

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHRISTOPHER PATRICK  
CRUZ,

Defendant-Appellant.

**FILED**

MAR 21 2008

C.A. 07-30384

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U.S. COURT OF APPEALS

D.C. No.: CR-07-52-GF-SEH

BRIEF OF APPELLEE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

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## STATEMENT OF JURISDICTION

This is an appeal from the conviction of the appellant, Christopher Patrick Cruz (hereafter Cruz) for the offense of assault resulting in serious bodily injury, a violation of 18 U.S.C. §§ 113(a)(6) and 1153. The offense occurred on the Blackfeet Indian Reservation, in the State and District of Montana.

The district court had jurisdiction of the prosecution under 18 U.S.C. § 3231. This Court has jurisdiction of Cruz' timely appeal under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court committed plain error then it denied Cruz' Rule 29 motion at the conclusion of the government's case-in-chief.

2. Whether district court abused its discretion in the manner in which it instructed the jury on how to determine whether Cruz is an Indian person and whether any error was harmless.

3. Whether sufficient evidence supported Cruz' conviction.

## STATEMENT OF THE CASE

A federal grand jury returned an indictment which charged Cruz with assault resulting in serious bodily injury. (ER 58-59). Cruz pled not guilty, but was subsequently convicted of the offense at trial. (ER 62, 64; CR 2, 30).

The district court sentenced him to 45 months imprisonment and three years supervised release. Cruz timely appeals.

## STATEMENT REGARDING ORAL ARGUMENT

Under Federal Rule of Appellate Procedure 34(a), the United States advises the Court of its view that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record and suffice to resolve this appeal.

## STATEMENT OF FACTS

### Cruz' Background and Status as an Indian Person

Cruz was born on July 28, 1987. (ER 38; RT 78). His mother is Clara Bird. (ER 77; RT 37). Bird is an enrolled member of the Blackfeet Tribe of Indians. (ER 37-38; RT 77-79). Her total quantum of Indian blood is 61/64th. (ER 38; RT 79). 29/64ths of her Indian blood

quantum is Blackfeet Indian, the remainder is Blood Indian, an Indian tribe in Canada . *Id.*

Cruz' father is Hispanic. (ER 42; RT 93). Accordingly, his quantum of Indian blood is one-half of his mother's. (ER 38; RT 80). Thus, his total quantum of Indian blood is 61/128ths. (ER 38; RT 80). His total quantum of Blackfeet Indian blood is 29/128ths. (ER 38; RT 81).

A person may become an enrolled member of the Blackfeet Tribe if he has a parent or grandparent who is named in the base membership book and possesses one-fourth degree of Blackfeet Indian blood. (ER 37; RT 74). A person who does not have a quantum of one-fourth Blackfeet Indian blood, but who does have a parent or grandparent who is an enrolled member of the tribe is eligible to apply for a descendent status. (ER 37; RT 74-76).

Descendants receive the same rights as enrolled members of the tribe, except that they do not receive a per capita payment, have the right to lease tribal land, or receive higher education through the Blackfeet Tribe of Indians. (ER 37, 39; RT 75-76, 82). Descendant status entitles the holder to receive medical treatment at any Indian



Health Service facility in the nation. (ER 37; RT 75). The status also enables the holder to receive some educational grants intended for Native Americans. (ER 37; RT 75-76). A descendent may hunt and fish on the Blackfeet Indian Reservation. (ER 37; RT 76). Finally, a descendent is subject to the criminal jurisdiction of the Blackfeet Tribal Court. *Id.*

Because Cruz did not have the requisite amount of Blackfeet Indian blood, he was ineligible to be an enrolled member of the tribe. (ER 39; RT 82). In 1995, however, he became a descendent of the tribe. (ER 37-38; RT 77-78).

During his short life, Cruz has lived in a variety of places, including Colorado, California, and Montana. (ER 42; RT 95). With respect to Montana, he lived in both Great Falls and Browning. *Id.* Browning is located on the Blackfeet Indian Reservation.

Cruz' parents divorced when he was nine or ten. (ER 42; RT 95-96). He lived with his mother at times on the Blackfeet Indian Reservation. (ER 44; RT 104). At various points he attended grade school and highschool in Browning. (ER 42; RT 96). When he grew older, Cruz worked for the Bureau of Indian Affairs (BIA) as a

firefighter. (ER 44; RT 104). He was also prosecuted in the Blackfeet Tribal Court. (ER 44; RT 104-05).

### **The Crime**

By December 2006, Cruz found himself living in the Town Motel in Browning. (ER 42; RT 96). On December 21, 2006, Cruz and some friends were drinking in a room in the motel. (ER 42; RT 97). At some point Cruz went outside to make a telephone call. (ER 43; 97).

During the course of the telephone call, Eudelma White Grass approached Cruz. (ER 43; RT 100). A fight ensued after White Grass pushed Cruz. (ER 43-44; RT 100-102). White Grass eventually fell to the ground. Cruz was angry with White Grass and kicked him five or six times in the face. (ER 46; RT 110). Cruz left White Grass on the ground. (ER 46; RT 110).

BIA Police Office Matthew Connelly subsequently found White Grass unconscious outside the motel. (ER 26-27; RT 33-34). White Grass was taken to a local hospital. (ER 27; RT 34). The doctor who treated him found he had suffered an intracranial hemorrhage or "brain bleed." (ER 32; RT 54). The doctor found the injury placed White Grass at a substantial risk of death. (ER 32; RT 55).

Cruz was identified as a suspect in the assault of White Grass. (ER 33; RT 59). On December 23, 2006, Special Agent Leona Broncho interviewed Cruz. (ER 33; RT 59-60). She asked if he was an enrolled member. (ER 33; RT 60). Cruz stated that he was not an enrolled member of the tribe, but was a descendent. *Id.* He stated his mother was an enrolled member of the tribe. (ER 33; RT 60-61). He subsequently admitted to beating White Grass on the date in question. (ER 33-35; RT 61-66).

### Legal Proceedings

In due course the grand jury returned its indictment. The indictment alleged that Cruz, an Indian person, committed the offense of assault resulting in serious bodily injury, thereby subjecting him to prosecution under 18 U.S.C. § 113(a)(6).

At trial, the government admitted evidence that Cruz was a descendent member of the Blackfeet Tribe of Indians, the meaning of that status, and the rights and burdens associated with that status. At the conclusion of the government's case-in-chief, Cruz moved for a judgement of acquittal, arguing that the government had not proven

beyond a reasonable doubt that Cruz was an Indian person. (ER 40; RT 88-89).

The district court denied the motion. (ER 41; RT 24). The court found Cruz had Indian blood. (ER 41; RT 91). The court further found that the Blackfeet Tribe of Indians recognized descendent members as Indians. *Id.* Consequently, the court denied the motion.

Cruz elected to testify. During the course of his testimony, he acknowledged that he had previously been prosecuted in the Blackfeet Tribal Court. (ER 44; RT 104-05). He stated that he had never received any benefits from the Blackfeet Tribe, obtained treatment at an Indian Health Service facility, or voted in a tribal election. (ER 42; RT 96-97).

Following his testimony, Cruz rested his case-in-chief, but did not renew his motion for a directed verdict.

At the settlement of jury instructions, the court proposed to instruct the jury, with respect to whether Cruz was an Indian person, as follows:

....

The term Indian person means a person who has some degree of Indian blood and is recognized by the federal government or a tribe as an Indian.

In determining whether a person is recognized by the federal government or a tribe as an Indian, you may consider tribal enrollment, government recognition, formally or informally, through receipt of assistance reserved only to Indians, enjoyment of the benefits of tribal affiliation, and social recognition as an Indian through residence on a reservation, and participation in Indian social life.

....

(ER 48; RT 121).

Cruz requested that the jury instruction should state that the jury should be instructed that the factors concerning whether he was recognized as an Indian person by the federal government or a tribe should be viewed in “declining order of importance.” (ER 47; RT 116). The district court denied the request, stating that *Bruce* stood for the proposition that the issue was one for the jury, not the court to decide. (ER 47; RT 116). The court observed the jury should consider all the criteria in *Bruce* and stated that it felt the instruction fairly stated the law. (ER 47; RT 116-17). Thus, the court instructed the jury in accordance with its proposed instruction. (ER 48; RT 121).

After a short deliberation by the jury, Cruz was convicted. He did not make a post-verdict motion for a judgment of acquittal.

## SUMMARY OF ARGUMENT

Cruz waived review of the district court's denial of his motion for a directed verdict at the conclusion of the government's case. Even if the Court does review the denial of the motion for plain error, or under any other standard of review, there was sufficient evidence for the matter to be presented to the jury.

The district court did not abuse its discretion in instructing the jury about the test to determine whether Cruz was an Indian person. Further, any error in instructing the jury was harmless.

The sufficiency of the evidence concerning Cruz' status as an Indian person should be reviewed for plain error only. Under any standard of review, sufficient evidence supported Cruz' conviction.

## ARGUMENT

### **I. Cruz Waived Review of The District Court's Denial Of His Motion For A Directed Verdict And The District Court Did Not Err When It Denied Cruz' Motion For A Directed Verdict.**

Standard of Review: It is well settled in this circuit that a defendant who presents evidence following the denial of a Rule 29 motion at the conclusion of the government's case-in-chief waives

appellate review of the denial. *Benchwick v. United States*, 297 F.2d 330, 335 (9th Cir. 1961); *United States v. Figueroa-Paz*, 468 F.2d 1055, 1058-59 (9th Cir. 1972); *United States v. Alexander*, 48 F.3d 1477, 1490, footnote 10 (9th Cir. 1995).

In this instance, Cruz presented evidence after the denial of his Rule 29 motion which followed the government's case-in-chief. He did not renew the motion following his case in chief. Accordingly, he has waived review of any Rule 29 motion in the case. The Court should review this issue for plain error only.<sup>1</sup>

Argument: In order to convict Cruz of the charged offense, the government was required to prove beyond a reasonable doubt that he

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"Plain error is '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc). "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice requiring a reversal." *United States v. Olano*, 507 U.S. 725, 734 (1993). Cruz "must establish 'that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.'" *Ameline*, 409 U.S. at 178 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) (citations and internal quotation marks omitted). "In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief," a defendant must show "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *Dominguez Benitez*, 542 U.S. at 81-82 (internal quotation marks omitted).

was an Indian person. Cruz maintains that the government failed to provide such evidence. When reviewed for plain error, or under any other standard of review, the evidence in this case established the Defendant is an Indian person.<sup>2</sup>

The generally accepted test for determining status as an Indian person considers: (1) the degree of Indian blood; and (2) tribal or government recognition as an Indian. *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005), citing *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996). A person claiming Indian status must satisfy both prongs. *Bruce*, 394 F.3d at 1223. Cruz meets both prongs.

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<sup>2</sup>Where, as here, a defendant presents evidence following a denial of his Rule 29 motion, this Court's review of the denial will consider all the evidence presented in the case, including evidence presented by the defendant. *Alexander*, 48 F.3d at 1490, footnote 10; *Figueroa-Paz*, 468 F.2d at 1058. See, also, *McGautha v. California*, 402 U.S. 183, 215-16 (1971) (a defendant whose motion for acquittal is denied at the conclusion of the government's case-in-chief must decide whether to stand on his motion or put on a defense, with the risk that in doing so he may bolster the government case enough to support a verdict of guilty). See, also, *United States v. Calderon*, 348 U.S. 160, 164 footnote 1 (1954) (by introducing evidence the defendant waives his objection to the denial of his motion to acquit and his proof may provide corroboration for essential elements of the government's case)



With respect to the first prong of the test, there need only be evidence of some Indian blood with respect to the person in question. *Bruce*, 394 F.3d at 1223-24. Generally, proof of Indian blood is sufficient where there is evidence the person in question has a parent or grandparent who is clearly identified as an Indian. *Id.* Thus, a person with as little as 1/8 Indian blood has been found to be an Indian. *Id.*, citing *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (S.D. 1988).

Cruz' mother is an enrolled member of the Blackfeet Tribe of Indians. His total quantum of Indian blood (including that from the Blood Tribe in Canada) is 61/128ths. (ER 38; RT 80). His total quantum of Blackfeet Indian blood is 29/128ths. (ER 38; RT 81). He thus has sufficient Indian blood to satisfy the first prong of the *Bruce* test.

The second prong of the test “probes whether the Native American has a sufficient non-racial link to a formerly sovereign people.” *Bruce*, 394 F.3d at 1224, citing *St. Cloud*, 702 F. Supp. at 1461. Ultimately, this prong requires some evidence that the person in question has been recognized as an Indian by either the federal or a

tribal government. *Bruce*, 394 F.3d at 1224-25. When analyzing this prong, courts have considered, in declining order of importance, evidence of the following: (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life. *Bruce*, 394 F.3d at 1224, citing *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995).

Cruz has certainly received recognition as an Indian from both the Blackfeet Tribe of Indians and the federal government. While he is not an enrolled member of a tribe, such enrollment is not the only means by which to determine status as an Indian. *Bruce*, 394 F.3d at 1224.

Cruz has received government recognition formally or informally by eligibility for assistance reserved only to Indians. He is a descendent, a status which affords him most of the rights afforded enrolled members, including certain educational grants. Further, the federal government recognizes that descendent members of tribes are

eligible to receive certain assistance reserved for Native Americans, including health care services. *Bruce*, 394 F.3d at 1224, footnote 6. Consequently, Cruz' status as a descendent member of the Blackfeet Tribe is significant and entitles him to receive assistance reserved for Indians.<sup>3</sup>

Likewise, Cruz' status as a descendent entitles him to most of the benefits reserved to other tribal members, including educational benefits and hunting and fishing privileges. Moreover, that status subjects him to the criminal jurisdiction of the Blackfeet Tribe and, indeed, he has been prosecuted by the tribe. That fact is significant, as recognized by *Bruce*, since the tribe cannot prosecute anyone but an Indian. *Bruce*, 394 F.3d at 1226-27.

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<sup>3</sup>Cruz maintains that this portion of the test requires proof that he actually received such assistance. Such is an overly narrow reading of *Bruce*. After all, *Bruce* strongly suggests that the eligibility for such assistance is a consequential step toward establishing that an un-enrolled person nevertheless an Indian. See, *Bruce*, 394 F.3d at page 1225, footnote 6. ("We note, in addition, that un-enrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of Interior as Indians without statutory reference to enrollment"). (Emphasis added).

Additionally, Cruz lived on the reservation at various times, including the time frame in which he assaulted White Grass. He attended school at various points while living in Browning. His family took the step of applying for him to receive descendent status when he was a child. He also worked as a firefighter under the employment of the BIA. Clearly, he participated in Indian social life on the reservation.

Given the totality of the circumstances, the evidence of Cruz' recognition as an Indian person is at least as strong as the evidence in *Bruce*. When combined with his blood quantum and connection to the tribe, the district court made no plain error when it found Cruz was an Indian person.

Thus, the government proved that Cruz was an Indian person. The district court did not err by denying the motion for a judgment of acquittal.

## **II. The District Court Did Not Abuse Its Discretion In Instructing The Jury And Any Error Was Harmless.**

Standard of Review: This Court reviews a district court's formulation of jury instructions for an abuse of discretion. *United*

*States v. Franklin*, 321 F.3d 1231, 1240-41 (9th Cir. 2003). Error may be harmless. *Chapman v. California*, 386 U.S. 189 (1967). Error in instructing is harmless where it is clear beyond a reasonable doubt that a rational jury would have found the jury guilty absent the error.

*United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (en banc).

Argument: Cruz complains that the district court erred because it did not instruct the jury that, in assessing whether he met the definition of an Indian under the second prong of the *Bruce* test, it should consider the factors under that prong in declining order of importance. The district court did not err and any error was harmless beyond a reasonable doubt.

#### **A. No Error Occurred.**

The court's instruction accurately cited *Bruce*'s two-prong test by stating that, "The term Indian person means a person who has some degree of Indian blood and is recognized by the federal government or a tribe as an Indian." (ER 48; RT 121). The court also instructed the jury about the factors it should consider with respect to the second prong. *Id.*

While the court did not instruct that the factors with regard to the second prong should be reviewed in a declining order of importance, it was not necessary that the court do so for two reasons.

First, *Bruce* concerned a case in which a defendant was charged with assault on a person under the age of 16, pursuant to 18 U.S.C. § 113(a)(5) and 1152. *Bruce*, 394 F.3d at 1217. At trial, the defendant in *Bruce* sought to prove as an affirmative defense that she was an Indian person, a fact which would have precluded her prosecution under 18 U.S.C. § 1152. *Bruce*, 394 F.3d at 1217, 1222. Since the defendant was not an enrolled member of the tribe, the district court found she had not satisfied her burden of production that she had proven the affirmative defense. *Bruce*, 394 F.3d at 1224. Thus, the district court refused to submit the matter to the jury. *Bruce*, 394 F.3d at 1218.

This Court found that the district court erred because it essentially concluded that tribal enrollment is not the only means to determine whether a person is recognized as an Indian. *Bruce*, 394 F.3d at 1224. In summarizing the long history of the issue as addressed in other court cases, this Court noted that those courts

considered the factors relevant to the second prong of the *Bruce* test in declining order of importance. *Id.* It is clear from the context of the Court's statement that it simply sought to make clear that tribal enrollment, while a strong indicator of a person's status as an Indian person, was not the only avenue to show that a person was recognized as an Indian.

The district court's jury instruction accurately captured the meaning of *Bruce*. The jury was instructed that there was a two-part test to determine whether Cruz was an Indian. The jury was further advised of the factors it should consider with respect to the second prong. Such was holding in *Bruce*. Thus, no error transpired with respect to the court's decision not to include the language which Cruz sought.

Second, *Bruce* clearly stated that courts have viewed the factors in declining order of importance. *Bruce* did not directly hold that a jury considering the factors must view the factors in a declining order of importance. Such a directive would have confused the jury and extended *Bruce* beyond its simple observation that courts have viewed the factors in declining order of importance.

### **B. Any Error Was Harmless.**

Moreover, any error in omission of the language was harmless beyond a reasonable doubt. The evidence established that Cruz was a descendent and that his status as such entitled him to nearly all the rights and benefits afforded an enrolled member. The jury knew that Cruz had been prosecuted in tribal court, a factor given great weight in *Bruce*. *Bruce*, 394 F.3d at 1226-27. The jury knew that he had lived on the reservation, attended school there, and worked for the BIA. Ultimately, regardless of the relative importance which attached to the factors associated with the second prong, it was proven beyond a reasonable doubt that Cruz was recognized as an Indian person, notwithstanding that he was not an enrolled member of the tribe. Hence, any error was harmless.

### **III. Sufficient Evidence Supported Cruz' Conviction.**

**Standard of Review:** Where, as in this case, a defendant fails to renew a Rule 29 motion at the end of a trial, this Court reviews for plain error a claim insufficient evidence. *United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004).



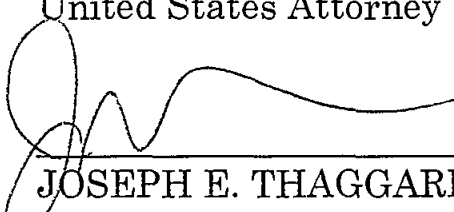
Argument: Cruz argues that there is insufficient evidence to prove that he is an Indian person. As detailed in section I of this argument, there is overwhelming evidence that he is, in fact, an Indian person. Thus, under any standard of review, there is sufficient evidence to support his conviction.

### CONCLUSION

For the foregoing reasons, Cruz' conviction should be affirmed.

**DATED** this 20th day of March, 2008.

WILLIAM W. MERCER  
United States Attorney



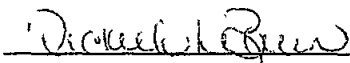
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Assistant U.S. Attorney

## CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of Montana, and that on the 20th day of March, 2008, she mailed a true and correct copy of the foregoing Response Brief of the United States of America, postage prepaid, to the following addressee(s):

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\_\_\_\_\_  
VICKIE L. LeBRUN  
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## STATEMENT OF RELATED CASES

There are no related cases.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 2218 words.

WILLIAM W. MERCER  
United States Attorney



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