**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>Appellee | **BRIEF ON BEHALF OF APPELLEE** |
| v. | Docket No. ARMY 20230579 |
| Specialist (E-4)<br>**STEPHEN C. CHILLURA,**<br>United States Army,<br>Appellant | Tried at Fort Sill, Oklahoma, on 22 August and 7-10 November 2023, before a general court-martial convened by Commander, Fires Center of Excellence and Fort Sill, Colonel Jacqueline Emanuel and Lieutenant Colonel Dan Mazzone, military judges, presiding. |

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

**Assignment of Error I**[1]

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING EVIDENCE OF APPELLANT'S PROPENSITY TO USE ALCOHOL.**

**Assignment of Error II**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING APPELLANT'S STEPCHILD'S FULL CID CHILD FORENSIC INTERVIEW UNDER THE RESIDUAL HEARSAY EXCEPTION.**

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[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

## Assignment of Error III

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING APPELLANT’S STEPCHILD’S STATEMENTS UNDER THE EXCITED UTTERANCE EXCEPTION.**

## Statement of the Case

On 10 November 2023, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of Domestic Violence and one specification of Child Endangerment, in violation of Articles 128b and 119b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 928b and 919b. (R. at 743-44). The military judge sentenced appellant to be reduced to the grade of E-1, confined for eight months, and to receive a bad conduct discharge. (R. at 841). On 22 November 2023, the convening authority took no action on the adjudged sentence and disapproved Appellant's request for deferment of reduction in grade and deferment of automatic forfeitures. (Action). On 27 November 2023, the military judge entered judgment. (Judgment).

## Statement of Facts

On 18 July 2022, the military police desk notified Army Criminal Investigative Division (CID) that an anonymous caller reported a "possible child abuse incident" at appellant's home. (R. at 126). Officer C.B., a Department of the Army civilian police officer at Fort Sill, responded and arrived at appellant's home around 1400. (R. at 153-54). answered the door when they arrived. (R. 154). Officer C.B. observed that was crying profusely, was distraught, and had heavy bruising and swelling on his face. (R. at 154). told law enforcement that "his daddy did it." (R. at 155). Law enforcement moved to

the backyard in search of [redacted] guardian. (R. at 155-56). There, Officer C.B. discovered appellant standing in a kiddie pool and drinking an alcoholic beverage. (R. at 156). When law enforcement met him, appellant stated, "I was only roughhousing with the child, it's not my fault the child is fair skinned." (R. at 158).

Later, Emergency Medical Services (EMS) arrived on scene and conducted an evaluation of [redacted] (R. at 159). EMS discovered [redacted] had extensive bruising across his back and buttocks. (R. at 159). Due to the severity of his injuries, EMS transported [redacted] to the hospital where he was seen by Doctor M.S., a pediatrician and child abuse specialist. (R. at 291). During this examination, Doctor M.S. found [redacted] had bruising below his chin and neck that extended over his shoulders. (R. at 291). Additionally, she discovered bruising on his lower back and buttocks. (R. at 291). Lastly, [redacted] had injuries that could be consistent with someone who had been strangled. (R. at 311-12). Doctor M.S. concluded the most likely explanation for [redacted] injuries was physical abuse. (R. at 311).

The ensuing law enforcement investigation discovered additional allegations that appellant also abused his other stepchild, [redacted] (R. at 474).

**Assignment of Error I**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING EVIDENCE OF APPELLANT'S PROPENSITY TO USE ALCOHOL.**

## Additional Facts

After the members were impaneled, but before the start of opening statements, defense counsel alerted the military judge that the government had not provided them with notice to introduce evidence under Mil. R. Evid. 404(b). (R. at 110-11). Prior to the start of trial, defense counsel did not request to exclude evidence pertaining to their client's use of alcohol under Mil. R. Evid. 401, 403, 404(b), or any other potential evidentiary rule. (R. at 17).

Despite this, during the government's opening statement when trial counsel mentioned appellant's use of alcohol on 18 July 2022, defense counsel objected and stated the basis as "unnoticed 404(b)." (R. at 114-15). Defense counsel further articulated "this is impermissible propensity evidence and unnoticed 404(b)." (R. at 114-15).

During a 39(a), outside the presence of the members, the military judge ruled on the initial 404(b) objection. (R. at 118). "I find that this is *res gestae* as part of what occurred on the – the – the day that the alleged incident occurred; and we will revisit it another time if we need to, but I believe that this is – this is not prohibited under 404(b)." (R. at 118).

Following opening statements, the government called Army Criminal Investigation Division (CID) Special Agent (SA) P.L. as their first witness. (R. at

125). Through his testimony, the government introduced Prosecution Exhibits 17, 18, and 21. (R. at 133). Each photo depicted appellant's residence on 18 July 2022. (R. at 132). Prosecution Exhibits 17 and 18 depicted a trash can containing multiple empty cans of "an alcoholic beverage." (R. at 134). Prosecution Exhibit 21 depicted "a kiddie pool filled with water, with what appeared to be a bottle containing an alcoholic beverage." (R. at 135). Defense did not object to the admittance of Prosecution Exhibit 17, 18, or 21. (R. at 133).

The government next called Officer C.B. (R. at 153). Officer C.B. testified he was one of the initial law enforcement officers who responded to appellant's residence on 18 July 2022. (R. at 153-4). When he arrived, he found appellant in the back yard. (R. at 156). Officer C.B. stated "I walked around the north side of the house to the back yard and found Sergeant Chillura sitting – or standing in the kiddie pool, in the backyard, drinking an alcohol beverage when I ordered him to come to me so I could detain him." (R. at 156). Once again, defense counsel did not object. (R. at 156).

A Child Protective Services investigator, K.B., also testified during the trial. (R. at 259). She further corroborated the direct eyewitness testimony of Officer C.B., and testified when she interacted with appellant he appeared to be intoxicated. (R. at 265).

In a later 39(a), outside the presence of the members, the military judge *sua sponte* clarified his earlier ruling pertaining to appellant's use of alcohol on 18 July 2022. (R. at 183). "I believe anything that occurred on – on the – the 22nd of July, is *res gestae* in terms of the acts that occurred between the accused and the alleged victim, [M.C.]."[2] (R. at 183).

Prior to the testimony of [redacted] defense counsel requested a 39(a). (R. at 207). Defense counsel objected to potential testimony of this witness that would pertain to appellant's alcohol use, not just on the day in question, but throughout the time he knew appellant. (R. at 209). The military judge cautioned government counsel that they had "a very thin leash" regarding other acts of drinking. (R. at 210). He elaborated if [redacted] "saw the accused drinking that day when everything happened that is fine." (R. at 210). However, in regard to other acts of drinking outside the date of the alleged misconduct, "I just don't see how that – that is not relevant at all." (R. at 210). When [redacted] testified, he stated appellant appeared "drunk" on the day of the charged misconduct. (R. at 215).

**Standard of Review**

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024).

[2] During his findings, the military judge incorrectly stated the date was the 22nd of July. The correct date was the 18th of July, as reflected on the charge sheet and during all witness testimony.

“[M]ilitary judges abuse their discretion (1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of the record; (2) if they use incorrect legal principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable.” *Id*.

**Law and Argument**

The military judge admitted evidence that showed appellant was under the influence of alcohol when he assaulted his five-year-old stepson. Appellant’s intoxication was inexorably intertwined with the charged offense, so the military judge did not err.

An accused may not be convicted of a crime based upon a general criminal disposition. *United States v. Hogan*, 20 M.J. 71, 73 (C.M.A. 1985); Mil. R. Evid. 404(a), (b) (generally prohibiting the use of evidence of character or past crimes to prove an accused acted in conformity therewith).

Rules requiring notice do not apply to *res gestae* evidence. *United States v. Metz*, 34 M.J. 349, 351 n.* (C.M.A. 1992). *Res Gestae* is defined as “[t]he events at issue, or other events contemporaneous with them.” *United States v. St. Jean*, 83 M.J. 109, 110 n.2 (C.A.A.F.) (citing Black’s Law Dictionary 1565 (11th Ed. 2019). “When conduct is inexorably intertwined with the alleged offense itself… it becomes part of the *res gestae* of the offense.” *United States v. Gaddy*, ARMY

20150227, 2017 CCA LEXIS 179, at *5 (Army Ct. Crim. App. 20 Mar. 2017) (summ. disp.) (quoting *United States v. Peel*, 29 M.J. 235, 239 (C.A.A.F. 1989)).

C.A.A.F. has long held that "*Res Gestae* is vitally important in many trials. It enables the fact finder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation." *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992).

This court has previously answered the same question now before it. Consumption of alcohol during, or in the lead up to, the commission of an offense is admissible as *res gestae*. *United States v. Hernandezaviles*, ARMY 20170131, 2019 CCA LEXIS 76, at *8 (Army Ct. Crim. App. 26 Feb 2018) (mem. op.). When asked to evaluate the admissibility of the accused's alcohol consumption during the evening of a sexual assault, this court held "[a]ppellant's alcohol consumption was part of the facts and circumstances explaining the *res gestae* of the offense" and upheld the trial court's ruling to admit the evidence. *Id*.

In this case, the government was not required to provide Mil. R. Evid. 404(b) notice because, as the military judge properly concluded, evidence the appellant consumed alcohol the morning he assaulted his 5-year-old stepson was *res gestae*. The government presented eyewitness testimony of a police officer who observed appellant drinking an alcoholic beverage, two witnesses who observed him to be in an intoxicated state on the day of the assault, and

photographs of the crime scene that depicted empty containers of alcohol. Evidence appellant was intoxicated was inexorably intertwined with the charged offense and necessary to understand the narrative surrounding the events of 18 July 2022. The military judge, correctly, limited government counsel from presenting evidence that did not relate to the date of the charged offense and noted that he did not see how this would be relevant to the proceedings. (R. at 210). The military judge narrowly tailored his ruling to permit only evidence pertaining to appellant's alcohol use on the day of the charged misconduct. Therefore, the probative value of this evidence was not outweighed by any purported unfair prejudicial effect to appellant.

**Assignment of Error II**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING APPELLANT'S STEPCHILD'S FULL CID CHILD FORENSIC INTERVIEW UNDER THE RESIDUAL HEARSAY EXCEPTION.**

**Additional Facts**

During the week of 11 September 2023, the government provided the trial court with notice of intent to present residual hearsay evidence at trial. (R. at 15). This notice pertained to a child forensic interview of the victim, [redacted] (Government Notice of Intent to Admit (Residual Hearsay)). On 18 September, the trial court instructed appellant to respond to this notice no later than 21

September 2023. (R. at 15). Appellant did not respond nor file a motion to exclude this evidence. (R. at 15).

At trial, the government attempted to call [redacted] to testify. (R. at 353). When government counsel attempted to swear him in, they asked him "do you know what it means to tell a lie?" he responded "no." (R. at 355). The military judge then excused [redacted] from the courtroom. (R. at 355).

The next day, the government recalled [redacted] (R. at 407). Government counsel properly administered an oath to [redacted] (R. at 409). However, when government counsel asked him about the events of the charged misconduct, he was unable to remember. (R. at 410). Following the second attempt to have [redacted] testify, the military judge found the government had satisfied their burden under Mil. R. Evid. 807 and Investigator J.O. could testify about the child forensic interview of M.C. (R. at 421). The military judge supplemented his findings with a written ruling which included the following findings of fact. (App. Ex. XXX).

On 18 July 2022, [redacted] went outside to play in her front yard. (App. Ex. XXX at 1). [redacted] saw [redacted] who was crying and very sad. (App. Ex. XXX at 1). [redacted] and [redacted] then went into their shared backyard where [redacted] repeated to [redacted] [redacted] what occurred. (App. Ex. XXX at 2.). [redacted] informed his mother (M.B.) of what was happening. (App. Ex. XXX. at 2). [redacted]

immediately responded and observed [redacted] with a swollen face and upset and crying. (App. Ex. at 2). [redacted] then called military police. (App. Ex. XXX at 2).

Military Police Officers C.B. and Sergeant (SGT) C.P. received a dispatch for an allegation of child abuse at the home of appellant. (App. Ex. XXX at 3). When both officers knocked on the door, [redacted] answered. (App. Ex. XXX at 3). They observed visible bruising and swelling on [redacted] face and noted that [redacted] was crying profusely. (App. Ex. XXX at 3). While crying he stated, “daddy did it.” (App. Ex. XXX at 3). During an on-scene examination by EMS, they noticed extensive bruising on [redacted] back and buttocks. (App. Ex. XXX at 3). The same day, law enforcement escorted [redacted] to CID where Investigator J.O. conducted a child forensic interview of him, wherein [redacted] disclosed appellant’s abuse that served as the basis for this court martial. (App. Ex. XXX at 4).

While not included in the judge’s ruling, Investigator J.O. testified she utilized CID’s official protocol to conduct the interview of [redacted] (R. at 442).

**Standard of Review**

This court reviews a military judge's decision to admit evidence under Mil. R. Evid. 807 for an abuse of discretion. *United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008) (citations omitted). "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo." *Id*. A

military judge has "considerable discretion" in admitting residual hearsay. *United States v. Kelley*, 45 M.J. 275, 280-81 (C.A.A.F. 1996) (citing *United States v. Pollard*, 38 M.J. 41, 49 (C.A.A.F. 1993)).

**Law and Argument**

A hearsay statement may be admitted under Mil. R. Evid. 807 if the proponent of the statement provides reasonable notice under Mil. R. Evid. 807(b) and:

(1) The statement has equivalent circumstantial guarantees of trustworthiness [to the hearsay exceptions found in Mil. R. Evid. 803 or 804];

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

C.A.A.F. has established certain non-dispositive factors to determine if there are sufficient circumstantial guarantees of trustworthiness. These non-exhaustive factors include: "(1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated." *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003) (quoting *United States v. Grant*, 42 M.J. 340, 343-44 (C.A.A.F. 1995)).

This hearsay exception is rarely invoked, but, when invoked, it most commonly involves victims of child abuse disclosing to an adult. *United States v.*

*Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996). For example, the residual hearsay exception has been used to introduce a child forensic interview, that occurred in accordance with a nationally recognized protocol for interviewing children, when the child was unwilling, or unable, to talk about the sexual assault on the stand. *United States v. McAninch*, ARMY 20170091, 2019 CCA Lexis 142, at *3-5 (Army Ct. Crim. App. 1 April 2019) (mem. op.).

**A. The statement has equivalent circumstantial guarantees of trustworthiness.**

Appellant asserts the military judge abused his discretion when he admitted the interview of [redacted] because it lacked sufficient guarantees of trustworthiness. (App. Br. 20-1). However, the military judge properly utilized the factors in *Donaldson* to determine the statement was trustworthy. (App. Ex. XXX. at 9). He pointed to the fact [redacted] statement was made in "the immediate aftermath" of his initial disclosure to law enforcement, [redacted] and [redacted] (App. Ex. XXX. at 9). [redacted] statement was also corroborated with the "testimony provided by his friends, the responding officers, and medical providers." (App. Ex. XXX. at 9). Lastly, the military judge weighed the mental state of [redacted] and found he lacked "animus towards the accused" in his statement to law enforcement. (App. Ex. XXX. at 9).

**B. The video statement was the most probative statement that could be offered evidence that the government could have reasonably obtained.**

Lastly, appellant argues the military judge abused his discretion because [redacted] had already twice testified at trial, and his direct testimony was the most probative evidence that could have been produced at trial. In an ideal world, [redacted] would have testified at trial. However, as the military judge pointed to in his ruling, "the most common 'necessity' under Mil. R. Evid. 807 involves the child's inability to remember the events previously disclosed to another." (App. Ex. XXX. at 10).

As the military judge correctly noted, the fact [redacted] was unable to testify at trial due to a lack of memory is consistent with common knowledge and ways of the world, that a young child's memory may fade quickly. (App. Ex. XXX. at 10). It is for this very reason why a military judge is afforded broad discretion to admit evidence under this rule and to best serve the interest of justice.

**C. The evidence did not materially prejudice appellant's substantial rights.**

If the military judge did improperly admit evidence, this court will evaluate whether the error prejudiced the appellant weighing: (1) the strength of the government's case; (2) the strength of the defense's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). Appellant is not warranted relief because a review of the record shows the *Kohlbek* factors weigh against appellant.

**1. The government's case was strong.**

While the interview of [redacted] in the direct aftermath of his injuries provided strong evidence of who caused his injuries, the government did not need this evidence to prove their case. Throughout trial, the government presented overwhelming circumstantial and direct evidence to establish appellant's guilt. This evidence included at least three separate points in time where [redacted] indicated appellant was the individual who assaulted him.

First, Officer C.B. testified when he first came into contact with [redacted] "he said, his daddy – his daddy did it." (R. at 155). Later, when [redacted] saw appellant he exclaimed "he hurt me" and once again identified appellant as the individual who caused his injuries. (R. at 173). Lastly, when [redacted] was examined by a medical professional, he once again stated he was choked by the appellant. (R. at 301).

In addition to [redacted] identifications, appellant also indicated he knew why law enforcement was called to the scene. When he first met military police, he stated, "I was only roughhousing with the child, it's not my fault the child is fair skinned." (R. at 158).

Each one of these identifications, along with other circumstantial evidence presented at trial, would have been enough to secure appellant's convictions at trial without the added benefit of Investigator J.O.'s interview. Combined, appellant's guilt was clear and obvious to the fact finder.

**2. The defense case was weak.**

At trial, the defense theory of the case centered around two things: (1) the statements in the recorded interview of [redacted] were unreliable, (2) the injuries to [redacted] could have occurred in a variety of different ways, to include bouncing on a trampoline or from a neighbor's swing.

As discussed above, [redacted] repeatedly identified appellant as the individual who caused his injuries. Had the military judge found [redacted] recorded interview unreliable, he still had ample evidence before him in which [redacted] identified appellant as having caused his injuries.

Lastly, appellant attempted to advance multiple theories as to how [redacted] suffered his injuries. However, the theories of how these injuries occurred all lacked corroboration by law enforcement, eyewitness testimony, or the medical personal who examined [redacted] Doctor M.S., who examined [redacted] and provided her expert opinion that physical abuse most likely caused [redacted] injuries, similarly undercut these theories. (R. at 311).

**3. The third and fourth factors of *Kohlbek* weigh in favor of appellant.**

The overall quality of the challenged evidence is high and was persuasive to the fact finder. The military judge explicitly found the evidence to be trustworthy. (App. Ex. XXX. at 9). The challenged evidence directly corroborated the government's other evidence at trial and depicted [redacted] in the immediate aftermath

of the charged misconduct.

Nevertheless, in balancing the strength and weaknesses of appellant's and the government's case the *Kohlbek* factors weigh in favor of the government. At trial the government presented multiple individuals who witnessed [redacted] in a distraught state with visible injuries. During this time period, he repeatedly expressed that appellant was the one who caused these injuries. He was then evaluated by a medical professional who concluded the injuries were a result of physical abuse. Once again, [redacted] identified appellant as the one who hurt him.

Meanwhile, the defense presented an unpersuasive and inconsistent theory that did not offer the trier of fact reasonable doubt as to the charged offenses.

### Assignment of Error III

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING APPELLANT'S STEPCHILD'S STATEMENTS UNDER THE EXCITED UTTERANCE EXCEPTION.**

### Additional Facts

When Officer C.B. responded to appellants home on 18 April 2022, he approached the front door and knocked. (R. at 155). [redacted] opened the door and was distraught and crying profusely. (R. at 155). Officer C.B. testified "he [redacted]) said, his daddy – his daddy did it." (R. at 155). Defense did not object to this statement. (R. at 155).

SGT C.P. also testified ██ "was very distraught and in an upset state of mind." (R. 164-65). He further explained, "I say distraught as in you could tell he had recently – recently been crying and kind of very drastically upset." (R. at 164-65). Trial Counsel asked SGT C.P. if ██ said anything when he answered the door. (R. at 165). Defense counsel objected and the military judge excused the panel to conduct an Article 39(a) hearing outside of their presence. (R. at 165).

During this Article 39(a) hearing, the military judge found Officer C.B. and SGT C.P. responded to appellant's home in response to an event where appellant struck ██ (R. at 170). Further, the military judge found "that when officers came to the house, ██ was still under the – the excitement of the events that occurred earlier that day, and I believe that this statement qualifies as an excited utterance under the circumstances." (R. at 170). Lastly, the military judge found this objection had already been waived.[3] (R. at 169-70). Two prior witnesses testified to the statement without objection from the defense counsel. (R. at 170).

Following this ruling, government counsel recalled SGT C.P. to the stand. (R. at 171). Government counsel re-asked the question to the witness, "Do you recall ██ saying anything when he opened the door?" (R. at 172). SGT C.P. responded, "I do not recall that on that immediate contact with him." (R. at 172).

[3] Although the military judge stated this issue was waived, the issue was likely forfeited due appellant's failure to timely raise his objection to the proffered evidence. *United States v. Cardreo*, 52 M.J. 213, 216 (C.A.A.F. 1999).

SGT C.P. testified the only statements ███ made to him were a “a little later on in the chain of events,” after ███ had been placed in his patrol vehicle. (R. at 173).

While ███ sat in the patrol vehicle, Officer C.B. brought appellant around to the front of the home. (R. at 173). When ███ saw appellant he spontaneously stated, “he hurt me” and pointed at the appellant. (R. at 173). Once again, defense counsel did not object to this statement. (R. at 173)

**Standard of Review**

A military judge’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). “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).”

This court reviews forfeited issues for plain error. *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008).

**Law and Argument**

"As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts-martial." *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021) (citing Mil. R. Evid. 801(c) and Mil. R. Evid. 802). However, "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement

that it caused," is admissible as an exception to the general prohibition on hearsay as an excited utterance. Mil. R. Evid. 803(2). "The implicit premise [of the exception] is 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).

For hearsay to be admitted as an excited utterance: (1) "the statement must be spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) "the event [that prompts the utterance] must be startling"; and (3) "the declarant must be under the stress of excitement caused by the event." *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987) (internal quotation marks omitted) (citations omitted). "The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *United States v. Henry*, 81 M.J. 91, 96 (C.A.A.F. 2021).

**A. Appellant's stepchild opening the door, crying, and saying, "daddy did it," to the responding MPs. (R. at 155).**

**1. Appellant forfeited his objection to this testimony, and the proper standard of review is "plain error."**

Mil R. Evid. 103(a)(1) requires a timely objection to preserve an evidentiary issue for appellate review, unless the evidentiary ruling rises to the level of plain error […][a]ppellant has the burden of persuading this court that (1) there was an

error; (2) that it was plain or obvious; and (3) that the error materially prejudiced a substantial right. *United States v. Cardreo*, 52 M.J. 213, 216 (C.A.A.F. 1999).

When government counsel elicited this statement from Officer C.B., defense counsel did not object. (R. at 155). Only later, during the testimony of a different witness entirely, did defense counsel raise an objection to this statement. (R. at 165). At this point, the military judge found defense had waived this issue because they failed to object in a timely manner. (R. at 170).

**2. The military judge did not err.**

The military judge placed his reasoning on the record and determined the statement fell within the exception of an excited utterance under Mil. R. Evid. 803. This determination was correct in law and fact and is reviewed for an abuse of discretion.

It is clear from the testimony of Officer C.B. that ███ provided these statements spontaneously and impulsively. He described ███ in a distraught state as soon as he answered the door, and provided the statement "daddy did it" without any prompting and not in response to any question asked by Law Enforcement. (R. at 155).

The military judge weighed the testimony he received during the course of the trial to find that an exciting event had occurred, in that ███ had been struck by his stepfather, and that ███ was still in an excited state when he made the

statement. (R. at 170). This factual finding was not clearly erroneous. Additionally, the military judge's application of law to this finding was legally correct. Therefore, the military judge did not abuse his discretion.

**B. Appellant's Stepchild calling out "he hurt me" from the police car, [pointing], and saying "Stephen." (R. at 120; R. at 173).**

**1. Appellant forfeited his objection to this testimony, and the proper standard of review is "plain error."**

Once again, defense counsel did not object to this evidence at trial. (R. at 173). This statement that government counsel elicited was clearly different than the statement defense counsel initially objected to. (R. at 165). The defense counsel first objected when government counsel asked the witness "did [ say anything to you when you answered the door?" (R. at 165). When provided the opportunity to answer this question, SGT C.P. answered, "I do not recall that on that immediate contact with him." (R. at 172). He went on to describe a separate statement made to him "a little later" once he had taken him to his patrol vehicle. (R. at 173).

SGT C.P. clearly articulated that both place and time separated the statement made from the one defense counsel objected to. To preserve this error, defense counsel would have had to once again object as this was a separate question and a separate statement the government attempted to elicit. Because they did not object, this issue was forfeited and is reviewed for plain error.

**2. The military judge did not err.**

The military judge did not abuse his discretion when he allowed the statement into evidence. The government counsel elicited a statement that fell clearly within the excited utterance exception in M.R.E. 803**.** The child-victim uttered this statement in the aftermath of the previous statement of "daddy did it." Notably, the military judge had found during this time period that appellant struck and that was still in an excited state when made the statement. (R. at 170). SGT C.P's testimony indicated that when saw appellant, he became [excited/fearful] and exclaimed "he hurt me."

Additionally, spoke spontaneously without any prompting from law enforcement personnel when he stated, "he hurt me" immediately upon seeing appellant, and before he had the ability to reflect or think about his statement.

Because the elicited statement fell within the excited utterance hearsay exception the military judge did not commit error when he permitted this testimony. Any purported error was therefore not plain and obvious.

**Conclusion**

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.

CPT, JA
Appellate Attorney, Government
Appellate Division

MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division

RICHARD E. GORINI
COL, JA
Chief, Government Appellate
Division

**CERTIFICATE OF SERVICE**

**UNITED STATES v. STEPHEN CHILLURA, ARMY 20230579**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 3 day of June, 2025.

ANGELA R. RIDDICK
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