

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GENTRY CARL LABUFF, Defendant-Appellant.	C.A. 10-30274 D.C. No.: CR-10-23-GF-SEH
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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

Gentry Carl LaBuff (“LaBuff”) and his cousin robbed the Subway restaurant on the Blackfeet Indian Reservation in Browning, Montana, on October 25, 2008. LaBuff was convicted following a jury trial. On appeal, LaBuff raises a single issue – he argues that he is not an “Indian person” for purposes of federal criminal jurisdiction.

Evidence was presented at trial that LaBuff’s biological father is an enrolled member of the Blackfeet Tribe (a federally recognized tribe), LaBuff has Blackfeet Indian blood, has lived on the Blackfeet Indian Reservation his whole life, has received free medical care all his life at the Indian Health Services (“IHS”) hospital on the Blackfeet Indian Reservation, has been arrested by tribal police, and prosecuted and convicted multiple times in the Blackfeet Tribal Court. The jury found LaBuff guilty. The evidence was sufficient. His conviction 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 September 17, 2010; LaBuff timely appealed. ER 354-361.

STATEMENT OF THE ISSUE

Whether there was sufficient evidence for the jury to find beyond a reasonable doubt that LaBuff is an “Indian person” for purposes of federal criminal jurisdiction.

STATEMENT OF THE CASE

LaBuff was charged with robbery/aiding and abetting robbery, a violation of 18 U.S.C. §§ 1153(a), 2111, and § 2. ER 1. An essential element of that charge is that LaBuff is an “Indian person.” ER 26-27. LaBuff was found guilty following a jury trial. ER 31. LaBuff appeals his conviction.

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

On October 25, 2008, LaBuff and his cousin robbed the Subway restaurant in Browning, Montana. ER 108-110, 144-146, 151, 183. They were arrested, and later charged by indictment with the robbery.

ER 1-2, 114-115. At trial, the following evidence was presented

regarding LaBuff's "Indian person" status:

- LaBuff's biological father is an enrolled member of the Blackfeet Tribe of Indians, ER 10, 83;
- LaBuff is considered a descendant by the Blackfeet Tribe, ER 10;
- The Blackfeet Tribe is a federally recognized tribe, ER 82;
- LaBuff has Blackfeet Indian blood (approximately 22%), ER 10, 82;
- LaBuff has lived on the Blackfeet Indian Reservation his entire life, ER 80-82, 97, 145, 180, 192-194, 215-216, 233, 284;
- LaBuff has received free medical care at the IHS hospital (which is run by the federal government, ER 96) on the Blackfeet Indian Reservation his entire life, which free care is reserved to Native Americans or Indian persons only, ER 99-103; The Indian Health Services hospital considers LaBuff to be a Native American or Indian person, ER 100, 103-104;
- LaBuff has been arrested by tribal and Bureau of Indian Affairs ("BIA") police officers on the Blackfeet Reservation, ER 219-220, 229-230, 233-234; tribal and BIA police officers on the Blackfeet Reservation have authority to arrest only enrolled members of federally recognized tribes, and descendants of persons who are enrolled members of federally recognized tribes, ER 219-220, 233-234; LaBuff has never challenged the tribe's or the BIA's authority to arrest him based on his status, ER 235;

- LaBuff has been prosecuted and convicted multiple times in the Blackfeet Tribal Court, ER 220-222; the Blackfeet Tribal Court has jurisdiction only over enrolled members of a federally recognized tribe, or a descendent of an enrolled member of a federally recognized tribe, ER 225; LaBuff has never challenged his convictions on the basis of lack of jurisdiction by the tribe, ER 223.

LaBuff moved at the end of the government's case for a judgment of acquittal, ER 259-260, and the district court denied that motion. ER 265. At the end of the trial, LaBuff renewed his motion for a judgment of acquittal. ER 302-303. The district court reserved ruling on LaBuff's renewed motion. ER 303. The jury found LaBuff guilty. ER 31, 342. The district court denied LaBuff's renewed motion for judgment of acquittal. ER 372; CR 62. LaBuff appealed. ER 360-362.

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 element of the crime at issue in this case, that LaBuff is an "Indian person," beyond a reasonable doubt.

LaBuff 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, LaBuff’s degree of Indian blood - slightly less than one-fourth - is sufficient, which LaBuff concedes. *See* LaBuff Br. at 18. Second, he is also recognized by the Blackfeet Tribe and the federal government as an Indian person. LaBuff qualifies for and receives free healthcare at the IHS hospital in Browning, Montana, on the Blackfeet Reservation. LaBuff has lived on the Blackfeet Reservation his entire life. And, LaBuff has been arrested by tribal police, prosecuted and convicted multiple times in Blackfeet Tribal Court.

Thus, the district court’s denial of LaBuff’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: The Major Crimes Act, 18 U.S.C. § 1153, establishes federal criminal jurisdiction over certain serious crimes committed in Indian country by Indian defendants. *United States v. Maggi*, 598 F.3d 1073, 1077 (9th Cir. 2010). Robbery is one of those serious crimes. *See* 18 U.S.C. § 1153(a). This Court recently reaffirmed the test set forth in *Bruce, supra.*, for determining Indian status under 18 U.S.C. § 1153. *See Maggi*, 598 F.3d at 1079-1080; *see also 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.*

First Prong: Sufficient Degree of Indian Blood

LaBuff concedes that the government met this prong by showing that he has more than 1/8 Indian blood. *See LaBuff Br.* at 18; *see also*

ER 10, 79-83. And there is no question that the first prong of the Bruce test was proved beyond a reasonable doubt – that LaBuff 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).

Second Prong: Tribal or Federal Government Recognition As An Indian

The second prong requires the government to prove that LaBuff 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

Although the Blackfeet Tribe is a federally recognized tribe, ER 82, LaBuff is not an enrolled member of that tribe. ER 80-84. But, LaBuff is a descendant. ER 10 . That reflects some degree of recognition by the Blackfeet Tribe. *See Maggi*, 598 F.3d at 1082 (“While descendant status does not carry similar weight to enrollment, and should not be considered determinative, *Cruz*, 554 F.3d at 847, it reflects some degree of recognition.”).

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

LaBuff 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 LaBuff qualifies for and received free healthcare (i.e., all services offered at the IHS hospital – well-child visits, dental, optometry, walk-in clinic, mental health, etc.) all his life from the IHS hospital on the Blackfeet Reservation, which care is reserved only to Indians or tribal members. ER 99-104. The IHS hospital is a federally-run facility. ER 96. The IHS hospital considers LaBuff to be a Native American or Indian person. ER 100, 103-104.

3 & 4. Enjoyment Of The Benefits Of Tribal Affiliation, and Social Recognition As An Indian Through Residence On A Reservation and Participation In Indian Social Life

LaBuff resided on the Blackfeet Reservation his entire life. ER 80-82, 97, 145, 180, 192-194, 215-216, 233, 284. LaBuff lived in

Blackfeet public housing during most of that time. ER 285. LaBuff also attended school on the Blackfeet Reservation. ER 283. Although non-Indians can live on the Reservation, live in Blackfeet public housing, and attend school in Browning on the reservation, LaBuff taking advantage of these benefits (in light of him being a descendant of an enrolled member of the Blackfeet Tribe, qualifying for and receiving free medical care at the IHS facility, being arrested and jailed by the tribe and BIA, and being prosecuted and convicted in tribal court) show the “sufficient non-racial link to a formerly sovereign people,” *see Cruz*, 554 F.3d at 849, under *Bruce* to establish that LaBuff is an “Indian person.”

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 LaBuff is an “Indian person,” beyond a reasonable doubt.

LaBuff tries very hard to make his situation look like the defendants’ in *Cruz* and *Maggi*. There are, however, some critical differences between LaBuff and the defendants in *Cruz* and *Maggi*:

1. Cruz never took advantage of any of the descendant benefits, *Cruz*, 554 F.3d at 846, and Maggi had only one documented instance of using IHS services. *Maggi*, 598 F.3d 1082. LaBuff has received free medical care at the IHS hospital on the Blackfeet Indian Reservation his entire life, ER 99-103; The Indian Health Services hospital considers LaBuff to be a Native American or Indian person, ER 100, 103-104.
2. Cruz lived on the reservation a brief time, *Cruz*, 554 F.3d at 846, and there was no evidence that Maggi lived on the reservation. *Maggi*, 598 F.3d at 1082-1083. LaBuff has lived on the Blackfeet Indian Reservation his entire life. ER 80-82, 97, 145, 180, 192-194, 215-216, 233, 284. In fact, all nine government witnesses stated that they knew LaBuff from living on the reservation and from seeing him around. *Id.*
3. Cruz was subject to the criminal jurisdiction of the tribal court and was at one time prosecuted in tribal court, *Cruz*, 554 F.3d at 846, and Maggi was prosecuted in tribal court several times. *Maggi*, 598 F.3d at 1083. There was, however, no evidence of the outcome of those prosecutions. *Id.* LaBuff has been arrested by tribal and BIA police officers on the reservation, who only have authority to arrest enrolled members and descendants. ER 219-220, 229-230, 233-234, 235. LaBuff has been prosecuted and convicted multiple times in the Blackfeet Tribal Court. ER 220-222. The Blackfeet Tribal Court has jurisdiction only over enrolled members of a federally recognized tribe, or a descendent of an enrolled member of a federally recognized tribe. ER 225.

LaBuff has never challenged his convictions on the basis of lack of jurisdiction by the tribe. ER 223.

Based on these differences, there was evidence in this case presented to the jury from which they could have found, beyond a reasonable doubt, that LaBuff is an Indian person under the *Bruce* factors. His conviction should be affirmed.

LaBuff goes on to argue that he is not an Indian person by listing many benefits, reserved for enrolled members of the Blackfeet Tribe, that he did not receive. *See* LaBuff Br. at 24. It is true that LaBuff did not received these benefits because he is not an enrolled member of the Blackfeet tribe. But, as a descendant of an enrolled member, he qualifies for, and in fact received, benefits reserved only to Indian persons. *See* ER 99, 100. Therefore, LaBuff's argument that, "[a]lthough he has received medical care provided only to those with some quantum of Native American blood, he has never received assistance reserved only to Indian persons," *see* LaBuff Br. at 24, is not true and contradicts the record. The bottom line is that LaBuff, although he did not take advantage of *all* the benefits reserved only for Indian persons (for which he qualified as a descendant, *see* ER 77, 84),

he did take advantage of enough of those exclusive benefits, for purposes of the *Bruce* test, to show that he is an Indian person. That, in conjunction with the other facts in this record, provided the jury with sufficient evidence from which it could find, beyond a reasonable doubt, that LaBuff is an Indian person.

CONCLUSION

This Court should affirm LaBuff's conviction.

DATED this 21st day of January, 2011.

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STATEMENT OF RELATED CASES

There are no related cases.

DATED this 21st day of January, 2011.

MICHAEL W. COTTER
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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 2,439 words.

DATED this 21st day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2011, I electronically filed the foregoing with the Clerk of Court of 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.

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