IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230030
Sergeant (E-5) **TYRESE S. CAMPBELL** United States Army, Appellant	Tried at Fort Bliss, Texas, on 3 October 2022, and 18–22 January 2023, before a general court-martial appointed by the Commander, Headquarters, 1st Armored Division and Fort Bliss, COL Robert L. Shuck, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING A 911 CALL AND BODY CAMERA FOOTAGE CONTAINING THE COMPLAINING WITNESS'S STATMENTS AS RESIDUAL HEARSAY.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE TRIAL COUNSEL AND SPECIAL VICTIM'S PROSECUTOR TO COMMENT ON APPELLANT'S RIGHT TO SILENCE DURING CLOSING ARGUMENT AND SENTENCING, RESPECTIVELY.

[1] Appellant rests on his pleadings concerning Assignment of Error I.

Statement of the Case

Appellant filed his initial brief on 25 January 2024. The government filed its response on 15 May 2024. This is appellant's reply.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING A 911 CALL AND BODY CAMERA FOOTAGE CONTAINING THE COMPLAINING WITNESS'S STATMENTS AS RESIDUAL HEARSAY.

The government raises four arguments, three of which merit rebuttal.[2]

A. The 911 Call and Body Camera Footage Are Not Prior Consistent Statements

The military judge did not admit the 911 call or body camera footage as prior consistent statements. (R. at 199) ("[T]he 911 call, the court will allow under M.R.E. 807 in its entirety. The body cam footage . . . [t]hat is admissible under M.R.E. 807."). Therefore, the argument that appellant waived or forfeited the issue is inapposite. (Gov't Br. 38).

Appellant prevails on the merits. A statement is admissible as non-hearsay under Military Rule of Evidence (Mil. R. Evid.) 801(d)(1)(B) only after "the declarant testifies and is subject to cross examination[.]" The 911 call and body camera footage could never have been admitted as prior consistent statements as both exhibits were offered *before* Mrs. [redacted] testified. (R. at 301) (admitting 911 call

[2] Appellant rests on his pleadings concerning the government's prejudice argument.

through Officer [redacted]); (R. at 347) (admitting body camera footage through Officer [redacted]); (R. at 465) (beginning of Mrs. [redacted]s testimony).

B. The 911 Call and Body Camera Footage Are Not Residual Hearsay

Mrs. [redacted] statements were not admissible as residual hearsay because Mrs. [redacted] was available as a witness and she said what the prosecution wanted her to say. *United States v. Czachorowski*, 66 M.J. 432, 434–35 (C.A.A.F. 2008) ("the residual hearsay exception is inapplicable when the evidence is not unreasonably difficult to obtain directly from an available declarant"). As discussed in appellant's opening brief, the government's reliance on *United States v. Haner*, 49 M.J. 72 (C.A.A.F. 1998), is distinguishable from the situation at hand, as it involved offering a victim's statements after the victim not only recanted, but testified on behalf of the accused. (Gov't Br. 39); (Appellant Br. 13–14); *Haner*, 49 M.J. at 75.

Contrary to the government's assertion, appellant did not waive his objection to the admission of the 911 call or body camera footage as residual hearsay. Motions in limine do not preserve an objection when such a motion "address[es] hypothetical concerns that may not arise during the course of trial[.]" *United States v. Dollente*, 45 M.J. 234, 240 (C.A.A.F. 1996). However, "[w]here the substance of the objection[] has been thoroughly explored during the hearing on the motion in limine, and the trial court's ruling permitting introduction of

evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility[.]"

Here, Mrs. [redacted] testimony was never a hypothetical concern—she was *the* central government witness, subpoenaed for trial. (App. Ex. XXI); (R. at 868). The residual hearsay issue was litigated thoroughly in written motions and at argument. (App. Ex. XXI); (App. Ex. XXV); (IR. at 23–34; 199). The military judge initially stated his ruling was conditional, but then he definitively admitted both the 911 call and the body camera footage, going so far as to parse out which statements were and were not admissible. (R. at 199) ("this is conditional based on the uncooperative nature of the complaining witness in the case, but the 911 call, the court will allow under M.R.E. 807 in its entirety."); (R. at 199) (parsing out portions of body camera footage, concluding "to 3:10 . . . That is admissible under M.R.E. 807."). The government relied on the military judge's pretrial ruling in admitting both statements. (R. at 301, 347). Consequently, the issue has been properly preserved for this court's review.[3] *Dollente*, 45 M.J. at 240.

[3] At worst, the issue is reviewed for plain error—a standard under which appellant nonetheless prevails due to the clear and obvious nature of the error as discussed above. *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018) ("As Appellant's motion in limine was not yet ripe and he did not renew his objection when afforded the opportunity to do so, we review for plain error.").

C. The 911 Call Is Not an Excited Utterance

"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" as an excited utterance. *United States v. Donaldson*, 58 M.J. 477, 484 (C.A.A.F. 2003). The government cannot overcome that presumption, where the 911 call took place hours after the events underpinning the lone finding of guilt, and even farther in time from the alleged choking incident for which the panel returned a verdict of not guilty. (R. at 298); (Pros. Ex. 3). Mrs. [redacted] concluded the call by stating she was not in any danger. (Pros. Ex. 3). The government's argument, which largely focuses on the fact that Mrs. [redacted] had an injured lip, fails to account for these critical facts, which show Mrs. [redacted] was not under the stress of a startling event at the time she made the statements presented in the 911 call. Mil. R. Evid. 803.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE TRIAL COUNSEL AND SPECIAL VICTIM'S PROSECUTOR TO COMMENT ON APPELLANT'S RIGHT TO SILENCE DURING CLOSING ARGUMENT AND SENTENCING, RESPECTIVELY.

Appellant does not simply argue, as the government asserts, that the military judge ought to have declared a mistrial. (Gov't Br. 42). Rather, appellant asserts the actions of the trial counsel and special victim's prosecutor were "improper argument amounting to prosecutorial misconduct[.]" *United States v. Norwood*, 81

M.J. 12, 19 (C.A.A.F. 2021). Appellant objected to trial counsel impugning appellant's credibility for availing himself of his Constitutional rights. (R. at 1036–37). Before appellant moved for a mistrial, the military judge responded to the objection in such an opaque and limited fashion, he not only failed to formally sustain the clearly meritorius objection, he failed to remediate the harm caused by trial counsel's improper argument. (R. at 1037) ("There's a lot of problems with that first statement, that the accused was not a witness in this case. And the fact that he was not a witness must be completely disregarded by yourself.").

The government's reliance on *United States v. Ashby*, 68 M.J. 108, 112 (C.A.A.F. 2009) is misplaced. (Gov't Br. 47–49). *Ashby* does not involve argument, it involves an opening statement. 68 M.J. at 121. Further, the reference to Ashby's right to silence was more oblique, and consequently, much less harmful. *Compare id.* ("You will hear testimony by these crew members that they were told that had a right to remain silent, similar to American law, and that they invoked that right to remain silent) *with* (R. at 1036) ("So I told you why [Mrs.] is a credible witness . . . So the flip side of this is that Tyrese Campbell is not. Now he didn't testify, no comment on that."). Lastly, the military judge in *Ashby* held a hearing addressing the error, concluding the error could be addressed through a curative instruction, and giving both parties the opportunity to re-voir dire the members and draft a proposed curative instruction—substantially greater curative

steps than taken in this case. *Ashby*, 68 M.J. at 121. Here, during closing argument, where error was more egregious, the military judge's cure was limited to three sentences that barely even referenced the government simultaneously vouching for the complaining witness while undermining appellant for exercising his Constitutional rights. (R. at 1036–37).

Finally, the government brief failed to substantively engage with the Special Victim Prosecutor's (SVP) statements at sentencing. (Gov't Br. 49–50) (citing *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007)). *Paxton*, the only sentencing argument case cited by the government, involved a statement from trial counsel wherein "trial counsel sought to draw the inference that Paxton was unwilling to accept responsibility" but "did not do so by commenting on Paxton's decision to exercise" his constitutional rights. 64 M.J. at 487. Even without commenting on the appellant's right to silence, and in the absence of a defense objection, the Court "nevertheless note[d their] concern regarding trial counsel's statement [.]" *Id.* at 488.

Here, the SVP's statements crossed a line in a way the trial counsel in *Paxton* did not. (R. at 1136). The SVP expressly tied the need for a more severe sentence to appellant's limited unsworn statement—a statement necessarily limited by appellant's then-pending state court action. (R. at 1127–33; 1135). Consequently, the SVP's statements under these circumstances amounted to a

direct comment on appellant's right to silence, requiring action. (R. at 1127–33; 1135).

Conclusion

Wherefore, appellant respectfully asks this honorable court to set aside the findings and sentence.

[redacted]

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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 29 May 2024.

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