UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, EWING,[1] and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class ANDRE J. FELTON
United States Army, Appellant

ARMY 20190214

Headquarters, Fort Campbell
Matthew A. Calarco, Military Judge
Lieutenant Colonel Patrick L. Bryan, Staff Judge Advocate

For Appellant: Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Paul T. Shirk, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Captain Ángel J. Valencia, JA (on brief).

17 December 2020

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ALDYKIEWICZ, Senior Judge:

Appellant contends his conviction for using disrespectful language toward a noncommissioned officer (NCO) is factually insufficient because the government failed to prove that he knew the alleged victim was actually a NCO.[2] While we agree the conviction must be set aside, we do so for a different reason.[3]

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[1] Judge Ewing decided this case while on active duty.

[2] A panel of officers sitting as a special court-martial convicted appellant, contrary to his pleas, of two specifications of failing to report, four specifications of willful

(continued . . .)

BACKGROUND

On 27 March 2018, appellant and Staff Sergeant (SSG) BS were at the Joint Readiness Training Center (JRTC), Fort Polk, Louisiana, on training rotations. The soldiers were assigned to different companies within 2d Brigade Combat Team, 101st Airborne Division and, until that evening, had never met. As SSG BS was walking in his operational camouflage pattern uniform on a path along the side of a two-lane road, he observed appellant walking towards his direction on the other side of the road. Staff Sergeant BS's rank was displayed on his uniform blouse and on his patrol cap. From approximately twenty feet away, SSG BS noticed appellant had a cigar in his mouth and that his patrol cap was crooked. Staff Sergeant BS yelled across the road and told appellant to take the cigar out of his mouth and fix his patrol cap. In reply, appellant stated, "Why do I have to do that, Sergeant?" and "I don't think it works that way," or words to that effect. After hearing appellant's response, SSG BS crossed the road, approached appellant, and again told him to remove the cigar and correct his uniform. An unpleasant exchange ensued, culminating in appellant walking away from SSG BS as SSG BS was speaking to him.[4]

Based on the initial exchange between SSG BS and appellant, the panel convicted appellant of Specification 5 of Charge II, which alleged:

(. . . continued)
disobedience of a superior commissioned officer, four specifications of willful disobedience of a NCO, three specifications of disrespect toward a NCO, one specification of assault of a NCO, one specification of dereliction of duty, one specification of failing to obey a lawful general regulation, one specification of provoking speech, and one specification of disorderly conduct, in violation of Articles 86, 90, 91, 92, 117, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 890, 891, 892, 917, and 934 [UCMJ]. The panel sentenced appellant to a bad-conduct discharge, confinement for ninety days, forfeiture of $1,120.00 pay per month for three months, and reduction to the grade of E-1. Due to dilatory post-trial processing, the convening authority reduced appellant's sentence of confinement from ninety to sixty days and otherwise approved the sentence as adjudged.

[3] We have given full and fair consideration to appellant's personally asserted matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them worthy of neither discussion nor relief.

[4] Appellant was convicted of disrespect toward a NCO based on his walking away from SSG BS while SSG BS was speaking to him (Specification 7 of Charge II).

> In that [appellant] . . . was disrespectful in language toward [SSG BS], a superior [NCO], then known by [appellant] to be a superior [NCO], who was then in the execution of his office, by saying to him, "Hey Sergeant, why do I have to take it out of my mouth?" and "I don't think it works like that Sergeant," or words to that effect.

LAW AND DISCUSSION

Appellant asserts this conviction is factually insufficient. We review his claim de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," we are "convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

We also review claims of legal sufficiency de novo. *Washington*, 57 M.J. at 399. "A finding of guilt is legally sufficient if any rational fact-finder, when viewing the evidence in the light most favorable to the government, could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citing *United States v. Webb*, 38 M.J. 62, 69 (C.A.A.F. 1993)). When applying this test, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *Id.* (quoting *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)) (internal quotation marks omitted).

It is a crime for an enlisted member to be "disrespectful in language or deportment toward a . . . noncommissioned officer . . . while that officer is in the execution of his office." UCMJ art. 91(3). The President has listed eight elements for this offense, specifically that: (i) the accused was an enlisted member; (ii) the accused did or omitted certain acts, or used certain language; (iii) such behavior or language was used toward and within sight or hearing of a certain NCO; (iv) the accused then knew that the person toward whom the behavior or language was directed was a NCO; (v) the victim was then in the execution of office; (vi) that under the circumstances the accused, by such behavior or language, was disrespectful to said NCO; (vii) the victim was the superior NCO of the accused; and (viii) the accused then knew that the person toward whom the behavior or language was directed was the accused's superior NCO. *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], pt. IV, ¶ 15.b.(3). The President has further elaborated that disrespectful behavior "may consist of acts or language," and that "[d]isrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language." *MCM*, pt. IV, ¶ 13.c.(3).

Appellant argues his conviction for using disrespectful language toward SSG BS must be set aside because there is insufficient proof that appellant possessed "actual knowledge" that SSG BS was a NCO. *MCM*, pt. IV, ¶ 15.c.(2). Having reviewed the testimony of SSG BS and considered the initial exchange between him and appellant, including appellant's use of the word "Sergeant," we are satisfied beyond a reasonable doubt that appellant had actual knowledge that SSG BS was a NCO. On this basis, appellant's argument fails.

We are not convinced, however, as a matter of legal sufficiency, that the actual language used by appellant toward SSG BS was, in and of itself, disrespectful as envisioned by the President's definition of that term. While appellant's response was not a model of linguistic decorum, it did not include profanity or name-calling, nor did it contain anything resembling an "abusive epithet" or words of contempt. *MCM*, pt. IV, ¶ 13.c.(3); *cf. United States v. Mitcham*, ARMY 20140969, 2017 CCA LEXIS 64, *3–5 (Army Ct. Crim. App. 30 Jan. 2017) (mem. op. on recon.) (finding the appellant's conviction for disrespect toward a superior commissioned officer factually sufficient based on the appellant stating to the officer words to the effect of "Fuck this shit, I'm not going to sign this because this is basically bullshit, sir" during a counseling session).[5]

We recognize our ability to "consider the context in which a statement is made when assessing whether it was disrespectful." *Mitcham*, 2017 CCA LEXIS 64 at *5 (citing *United States v. Najera*, 52 M.J. 247 (C.A.A.F. 2000)). However, in this case—and unlike the facts of *Mitcham*—there is no preexisting context to consider because the statements alleged in Specification 5 of Charge II encompass the initial exchange between appellant and SSG BS. *See id.* at *5 (noting the genesis for the appellant's counseling session was the appellant "making a highly offensive and sexist comment at a unit mandatory training session"). As such, we decline to read retrospective disrespect into the charged language based on appellant's subsequent disrespectful behavior toward SSG BS.

For these reasons, we conclude appellant's statements to SSG BS, as alleged in Specification 5 of Charge II, are not disrespectful as the President has defined the term. Accordingly, we find this specification legally insufficient and take appropriate action in our decretal paragraph.

Having found Specification 5 of Charge II legally insufficient, we must determine whether we are able to reassess appellant's sentence based on the remaining findings of guilty. Considering the "totality of the circumstances

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[5] Even though this court found SSG Mitcham's conviction factually sufficient, we ultimately disapproved the finding based on the government's concession. *Mitcham*, 2017 CCA LEXIS 64 at *7–9.

presented" and the "illustrative, but not dispositive" factors articulated in *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013), we are confident in our ability to reassess appellant's sentence rather than remand his case to the convening authority.

Appellant remains convicted of a litany of offenses, including assaulting another NCO. The remaining convictions reflect insolence of an astonishing degree. Additionally, given the forum at which he was tried and the fact that the military judge instructed the members that Specification 4 and 5 of Charge II were "one for sentencing purposes,"[6] setting aside Specification 5 of Charge II would have no impact on appellant's maximum punitive exposure. Therefore, we are confident that even absent the finding of guilty of Specification 5 of Charge II, appellant would have received a sentence at least as severe as the sentence adjudged at his court-martial and approved by the convening authority.

CONCLUSION

The finding of guilty of Specification 5 of Charge II is SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the errors noted, and in accordance with *Winckelmann*, 73 M.J. at 15–16, the sentence approved by the convening authority is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored.[7]

Judge WALKER concurs.

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[6] The military judge, sua sponte, merged for sentencing Specifications 4 and 5 of Charge II.

[7] The parties noted the promulgating order contains an error that requires correction. At trial, the military judge dismissed the following language in the Specification of Charge IV: "you can't make me do anything anymore. I'm not going to listen to you." Despite the military judge's dismissal of that quotation, it was erroneously included in the promulgating order. Additionally, the promulgating order is erroneously dated 5 March 2020 when the Convening Authority took action on 6 March 2020. Lastly, the promulgating order notes that sentence was adjudged on 1 April 2019; appellant was sentenced on 2 April 2019. The court shall take corrective action in a Notice of Court-Martial Order of Correction to correct the language in the Specification of Charge IV, the date of the promulgating order, and the date appellant was sentenced.

EWING, Judge, concurring in part and dissenting in part:

I would find Specification 5 of Charge II legally sufficient in part. While I agree with the majority's holding that the phrase "Hey Sergeant, why do I have to take it out of my mouth?" does not amount to disrespectful language, in my view the phrase "I don't think it works like that Sergeant" is best read as a sarcastic challenge to the NCO's authority, and therefore constitutes "words of contempt" under the circumstances, particularly when viewed "in the light most favorable to the government." *Nicola*, 78 M.J. at 226. I therefore respectfully dissent from the majority's holding on that issue. I concur with the majority's sentence reassessment analysis.

FOR THE COURT:

(b) (6)

JOHN P. TAITT
Chief Deputy Clerk of Court

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NOTICE OF COURT-MARTIAL ORDER CORRECTION

IT IS ORDERED THAT, to reflect the true proceedings at the trial of the above-captioned case,

SPECIAL COURT-MARTIAL ORDER NUMBER 1, HEADQUARTERS, FORT CAMPBELL, 2700 INDIANA AVENUE, FORT CAMPBELL, KENTUCKY 42223,

IS CORRECTED AS FOLLOWS:

BY reflecting the date of the Special Court-Martial Order Number 1 as "6 March 2020."

BY deleting in lines two and three of The Specification, Charge IV, the words: "you can't make me do anything anymore. I'm not going to listen to you."

BY reflecting in the sentence paragraph, that the sentence was adjudged on 2 April 2019.

DATE: 17 December 2020

FOR THE COURT:

(b) (6)

JOHN P. TAITT
Chief Deputy Clerk of Court