

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GORDON RAY MANN, JR.,

Defendant-Appellant.

C.A. 09-30052

D.C. No.: CR-08-68-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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INTRODUCTION

Gordon Ray Mann, Jr., (“Mann”), appeals his conviction for sexually molesting an eight-year-old child. The sole issue on appeal is whether Mann is an Indian person for purposes of federal criminal jurisdiction.

Mann is an enrolled member of the Little Shell Tribe of Chippewa Indians. The Little Shell Tribe is recognized by the State of Montana, but not the federal government, as a tribe of Indians. Mann has a degree of Indian blood, holds himself out to be an Indian person, has received free healthcare from an Indian Health Services hospital, participates in Indian social, cultural, and religious ceremonies, and hunts and lives on an Indian reservation. He, therefore, is an Indian person for purposes of federal criminal jurisdiction. The district court’s denial of Mann’s motion for judgment of acquittal should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Judgment was February 9, 2009. (ER-II Tab 5). Mann appealed February 10, 2009. (ER-II Tab 4).

STATEMENT OF THE ISSUES

Whether Mann is an Indian person for purposes of federal criminal jurisdiction.

STATEMENT OF THE CASE

Mann was convicted of one count of Aggravated Sexual Abuse, a violation of 18 U.S.C. §§ 1153(a) and 2241(c). He appeals the district court's denial of his motion for a judgment of acquittal, *see* Rule 29, Fed. R. Crim. P., and claims that he is not an Indian person for purposes of federal criminal jurisdiction. Because Mann is an Indian person, his conviction should be affirmed.

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.

STATEMENT OF FACTS

During Summer 2005 through February 2006, Mann sexually abused an 8-year-old child by performing oral sex on the child and fondling the child's genitals. (ER-I Tab 2, pp. 86, 87, 90, 140, 142-43).

These incidents took place at Mann's residence in Browning, Montana, on the Blackfeet Indian Reservation. (ER-I Tab 2, pp. 77, 86, 90, 142-43).

Mann is an enrolled member of the Little Shell Tribe of Chippewa Indians. (ER-I Tab 2, pp. 69, 76, 108, 140-41; ER-II Tab 10). The Little Shell Tribe is recognized by the State of Montana, but not the federal government, as an Indian tribe. (ER-I Tab 2, pp. 67, 78, 109, 128, 135).

Mann has 10/64ths degree of Chippewa Indian blood and 11/64ths of "other" Indian blood - or almost one-third total Indian blood. (ER-I Tab 2, p. 108; ER-II Tab 10). Mann holds himself out to be an Indian person. (ER-I Tab 2, p. 142). He qualifies for and has received free healthcare from the Indian Health Services hospital on the Blackfeet Indian Reservation, which care is reserved only to Indians or tribal members. (ER-I Tab 2, pp. 68-70, 71-74, 143). Mann lives and hunts on the Blackfeet Reservation. (ER-I Tab 2, pp. 77, 141-43). He also participates in Indian social, cultural and religious events, such as beading, pow-wows, eating fry bread, and ceremonial dancing with members of the Blackfeet Tribe. (ER-I Tab 2, pp. 77, 141-43). Mann

has been invited by members of the Blackfeet Tribe to attend Indian religious ceremonies such as sweats. (ER-I Tab 2, p. 142).

SUMMARY OF ARGUMENT

Viewing the evidence in this case in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime, particularly that Mann is an “Indian person,” beyond a reasonable doubt.

Mann satisfies the test set forth by this Court in *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005), for determining whether someone is an “Indian person.” First, Mann’s degree of Indian blood - slightly less than one-third - is sufficient. Second, he is also recognized by the Blackfeet Tribe and the federal government as an Indian person. Mann is an enrolled member of the Little Shell Tribe of Chippewa Indians. Mann is also, however, affiliated with the federally recognized Blackfeet Tribe. Mann qualifies for and receives free healthcare at the Indian Health Services hospital in Browning, Montana, on the Blackfeet Reservation. Mann holds himself out to be an Indian person, lives and hunts on the Blackfeet Reservation, and participates there in Indian social, cultural, and religious ceremonies. Mann has also been

invited by members of the Blackfeet Tribe to attend Indian religious ceremonies such as sweats.

Thus, the district court's denial of Mann's motion for a judgment of acquittal should be affirmed.

ARGUMENT

Standard of review: Normally, because the question of Indian status operates as a jurisdictional element under 18 U.S.C. § 1153, the standard of review is *de novo*. See *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005). But, whenever, as in this case, a defendant brings a motion for acquittal in order to challenge the sufficiency of the evidence underlying a jurisdictional element, this Court owes deference to the jury's ultimate factual finding. See *United States v. Cruz*, 554 F.3d 840, 843-44 (9th Cir. 2009). This Court reviews the district court's decision in such a situation under the standard applied to sufficiency-of-the-evidence challenges: "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.* (internal quotations omitted).

Argument: Mann argues that he is not an Indian person for purposes of federal criminal jurisdiction because he is a member of the Little Shell Tribe of Chippewa Indians, which is not a federally recognized tribe of Indians. Mann Br. at 17. Mann, in essence, argues that the prosecution failed to prove (and cannot prove) that he is an Indian person for purposes of federal criminal jurisdiction. Mann's argument fails, however, because he is affiliated with the federally recognized Blackfeet Tribe.

This Court recently reaffirmed the test set forth in *Bruce, supra.*, for determining Indian status under 18 U.S.C. § 1153. *See Cruz*, 554 F.3d at 845. "The *Bruce* test requires that the Government prove two things: that the defendant has a sufficient 'degree of Indian blood,' and has 'tribal or federal government recognition as an Indian.'" *Id.*

Mann claims that this test does not apply because *Bruce* arose under Section 1152, not Section 1153. Br. 15, 20. He is incorrect. This Court recently made clear that the same test applies under Section 1153. *Cruz*, 554 F.3d at 845.

Mann also contends that the case is controlled by this Court's earlier decision in *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993).

Br. 14-15, 19-21. Mann is incorrect because unlike LaPier, Mann is also affiliated with a federally recognized tribe - the Blackfeet. As in this case, *LaPier* involved a member of the Little Shell Tribe who committed a crime on the Blackfeet Reservation. In *LaPier*, this Court did not even reach the test cited in *Bruce* and *Cruz*, because “there is a simpler threshold question that must be answered first, . . . Is the Indian group with which LaPier claims affiliation a federally acknowledged Indian tribe.” *Id.* at 304-305. Since LaPier only claimed membership or affiliation with the Little Shell Tribe, and not the Blackfeet Tribe, this Court held that he could not be an Indian for criminal jurisdiction purposes. *Id.* at 305-306. Unlike *LaPier*, however, in this case, the evidence showed that Mann was also affiliated with the Blackfeet Tribe. Thus, this case is not controlled by *LaPier*.

First Prong: Sufficient Degree of Indian Blood

In this case, there is no question that the first prong of the *Bruce* test was proved beyond a reasonable doubt – that Mann has a sufficient degree of Indian blood. One-eighth Indian blood has been held to be sufficient. *See Bruce*, 394 F.3d at 1223-1224 (finding one-eighth Indian

blood to be sufficient and citing other cases finding one-eighth to be sufficient). Mann has 10/64th's Chippewa blood and 11/64th's "other" Indian blood - totaling almost one-third. (ER-I Tab 2, p. 108; ER-II Tab 10).

Second Prong: Tribal or Federal Government Recognition As An Indian

The second prong requires the government to prove that Mann is recognized by a tribe or the federal government as an Indian. This Court outlined four factors that govern this second prong; those four factors are, in declining order of importance: 1) tribal enrollment; 2) government recognition formally and informally through 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. *Cruz*, 554 F.3d at 846.

1. Tribal Enrollment

Mann is not enrolled in a federally recognized tribe. He is an enrolled member of the Little Shell Tribe of Chippewa Indians. (ER-I Tab 2, pp. 69, 76, 108, 140-41; ER-II Tab 10).

Although it is the most important factor, tribal enrollment is not the only means and not necessarily determinative of the second prong of the *Bruce* test. *Bruce*, 394 F.3d at 1224; accord *United States v. Antelope*, 430 U.S. 641, 646 n. 7 (1977) (“[E]nrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction . . .”); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) (“The lack of enrollment . . . is not determinative of status . . . [T]he refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian.”); *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988) (“[A] person may still be an Indian though not enrolled with a recognized tribe.”).

2. Government Recognition Formally and Informally Through Receipt of Assistance Reserved Only To Indians

Mann meets the second most important factor: government recognition through receipt of assistance reserved only to Indians. See *Cruz*, 554 F.3d at 848. It is undisputed that Mann qualified for and received free healthcare (i.e., direct care for an emergency and Urgent care) from the Indian Health Services hospital on the Blackfeet

Reservation, which care is reserved only to Indians or tribal members. (ER-I Tab 2, pp. 68-70, 71-74, 143).

3. Enjoyment Of The Benefits Of Tribal Affiliation

Mann enjoyed the benefits of Blackfeet tribal affiliation in that he hunts on the reservation. (ER-I Tab 2, p. 141-42). *See Cruz*, 554 F.3d at 848 (hunting on the Blackfeet Reservation recognized as a benefit of tribal affiliation).

4. Social Recognition As An Indian Through Residence On A Reservation and Participation In Indian Social Life.

Mann also meets the fourth factor in that he holds himself out to be an Indian person, (*see* ER-I Tab 2, p. 142), he lives on the Blackfeet Reservation, (*see* ER-I Tab 2, pp. 77, 141), and he participates in Indian religious, cultural, and social events with members of the Blackfeet tribe, such as beading, pow-wows, eating fry bread, and ceremonial dancing. (ER-I Tab 2, pp. 141-42). Mann has also been invited by members of the Blackfeet Tribe to attend sweats, an Indian religious ceremony. (ER-I Tab 2, p. 142).

Viewing the above evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime, particularly that Mann is an “Indian person,” beyond a reasonable doubt.

CONCLUSION

This Court should affirm the district court’s denial of Mann’s motion for judgment of acquittal.

DATED this 25th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/E. Vincent Carroll
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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 1,894 words.

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