Case No. 10-2252

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

v.

LINDA DIAZ,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO CASE NO. CR-09-1578 LH
C. LEROY HANSEN, UNITED STATES DISTRICT JUDGE

ORAL ARGUMENT IS REQUESTED

OPENING BRIEF OF DEFENDANT/APPELLANT LINDA DIAZ

SAMUEL L. WINDER
New Mexico Bar #5754
1011 Lomas Avenue N.W.
Albuquerque, New Mexico 87102
Tel: 505-247-9142

Attorney for Defendant/Appellant

TABLE OF CONTENTS

Appendix- Volumes I, II, and III will be mailed within 2 days of this filing.

TABLE OF AUTHORITIES

CASES FROM THE UNITED STATES SUPREME COURT

CASES FROM THE LOWER COURTS

TABLE OF STATUTES

FEDERAL RULES OF EVIDENCE

COMMITTEE'S PATTERN JURY INSTRUCTIONS, CRIMINAL CASES

NEW MEXICO STATUTES

I. PRIOR OR RELATED APPEALS

There are no prior related appeal appeals.

II. JURISDICTIONAL STATEMENT

The District Court's jurisdiction, *see* Fed.R.App.P.28(a)(4)(A), arose under 18 U.S.C. § 3231 (district court jurisdiction over federal offenses) because Linda Diaz was charged by indictment with one count of leaving the scene of an accident. *See* 18 U.S.C. §§1152, 13.

This appeal is from the district court's judgment of conviction and sentence, which is a final order. *See* Fed.R.App.P.28(a)(4(D).

This Court's appellate jurisdiction, *see* Fed.R.App.P.28(a)(4)(B), arises under 28 U.S.C. § 1291 (appellate jurisdiction over final decisions of district courts).

This appeal is timely. *See* Fed.R.App.P.28(a)(4)(C). On November 2, 2010, the district court sentenced Ms. Diaz to 12 months and 1 day. Doc. 165. (Clerk Minutes) On November 17, 2010, the district court entered its written judgment. Aplt. App. At 213-217. On November 22, 2010, Ms. Diaz filed a timely notice of appeal. Aplt. App. at 218.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the United States proved beyond a reasonable doubt that the alleged victim was non-Indian pursuant to *United States v. Prentiss*?
2. Whether the district court's submission of jury instructions without a definition for an "accident " was error?
3. Whether the district court abused its discretion by allowing the United States to introduce evidence of Ms. Diaz consuming alcohol and disallowing the introduction of evidence concerning the intoxication of the alleged victim?
4. Whether the district court committed error by making improper remarks in the presence of the jury?
5. Whether the district court erred when it denied Ms. Diaz's request for a new trial based up impeachment material involving a member of the prosecution team that was not disclosed?

IV. STATEMENT OF CASE AND FACTS

A. Evidence concerning Ms. Diaz's consumption of alcohol and Mr. Espinoza's intoxication.

The United States filed a Notice of Intent to Introduce Evidence Pursuant to Federal Rule of Evidence 404(b) seeking to introduce testimony of Ms. Diaz's consumption of alcohol. Ms. Diaz responded that the Government's Rule 404(b) Evidence was not probative and would seriously prejudice Ms. Diaz at trial.

If the district court allowed the United States to introduce such evidence, Ms. Diaz requested the following evidence be introduced: (1) Mr. Espinoza "was drinking at a casino in Espanola several hours before Mr. Espinoza was walking [sic] US Highway 84/285." Doc. 32 , 4; (2) Mr. Espinoza "left to go 'to a party in the Pojoaque area' where he 'may have been drunk.'" *Id.*; (3) Mr. Espinoza was at the party form 3:00 a.m. or 4:00 a.m. *Id.*; and (4) the autopsy would show, Mr. Espinoza was legally intoxicated at the time of his death." *Id.* Ms. Diaz submitted there "will be two-mini trials that will be introduced in this case if the Court grants" the United States' request. *Id.*

The district court denied Ms. Diaz's request and indicated it would *evaluate* whether or not Ms. Diaz's alcohol would be properly admitted as evidence of motive in this case.

At the end of the testimony of one of the *defense* witnesses, the district court stated:

THE COURT: Further, there is little, if any, purpose of piling on testimony about who had what to drink. It doesn't make any difference whether or not she was – the defendant had beer or what, except for the purpose of establishing that she may have had a purpose in not stopping and calling the police. So, you know, this case has gotten so far afield from the real issues that I am really, really wondering if you guys know what this case is about.

MR. WINDER: Your honor, for the record, can I go ahead and make a record for myself here?

THE COURT: You can make a record all day long, but we're going to do it later. Okay?

MR. WINDER: Thank you, sir.

THE COURT: All right.

Id. at 401-402.

B. Ms. Diaz's Objections with regard to Jury instructions for Leaving the Scene of an Accident.

On December 7, 2009, the United States filed a Memorandum of Law in Support of Proposed Instructions ("Memorandum of Law') arguing that "the [alleged] offense constitutes a strict liability crime under New Mexico law and, for that reason, the government is not required to prove any *mens rea* to sustain a conviction of that offense." Aplt.App at 20.

Ms. Diaz filed a Response to the United States' Memorandum of Law arguing that there was no federal law or New Mexico law to support the United States' position that no *mens rea* is required to sustain a conviction pursuant to Subsection (B). Aplt.App. at 32-33. In addition, Ms. Diaz submitted that the United States would have to have knowledge that she had hit a person in an *accident.*

On February 2, 2010, the district court found Section B "is *not* a strict liability crime" and only required "knowledge that [Ms. Diaz] was involved in an accident." Aplt.App. at 54. The district court declined to determine the exact content of jury instructions, pending its consideration of evidence adduced at trial. *Id*. at 56. The district court referred the parties to the Committee's Pattern Jury Instruction, Criminal Cases, Tenth Circuit (2005), Instruction 1.33, "as a source for possible use in the event that it is appropriate at trial to give such an instruction." *Id.*

Ms. Diaz filed a Motion for Clarification or in the Alternative Motion for Reconsideration ("Motion for Clarification") Aplt.App at 58-63. Ms. Diaz submitted there was no dispute Ms. Diaz was involved in an "accident", but whether Ms. Diaz had "knowledge she was involved in an accident that involved her striking "'a *person*'". *Id.* at 60.

On February 11, 2010, the district court denied Ms. Diaz's Motion for Clarification. Aplt.App at 80-81. The district court held "[u]nder section (B), for guilt to be imposed, *it is not necessary that the United States prove that the driver knew the accident involved a person, nor is it required that the driver knew that the accident resulted in great bodily harm or death of any person." Id.* at 81.

At a pretrial conference on February 12, 2010, Ms. Diaz again objected that there was no definition for accident in the United States' proposed jury instructions:

The district court stated:

> I've concluded that the meaning of the statute is as I've announced – and I think you have to read it more than once to make it clear, because *it could have been drafted more clearly, but when you read all of those sections together, I think the statute's meaning comes out.* So I'm prepared to proceed, and I think I'll give your instruction, proposed instruction, due consideration, and I welcome defense counsel's instruction proposals the same. Okay? Aplt. App. at 234-235.

C. <u>The jury instructions</u>

The jury instructions did not included the definition for an accident.

Ms. Diaz proposed the jury instructions provide a definition for an "accident" as an event that involves a person who is injured or killed, citing NMSA 66-7-203. Aplt. App. at 66.

The jury instructions included a definition of "knowledge" (hereinafter the "knowledge instruction ") that provided:

> In order for the government to prove knowledge, it must demonstrate, beyond a reasonable doubt, that:
> the act was done voluntarily and intentionally, and not because of mistake. Although knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant *deliberately blinded herself to the existence of a fact*. Knowledge can be inferred in the *defendant was aware of a high probability of the existence of the fact in question,*

unless the defendant did not actually believe the fact in question (emphasis added). Aplt.App at 91.

D. District court judge's comments in the presence of the jury.

During the cross-examination of a United States' witness, the district court stated in the jury's presence:

THE COURT: I'm having trouble understanding the relevance of whether or not that was a designated traffic lane or not. I can't see the relevance.

MR. WINDER: Is there a walking path on the highway?

THE COURT: I can't still see the relevance of that.

MR. WINDER: Your Honor, I'll move on.

THE COURT: I think you should. This is far afield from the issues in the case.[1] (JT 281).

At the close of the United States' case-in-chief, Ms. Diaz submitted an oral Rule 29 motion arguing that one of the critical issues for the defense was with regard to the right lane not being a shoulder. (JT 335). The district court asked how it was relevant. *Id.* The district court stated: [t]he question is not whether he was walking on a highway or out in the country without a road. The question is

[1] There are four volumes of jury trial transcripts. Volume I is paginated from 1-106, Volume II is paginated from 107-333, Volume III is paginated from 334-565, and Volume IV is paginated from 566-639. The jury trial transcript will be references as "JT" with the corresponding page number.

whether she violated the statute by failing to stop and render aid. That's the only question." (JT 336).

At the end of the testimony of one of Ms. Diaz's testimony, outside the jury's presence, the district court stated:

THE COURT: I will not accept any more testimony about the road. We've heard enough about the road. We've heard plenty of testimony about whether it's three lanes or two lanes or a sidewalk or goat path. It's doesn't make any difference where it happened. The statute does not differentiate between locations. It's not relevant. No more testimony about it. (JT 401)

E. Facts Adduced at Trial

1. United States' case-in-chief.

On April 3, 2010, Mr. Matthew Gutierrez, went to dinner with Lisa Maestas, Kim Enriquez, Leslie Bird, and Stephanie Crosby at the Buffalo Thunder at the Pueblo of Pojoaque. (JT 53 – 55, 190-91). Later, Ms. Kathy Fierro joined the group. *(*JT 184, 190). Ms. Diaz join them and arrived at about 9:30 or 10:00 p.m. (JT 53-54). Mr. Gutierrez bought Ms. Diaz a beer. (JT 55). Ms. Diaz took a drink of the beer, but did not finish it. (JT 56).

At about 10:30 p.m. or 11:00 p.m., the group decided to play pool at the Tropicana in Espanola. (JT 58-60). Mr. Gutierrez drove Ms. Diaz's car to the

Tropicana. (JT 58). Mr. Gutierrez or Ms. Diaz brought a round of drinks. (JT 194). Ms. Fierro bought a second beer for herself, Mr. Gutierrez and Ms. Diaz. (JT 196).

The group left the Tropicana between 1:45 a.m. and 2:00 a.m. (JT 62). Ms. Diaz drove her car to Ms. Fierro's home to pick up six beers. (JT 63). Ms. Diaz was the "designated driver" and was not intoxicated or impaired to any degree. (JT 63). Ms. Diaz drove the group to Mr. Gutierrez's home. The group heard some loud noised on the roof as if someone was running back and forth. (JT 68, 204). Everyone was concerned about the noise. (JT 68). Mr. Gutierrez asked that no one leave the house because he was afraid something bad might happen. (JT 205, 235).

At about two hours later, Ms. Diaz decided to leave Mr. Gutierrez's home. (JT 206). Ms. Diaz left with Ms. Fierro. (JT 236). Ms. Diaz dropped Ms. Fierro at her house which was about ten minutes away from Mr. Gutierrez's home. (JT 236).

At about 4:27 a.m., Ms. Fierro received a call from Ms. Diaz telling her "I think I hit something." (JT 211, 238, 243). Ms. Diaz was crying and upset. (JT 211, 238). Ms. Fierro told her sister, "I will be right over." (JT 212). Ms. Fierro went to the front door and calmed Ms. Diaz down and told her, "its okay. Calm down." (JT 213). Ms. Diaz told her, "I hit something." (JT 213, 218, 220). Ms. Fierro told her, "It was probably a sign or something." (JT, 213, 218, 220). Ms.

Fierro and her daughter tried to calm Ms. Diaz down. (JT 217). They stayed there for about twenty minutes "talking to her" and then left. (JT 217, 224). Ms. Diaz said she was okay. (JT 217). Ms. Fierro got home at about 5:00 a.m and went to bed. (JT 224, 225).

A man found a body in a ditch near Highway 84/285. (JT 33-35). At 11:51 a.m. on April 4, 2009, Officer Long, a police officer with the Pojoaque Police Department, arrived where Mr. Espinoza's body was found. (JT 33-35).

Mr. John P. Montowine, special agent with the Bureau of Indian Affairs, became involved with the investigation on April 5, 2009. (JT 112). Mr. Montowine's acknowledged the following:

> (1)Leaving the scene of an accident is not a major crime; (2) the United States would not have jurisdiction to prosecute if the victim was Indian: (3) a surveillance video showed that Ms. Diaz taking a drink of a beer for about six seconds while she was at the Buffalo Thunder, but he did not know how much alcohol Ms. Diaz had drank; (4) he had no knowledge whether Ms. Diaz was intoxicated or impaired; (5) there was no indication that Ms. Diaz had been driving illegally; (6) Mr. Espinoza was walking on the right lane of the highway wearing a dark leather jacket; (7) Ms. Diaz's vehicle was visible where everyone could see the damage; (8) it would have been a good idea to determine whether Ms. Diaz might have seen a body thrust into her car; (9) he did not see any hair or blood on Ms. Diaz's vehicle; (10) prior to learning that windshield damage had been caused by the body of Mr. Espinoza; Mr. Montowine would not have known what caused the windshield damage; (11) the windshield damage could have been caused by a number of things, including an animal or someone throwing something into the windshield; (12) the side-view passenger mirror could have been knocked off by an animal or a number of things. (JT 142-71).

.

At about 8:47 a.m. on April 5, 2009, Mr. Frank Rael, a lieutenant with the Pojoaque Police Department received a call from Ms. Diaz. (JT 42-43). Ms. Diaz told Lieutenant Rael she did not want to speak with him over the phone, and Lieutenant Rael told her that he would meet her about 35 to 45 minutes at her home. (JT 43). Ms. Diaz told him that she had done something very bad and was worried. (JT 43). Lieutenant Rael arrived at her home at about 9:35 a.m., and saw the vehicle involved in the incident parked in front of Ms. Diaz's home. (JT 44) . The car had a broken windshield on the passenger side, and the passenger side mirror had been broken. (JT 45). Ms. Diaz appeared to be worried and had been crying. (JT 45).

Mr. Dennis O'Brien, traffic accident reconstructionist, was tendered as a Rule 702 government expert in accident reconstruction. (JT 244, 246). At the time of the incident, he was employed with the Santa Fe County Sheriff's Department. (JT 246). Mr. O'Brien arrived at the scene of the incident at approximately 1:30 p.m. on Saturday April 4, 2009. *(*JT 247-48). Mr. O'Brien took photographs on the "paved shoulder of the highway." (JT 250). The passenger side mirror was found about 15 feet away from Mr. Espinoza's body. (JT 252). The mirror was about 25 feet off the road. (JT 253). Pursuant to his investigation, Mr. O'Brien obtained a blood sample of Mr. Espinoza. (JT 265). Mr. O'Brien inspected the

vehicle. (JT 265). Mr. O'Brien observed the autopsy injuries. (JT 267). Based upon Mr. O'Brien's view of the injuries and the vehicle damage, Mr. Espinoza "rolled off the side of the car…." *(*JT 271). Based upon Mr. O'Brien opinion, if the vehicle was going 45 miles per hour, and it struck Mr. Espinoza, it would take .09 seconds or a tenth of second to slide from the front of the bumper to the windshield. (JT 274-75). If the vehicle had been going 30 miles per hours, it would be .13 seconds. (JT 275).

According to Mr. O'Brien, Mr. Espinoza's body would have been on Ms. Diaz's vehicle for *.09 second and it would be less than a blink of an eye.* (JT 275). In Mr. O'Brien's opinion, a blink of an eye might be longer than .09 of a second, and Mr. Espinoza was projected over the side of the vehicle. (JT 275-76, 284). Mr. O'Brien was certain Mr. Espinoza was walking on the "paved shoulder" and not on the highway. (JT, 279, 299). According to Mr. O'Brien, "[i]t is considered part of the traffic way, but it is not part of the designated traffic lane at that point where he was struck." (JT 279). Despite being shown Defendant's Exhibit 5 that showed a right-turning lane, Mr. O'Brien disputed that there was a right turning lane on the highway. (JT 279).

Mr. O'Brien was aware Mr. Espinoza was wearing a dark black leather jacket and black pants. (JT 286-87). Mr. Espinoza also acknowledged Mr. Espinoza was walking in the same direction of traffic. (JT 287). Mr. Espinoza

was "coming from an apartment at a party… in Pojoaque, and it appears he was walking northbound." (JT 287). Mr. O'Brien wanted to find out what Mr. Espinoza had been doing prior to when the "crash happened." (JT 288). Mr. O'Brien believed Mr. Espinoza might have left the party between 3:30 a.m. and 4:30 a.m. based upon his interview of persons who had been at the party with Mr. Espinoza. (JT 288). With regard to the windshield damage to Ms. Diaz's vehicle, Mr. O'Brien's opinion was the damage *could not* have been caused by an animal. (JT 291). Mr. O'Brien knew the damage was caused by a person *even though his report said the damage was "consistent"* with being caused by a pedestrian. (JT 291-92). Mr. O'Brien acknowledged there was a difference between the language contained in his investigative report the damage was "*consistent with a pedestrian/motor vehicle collision*" as opposed to this courtroom testimony that the damage "was" *caused* by a person. *(*JT 292).

Mr. O'Brien did not know Mr. Espinoza's mental state at the time he was walking on the highway. (JT 295). According to Mr. *O'Brien it was safe to walk on a right shoulder on a dangerous highway.* (JT 296). Specifically, Mr. O'Brien's opinion was *it was safe for a person to walk at 4:15 a.m., with a dark leather jacket, and dark pants, in the direction of traffic on a dangerous highway.* (JT 296-97).

Mr. Joseph Schiel, a criminal agent with the New Mexico State Police, took seven tape lifts from the passenger side of the vehicle. (JT 300-04). The tape lifts were taken because a person could not see any human hair on the windshield with one's naked eye. (JT 307). After the tape lifts were taken, there were two hairs that were visible. (JT 307) Mr. Schiel knew the case was being investigated with regard to a pedestrian-related fatality when he took photographs of the vehicle. (JT 308). Mr. Schiel reviewed a photograph of the windshield and thought the *windshield damage could have been caused by anything.* (JT 308). Specifically, it could have been caused by an animal or a sign blowing in the wind. (JT 308). According to Mr. Schiel, "All I can tell you, [the windshield damage] was caused by something striking the car. *I don't know what that something was."* (JT 308). Upon review of a government exhibit showing a dent to the vehicle, Mr. Schiel did not know what caused the damage. (JT 308). Specifically, Mr. Schiel did not know if the dent was caused by a person, and he did not know what struck the car. (JT 308-09).

Ms. Kristin Marie Radecki, a forensic scientist with the New Mexico Department of Public Safety Crime Lab, was qualified as recognized expert in her field. (JT 309-11). Ms. Radecki received seven tape lifts from the impact area of the windshield. (JT 314-315). Ms. Radecki extracted a DNA profile, compared it to the blood standard from Mr. Espinoza, and obtained a DNA profile for his blood

standard. (JT 316-17). Ms. Radecki had a DNA profile of the hair from the windshield and from the known standard of Mr. Espinoza, and she compared the two DNA samples to see if they matched. (JT 317) Ms. Radecki concluded there was a match between Mr. Espinoza's DNA profile, and the DNA profile that was obtained from the hair. (JT 317) According to Ms. Radecki, the DNA profile obtained from the hair was "a very rare DNA profile…." (JT 319). Ms. Radecki also looked at the blood sample of Mr. Espinoza obtained by the BIA, but was not taken from Ms. Diaz's vehicle. (JT 321).

According to Dr. Ross Zumwalt, the chief medical investigator for the State of New Mexico, Mr. Espinoza's fatal injuries were consistent with pedestrian impact from an automobile. *(*JT 84). According to Dr. Zumwalt, Mr. Espinoza was unconscious immediately. *(*JT 86).

Mr. Ezequial Espinoza, the father of Mr. Espinoza, was a government witness for "jurisdictional purposes." Aplt.App. at 267. Mr. Espinoza conducted some research concerning his heritage when he was a student at the University of New Mexico Highlands University even though his degree was in education and Spanish Tizo and classical language. Aplt.App. at 268. Mr. Espinoza became interested in his genealogy. *Id.* According to Mr. Espinoza, he and his wife are Sephardic Jews, and she does not "have any Native American or Indian background." Aplt.App. at 269. Mr. Espinoza's father was Hebrew and based

upon Mr. Espinoza's "knowledge" he did not have any "Native American or Indian background." Aplt.App. at 270. Mr. Espinoza's father was "Hispanic Sephardic Jewish is Spanish Jew." *Id.* Based upon Mr. Espinoza's knowledge, neither his father-in-law or mother-in-law "have any Native American or Indian background." *Id.* The prosecutor clarified, "American Indian when I say that." *Id.* According to Mr. Espinoza:

> (1) his son did "*not associate himself with any Native American tribe or pueblo" that he was aware of until "he got a job at Espanola in the Casino";* (2) his son would say that "he was a Spanish Jew, and he was very proud of it"; (3) none of Mr. Espinoza's children are enrolled members of a pueblo of Native American tribe; (4) he was not an expert and his research was based upon his personal knowledge; (5) there was nothing else he had other than the research that he did and his personal background ; and (6) all he had was his knowledge, research and "my family cultural background." Aplt.App. at 271-273.

2. Ms. Diaz's case-in-chief.

Mr. Milton Rodriguez, a private investigator, stated there

are three traffic lanes on U.S. Highway 84/285, and one of the lanes is a turning lane. (JT 357). The difference between a shoulder and a turning lane is a shoulder is a place where one parks on the side of the road if one had car trouble or needed to pull over for an emergency as opposed to a turning lane used a road exit to turn. (JT 348). Mr. Rodriguez took photographs of where the incident occurred that revealed a right turning lane and not a shoulder. (JT 346-49). Based upon his investigation, Mr. Espinoza was walking north on the right-hand turning lane

wearing a dark leather jacket and dark pants. (JT 346-53). Mr. Espinoza placed himself in a dangerous situation and was "kind of like walking on a railroad track at night. I mean, you may not see the traffic or traffic coming up behind you. (JT 354).

Mr. Thomas Lopez, an electrical engineer at Los Alamos National Laboratory, lives at a home on U.S. Highway 84/285. (JT 366-67). Mr. Lopez:

> (1) was familiar with Highway 84/285; (2) knew there are two northbound lanes and one right hand-turning lane: (3) *viewed the highway as being dangerous;* (4) there are a lot of skunks, raccoons, and cows on the highway at night; (5) did not believe there was requirement that one reports if they hit a dog or cat on the highway; (6) would probably not stop if he hit something on the road at night; (7) *if his wife hit something, Mr. Lopez would not want her to stop at 4:27 a.m. for safety reasons*.; and (8) thought a skunk, dog, and raccoons could create damage to a windshield. (JT 366-74).

Ms. Lisa Rene Maestas was at the Buffalo Thunder Resort at the Turquoise Trail restaurant. (JT 375-76). Ms. Maestas did not see Ms. Diaz drinking at the restaurant. (JT 377). At Matthew Gutierrez's home, Ms. Maestas heard something on the roof and became scared. (JT 383). During this time, Ms. Maestas did not believe she saw Ms. Diaz drinking. (JT 385).

Ms. Stephanie Crosby, the tribal secretary for the Pueblo of Pojoaque, was at the Tropicana with the group. (JT 402-04). Ms. Crosby did not see Ms. Diaz drink any alcohol at the Tropicana. (JT 404-05). Ms. Crosby left the Tropicana with the group and Ms. Diaz driving. (JT 405). Ms. Crosby who has four children

would not have put herself in a vehicle with Ms. Diaz if she had been impaired. (JT 403-05).

Mr. Jose Sarmiento, Ms. Diaz's son, went to his mother's house at about 8:30 a.m. on April 4, 2009. (JT 408-09). Mr. Sarmiento saw the windshield damage and a mirror missing. (JT 409). The car was not hidden. (JT 422). Mr. Sarmiento thought his mother had hit a "construction barrel or trash or something. I wasn't sure." (JT 409). Mr. Sarmiento has seen construction barrels "do a good amount of damage to vehicles." (JT 416). Mr. Sarmiento asked his mother what had happened, and she did not know. (JT 409). Ms. Diaz said something had hit her car. (JT 409) Mr. Sarmiento looked at the fender, the windshield and looked to see if there was any hair or blood on the car. (JT 409-10). Ms. Diaz again stated she did not know, but she was concerned something hit the car. (JT 410, 422). Ms. Diaz told her son she did not think she had hit a person or animal. (JT 422). They talked about it, and Ms. Diaz thought it was like an animal or maybe a person, but Mr. Sarmiento talked to her about it and said "it probably would be more blood, more evidence, that you would be able to see it." (JT 422). Mr. Sarmiento did not see any blood or hair on the vehicle. (JT 422). Ms. Diaz asked "what could it have been? You know, what do you think it was? And I told her it wasn't anything." (JT 416). Mr. Sarmiento *reassured his mother that she had not hit an animal or a person.* (JT 418). The thought never crossed his mind that Ms. Diaz had hit a

person. (JT 424). Mr. Sarmiento believed if his mother had hit a person, she "would have called the cops." (JT 420). If his mother had "hit a trash can. I really don't think [the police] would want to hear about her hitting a trash can." (JT 421).

Ms. Karla Fierro, Ms. Kathy Fierro's daughter, learned her mother had received a call from her sister telling her that she had hit something. (JT 429). She and her mom looked for something on the highway, but they did not see anything. (JT 430). Karla told her aunt that she had not "seen anything, that everything was going to be okay." (JT 431). Ms. Diaz did not tell her that she had hit a person. (JT 431). They were at the home for about 15 or 30 minutes. (JT 432).

Mike Adams, a pastor at the Sunland Hills Christian Church Fellowship, has known Mr. Diaz for about 10 years since his stepson is married to her daughter. (JT 445-46). Mr. Adams was aware of her reputation and saw her honest and truthfulness as "exemplary. She's an extremely honest person." (JT 446).

Ms. Diaz, was an elected official and the Lieutenant Governor of the Pueblo of Pojoaque. (JT 448). As part of her responsibilities, she was to take care of her people, such as child care, and making sure the programs are running on budget and providing educational services for tribal members. (JT 448).

On April 3, 2009, Ms. Diaz received a call from her cousins and friends who were at the Buffalo Thunder. *(*JT 455). She arrived at the Buffalo Thunder at about 10:00 p.m. (JT 455). At the Buffalo Thunder, she had one drink of beer. (JT

457) After about 45 minutes, they went to the Tropicana. (JT 457). At the Tropicana, Ms. Diaz made one order, including a beer for herself. (JT 458). She drank two sips of the beer. (JT 459). Ms. Fierro ordered her another beer, and she took one or two drinks. *(*JT 460). Ms. Diaz did not feel intoxicated or impaired. (JT 461-62). The group left with Ms. Diaz driving. (JT 463). Ms. Diaz drove to Ms. Fierro's home and then to Mr. Gutierrez's home. (JT 463-64).

At Mr. Gutierrez's home, they heard some noises like hooves or feet running on the roof. (JT 465). Mr. Gutierrez called his uncle for assistance. (JT 466). At about 4:10 a.m., Ms. Diaz sent a text to her sister that she wanted to go home. (JT 467). Ms. Diaz sent a text because Mr. Gutierrez did not think it was a good idea for anyone to leave the house, and she wanted to go home. (JT 467). Ms. Diaz left with Ms. Fierro and drove her home. (JT 468). It takes about 17 minutes to drive from Mr. Gutierrez's home to Ms. Diaz's home. (JT 469).

As Ms. Diaz was driving home, she got onto the right-hand lane and "saw something black hit my windshield, and I screamed, and I looked back through the rearview mirror, and I didn't see anything." (JT 469). Ms. Diaz screamed because of the impact on her windshield. (JT 473). Ms. Diaz thought someone had thrown something at her car, and she drove home to call her sister at 4:27 a.m. to check and see if there was anything on the road. (JT 470, 473-74). Ms. Diaz did not know she had hit a person because "[i]t was so fast that I – it just happened so fast

that I didn't know what it was, and when it hit my windshield, I just looked back, and I didn't see anything." (JT 471). Ms. Diaz did not observe a person for a fleeting second. (JT 554). Ms. Diaz did not think she had hit a person. (JT 544). Ms. Diaz did not stop her vehicle because she was scared and had "heard different things about people throwing things at cars for them to stop when it's dark." (JT 471). Specifically, she had heard about how people get hurt and violence happens when people throw things at cars. (JT 472). Ms. Diaz was also thinking of what had happened at Mr. Gutierrez's house. (JT 472). Ms. Diaz "didn't know what was out there", and she is a single woman. (JT 550). People knew she was the Lieutenant Governor of Pojoaque, and people also knew the car that she drove. (JT 550). Ms. Diaz thought she might endanger herself if she got out of the car. (JT 550).

When Ms. Diaz's sister and nieces arrived, Karla Fierro told her, "Tia Linda…I didn't see anything on the road; everything's fine." (JT 475). Ms. Diaz was freaked out and had not looked at her vehicle when she arrived home. (JT 475-76). Ms. Diaz did not want to go out to her car, and "just wanted to get inside [my] house." (JT 476). Ms. Diaz's sister and nieces stayed for about 15 or 20 minutes, and then Ms. Diaz locked all the doors and went into her room and turned on the television to try and get her mind off what had happened. (JT 477). During this time, Ms. Diaz had no idea she had hit a person. (JT 477).

Ms. Diaz woke up at 8:30 a.m. and prepared for her granddaughter's birthday. (JT 477). Ms Diaz's son, Jose Sarmiento, came over to get some things for his daughter's birthday party. (JT 480-81). Mr. Sarmiento asked Ms. Diaz about the damage to her car. (JT 481). Ms. Diaz told her son "something had hit my car, and I asked him what he thought it could be." (JT 481). Ms. Diaz did not have any thoughts she had hit a person, and if so she would have called the police. (JT 481).

At about 11:38 a.m., Ms. Diaz received a telephone call from Mr. Gutierrez concerning his girlfriend, Lisa Maestas' cell phone, that was lost. (JT 479 -80). Ms. Diaz went to her car to look for the cell phone and saw the windshield damage. (JT 480). Ms. Diaz "had a question in [her] mind, like what could it have been. I just…just had a question in my mind about what it could have been." (JT 480). Ms. Diaz did not have any thoughts she had hit a person. (JT 480).

Ms. Diaz went to her granddaughter's birthday party at about 1:00 p.m. and left at about 4:00 p.m. (JT 482). Ms. Diaz was still thinking about what had happened, but she still did not think she had hit a person with her car. (JT 482). Ms. Diaz drove her other vehicle to get put some air in the tires and drove by the area where something had hit her car. (JT 483-85). Ms. Diaz noticed there were police units in the area, but she did not know if the police were investigating a crime or why they were there. (JT 484-85). Ms Diaz did not know if her vehicle

had "any contact with a person", and if so, she would have contacted the police. (JT 485).

Ms. Diaz went to bed at 8:52 p.m. because she had called her son Jose Sarmiento as reflected in phone records introduced into evidence. (JT 493). When Ms. Diaz went to bed she "just didn't really think [what happened with her windshield] was anything of significance. I didn't think it was – that something had just hit my windshield, that's it." (JT 493). If Ms. Diaz had known she had hit Mr. Espinoza, she would not have gone to bed at 8:52 p.m., and she would have called the police. (JT 493-94).

At 8:07 a.m. the next morning, Ms. Diaz watched television and learned that a person had been found where something had hit her windshield. (JT 494-95). Ms. Diaz "didn't know what to think. I know that I didn't hit anything. I was … if I had known I had hit anybody I would have gone to the police. (JT 495). As reflected in telephone records, Ms. Diaz placed a call to Lieutenant Frank Rael at 8:27 a.m. (JT 495). Ms. Diaz knew that she "needed to call law enforcement. I needed to let them know." (JT 496). Lieutenant Rael returned her call at 8:45 a.m. (JT 495). Ms. Diaz told Lieutenant Rael "[t]hat I had done something – that I felt bad that I had done something bad." (JT 497) When Ms. Diaz saw the news clip on television at 8:07 a.m., it was the first time she put everything together and knew that she had hit a person. (JT 497). If Ms. Diaz had known that

she had hit a person at 4:26 a.m. she would have called the police. (JT 497). Ms Diaz called Lieutenant Rael voluntarily and no one forced her to call him. (JT 497).

Ms. Diaz had not expected a person to be walking on the right side of the highway, wearing a dark leather jacket, and dark pants at 4:26 a.m. (JT 545). Ms. Diaz had no knowledge that she had hit a person. (JT 546). Ms. Diaz had not drunk any alcohol between 12:00 a.m. and 4:10 a.m. when she left Mr. Gutierrez's home. (JT 548) . If Ms. Diaz had been impaired to the slightest degree, she would not have driven her sister home. *(*JT 549).

F. Ms. Diaz's Motion for Judgment of Acquittal

Ms. Diaz filed a Motion for Judgment of Acquittal arguing that the United States had not proven the victim's non-Indian status. The district court denied the motion, citing *United States v. Prentiss*, stated: "[n]otably, however, the [C]ourt has not determined what may be an even more difficult proof, showing that a person is not an Indian." Aplt.App. at 200.

G. Supplemental Motion New Trial

Ms. Diaz filed a Supplemental Motion for New Trial based upon the United States expert witness, Mr. Dennis O'Brien. Mr. O'Brien was the subject of a $3 million civil default judgment, and a United States Department of Justice Investigation. Aplt.App. at 177-192.

In a March 17, 2010 letter to Ms. Diaz's attorney, the United States disclosed a SWAT standoff of April 10, 1994 that did not "remotely resembl[e] *Giglio* material." Aplt. App. at 189. Specifically, the AUSA wrote that "[he] came across in the public domain that relate[d] to a separate incident involving Mr. O'Brien." *Id.* The March 17, 2010 letter set forth events of April 10, 1994 that led to a Civil Rights Division investigation conducted by the United States Department of Justice. *Id.* [2] On March 17, 2010, Ms. Diaz's counsel responded to the letter and wrote the evidence should have been disclosed. Aplt.App. at 191-192.

In Ms. Diaz's Supplement Motion for New Trial, Ms. Diaz submitted that Mr. Gerald Viarrial, who was involved in the SWAT standoff, is the cousin of Ms. Diaz. Aplt.App at 180. In addition, Ms. Stephanie Crosby, a defense witness, is the sister of Mr. Gerald Viarrial. *Id*. Given Mr. O'Brien's incredible testimony at trial, Ms. Diaz raised issues regarding his truthfulness. In her supplemental request for new trial, Ms. Diaz requested an evidentiary hearing.

The district court denied Ms. Diaz's Supplemental Motion for New Trial without an evidentiary hearing. The district court stated it was not clear whether the United States had suppressed evidence and "it is unclear that the evidence at issue here even would have been admissible at trial". Aplt.App. at 205-206.

[2] In the March 17th letter, the AUSA wrote that undersigned counsel should have been aware of the incident based

V. SUMMARY OF ARGUMENT

Ms. Diaz requests this Court reverse the conviction because: (1) the United States did not prove that Mr. Espinoza was a non-Indian, beyond a reasonable doubt; (2) the jury instructions allowed the United States to convict Ms. Diaz without proof of knowledge she had struck a person in an accident: (3) the district court abused its discretion when it allowed the United States to introduce highly prejudicial testimony concerning Ms. Diaz's consumption of alcohol and prevented Ms. Diaz from introducing evidence of Mr. Espinoza's intoxication; (4) the district court made improper comments in the presence of the jury that had a direct impact on Ms. Diaz's defense; and (5) the district court erred by denying a new trial based upon the United States' failure to disclose impeachment material.

VI. ARGUMENT

A. The United States did not prove the victim was non-Indian beyond a reasonable doubt, pursuant to this Court's analysis set forth in *United States v. Prentiss*.

1. The Standard of Review

This Court reviews questions of law *de novo*. *United States v. Irvin*, 906 F.2d 1424 (10th Cir. 1990). *De novo* review requires an independent determination of the issues, similar to that which the trial court makes its initial ruling. *See United States v. Ortiz*, 804 F.2d 1161, 1164 (10th Cir. 1996).

---

upon his position as a federal prosecutor in September 1994. Aplt.App. at 190.

2. The United States only introduced the testimony of the victim's father to prove the victim was non-Indian and did not prove the victim's non-Indian status beyond a reasonable doubt as directed by this Court in *United States v. Prentiss.*

This Court's analysis in *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) should lead to a reversal of Ms. Diaz's conviction.

In *Prentiss*, this Court set forth that the term "Indian" under §1152 is not defined in the statute or in related statutes addressing criminal jurisdiction in Indian country. This Court opined that the government is *required* to demonstrate that, in light of the evidence presented at trial, "no jury could reasonably find" that the victim of a crime was not an Indian. 273 F.3d at 1279. In the absence of a statutory definition, "this circuit has applied a two-part test for determining whether a person is an Indian for the purpose of establishing federal jurisdiction over crimes in Indian country." *Prentiss*, 273 F.3d at 1280.

This Court rejected the government's argument that the two-part test for determining Indian status is not appropriate. *Prentiss*, 273 F.3d at 1282. Specifically, this Court opined that tribal recognition is not enough, but "some evidence of Indian blood was also necessary." *Id*. at 1281-1282. This Court "acknowledge[d] that the issue of how one ought to determine Indian status under the federal statutes governing crimes in Indian country is extraordinarily complex and involves a number of competing policy considerations." *Id*. at 1282.

In *Prentiss*, the government had not presented any evidence that either of the victims "ha[d] some Indian blood." *Prentiss*, 273 F.3d at 1282. In other cases, this Court noted that the government had introduced a certificate of tribal enrollment indicating the degree of Indian blood possessed by the defendant. *Id.* *See United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976).

This Court concluded that the evidence noted by the government, testimony that the victims were members of the Tesuque Pueblo and a stipulation that a victim was a member – "does not itself establish that either of them had any Indian blood." *Prentiss*, 273 F.3d at 1283. This Court rejected the government's proof of non-Indian status based solely upon the tribal law enforcement agent's testimony that the defendant was not a member of the particular pueblo. *Id.* This Court affirmed that "[a]bsent any evidence that Indian blood was one of the requirements for membership in the Tesuque Pueblo, the evidence on which the government relies does not establish that victims were Indians under §1152." *Id*. With regard to Prentiss's status, this Court also concluded that "important evidence [was] also lacking." *Id*. Specifically, this Court rejected the government's theory that Mr. Prentiss was a non-Indian and that as a result of the victims Indian status, federal jurisdiction was established by 1152 because the crime was interracial. *Id*. This Court noted that "the only evidence of Mr. Prentiss's status was provided that Mr. Prentiss was not a member of the Tesuque Pueblo." *Id.* This Court wrote that

"[u]nfortunately for the government, the fact that a person is not a member of a particular pueblo does not establish that he or she is not an Indian under §1152. " *Id.* (*citing United States v. Romero*, 136 F.3d 1268 (10th Cir. 1988).

After the United States' case-in-chief, Ms. Diaz argued the factors in *United States v. Prentiss* were not satisfied. Specifically, the mere fact Mr. Espinoza's father had done research and believed his son was non-Indian was not sufficient. The United States did not bring in one expert witness or an objective witness to testify Philip Espinoza was not a member of the Pojoaque Pueblo or any tribe in the state of New Mexico. The United States did not satisfy their burden in this case.

The United States completely avoided the direction from this Court in *Prentiss.* The United States did not ask Mr. Espinoza one single question with regard to whether his son had any degree of Indian blood. Specifically, the United States did not offer any evidence Mr. Espinoza did not have any degree of Indian blood. The only evidence produced was that Mr. Espinoza did not "have any Native American or Indian background." Aplt. App. at 270. In *Prentiss*, this Court held that "degree of Indian blood" is an element to determine Indian status, not whether a person has an "Indian background." The United States utterly failed.

The United States had within its means to prove that Mr. Espinoza was non-Indian. Specifically, the United States had obtained his blood sample. Even though it was clear that the vehicle in this matter belonged to Ms. Diaz; the United States introduced the testimony of an expert witness to testify that the hair found on the windshield belong to Mr. Espinoza. Surely, the United States could not have gone into federal court with the father testifying that the hair belonged to his son.

In *Prentiss*, this Court set forth that the classification of whether a person is Indian is complex and sophisticated. For the United States to suggest that it can meet its high burden by introducing a non-objective witness is troubling. At trial, the AUSA asked Mr. Espinoza, "[b]eyond, obviously, his blood lines, did he associate himself with any Native American tribe or pueblo that you're aware of?" Perhaps, the United States had hoped for a better answer. However, Mr. Espinoza responded "[n]ot until he got a job at Espanola in the Casino." Aplt. App. at 271. It is incredible that the United States would attempt to satisfy the "degree of Indian blood" test with "evidence" that the victim getting "a job at Espanola in the Casino."

Moreover, if this Court should accept the testimony of a father of a victim, then this Court should allow a defendant to bring in a relative to testify that their relative is non-Indian to escape the jurisdictional parameters of the Major Crimes

Act, 18 U.S.C. § 1153. Here, where the United States would have *no jurisdiction to prosecute Ms. Diaz if the victim was Indian; the United States should have met its burden.*

The district court acknowledged that the "[C]ourt has not determined what may be an even more difficult prove, showing that a person is not an Indian." Aplt. App. at 200. Surely, this Court cannot agree that the means set forth in this case is the proof to show a person is not an Indian.

This conviction should be reversed summarily based upon the United States' failure to prove Mr. Espinoza's non-Indian status.

B. The district court's refusal to include a definition of "accident" in the jury instructions allowed the United States to convict Ms. Diaz without proof of knowledge she had struck a person.

1. Standard of Review

This Court reviews jury instructions *de novo* to determine whether as a whole, they adequately apprise a jury of the issues and the governing law. *See United States v. Smith* 63 F.3d 956, 965 (10th Cir. 1995), vacated on other grounds, ___ U.S. ___, 116 S.Ct 900 (1996). This Court reviews the adequacy of jury instructions *de novo*, examining the challenged instruction in light of the instructions as a whole. *United States v. Oberle*, 136 F.3d 1414 (10th Cir. 1998); *See United States v. Russell* 109 F.3d 1503, 1513 (10th Cir.), *cert. denied*, 521 U.S. 1126 (1997). This Court reviews jury instructions for error by reviewing them as a

whole "to determine whether the jury may have been misled, upholding the judgment in the absence of substantial doubt the jury was fairly guided." *United States v. Wiktor*, 146 F.3d 815, 817 (10th Cir. 1998) (internal quotations omitted).

2. The jury instructions did not apprise the jury of the issues and governing law.

Without a definition for an accident, the district court allowed the United States to convict Ms. Diaz's without proving she had any knowledge that she had struck a person where there is no governing law.

a. There is no New Mexico law that provided any guidance with regard to the jury's instructions.

Ms. Diaz requested the district court not allow the United States to present a lesser-included instruction to the petit jury "since there is no New Mexico legal authority with regard to the elements required to sustain a conviction pursuant to Section B." Aplt.App. at 59. Ms. Diaz submitted that "[t]he Government and Defendant Diaz must now tailor an instruction that no New Mexico court has construed and where there is no guidance from the New Mexico Uniform Jury Instructions." *Id.*

At the pretrial conference on February 12, 2010, the district court agreed that the statute could have been drafted more clearly and welcomed defense counsel's

instruction proposals. Aplt.App. at 234-235. Ms. Diaz submitted a definition for an "accident", but the district court denied the request. Without a definition for an accident that involved a "person", the United States only needed to prove there was an "accident" without any proof that Ms. Diaz knew that she had struck a person.

The district court did not cite a single New Mexico court decision in its order. Instead, the district court cited a Vermont case, *State v. Sidway*, 431 A.2d 1237 (Vt. 1981). *Sidway* involved an "accident" where the defendant's vehicle crashed into another vehicle *not a person*. *Sidway* also did not address the parameters of a lesser included instruction that has never been tested by any New Mexico court.

The closest a New Mexico court has come to construing Subsection (B) occurred in *New Mexico v. Cumpton*, 129 N.M. 47, 2000 N.M. App. Lexis 20, *cert denied* (2000). In *Cumpton,* the court held that Section B requires the state to prove *mens rea.* Significantly, *Cumpton* involved an "accident" where the defendant's vehicle crashed into another vehicle that resulted in the death of person. In *Cumpton,* the defendant entered into a guilty plea and also had "knowledge" that he had committed a crime involving a person.

N.M.SA. 66-7-201(A), provides in part that the "[t]he driver of any vehicle in an accident resulting in injury to death of any person shall immediately stop the vehicle …until he has fulfilled the requirements of Section 66-7-203 NMSA

1978." Section 66-7-203 NMSA provides in part that "[t]he driver of any vehicle involved in an accident resulting in injury to or death of any person …shall give his name, addresses…to the person struck…" Implicit in this section is the knowledge that a driver has knowledge that a person was involved in an accident.

In this case, the district court submitted jury instructions where there was no federal or state authority to support the elements.

b. There is no federal law that provided any guidance with regard to the jury instructions.

There is no federal authority to support the jury instructions. The district court referred the parties to the Committee's Pattern Jury Instruction, Criminal Cases, Tenth Circuit (2005), Instruction 1.33, as a source "for possible use in the event that it is appropriate to give such an instruction." Aplt.App. at 56. That instruction provided no guidance with regard to any elements. Moreover, the comments accompanying this instruction, indicate that "…the weight of authority supports giving such instruction, at least when the defendant requests it." *See Darks v. Mullin*, 327 F.3d 1001, 1008 n.2 (10th Cir. 2003).

c. The district court erred by allowing the United States to mislead the jury with the jury instructions.

The jury was misled by the jury instructions based upon the district court's refusal to include a definition that an "accident" involves a person. Specifically,

the district court allowed the AUSA to cross-examine Ms. Diaz with the elements of the jury instructions where no intent was required. The cross-examination was directly related to the issue regarding "accident." Over the objection of Ms. Diaz, the district court allowed the following:

AUSA: The last thing I want to do is ask you a series of questions. I actually put them on the screen here for us to make sure we're in agreement about some things. Okay?

MR. WINDER: Your honor, I'm going to object, because, you know, at some point, we're going to have instructions, and I don't know what Mr. Burkhead's purpose of going through this is. My client has been on the stand for about an hour, so I object to any other lines of questioning…

THE COURT: Are you objecting to the form of the question?

MR. WINDER: Yes, I'm objecting to the form.

THE COURT: What's wrong with the form?

MR. WINDER: Your honor, he's going to read elements to the jury. Right here are the elements that Mr. Burkhead has. I don't know why he needs to go through those at this moment, and he's been testifying for the last half hour. You're going to read the instructions. He's going to get a chance to do a closing argument at some point.

THE COURT: Overruled.

….

AUSA: When that happened, you *knew that an accident* had occurred, right?

MS. DIAZ: I knew something had hit my car, yes.

AUSA: And you don't dispute, do you, now that the accident resulted in Phillip Espinoza dying? There is no dispute about that, right?

MS. DIAZ: No.

AUSA: And you don't dispute either, ma'am, that one that happened, you failed to remain at the scene of that accident right?

MS. DIAZ: I didn't stop because something hit my car, no.

(JT, 541-42).

The district court allowed the United States to tell the jury that Ms. Diaz was guilty without having to prove any knowledge or intent. There was no legal support for the jury instructions. The jury was misled based upon the fact there was no legal authority to support the jury instructions.

C. The district court abused its discretion by allowing the United States to introduce highly prejudicial evidence concerning Ms. Diaz's consumption of alcohol and prevented Ms. Diaz from introducing evidence regarding the victim's intoxication.

1. Standard of Review

This Court reviews evidentiary rulings under an abuse of discretion standard. *See United States v. Trancosa*, 968 F.2d 22 (10th Cir. 1992).

2. The district court abused its discretion by allowing the United States to introduce highly prejudicial evidence concerning Ms. Diaz's consumption of alcohol and prevented Ms. Diaz from rebutting the United States' introduction of evidence concerning the allegation Ms. Diaz was impaired or intoxicated.

The district court previously indicated it would evaluate whether or not Ms. Diaz's drinking alcohol would be properly admitted as evidence of motive in this case. However, relevant evidence is still subject to Rule 403's balancing of probative value and prejudice. *See United States v. Castillo*, 140 F.3d 874, 884 (10th Cir. 1998). Under the required balancing test, a district court may nonetheless exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" to the defendant. Fed.R.Evid.403. *See United States v. Rodriguez*, 192 F.3d 946 (10th Cir. 1999).

The district court did not evaluate whether the evidence should be admitted with a proper analysis. Instead, the district court allowed the United States to introduce evidence through several witnesses who testified that Ms. Diaz had been

drinking alcohol. The district court allowed the introduction of a video surveillance showing Ms. Diaz drinking a bottle of beer. Ms. Diaz attempted to counter the implication that Ms. Diaz was intoxicated or impaired. However, the district court prevented the defense from introducing any testimony to counter the United States' attempt to portray Ms. Diaz as being impaired or intoxicated. The district court stated that "it [does not] make any difference whether or not she was – the defendant had beer or what…." (JT 401-02). Ms. Diaz attempted to make a record, but this district court refused to allow Ms. Diaz to make a record. (JT 401-02).

The district court allowed the United States to introduce highly prejudicial evidence that had a direct bearing on the guilty verdict. Specifically, the United States introduced testimony that Ms. Diaz was drinking alcohol starting at about 10:00 a.m. The district court refused to allow the defense from countering the United States' position that Ms. Diaz was intoxicated or impaired. Moreover, prior to trial, Ms. Diaz had warned the district court that there could be a mini-trial if he were to allow testimony that Ms. Diaz had been drinking.

3. The district court abused its discretion by preventing Ms. Diaz to introduce evidence of Mr. Espinoza's intoxication.

Mr. Espinoza was intoxicated at the time of the incident. There was evidence introduced he had been at a party and had been walking on the dangerous highway for about one hour. Mr. Espinoza's acts prior to the incident were not Rule 404(a) or Rule 404(b) Evidence. Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. *Elliot v. Turner Construction Company*, 381 F.3d 995 (10th Cir. 2004). As the this Court wrote in *Elliot*, "intrinsic" evidence is directly related to or the part of the same event. *Id*. at 1004. Mr. Espinoza's drinking and intoxication would have shown the "context" of a charged crime, as "[a] jury 'cannot be expected to make its decision in a void.'" *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980). Moreover, Mr. Espinoza's actions on April 4, 2009 were "inextricably intertwined with the charge crimes" and witness' testimony will be confusing and incomplete without mention of the prior acts. *See United States v. Record*, 873 F.2d 1363, 1272 (10th Cir. 1989).

The district court allowed Ms. Diaz to introduce evidence Mr. Espinoza was a party in Pojoaque and had been walking on the highway for about one hour. The district court's refusal to allow the additional evidence of Mr. Espinoza's intoxication was inappropriate. This was patently unfair when the district court allowed the evidence of Ms. Diaz come in throughout the trial.

The district court's refusal to allow Ms. Diaz to introduce evidence had a direct bearing on the United States' burden of proof. Ms. Diaz was entitled to defend herself with critical facts that were relevant and probative. The facts were not Rule 404(a) or Rule 404(b) Evidence. Mr. Espinoza's intoxication was inextricably intertwined with the evidence that was at the heart of the United States' case. Mr. Espinoza was walking on US Highway 84/285 after leaving a party where he had been drinking. These facts were probative and not outweighed by Rule 403. The United States argued the introduction of Mr. Espinoza's level of intoxication would be prejudicial, but in the same vein argued that the introduction of Ms. Diaz's acts would not be prejudicial. The district court abused its discretion in allowing the United States to introduce evidence of Ms. Diaz drinking alcohol and refusing to allow evidence of Mr. Espinoza's intoxication in this matter.

D. The district court erred by making prejudicial improper comments in the presence of the jury that had a direct impact on Ms. Diaz's defense.

1. Standard of Review

Whether a trial judge intervened appropriately in trial proceedings is reviewed for abuse of discretion. *Massey v. United States*, 358 F.2d 782, 787 (10th Cir. 1966); *United States v. Powers*, 500 F.3d 500, 513 (6th Cir. 2007).

2. The district court erred when he made comments in the presence of the jury.

A trial court is permitted to comment on the evidence as long as the comments are not one-sided and do not distort or add the evidence or mislead the jury. *United States v. Nickl,* 427 F.3d 1286, 1293 (10th Cir. 2005); *United States v. Jaynes,* 75 F.3d 1493, 1503 (10th Cir. 1996). However, the court must keep in mind that "potential prejudice lurks behind every intrusion into a trial made by a presiding judge." *United States v. Hickman*, 592 F.2d 931, 933 (6th Cir. 1979). This is because "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." *Nickl,* 427 F.3d at 1295 (quotation omitted). Consequently, the court should exercise its comment power "cautiously and only in exceptional cases." *United State v. Chanthadara,* 230 F.3d 1237, 1249 (10th Cir. 2000) (*quoting Davis v. United States*, 227 F.3d 568, 570 (10th Cir. 1955)).

The district court erred with the remarks: "I'm having trouble understanding the relevance of whether or not that was a designated traffic lane or not. I can't see the relevance". (JT, 336). Ms. Diaz attempted to further cross-examine the United States witness, and the district court further remarked, "I can't see the relevance of that." (JT 336) *Id.* Ms. Diaz had to follow the district court's order. The district

court further remarked, "This is far afield from the issues in the case." (JT 336) When Ms. Diaz attempted to address the issue in her case-in-chief, the district court stated, "I will not accept any more testimony about the road. We've hear enough about the road. (JT 401). The district court further stated "[w[eve' heard plenty of testimony about whether it's three lanes or two lanes or a sidewalk or goat path." (JT 401). The district court did not care where the incident occurred. (JT 401).

The district court's comments were one-sided. The district court made comments in the presence of the jury that this evidence was not relevant. Part of Ms. Diaz's defense was she had no knowledge a person would be walking on the highway, the right-turning lane. The district court's remarks seriously undermined Ms. Diaz's defense by suggesting it did not matter whether she would have expected a person to be walking on a highway. The district court abused its comment discretion. *See Quercia v. United States*, 289 U.S. 466, 468-72 (1933) (it was error to tell the jury the defendant's wiping of his hands while testifying was almost always an indication of lying); *Nickl*, 427 F.3d at 1292-95 (it was error to tell the jury the witness acted with intent to injure or defraud the bank, when that was disputed element of the charged offense); *United States v. Anton*, 597 F.2d 371, 372-76 (3rd Cir. 1979) (court improperly commented that the defendant was devoid of credibility); *United States v. Yates*, 553 F.2d, 518, 512-21 & n. 1 (6th

Cir. 1977) (court improperly commented that it was clear from the evidence that the defendant admitted his participation in the bank robbery).

***3.* The district court's error was not harmless.**

The United States cannot prove the court's one-sided comments were not harmless. First, as noted above, whatever a trial judge says has great influence on a jury. *See Nickl*, 427 F.3d at 1295. This is particularly true, when the judge expresses his opinion in a strong, unequivocal and one-sided way. *See Anton*, 597 F.2d at 375. Second, the district court's comments gutted Ms. Diaz's defense concerning knowledge of whether she had hit a person. Third, the district court's general instruction at the start of the trial that nothing it said should lead the jury to believe the court had an opinion about facts could not counter the court's comments in the presence of the jury. The United States did not object to the testimony. Instead, the district court's remarks gutted the defense's claim regarding "knowledge". Specifically, Ms. Diaz's argument was that she did not have any "knowledge" that a person would be walking on the right-hand turning lane. The district court's remarks informed the jury that this was irrelevant and Ms. Diaz's knowledge she had hit a person was irrelevant. This was improper.

The knowledge instruction set forth the following, "knowledge can be inferred if the defendant was aware of a high probability of the existence of the fact in question…" There was not a high probability that a person would have been

walking on the right-hand turning lane of a dangerous highway at 4:26 a.m. in the morning. If one was driving on the shoulder, there is a higher probability that a person might be walking on the shoulder. By making these comments, the district court had a direct impact on the salient issue of knowledge and committed error. The jury was led to believe Ms. Diaz's argument was frivolous based upon the district court's comments.

E. The district court erred by denying Ms. Diaz's motion for new trial based upon impeachment material from a member of the prosecution team.

1. Standard of Review

This Court's review of a *Brady* claim in the context of a Rule 33 motion for a new trial is *de novo*, with any factual findings reviewed for clear error. *United States v. Mendez*, 514 F.3d 1035, 1046 (10th Cir. 2008); *United States v. Perl*, 324 F.3d 1210, 1215 (10th Cir. 2003). "A defendant who seeks a new trial based on an alleged Brady violation must show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material. *United States v. Torres*, 569 F.3d 1277 (10th Cir. 2009). If these three factors are satisfied, regardless of the prosecution's intentions in suppressing the evidence, a new trial is justified. *See Giglio v. United States*, 405 U.S. 150, 154 (1972).

2. The district court erred by denying Ms. Diaz's Supplemental Motion for New Trial based upon impeachment material that was not disclosed concerning a member of the prosecution team.

The Due Process Clause of the Fifth Amendment requires the prosecution to disclose all evidence that is material to the issue of guilt and that may favor the defendant. See *Brady v. Maryland,* 373 U.S. 83, 87 (1963), see also *United States v. Robinson,* 39 F.3d 1115, 1118 (10th Cir. 1994).

In particular, the Constitution obligates the prosecution to disclose all evidence in its possession that could impeach the testimony of any witness. *Id.* at 87, see also *United States v. Robinson,* 39 F.3d at 1118 (10th Cir. 1994), *Smith v. Secretary of New Mexico Department of Corrections,* 50 F.3d 801, 822-823 (10th Cir. 1995). Due process requires disclosure of all material exculpatory, favorable or helpful evidence which "if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley,* 473 U.S. 667, 675 (1985). In addition, "impeachment is integral to a defendant's constitutional right to cross-examination, [and] there exists no pat distinction between impeachment and exculpatory evidence under *Brady*." *United States v. Buchanan,* 891 F.2d 1536 (10th Cir. 1989), *cert. denied,* 494 U.S. 1088 (1990). In *Giglio*, the Supreme Court held that when "the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the] general rule [of *Brady]*." 405 U.S. at 154. A defendant who seeks a new trial based on an

alleged *Brady* violation must show by a preponderance of the evidence that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material. *United States v. Velarde,* 485 F.3d 553, 558 (10th Cir. 2007).

The prosecution suppressed material, exculpatory and impeachment evidence which would have been favorable to her. In particular, the prosecution withheld valuable impeachment evidence for its expert witness, Mr. Dennis O'Brien.

It is irrelevant for *Brady* purposes "whether the non-disclosure was a result of negligence or design." *United States v. Buchanan,* 891 F.2d 1436, 1440 (10th Cir. 1989), quoting *Giglio*, 405 U.S. at 154. Instead, the suppression of material, impeachment evidence violates due process "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, *supra,* 373 U.S. at 87. Because the prosecution is the party who is ultimately accountable for the non-disclosure of *Brady* evidence, *Brady's* obligations of fairness and substantial justice are not limited to the individual prosecutors. *Giglio, supra,* 405 U.S. at 154. Rather, *Brady* is broadly interpreted to encourage prosecutors to carry out their "duty to learn of favorable evidence known to the others acting on the government's behalf in the case, including the police. *United States v. Combs,* 267 F.3d 1167, 1174 (10th Cir. 2001).

Moreover, the "prosecution" for *Brady* purposes encompasses not only the individual prosecutor handling the case, "but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." *Smith v. Secretary N.M. Dept. of Corrections*, *supra*, 50 F.3d at 824. Thus, it logically follows that because investigative officers are part of any criminal prosecution, "the taint on the trial is no less if they, rather than the prosecutors, were guilty of non-disclosure." *Ibid*, citing *United States v. Buchanan*, *supra*, 891 F.2d at 1442.

As a result, the prosecution's duty to disclose material, exculpatory, impeachment evidence extends to any and all investigators who are assisting the prosecution. *United States v. Velarde, supra,* 485 F.3d at 559. Here, the government breached its basic obligation. The government had a duty to be aware of its law enforcement witness and in this case an expert witness that happened to be a former law enforcement officer.

Mr. O'Brien was part of the prosecution team. It can be assumed that Mr. O'Brien was aware that he was one of ten members of the SWAT team of the April 10, 1994 based upon the AUSA's March 17, 2010 letter. *See*, Aplt.App. at 189-190.

The information would have been favorable to Ms. Diaz because the information could have been used to impeach Mr. O'Brien. Mr. O'Brien was one

of ten members of a SWAT where one of the members of the team was shot by Gerald Viarrial. Mr. O'Brien may have known that Ms. Diaz is the cousin of Mr. Viarrial. Ms. Stephanie Crosby was one an important defense witness, and is the sister of Mr. Viarrial. However, Mr. O'Brien, as part of the prosecution team, had the duty to disclose this information to the defense.

It is immaterial whether this failing was the result of inadvertence, negligence, or malicious intention, the result is the same – Ms. Diaz was deprived of valuable information which would have impeached the testimony of a prosecution witness and which could have corroborated her defense in this case. The government's failure to provide information concerning Mr. Dennis O'Brien undermined the outcome and fairness of these proceedings.

For the evidence to be material, there must be "a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler v. Greene,* 527 U.S. 263, 289 (1999). A reasonable probability is understood to mean a "probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 681-682 (1985). This inquiry "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). Instead, the touchstone is simply whether the ultimate verdict is one "worthy of confidence."

Strickler v. Greene, 527 U.S. at 290. In that regard, the materiality inquiry focuses on whether the disclosure would have created a reasonable doubt of guilt." *United States v. Young*, 45 F.3d 1405, 1408 (10th Cir. 1995).

In *United States v. Burke*, 571 F.3d, 1048 (10th Cir. 2009), this Court held that the belated disclosure of impeachment or exculpatory information favorable to the accused violates due process when an "earlier disclosure would have created a reasonable doubt of guilt." (*citing United States v. Young*, 45 F.3d 1405, 1408 (10th Cir. 1997)). Furthermore, this Court has held that where a district court concludes that the government was dilatory in its compliance with its compliance with *Brady*, to the prejudice of the defendant, the district court has the discretion to determine an appropriate remedy, whether it me exclusion of the witness, limitations on the scope of the permitted testimony, instructions, to the jury, or even mistrial. *United States v. Burke*, 571 F.3d at 1054.

The United States' failure to disclose information would have impeached the expert testimony of Dennis O'Brien and was material because the information would have created a reasonable doubt of guilt. Mr. O'Brien offered three relevant opinions that could have had a direct impact on the jury verdict; 1) he testified that the windshield damage could have only been caused by a human (despite two United States' witnesses testimony that the windshield damage could have been caused by something other than a person); 2) Mr. Espinoza was walking on the

"shoulder", and 3) his incredible testimony that a person walking on a dangerous highway at 4:26 am in the dark, in a dark leather jacket, with dark pants, and walking in the direction of traffic *was not dangerous.* Any of these issues had a direct impact on whether Ms. Diaz was guilty of having knowledge that she hit a person. In addition, these issues also have an impact with regard to whether Ms. Diaz was aware of a high probability that Mr. Espinoza was walking on the right turning lane of a dangerous highway. There is a reasonable probability that if this evidence had been disclosed, the result of Ms. Diaz's trial might have been different. Indeed, the evidence would have put the entire case in such a different light that it must now undermine the Court's confidence in the jury's verdict. Cf. *Kyles v. Whitley, supra,* 514 U.S. at 435. To be material a defendant does not need to show that the withheld evidence would have resulted in an acquittal; instead, the defendant is only obligated to demonstrate that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence." *Kyles v. Whitley, supra,* 514 U.S. at 434-35.

There is a reasonable probability that if the United States had disclosed the withheld evidence; the biased testimony of Mr. O'Brien would have been further undermined. The jury was left with the impression that Mr. O'Brien was incapable of embellishing any facts.

As the Supreme Court has held "[t]he government's duty to disclose material evidence favorable to the accused is rooted in the premise that the sovereign's ultimate interest in criminal prosecution is not to maximize convictions for their own sake, but to ensure that 'justice shall be done.'" *United States v. Agurs,* 427 U.S. 911 (1976). In this case, "justice" was not served based upon the United States' failure to live up to its obligations.

Ms. Diaz should have been afforded an opportunity to investigate the matters associated with Mr. Dennis O'Brien's involvement in the April 10, 1994 SWAT incident that resulted in the acquittal of Mr. Viarrial and favorable result from the Department of Justice Investigation. The district court's decision to deny the motion for new trial without a hearing was error.

VII. CONCLUSION AND STATEMENT REGARDING ORAL ARGUMENT

For the foregoing reasons, Ms. Diaz respectfully requests the conviction be vacated and this case be remanded for further proceedings.

Ms. Diaz requests oral argument in this case. Oral may materially assist the Court in the disposition of this appeal. The issues in this case are unique. Undersigned counsel represented Ms. Diaz at trial and oral argument would afford the panel an opportunity to pose questions that may not have been adequately addressed in the briefs.

Respectfully submitted,
SAMUEL L. WINDER
_____/s/ Samuel L. Winder
1011 Lomas Blvd. NW
Albuquerque, New Mexico 87102
(505) 247-9142

Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSIONS

I, Samuel L. Winder, hereby certify that the foregoing Opening Brief was filed with the Clerk of the Court for the United States of Appeals for the Tenth Circuit by using the appellate CM/ECF system on this 3rd day of May, 2011, and the original and seven photocopies of the Opening Brief and an original and a copy of the Appendix will be sent by Federal Express to the United States Court of Appeals for the Tenth Circuit, Office of the Clerk, located at Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80527, within two business days of the electronic filing.

I ALSO CERTIFY that one copy of this Opening Brief Regarding was sent via electronic email to Jennifer M. Rozzoni for Plaintiff/Appellee United States, at her electronic mail addresses of jennifer.m.rozzoni@usdoj.gov, this May 3, 2011.

I ALSO CERTIFY THAT all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with Avast! Anti-Virus Ver. 100522-1, Program version 5.0.462 updated on May 3, 2011, a commercial virus scanning program and, according to the program, are free of viruses.

_____/s/__Samuel. L. Winder_____
SAMUEL L. WINDER, Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)(C)

I hereby certify that the foregoing Appellant's Brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) in that the "Word Count" utility provided with Microsoft Word., the word processing software utilized in the preparation of this document indicates a total work count of 13,997 which is fewer than the 14,000 words permitted pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C).

_____/s/ Samuel L. Winder_____
SAMUEL L. WINDER, Attorney for Defendant/Appellant

ATTORNEY'S CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of Appellant's Opening Brief and Appendix will be mailed via United States Postal Service First Class to opposing counsel on May 4, 2011 at the following address:

Jennifer M. Rozzoni, Esq.
Office of the United States Attorney
United States Attorney's Office
P.O. Box 607
Albuquerque, New Mexico 87103-0607

_____/s/_Samuel L. Winder___
SAMUEL L. WINDER., Attorney for Defendant/Appellant