UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JUSTIN R. SCHROEDER
United States Air Force

ACM 36365

13 December 2006

Sentence adjudged 14 January 2005 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: William A. Kurlander.

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jamie L. Mendelson.

Before

BROWN, SCHOLZ, and BECHTOLD
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his pleas, of larceny of more than $500 in violation of Article 121, UCMJ, 10 U.S.C. § 921.[*] A general court-martial consisting of officer and enlisted members sentenced him to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings of guilty but approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 60 days, and reduction to E-1.

On appeal, the appellant asserts that the military judge abused his discretion when he ruled that out-of-court statements made by the appellant, and proffered by

[*] The appellant's purposeful destruction of his vehicle and subsequent receipt of $8,319.73 from his fraudulent insurance claim formed the basis of the sole Charge and Specification against him.

the defense, were not excited utterances under the Military Rules of Evidence and were therefore inadmissible hearsay. *See* Mil. R. Evid. 803(2). We find this assignment of error to be without merit and affirm both the findings and the sentence.

We review a military trial judge's decision to admit or exclude evidence using an abuse of discretion standard, under which we assess whether the military judge's findings of fact were clearly erroneous or whether the decision was influenced by an erroneous view of the law. *United States v. Dobson*, 63 M.J. 1, 19 (C.A.A.F. 2006) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the rule against hearsay and is a recognized exception. Mil. R. Evid. 803(2). "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 the startling event." *United States v. Moolick*, 53 M.J. 174, 176 (C.A.A.F. 2000) (quoting *United States v. Chandler*, 39 M.J. 119, 123 (C.M.A. 1994). Our superior court set forth a three-part test to determine admissibility under the excited utterance exception: (1) the statement must relate to a startling event, (2) the declarant made the statement while under the stress of excitement caused by the startling event, and (3) the statement was "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (quoting *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003)).

The military judge heard testimony outside the presence of the members to determine if several statements made by the appellant to two of his friends were admissible as exceptions to the rule against hearsay. The military judge admitted some of the statements under the excited utterance exception of Mil. R. Evid. 803(2), but found that other proffered statements did not qualify under the rule and therefore excluded them. The statements admitted by the military judge were made by the appellant during a cell phone conversation with the appellant's friend, ST, and shortly thereafter when ST and another friend arrived at the appellant's location at the bottom of a hill, down which the appellant's truck had rolled. The appellant's statements were, in effect, that there was an accident, that the appellant was involved in the accident, and that he had wrecked his truck on the top of the hill. The military judge's finding on the record was, "[t]his is somewhat of a stretch, but because [ST] indicated that [appellant] was nervous and skittish and that there was blood on the forehead, I will consider [appellant's] statements to [ST] as an excited utterance under 803(2)." However, the military judge found the appellant's later statements, made by the appellant to his friends after they had all driven back up the hill, were not excited utterances because there was time for deliberation and reflection by the appellant.

The evidence showed that, after the appellant's two friends talked to him at the bottom of the hill, the three of them got into ST's truck and drove back up to the top of the hill. During this drive, the appellant silently smoked a cigarette. While there was conflicting evidence in the record as to how much time had transpired between the purported accident and the appellant's statements, the evidence was clear that the appellant had already called a tow truck and his truck had, in fact, been towed before his friends even called him. The cell phone call between the appellant and ST took place approximately five minutes prior to ST's arrival at the bottom of the hill.

While the timing of the utterance is not dispositive as to the applicability of the excited utterance exception, "[a]s a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under [Mil. R. Evid.] 803(2)." *Donaldson*, 58 M.J. at 484 (*quoting United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990)).

Based on our review of the record, we find that the military judge did not abuse his discretion when finding the appellant's later statements, made at the top of the hill, were not excited utterances under Mil. R. Evid. 803 (2). Furthermore, we hold that even if the judge erred in excluding these statements, it was harmless and not of constitutional dimension. *Moolick*, 53 M.J. at 177. The test for nonconstitutional error is whether the error itself had substantial influence on the findings. *Id.* (quoting *United States v. Armstrong*, 53 M.J. 76, 81 (C.A.A.F. 2000)). The government's case was strong and included not only the written confession of the appellant, but also a recording of the appellant telling another airman how he intentionally rolled his truck off the hill. Because the defense's theory that the rollover was an accident was presented to the members through several witnesses, along with the admissible excited utterances and the testimony of the appellant, we are convinced the excluded statements would not have influenced the findings.

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator