UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39362

UNITED STATES
Appellee

v.

William H. ABEL
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 27 December 2018

Military Judge: Jefferson B. Brown.

Approved sentence: Dishonorable discharge, confinement for 30 days, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 29 July 2017 by GCM convened at Tinker Air Force Base, Oklahoma.

For Appellant: Major Meghan R. Glines-Barney, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Before MAYBERRY, JOHNSON, and DENNIS, *Appellate Military Judges*.

Senior Judge JOHNSON delivered the opinion of the court, in which Chief Judge MAYBERRY and Judge DENNIS joined.

JOHNSON, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of sexual assault by causing bodily

harm in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. The court members sentenced Appellant to a dishonorable discharge, confinement for 30 days, total forfeiture of pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant raises two issues on appeal: (1) whether the military judge erred by excluding evidence of out-of-court statements by Appellant offered by the Defense as an excited utterance; and (2) whether the military judge erred by admitting an out-of-court statement by the victim, SB, offered by the Government as an excited utterance. We find no prejudicial error and we affirm the findings and sentence.

I. BACKGROUND

In early August 2016, Appellant was stationed at Tinker Air Force Base (AFB), Oklahoma. Appellant resided in an off-base apartment in Oklahoma City with two other male Airmen, Senior Airman (SrA) KL and SrA RW. At the time, SrA KL was in a romantic relationship with a civilian woman, PM. PM had two female roommates, NJ and the victim in this case, SB. SB's only social interaction with Appellant prior to 4 August 2016 had been one occasion when he visited the women's house as part of a group that played drinking games for approximately two or three hours.

On 4 August 2016, all six individuals planned to go out together for the evening. The group spent approximately 30 to 45 minutes talking and drinking alcohol at the Airmen's apartment before they walked to a nearby bar. They stayed at the bar for approximately two or three hours. At one point toward the end of the evening, SB and Appellant sat together away from the rest of the group and engaged in small talk for what SB later estimated to be 15 minutes. The conversation ended when PM approached and began speaking with SB, after which SB began dancing and then joined the rest of the group at another part of the bar.

In the course of the entire evening, SB drank approximately one and a half beers and at least six shots of whisky. She became significantly intoxicated. SB later testified her memory "fade[d]" toward the end of the evening. The last event SB remembered was writing the tip for her bar tab. PM later testified that SB became "wobbly in her chair," "tired," and "sleepy." When most of the group called a ride to return to the Airmen's apartment, SrA RW carried SB to the vehicle because SB was stumbling. Appellant decided to stay longer at the bar when the rest of the group returned to the apartment.

Inside the apartment, SB was placed on a futon in a common area, where she promptly vomited. PM and NJ cleaned up the mess. PM got a glass of water

for SB, who appeared "very drowsy." After PM made sure SB was "okay," the rest of the group retired to different bedrooms, leaving SB lying on the futon. PM heard Appellant return to the apartment approximately 30 to 40 minutes after the rest of the group.

SB's next memory was awakening to find herself lying in Appellant's bed with Appellant "on top" of her. Appellant removed her shorts and underwear. SB later testified she did not say anything. She described herself as

> kind of going in and out of it like as if my body was trying to wake me up, but my mind just kept fading back and being dizzy. . . . I was so dizzy and I couldn't move and then by the time that he was taking off my pants I was just frozen and trying to get out of the state that I was in.

Appellant then penetrated her vagina with his penis for "[a]bout five minutes." SB testified at that point she "was able to start moving [and she] moved like up and out of it and then rolled over." SB continued to feel dizzy and felt she could not get out of the bed. After approximately five minutes she fell asleep.

The following morning, 5 August 2016, PM found SB and Appellant sleeping back-to-back on Appellant's bed with the covers pulled up. PM pulled the covers down to wake up SB and discovered SB was not wearing her shorts or underwear, although her shirt, bra, and sandals were still on. PM woke SB, helped SB find her underwear and shorts and get dressed, and took SB downstairs to the living room to talk. PM later testified:

> I was trying to calmly ask [SB] what had happened and she--it was really hard for her to like get the words out and I wasn't really understanding what she was saying. So I said, "Here, let's go outside and talk," so we got all her stuff, we got my purse, her purse, we moved down the stairs, walked out the front door and on the sidewalk I was able to talk to her more and I asked her if her and [Appellant] slept together and she said, "Yes." I said, "Did you want to?" And she said, "No."
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> . . . .
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> From there I asked her, "What would you like to do from here? This is completely your decision. Do you want to go to work? Do you want to go to the hospital? What would you like to do?" And she said she wanted to go to the hospital.

SB subsequently underwent a sexual assault forensic examination and was interviewed by civilian police on 5 August 2016. That afternoon, civilian police arrived at Appellant's apartment to speak with Appellant, who was home. As the police arrived, SrA KL and SrA RW drove up to the apartment, saw the

police, and decided to keep driving. When they returned approximately five minutes later, the police were speaking with Appellant. SrA KL later testified that Appellant appeared "shaking and extremely distraught, freaking out" as he spoke with the police. SrA KL observed Appellant being questioned for approximately seven minutes. The police then took statements from SrA KL and SrA RW for approximately ten minutes, after which the police departed.

SrA KL testified that approximately two minutes after the police had gone Appellant spoke with SrA KL about what happened the night before. Appellant told SrA KL that he had laid down on his bed facing away from SB. Then, according to Appellant,

> [SB] grabbed [Appellant] and pulled him over. They started making out, proceeded to have sex. He after--it was like five minutes or so, he said he didn't last very long, he performed oral, got up[,] offered her sweatpants, and then they--she said, "No," and then they went back to bed.

II. DISCUSSION

A. Law

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017) (citation omitted). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

Military Rule of Evidence (Mil. R. Evid.) 803(2) provides that an "excited utterance," defined as a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused," is an exception to the general prohibition on hearsay evidence. *See* Mil. R. Evid. 801, 802; *Bowen*, 76 M.J. at 87–88. The excited utterance exception is based on the premise "that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990) (internal quotation marks omitted). "The guarantee of trustworthiness of an excited utterance is that the statement was made while the declarant was still in a state of nervous excitement caused by a startling event." *United States v. Chandler*, 39 M.J. 119, 123 (C.M.A. 1994) (citation omitted). To determine whether a hearsay statement qualifies as an excited utterance, we apply a three-pronged test: "(1) the statement must be 'spontaneous, excited or impulsive rather than the product of reflection and deliberation'; (2) the event prompting the utterance must be 'startling'; and (3) the declarant must

be 'under the stress of excitement caused by the event.'" *Bowen*, 76 M.J. at 88 (quoting *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987)). Although the statement relating to the startling event "need not always follow immediately after the event, a lapse of time between the event and the utterance creates a strong presumption against admissibility." *Jones*, 30 M.J. at 129.

Whether an error is harmless is a question of law we review de novo. *Bowen*, 76 M.J. at 87 (quoting *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003)). "For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." *Id.* (quoting *McCollum*, 58 M.J. at 342) (internal quotation marks omitted). "We evaluate the harmlessness of an evidentiary ruling by weighing: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *Id.* at 89 (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

B. Appellant's Statements to SrA KL

1. Additional Background

The Government called SrA KL to testify at trial. On cross-examination the Defense attempted to elicit Appellant's statements to SrA KL after Appellant spoke with the police on the afternoon of 5 August 2016. Assistant trial counsel objected that this was inadmissible hearsay. Trial defense counsel responded that it was an excited utterance. In a ruling during an Article 39(a), UCMJ, session the military judge sustained the objection. The military judge explained:

> I find that this is not an excited utterance. There was sufficient time for reflection for [Appellant] between the police officers talking to him and then having the separate conversation with his roommates. Furthermore, what he was discussing, it occurred--at this point I think it was probably about a day and a half earlier and while I understand--the actual incident, the actual sexual assault incident or consensual sexual relationship had occurred approximately a day to a day and a half earlier, which provided a sufficient time--

At this point, trial defense counsel interrupted to clarify that Appellant's encounter with the police and statements to SrA KL occurred on the afternoon of 5 August 2016. After confirming this with the witness, SrA KL, the military judge continued: "I find that the approximate twelve hours was a sufficient intervening time and that that does not qualify as an excited utterance . . . ." Trial defense counsel then requested "clarification":

> DC [Defense Counsel]: Is the ruling based upon the amount of time between the alleged assault and when [Appellant] told the witness about it or are you counting, I guess, the startling event as the notification by the police that an allegation has been made?
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> MJ [Military Judge]: . . . There is [sic] actually arguably two events; one is the amount of reflection that [Appellant] had after the incident occurred, and when I say "incident" now I am referring to the sexual contact that occurred. Certainly, defense, presumably your argument is that [Appellant] thought it was consensual the entire time, so the startling event was when the cops came and talked to him about this.
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> DC: Correct, Your Honor.
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> MJ: However, that may be an argument. I don't believe there is sufficient evidence or testimony that I've seen to suggest that that was necessarily the case. He had a sexual encounter, which at least the defense counsel and trial counsel agree with that, as to the alleged victim, there has been approximately twelve hours since that when he was approached and I find that is sufficient intervening time that he was not under duress that entire period of time and because of the amount of time that he had for reflection I will sustain the objection as to hearsay.

2. Analysis

Citing *United States v. Moolick*, 53 M.J. 174, 177 (C.A.A.F. 2000), Appellant contends that being accused of sexual assault can qualify as a "startling" event for purposes of finding an excited utterance under Mil. R. Evid. 803(2). We agree. Nevertheless, we do not find the military judge abused his discretion in finding Appellant's statements to SrA KL were not an excited utterance under the circumstances of this case.

To establish an excited utterance, the proponent must demonstrate the statement was not the product of "reflection and deliberation." *Arnold*, 25 M.J. at 132 (citation omitted). Accepting that Appellant was "distraught" after he learned of SB's sexual assault allegation from the police, we find the military judge reasonably concluded Appellant had an opportunity to reflect on his circumstances before he spoke with SrA KL. In response to questions from the military judge, SrA KL testified that Appellant spoke with SrA KL approximately 25 minutes after the police first arrived; approximately 19 minutes after SrA KL first observed Appellant speaking with the police after he and SrA RW returned; and approximately two minutes after the police departed. The military judge reasonably determined Appellant's exculpatory statements

were not impulsive or spontaneous in immediate response to the allegation, but came after some opportunity to reflect and deliberate on what he would tell his housemates about the situation.

Appellant's statements may be distinguished from the excited utterance the United States Court of Appeals for the Armed Forces (CAAF) found in *Moolick*. There, the alleged victim awoke to find the appellant on top of her. *Moolick*, 53 M.J. at 175. She immediately pushed the appellant off of her and ran to the room of another female Sailor, screaming and claiming the appellant had raped her. *Id.* The appellant arrived 30 seconds later. *Id.* When he heard the alleged victim accuse him of rape, the appellant appeared "shocked, [in] disbelief, upset." *Id.* (alteration in original). The appellant "responded to the accusation by saying, 'You grabbed me first.' Then he threw up his hands, said 'call the cops,' and walked out of the room." *Id.* Thus in *Moolick* the CAAF found the military judge erred in excluding the excited utterance because the appellant was "upset" *and* "responded immediately" to the accusation. *Id.* at 176. By contrast, in the instant case, even if Appellant remained upset from learning about the sexual assault allegation from the police, he had an interval of time to think about what he would say before he spoke to SrA KL. Under the circumstances, including the elapse of approximately 12 hours from the sexual act itself and the knowledge that he was under investigation by the police, we find this was enough time to undermine the premise that Appellant lacked an opportunity to fabricate his version of events. *See Jones*, 30 M.J. at 129.

C. SB's Statement to PM

1. Additional Background

At trial, the Government elicited PM's testimony, described above, that on the morning after the assault she asked SB if SB had wanted to sleep with Appellant and SB responded "No." The Defense objected that the statement was hearsay. During an Article 39(a) session, PM described SB's condition when she took SB downstairs as "very shaky and she had just woken up still, so she wasn't able to really respond to me at that moment." The area defense counsel explained the Defense's objection: "The witness, [PM], testified about the witness's [sic] demeanor, that she was tired, that she was sluggish. Sir, when looking at the mental state required for excited utterance it requires some sort of emotion, it requires some sort of excitement from the actual language of the exception to hearsay."

The military judge overruled the objection:

> I will admit it in as an excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress or [sic] excitement that it caused, the testimony as it has been set forth by this witness was that she [SB] seemed

> to not really know what was going on, and that this appears to be one of the first opportunities that she had to actually relay what had occurred. I will overrule that objection and I will allow those questions and those responses.

2. Analysis

Appellant contends the military judge erred because SB's statement to PM was made hours after the startling event and SB was not in an excited state at the time. In addition, Appellant notes the statement was not spontaneous but rather made in response to specific questions from PM. *See Jones*, 30 M.J. at 129–30 (noting that statements being made "in response to a question" rather than "being the product of impulse or instinct" weighs against finding an excited utterance). The Government responds with several arguments. The Government contends that, because SB fell asleep after the sexual assault and slept until she was awoken by PM, she lacked an opportunity to reflect or fabricate regarding the incident. The Government also suggests that SB's discovery in the morning that she was "in a strange bed, halfway clothed, and unable to find her underwear" was itself a "startling realization" which might be the trigger for an excited utterance. The Government further argues the declarant need not be in an excited state so long as she remained under the "stress" of the startling event. In addition, the Government avers that although SB's statements were in response to questions, PM's questions were not leading, and questioning is only one non-dispositive factor in weighing whether a statement qualifies as an excited utterance. *See Donaldson*, 58 M.J. at 483.

Appellant makes valid points. The proponent of a declaration bears the burden of demonstrating the statement was made under the "stress of excitement" in order to establish it was an excited utterance. SB had testified she fell asleep five minutes after the sexual assault. PM testified SB was asleep when she found SB in Appellant's room, and PM had to wake her up. Falling asleep or being drowsy are not typically indicative of an excited state. Similarly, whereas SB "seemed to not really know what was going on," a confused utterance is not necessarily an excited utterance for purposes of the exception to the hearsay rule.

Nevertheless, assuming *arguendo* the military judge abused his discretion by admitting SB's statements to PM, we find the error did not substantially influence the findings. *See Bowen*, 76 M.J. at 87. In assessing the harmlessness of a nonconstitutional error, we consider the materiality and quality of the evidence in question. *Kerr*, 51 M.J. at 405. In this case, SB's statements to PM on the morning of 5 August 2016 added little to the Government's case. This was not a case where the report of sexual assault was delayed or was recanted at any point. Even if SB's statements to PM had been excluded, SB's belief that she had been sexually assaulted would have been implicit in the testimony

regarding her going to a hospital and submitting to a sexual assault forensic examination and police interview that day. More significantly, the sexual assault nurse examiner's report, prepared on the same day and admitted without objection as a prosecution exhibit, contained SB's narrative description of the assault which also indicated SB did not consent. Recognizing the Government bears the burden of demonstrating the error was harmless, we nevertheless note Appellant has not identified any prejudice from the alleged error. We conclude any error in admitting SB's statements to PM was harmless.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court