UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Fernando M. BROWN, Chief Machinery Technician
United States Coast Guard, Appellant

No. 22-0249
Crim. App. No. 001-69-21

Argued January 24, 2023—Decided October 23, 2023

Military Judge: Ted R. Fowles

For Appellant: *Scott Hockenberry*, Esq. (argued); *Lieutenant Commander Kristen R. Bradley* (on brief).

For Appellee: *Lieutenant Commander Daniel P. Halsig Jr.* (argued); *Lieutenant Elizabeth Ulan.*

Chief Judge OHLSON announced the judgment of the Court, in which Judge SPARKS, Judge MAGGS, Judge HARDY, and Judge JOHNSON joined in part. Judge SPARKS filed a separate opinion concurring in part and dissenting in part, in which Judge JOHNSON joined. Judge HARDY filed a separate opinion concurring in part and dissenting in part, in which Judge MAGGS joined in part.

Chief Judge OHLSON announced the judgment of the Court.

Sometimes a seemingly simple statute can be devilishly difficult to interpret. As reflected by the various opinions in this case, that certainly is true with Article 91(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 891(3) (2018), which prohibits disrespect towards a warrant, noncommissioned, or petty officer. Nonetheless, this case resolves two key points. First, a majority of this Court holds that an accused servicemember can be convicted under Article 91(3) even if his or her disrespectful conduct occurs outside the physical presence of the victim. Importantly, that means that disrespectful language or behavior towards a warrant, noncommissioned, or petty officer can be criminally actionable even when it is *remotely* conveyed using a digital device such as a smartphone and even when the disrespectful language or behavior is conveyed via social media. And second, a majority of this Court holds that under Article 91(3), servicemembers can only be held criminally liable if *at the time they conveyed* the disrespectful language or behavior the victim was *then* in the execution of his or her office. The reasons for these conclusions are explained below.

I. Background

Appellant was stationed aboard the United States Coast Guard Cutter (USCGC) Polar Star. Senior Chief Petty Officer (SCPO) K.B., the ship's Command Senior Chief, created a text group consisting of the cutter's eleven chief petty officers. This text group—colloquially referred to as the "Chief's Mess"—was designed to pass along work-related information because the crew was geographically separated while the cutter was in dry dock. There was no explicit order to participate in the text group. However, during his court-martial testimony SCPO K.B. agreed with the trial counsel that it would be inappropriate for a chief petty officer to ignore a "crew issue" even if it was raised outside of work hours. All group members used their personal cell phones to access the texts. Although the text

group sometimes encompassed "some levity" and "friendly conversations," it was otherwise "all work-related."

The three instances of disrespect for which Appellant was convicted consisted of messages he sent to the text group which contained either modified pictures of, or specific references to, one of his three fellow chief petty officers: Chief Petty Officer (CPO) J.D., SCPO K.B., and CPO S.C. The first instance occurred when CPO J.D., while working on the cutter, sent a picture of himself to the text group. Appellant modified the photo by adding a crude drawing of male genitalia to CPO J.D.'s forehead and then resent the image to the group. CPO J.D. was "down in dry dock" when he received the message from Appellant. Upon seeing that he received the text, CPO J.D. checked his phone to "keep track of what was going on throughout the text message stream, [and to see] if there was anything . . . pertinent."

The second instance occurred after SCPO K.B. missed a chief's call. Appellant sent a picture which depicted a scantily clad man along with a text stating: "Found out why [K.B.] missed chiefs [sic] call." This text was sent at 7:39 p.m., outside of regular duty hours.

The third instance occurred when Appellant sent a picture of CPO S.C.'s high school yearbook photo with the added caption: "Voted most likely to steal your bitch." CPO S.C. identifies as lesbian, a fact which was known among the Chief's Mess. At the time she received the disrespectful message she was on convalescent leave. CPO S.C. testified that she felt embarrassed when Appellant posted the photo to the group.

A special court-martial composed of a military judge sitting alone convicted Appellant, contrary to his pleas, of three specifications of disrespect towards a noncommissioned officer in violation of Article 91(3), and one specification of sexual harassment in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2018). The military judge sentenced Appellant to reduction to E-4, a reprimand, and restriction for thirty days. The convening authority approved

the sentence. Upon application of Appellant, the Judge Advocate General of the Coast Guard sent the case to the United States Coast Guard Court of Criminal Appeals (CCA) pursuant to Article 69(d), UCMJ, 10 U.S.C. § 869(d) (2018). The CCA set aside and dismissed the Article 92 charge and its specification, affirmed the remaining findings, and reassessed the sentence, reducing Appellant to E-6 but otherwise affirming the sentence. We granted review of the following issue:

> Are Appellant's convictions under Article 91 legally insufficient where there is an absence of evidence that the charged conduct occurred in the sight, hearing, or presence of the alleged victims while they were in the execution of their office?

United States v. Brown, 83 M.J. 64 (C.A.A.F. 2022) (order granting review). We affirm in part and reverse in part the decision of the CCA.

II. Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citing *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In reviewing for legal sufficiency, this Court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citation omitted) (internal quotation marks omitted).

Questions of statutory construction are also reviewed de novo. *Wilson*, 76 M.J. at 6 (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)). "[I]t is axiomatic that '[i]n determining the scope of a statute, we look first to its language.' " *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (alterations in original) (quoting *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014)). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (internal quotation marks omitted) (quoting *Barnhart v. Sigmon Coal Co., Inc.* 534 U.S. 438, 450 (2002)). Of

note, "we are not bound by the President's interpretation of the elements of substantive offenses." *Wilson*, 76 M.J. at 6 (citing *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998)). Nonetheless, "when the President's narrowing construction of a statute does not contradict the express language of a statute, it is entitled to some deference, and we will not normally disturb that construction." *Id.* (citing *Murphy*, 74 M.J. at 310).

III. Discussion

The relevant text of Article 91(3) states: "Any warrant officer or enlisted member who . . . treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his [or her] office . . . shall be punished as a court-martial may direct."

Appellant's argument before this Court can largely be distilled into two prongs: (1) Do the provisions of Article 91(3) encompass those instances where an accused *remotely* uses digital communication technology? And if so, (2) does the victim have to be "in the execution of . . . office" at the time *the accused conveys* the disrespectful language or behavior, or is it sufficient for the victim to be in the execution of office at the time *the victim views or hears* the disrespectful language or behavior? We address each of these prongs in turn.

A. Prong One: Within Sight, Hearing, or Presence[1]

As shown above, the language of Article 91(3) is quite broad. However, the elements supplied by the President narrow the scope of the offense. In pertinent part, the elements make it a crime for "a warrant or enlisted member" to use disrespectful language or behavior "toward *and*

[1] Judge Sparks and Judge Johnson concur with this section. *See United States v. Brown*, 83 M.J. __, __ (1) (C.A.A.F. 2023) (Sparks, J., with whom Johnson, J., joins, concurring in part and dissenting in part). Judge Maggs and Judge Hardy dissent from this section. *See Brown*, 83 M.J. at __ (7-8) (Hardy, J., with whom Maggs, J., joins in part, concurring in part and dissenting in part).

within sight or hearing of a [victim] warrant officer, noncommissioned, or petty officer." *Manual for Courts-Martial, United States* pt. IV, para. 17.b.(3)(c) (2019 ed.) (*MCM*) (emphasis added); *see also id.* para. 17.c.(5) (explaining that the word " '[t]oward,' " as used in subsection (c), "requires that the *behavior and language* be within the sight or hearing of the warrant, noncommissioned, or petty officer concerned" (emphasis added)). Because the President had the authority to constrict the scope of the statute in this manner, it is the President's language contained within the elements of the *MCM* that guides our analysis. *Wilson*, 76 M.J. at 6.

Appellant argues that an offense under Article 91(3)—particularly in light of the elements supplied by the President—can occur only if the accused and the victim were in "physical proximity" at the time of the charged conduct. Thus, it would appear that Appellant's position is that a servicemember can convey to a victim recipient a disrespectful and public message through any medium—text, telephone, email, video communication, social media, etc.—yet avoid punishment if the offending sender was not physically proximate to the victim when the conduct occurred.

It is essential to note, however, that language requiring physical proximity between an accused and a victim is absent from both the statutory language of Article 91(3) and from the listed elements.[2] Rather, all that is required

[2] The President has defined the elements of Article 91(3) as:

> (a) That the accused was a warrant officer or enlisted member;
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> (b) That the accused did or omitted certain acts, or used certain language;
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> (c) That such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;
>
> (d) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

under element (c) is that the *disrespectful language or behavior* was within the sight or hearing of the victim. Indeed, we note that the explanation of Article 91 refers the reader back to the discussion of "disrespect" in Article 89, UCMJ,[3] which states that *presence* "*is not essential*."[4] *MCM* pt. IV, para. 15.c.(2)(c) (emphasis added). In other words, regardless of physical proximity, this element is met so long as an accused causes his or her disrespectful language or behavior to come within the sight or hearing of the victim.

Therefore, we hold that disrespectful language or behavior towards a warrant, noncommissioned, or petty officer can be criminally actionable even when it is remotely conveyed using a digital device and even when the disrespectful language or behavior is conveyed via social media.

> (e) That the victim was then in the execution of office; and
>
> (f) That under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

MCM pt. IV, para. 17.b.(3)(a)-(f). There are two additional elements if the victim was the *superior* noncommissioned or petty officer of the accused. *Id.* para. 17.b.(3)(g)-(h). These additional elements apply only to the specification regarding SCPO K.B. These additional elements are not at issue in this case.

[3] Disrespect toward superior commissioned officer; assault of superior commissioned officer, Article 89, UCMJ, 10 U.S.C. § 889 (2018).

[4] The President's explanatory text accompanying Article 91 states: "Article 91 has the same general objects with respect to warrant, noncommissioned, and petty officers as Articles 89 and 90 have with respect to commissioned officers, namely, to ensure obedience to their lawful orders, and to protect them from violence, insult, or disrespect." *MCM* pt. IV, para. 17.c.(1).

B. Prong Two: In the Execution of Office[5]

In order for disrespectful conduct to be a chargeable offense, element (e) of Article 91(3) requires the following: "That the victim was *then* in the execution of office."[6] *MCM* pt. IV, para. 17.b.(3)(e) (emphasis added). We conclude that this language requires the victim to be in the execution of his or her office *at the time the accused engages in the disrespectful behavior*. We come to this conclusion based on our textual analysis of two elements listed in the *MCM*.

Elements (d) and (e) list two further conditions that are necessary to find a servicemember criminally liable under Article 91(3). These two elements require the government to show that "the accused *then* knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer" and that "the victim was *then* in the execution of office." *MCM* pt. IV, para. 17.b.(3)(d)-(e) (emphasis added). It is clear that under element (d), the word "then" imposes a requirement that the accused knew the military status of the victim *at the time the accused engaged in the disrespectful behavior*. *See id.* para. 17.c.(2) ("All of the offenses prohibited by Article 91 require that the accused have actual knowledge that the victim was a warrant, noncommissioned, or petty officer."); *cf. United States v. Biggs*, 22 C.M.A. 16, 18, 46 C.M.R. 16, 18 (1972) (concluding there was sufficient evidence "to support the court's determination that, *at the time of the*

[5] Judge Maggs and Judge Hardy concur with this section. *See Brown*, 83 M.J. at __ (7-9) (Hardy, J., with whom Maggs, J., joins in part, concurring in part and dissenting in part). Judge Sparks and Judge Johnson dissent from this section. *See Brown*, 83 M.J. at __ (1-4) (Sparks, J., with whom Johnson, J., joins, concurring in part and dissenting in part).

[6] Paragraph 17 of Part IV of the *MCM* refers the reader to Paragraph 15 for a discussion of the phrase " 'in the execution of his office.' " *MCM* pt. IV, para. 17.c.(5). "An officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage." *Id.* para. 15.c.(3)(f).

offenses . . . the accused knew the military identity" of his victims (emphasis added)).

Element (e) also uses the word "then." It requires that "the victim was *then* in the execution of office." *MCM* pt. IV, para. 17.b.(3)(e) (emphasis added). Because of the repeated use of the same word "then" in consecutive *MCM* elements, we conclude this word must have the same meaning and effect. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes."). Therefore, reading these elements together demonstrates that the victim must be "in the execution of office" *at the time the accused engaged in the disrespectful behavior*.

This interpretation of element (e) is bolstered by examining the statutory language upon which it is predicated. The relevant portion of Article 91(3) prohibits an enlisted member from engaging in disrespectful language or behavior towards a petty officer "*while* that officer is in the execution of his office." (Emphasis added.) The word "while," when used as a conjunction, means "during the time that."[7] *See also Leighton Techs. LLC v. Oberthur Card Sys., S.A.*, 358 F. Supp. 2d 361, 386 (S.D.N.Y. 2005) (defining "while" to mean "simultaneously or concurrently"). The best interpretation of this language within Article 91(3) is that it imposes a "concurrency requirement" regarding the conduct of the accused on the one hand and the official status of the victim on the other. Therefore, Appellant's convictions under Article 91 can stand only if the evidence shows that SCPO K.B., CPO J.D., and CPO S.C. were in the execution of their office *during the time that* Appellant conveyed his disrespectful language or behavior.[8]

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[7] *While*, *Merriam-Webster Unabridged Online Dictionary*, https://unabridged.merriam-webster.com/unabridged/while (last visited Oct. 13, 2023).

[8] We acknowledge that our reading of the elements creates situations in which a warrant officer or enlisted member cannot be held criminally liable under Article 91(3) despite using

C. Application of the Second Prong to this Case[9]

Having resolved the meaning of Article 91(3), we now must determine its application to the facts of Appellant's case.

1. SCPO K.B. and CPO S.C.

It is true that when conducting a legal sufficiency review, "the relevant question an appellate court must answer is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Herrmann*, 76 M.J. 304, 307 (C.A.A.F. 2017) (citation omitted) (internal

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blatantly disrespectful language or behavior towards a warrant, noncommissioned, or petty officer if the putative victim was not in the execution of his or her office at the time of the disrespectful act. Nevertheless, it is not the role of this Court to expand the reach of either statutory language passed by Congress or elements of the articles promulgated by the President in order to avoid anomalous or undesirable results. *Cf. Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). However, Congress or the President may, of course, revise the current language of Article 91(3) and/or its elements in order to more comprehensively address disrespectful conduct if they deem it appropriate to do so.

[9] In a November 2, 2023 petition for reconsideration, Appellant argued that the CCA does not have factfinding authority in this instance because this case arrived at the lower court under Article 69, UCMJ, rather than under Article 66, UCMJ, 10 U.S.C. § 866 (2018). Appellant is correct. Article 69(e) precluded the CCA from factfinding, and thus this Court's lead opinion could not rely on the CCA's factfinding. However, we note that the lead opinion did not rely exclusively upon the CCA's factual finding in reaching its conclusion in this case. Indeed, eliminating the CCA's findings of fact does not change the lead opinion's conclusions because the evidence contained in the record of trial was sufficient to uphold Appellant's conviction regarding CPO J.D. We have, however, revised this opinion and removed language referring to the CCA's factfinding ability.

quotation marks omitted). But despite this generous standard, it must be noted that in the instant case the Government failed to introduce evidence demonstrating that two of the victims—SCPO K.B. and CPO S.C.—were on duty when Appellant sent the texts. For example, the Government did not elicit testimony from SCPO K.B. and CPO S.C. that they opened the texts concurrent with Appellant sending them. Therefore, these two convictions cannot withstand appellate scrutiny. Accordingly, we set aside the findings pertaining to SCPO K.B. and CPO S.C.

2. CPO J.D.

Regarding the remaining victim, CPO J.D. testified he was "down in dry dock" when he "received a message" in the Chief's Mess group text. His testimony further reflects that he checked his phone when he received this message to "keep track of what was going on throughout the text message stream, [to see] if there was anything . . . pertinent." And upon opening the group text, CPO J.D. discovered Appellant's disrespectful text. Thus, when drawing "every reasonable inference from the evidence of record in favor of the prosecution," *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citation omitted) (internal quotation marks omitted), we conclude there is sufficient evidence that CPO J.D. was in the execution of his office at the time Appellant engaged in the disrespectful conduct. Accordingly, we affirm Appellant's conviction pertaining to CPO J.D.[10]

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[10] In his petition for reconsideration, Appellant also argued that this Court cannot affirm his conviction under Specification 1, Charge I, because "Appellant's conduct has never been evaluated by a factfinder under the proper construction of the elements." Petition for Reconsideration at 1, *United States v. Brown*, No. 22-0249/CG (C.A.A.F. Nov. 2, 2023). The Court is unpersuaded by this argument. In this judge-alone trial, the military judge was the factfinder. And in issuing his special findings, the military judge held that "[a]t the time that [Appellant] *communicated* the digital photograph, which included a depiction of male genitalia, [CPO J.D.] was *then in the execution of his office*." (Special Findings at 3) (Emphasis added.) Such language

IV. Judgment[11]

The decision of the United States Coast Guard Court of Criminal Appeals is affirmed as to Charge I and Specification 1 thereunder, but reversed as to Specifications 2 and 4 of Charge I and as to the sentence. The findings of guilty with respect to the latter two specifications are set aside and dismissed. The record is returned to the Judge Advocate General of the United States Coast Guard for remand to the Court of Criminal Appeals to either reassess the sentence based on the affirmed findings or order a sentence rehearing.

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indicates that, in convicting Appellant of the offense at issue, the trier of fact did indeed apply the theory regarding the presidentially defined element (e) of Article 91(3) that was articulated in the lead opinion. Therefore, contrary to Appellant's argument, Appellant's conduct *has* been evaluated by a factfinder under the proper construction of the elements.

[11] Judge Maggs and Judge Hardy join with respect to setting aside the offenses involving SCPO K.B. and CPO S.C. but would also set aside the offense involving CPO J.D. *See Brown*, 83 M.J. at __ (9 & n.5) (Hardy, J., with whom Maggs, J., joins in part, concurring in part and dissenting in part). Judge Sparks and Judge Johnson join with respect to affirming the offense involving CPO J.D. but would also affirm the offense regarding SCPO K.B. *See Brown*, 83 M.J. at __ (4-5) (Sparks, J., with whom Johnson, J., joins, concurring in part and dissenting in part). Therefore, the judgment expressed here is supported by a majority of the Court. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (articulating that when a fragmented Court decides a case and no single rationale commands the majority, " 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds' " (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))).