant gap: the lack of any affirmative evidence of non-consent or incapacity. The "I think he raped me" statement filled this gap – and the Government leveraged it to the fullest. As such, even if this Court concludes the evidence is legally sufficient, these same considerations reinforce the prejudice of the improper admission of the hearsay evidence.

WHEREFORE, this Honorable Court should reverse the Air Force Court's decision and set aside the findings and the sentence.

Conclusion

Without competent evidence to meet its burden, the Government presented proxy evidence of SrA H.S. hypothesizing that she would not have consented. The Government made the speculative statement, "I think he raped me," the central theme of its case, and repeatedly used it as a proxy for the ultimate issue of guilt. But this statement was inadmissible hearsay, and the military judge's characterization of it as an "excited utterance," unaccompanied by findings of fact or analysis on the record, was a clear abuse of discretion.

Meanwhile, the competent evidence presented was limited to (1) direct evidence of innocence (Appellant's statements) and (2) corroborating evidence of

innocence (SrA H.S.'s testimony). While the Government undeniably had evidence of intoxication, that is not the legal standard. The legal standard is incapacitation. And the evidence consistently showed that SrA H.S. had the capacity to consent, did consent, and that Appellant believed she consented. This evidence was legally insufficient.

WHEREFORE, this Honorable Court should reverse the Air Force Court's decision and set aside the findings and the sentence.

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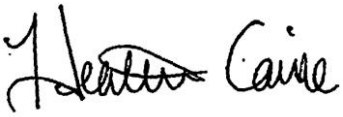

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APPENDIX A

United States v. Lossiah

United States Court of Appeals for the Tenth Circuit

April 25, 2005, Filed

No. 04-2068

Reporter
129 Fed. Appx. 434 *; 2005 U.S. App. LEXIS 7097 **

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON LOSSIAH, Defendant-Appellant.

Notice: [1]** RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: US Supreme Court certiorari denied by *Lossiah v. United States, 546 U.S. 954, 126 S. Ct. 465, 163 L. Ed. 2d 353, 2005 U.S. LEXIS 7587 (Oct. 11, 2005)*

Post-conviction proceeding at, Magistrate's recommendation at *United States v. Lossiah, 2006 U.S. Dist. LEXIS 108152 (D.N.M., Oct. 26, 2006)*

Prior History: (D.C. No. CR-00-171 MV). (D. N. M.).

Core Terms

startling event, younger sister, older child, excited utterance, younger child, contends, seeing, sexual assault, convictions, counts, excited, raped, sexual abuse, hearsay, argues

Case Summary

Procedural Posture

A jury for the United States District Court for the District of New Mexico found defendant guilty of two counts of aggravated sexual abuse in violation of *18 U.S.C.S. §§ 1153*, *2241(c)*, *2246(2)(A)*. Defendant appealed.

Overview
Defendant contended that hearsay evidence was improperly admitted, that the evidence submitted was insufficient to support his convictions, and that the jury's verdicts were irrationally inconsistent. The younger child's statement that defendant had previously raped her was related to the startling event of seeing him at the school. Further, she testified about the statement she made to her teacher, and defendant had the opportunity to cross-examine her. Thus, the trial court did not abuse its discretion in admitting the child's statement as an excited utterance. Also, there was sufficient evidence for a rational jury to have found defendant guilty of aggravated sexual abuse because (1) the older child testified as to sexual activity with defendant that she was forced to perform; (2) she testified that she reported those same acts to a doctor; (3) the medical evidence presented through doctor's testimony was consistent with vaginal penetration; and (4) the doctor testified that the older child described both acts of sexual abuse to her during the medical examination. Finally, the appellate court found that the verdicts were not inconsistent or irrational.

Outcome
The appellate court affirmed the trial court's judgment.

LexisNexis® Headnotes

Evidence > ... > Exceptions > Spontaneous Statements > Criminal Proceedings

Evidence > ... > Exceptions > Spontaneous Statements > General Overview

Evidence > ... > Exceptions > Spontaneous Statements > Excited Utterances

HN1[] **Spontaneous Statements, Criminal Proceedings**

An excited utterance, a statement relating to a startling

event or condition made while a declarant is under the stress of excitement caused by the event or condition, is excluded from the definition of hearsay under Fed. R. Evid. 803(2).

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

HN2[] Abuse of Discretion, Evidence

An appellate court reviews evidentiary rulings under an abuse of discretion standard and reverses a district court's rulings only for a clearly erroneous finding of fact or an erroneous conclusion of law or a clear error in judgment.

Evidence > ... > Exceptions > Spontaneous Statements > Criminal Proceedings

Evidence > ... > Exceptions > Spontaneous Statements > General Overview

Evidence > ... > Exceptions > Spontaneous Statements > Excited Utterances

HN3[] Spontaneous Statements, Criminal Proceedings

To come within the excited utterance exception under Fed. R. Evid. 803(2), a declarant need not show signs of excitement immediately upon witnessing or experiencing a startling event. Rather, the declarant is simply required to still be under the continuing stress of excitement caused by the event or condition when making the statement.

Evidence > ... > Exceptions > Spontaneous Statements > Criminal Proceedings

Evidence > ... > Exceptions > Present Sense Impressions > General Overview

Evidence > ... > Exceptions > Spontaneous Statements > General Overview

HN4[] Spontaneous Statements, Criminal Proceedings

Permissible subject matter of the statement is limited under the present sense impression exclusion to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. With the excited utterance exclusion, however, the statement need only relate to the startling event or condition, thus affording a broader scope of subject matter coverage. Fed. R. Evid. 803.

Evidence > ... > Exceptions > Spontaneous Statements > Criminal Proceedings

Evidence > ... > Exceptions > Spontaneous Statements > General Overview

HN5[] Spontaneous Statements, Criminal Proceedings

The basis of an excited utterance exception, Fed. R. Evid. 803(2), rests with the spontaneity and impulsiveness of the statement; thus, the startling event does not have to be the actual crime itself, but rather may be a related occurrence that causes such a reaction.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Evidence > Weight & Sufficiency

Criminal Law & Procedure > ... > Crimes Against Persons > Sex Crimes > General Overview

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Sufficiency of

Evidence

HN6 **Sexual Assault, Abuse of Children**

Sufficiency of the evidence to support a jury's verdict is a legal issue that is reviewed de novo. In order to conclude that the evidence was insufficient as a matter of law, a court must view the evidence and reasonable inferences therefrom in the light most favorable to the government and then determine that no rational jury could have found a defendant guilty beyond a reasonable doubt.

Criminal Law & Procedure > Trials > Witnesses > Credibility

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

HN7 **Witnesses, Credibility**

The credibility of witnesses is a matter for the jury, and on appeal an appellate court must resolve credibility issues in the jury's favor unless the testimony is inherently incredible.

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For JASON LOSSIAH, Defendant - Appellant: Stephen P. McCue, Fed. Public Defender, John Van Butcher, Asst. F.P. Defender, Office of the Federal Public Defender, Albuquerque, NM.

Judges: Before BRISCOE, HOLLOWAY and MURPHY, Circuit Judges.

Opinion by: Mary Beck Briscoe

Opinion

[*435] ORDER AND JUDGMENT *

Defendant Jason Lossiah appeals his convictions for two counts of aggravated sexual abuse in violation of *18 U.S.C. §§ § 1153*, *2241(c)*, *2246(2)(A)*. Lossiah contends hearsay evidence was improperly admitted, the evidence submitted was insufficient to support his convictions, and the jury's verdicts are irrationally inconsistent. [1] We have jurisdiction pursuant to *28 U.S.C. § 1291* **[**2]** and affirm.

[*436] I.

In January of 2002, Lossiah was charged in a superceding indictment with six counts of aggravated sexual abuse in violation of *18 U.S.C. §§ 2241(c)* and *2246(2), subsections (A)*, *(B)*, and *(D)*. Three counts involved a child who was over the age of 12 but under the age of 16, and three counts involved her younger sister, who was under the age of 12. Lossiah was convicted after a jury trial on four counts and acquitted of two. Lossiah's motion for a new trial was granted. A second trial, which began in June of 2003, ended in a mistrial.

The third trial, which gives rise to this appeal, began in August 2003. The jury returned guilty verdicts on Counts I and II, both involving the older child, and acquitted on **[**3]** Count III, involving the older child, and Count IV, the only remaining count involving her younger sister. [2]

The children, who were the victims of the crimes charged, lived at the school they attended on their reservation. With their mother's permission, Lossiah and other members of his family would bring the children snacks at school or check them out from school to take them to a nearby store so that they could select their own snacks. On December 19, 2000, Lossiah checked the older child out of school. Although he told her they were going to get a snack, he instead sexually

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3*.

[1] Although the United States initially filed a cross-appeal (No. 04-2100) challenging the court's grant of a downward departure, it later moved to dismiss the cross-appeal. The government's motion to dismiss its cross-appeal was granted by the court on January 27, 2005.

[2] Lossiah was convicted of Counts I and II for forcing the older child to engage in sexual acts in violation of *18 U.S.C. §§ § 1153*, *2241(c)*, *2246(2)(A)*. Lossiah was acquitted of Count III, which charged a violation of *18 U.S.C. §§ § 1153*, *2241(c)*, *2246(2)(B)*, and of Count IV, which charged a violation *18 U.S.C. §§ § 1153*, *2241(c)*, *2246(2)(D)*.

assaulted her. This sexual assault of the older child is the basis for the convictions appealed.

[4]** The evidence at trial also related to alleged sexual abuse of the younger child, and the testimony of Kelly Smith, her third grade teacher, is the focus of Lossiah's argument that hearsay evidence was improperly admitted. Specifically, the same day that the older child was assaulted, her younger sister upon seeing Lossiah in the school office ran to Smith and asked Smith not to let Lossiah take her from school because he had raped her. The younger sister made this statement to Smith on December 19. The Government contends Lossiah sexually assaulted the younger sister sometime before Thanksgiving, suggesting October 19 as the exact date. A few days after December 19, Dr. Margaret Bradley examined both of the children.

II.

Excited utterance

Lossiah contends the court erred in admitting the following statement as an excited utterance: "Don't let him check me out. He raped me." ROA, Vol. XIV, at 213. Smith testified the younger sister made this statement to her. Lossiah argues that (1) the younger sister was not immediately excited after a startling event, (2) there is no evidence that a startling event occurred, and (3) the statement does not relate to a startling event. The **[**5]** district court admitted the statement as an excited utterance, but did not indicate what startling event prompted the statement. Id. at 204-213. Lossiah objected to the admission of the statement as constituting hearsay. Id. at 204.

HN1[] An excited utterance, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event **[*437]** or condition," is excluded from the definition of hearsay under *Federal Rule of Evidence 803(2)*. HN2[] We review "evidentiary rulings under an abuse of discretion standard and reverses district court rulings only for a clearly erroneous finding of fact or an erroneous conclusion of law or . . . a clear error in judgment." *United States v. Lang, 364 F.3d 1210, 1222 (10th Cir. 2004)*.

Lossiah contends that the statement was not an excited utterance because the younger child initially appeared calm following the startling event. This argument understates the test. HN3[] To come within the excited utterance exception, the declarant need not show signs of excitement immediately upon witnessing or experiencing a startling event. Rather, the declarant is **[**6]** simply required to still be under the continuing stress of excitement caused by the event or condition when making the statement. See *United States v. Farley, 992 F.2d 1122, 1126 (10th Cir. 1993)*.

Lossiah also contends the court's ruling was erroneous because there was no evidence of a startling event when the statement was admitted. Lossiah is correct that evidence of a startling event had not been fully developed when the statement was admitted. However, this gap in the evidence was later rectified. When the statement was admitted, Smith had testified that the students were walking back and forth in the hallway going to the cafeteria and that the older child took the younger child out of the lunch line and whispered something to her. However, later in the trial, the younger child testified "I was about to go to lunch. I asked Ms. Smith if I could use the restroom. I seen Jason at the front office, so I ran to tell Kelly Smith that I didn't want to go with him, and she asked me why, and I told her that - - what happened to me." Id. at 308. The prior sexual assault caused the child to be fearful when she saw Lossiah in the school hallway. Her seeing Lossiah in **[**7]** the hallway was a startling event which would support the admission of Smith's hearsay statement.

Lossiah argues that it is "unclear as to when [the younger sister] may have seen [him] or how much time elapsed between then and her statement to Kelly Smith." Aplt. Reply Br. at 3. However, the testimony at trial indicates that upon seeing Lossiah in the office, the younger sister "ran to tell" Smith. Vol. XV, ROA at 308. This chronology of events indicates immediacy, not delay. That her statement quickly followed her seeing Lossiah is supported by the school sign-out sheet, which shows Lossiah checked the older child out from the office at 11:20, and Smith's testimony that the younger child sought protection around 11:30. Aplee. Br., Exhibit 8A; ROA, Vol. XIV, at 213.

Lossiah also argues that his presence at the school was not uncommon, thus he contends the younger child seeing him in the office would not constitute a startling event. While it is true that the Lossiah family, including the defendant, frequently came to the school, that fact becomes irrelevant when the intervening sexual assault on the younger child is also considered. That intervening fact would cause the child **[**8]** to respond as she did upon seeing him.

Lossiah also argues that the younger child's statement concerning a prior rape did not relate to the startling event of her seeing him at ths school. HN4[↑] "Permissible subject matter of the statement is limited under [the present sense impression exclusion] to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. [With the excited utterance exclusion,] however, the statement need only 'relate' to the startling event or condition, thus affording a broader scope of subject matter coverage." **[*438]** Fed. R. Evid. 803, Advisory Committee's Notes.

In Esser v. Commonwealth, 38 Va. App. 520, 566 S.E.2d 876, 879 (Va. Ct. App. 2002), the Virginia Court of Appeals concluded that HN5[↑] "the basis of the excited utterance exception rests with the spontaneity and impulsiveness of the statement; thus, the startling event does not have to be the actual crime itself, but rather may be a related occurrence that causes such a reaction." In Esser, a victim of a sexual assault informed her mother that her aunt's boyfriend had **[**9]** raped her. Id. at 880. Finding the statement admissible as an excited utterance, the court noted that "the statement was made the first time she believed she was to be returned to the place where she was assaulted and to the control of appellant, the man who had raped and sexually assaulted her." Id.

Similarly, the younger child's statement here that Lossiah had previously raped her is related to the startling event of seeing him at the school. Further, the younger child later testified about the statement she made to her teacher, and Lossiah had the opportunity to cross-examine her. Thus, the district court did not abuse its discretion in admitting the child's statement as an excited utterance.

Sufficiency of the evidence

Lossiah contends there was insufficient evidence to support his convictions for violating 18 U.S.C. §§ 2241(c) and 2246 (Counts I and II). HN6[↑] "Sufficiency of the evidence to support a jury's verdict is a legal issue that is reviewed *de novo*. In order to conclude that the evidence was insufficient as a matter of law, the court must view the evidence and reasonable inferences therefrom in the light most favorable to the government **[**10]** and then determine that no rational jury could have found Defendant guilty beyond a reasonable doubt." United States v. Norman, 388 F.3d 1337, 1340 (10th Cir. 2004) (internal citations and quotation marks omitted).

As regards the convictions at issue, the older child testified as to sexual activity with Lossiah that she was forced to perform, including vaginal and anal sex. She also testified that she reported these same acts to Dr. Bradley. The medical evidence presented through Dr. Bradley's testimony was consistent with vaginal penetration. Dr. Bradley also testified that the older child described both acts of sexual abuse to her during the medical examination. When viewed in the light most favorable to the government, there is sufficient evidence for a rational jury to have found Lossiah guilty beyond a reasonable doubt. See Rojem v. Gibson, 245 F.3d 1130, 1141-42 (10th Cir. 2001).

Lossiah asks us to conclude that the older child's testimony was incredible and to reweigh the evidence. HN7[↑] "The credibility of witnesses is a matter for the jury, and on appeal we must resolve credibility issues in the jury's favor unless the testimony is inherently **[**11]** incredible." United States v. Smith, 131 F.3d 1392, 1399 (10th Cir. 1997). On the record presented, we cannot conclude the child's testimony was inherently incredible.

Inconsistent verdicts

The jury acquitted Lossiah on Count III, but convicted as to Count II. Lossiah contends that there is less evidence to support a guilty verdict as to Count II than Count III. He concedes that a verdict should not be overturned merely because it is inconsistent, but argues that the jury's verdicts are not only inconsistent, but also exceed the bounds of rationality.

The fatal flaw in Lossiah's argument is that these verdicts are not inconsistent or **[*439]** irrational. The acts at issue in Count II and Count III are different and distinct acts. Lossiah could have committed one act of sexual abuse without having committed the other. Further, there was medical evidence that supported the conviction on Count II, while there was no such evidence to support the charge in Count III. A rational jury could have rendered a different verdict on Count II than it did on Count III on that basis alone.

Affirmed.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

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