No. 11-3718

Criminal

In the

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOSEPH JOSHUA JACKSON,

APPELLANT.

Appeal from the United States District Court for the

District of Minnesota

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Joseph Joshua Jackson (hereinafter Jackson) pleaded guilty to Count 2 (Assault with a Dangerous Weapon in violation of Title 18, United States Code, Sections 113(a)(3), 1151, and 1153), and Count 4 (Discharge of a Firearm During the Commission of a Crime of Violence in violation of Title 18, United States Code, Section 924(c)(1)(A)(iii)) of an indictment. The assault on the victim was brutal and unsparing. She was left wounded and defenseless. The defendant was sentenced to a 10-year mandatory consecutive sentence on Count 2 and a below-range 30-month sentence on Count 4, for a total term of 150 months' imprisonment. He challenges the substantive reasonableness of this sentence.

In his plea agreement, Jackson reserved the right to challenge whether the events giving rise to his prosecution occurred in "Indian country" within the meaning of federal law. The village of Redby is within the exterior boundaries of the Red Lake Indian Reservation, and the reservation was not diminished by an Act of Congress.

If the Court grants oral argument, then the United States believes that ten minutes per side would be sufficient.

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STATEMENT OF THE CASE

On June 7, 2010, Jackson was indicted for multiple counts of felony assault and discharge of a firearm during the commission of a crime of violence.

On July 6, 2010, a motions hearing was held before Chief Magistrate Judge Raymond Erickson. Jackson filed a motion to dismiss the indictment, for lack of federal jurisdiction. He argued that the Red Lake Indian Reservation had been diminished.

On August 5, 2010, then-Chief Magistrate Judge Erickson issued a Report and Recommendation denying Jackson's motion to dismiss the indictment.

On August 19, 2010, Jackson filed an objection to the Report and Recommendations.

On August 23, 2010, U.S. District Judge Donovan W. Frank adopted the Report and Recommendation and overruled Jackson's objection.

On January 20, 2011, Jackson pleaded guilty to one count of assault with a dangerous weapon (Count 2) and discharge of a firearm during the commission of a crime of violence (Count 4). The plea was pursuant to a conditional plea agreement. As part of the plea agreement, the United States agreed to dismiss two counts of felony assault (Counts 1 and 3).

Jackson was sentenced on November 29, 2011. The district court sentenced Jackson to 150 months' total imprisonment: the mandatory consecutive 120-month term of imprisonment for the discharge of a firearm during the commission of a crime of violence conviction and a below-range 30-month sentence for felony assault conviction.

A notice of appeal was filed on December 12, 2011.

STATEMENT OF THE FACTS

During the early morning hours of April 29, 2010, Joseph Joshua Jackson argued with Danielle Adel King about whose child was cuter. (PSR ¶ 6.) The argument occurred while Jackson was driving his truck through the village of Redby on the Red Lake Indian Reservation. (Id.) Jackson stopped his vehicle, threw King to the ground and kicked her in the head with shod feet. (Id.) Jackson then shot King in the abdomen. (Id. at ¶¶ 5-6.) Jackson left a wounded and helpless King in the parking lot of the Redby Garage and Post Office. (Id.)

Jackson was indicted by a grand jury on June 7, 2010. See CR 1-3.[1] The indictment charged Jackson with assault with intent to commit murder; assault with a dangerous weapon, two counts; and discharge of a firearm during the commission of a crime of violence. Id.. The prosecution was brought under the Major Crimes Act, Title 18, United States Code, Section 1153(a). The indictment charged the offenses were committed in Indian Country as defined in Title 18, United States Code, Section 1151.

On July 6, 2010, a motions hearing was held before then-Chief U.S. Magistrate Judge Raymond Erickson. Jackson filed a motion to dismiss the

[1] Citations to the "CR" refer to the page numbers of the Index of the Eighth Circuit.

indictment for lack of federal jurisdiction. See Gov. Appx. 1. The defense argument was that the Red Lake Indian Reservation had been diminished by an act of Congress that transferred land to the Minneapolis, Red Lake and Manitoba Railroad, and thus, was privately-owned land. Id. at 4. The United States responded that private ownership of the land did not eliminate Federal jurisdiction under the Major Crimes Act. Id. at 4-5. Only Congress can diminish an Indian reservation, and Congress had not clearly diminished the Red Lake Indian Reservation. Id.

On August 5, 2010, Magistrate Judge Erickson issued a Report and Recommendation concerning Jackson's motion to dismiss. Id. In a detailed memorandum of law, Magistrate Judge Erickson concluded that the Red Lake Indian Reservation had not been diminished by an act of Congress. Id. at 20. Jackson filed an objection to the Report and Recommendation on August 19, 2010. See CR 32-33. In an order dated August 23, 2010, U.S. District Judge Donovan W. Frank adopted the Report and Recommendation and overruled Jackson's objection. See CR 34-35.

On January 20, 2011, Jackson pleaded guilty, pursuant to a conditional plea agreement, to one count of assault with a dangerous weapon and one count of discharge of a firearm during the commission of a crime of violence. See CR 36-

42. Jackson reserved the right to challenge the legal issue of whether or not the Red Lake Indian Reservation had been diminished by an act of Congress. See Plea Tr. at 16, 21. The United States agreed to dismiss the remaining counts at sentencing. See CR 36.

On November 29, 2011, Jackson was sentenced to a prison term of 150 months. See CR 56-61. Prior to the sentencing hearing, the defense filed a position paper and, at sentencing, presented argument concerning Jackson's difficult youth and background. See CR 49-55; Sent. Tr. at 19-22 . Defense counsel brought up Jackson's involvement with a psychologist, his family, his drug use and his employment with Boys and Girls Club of Red Lake and Americorps. See Sent. Tr. at 19-22. The sentencing court also reviewed several letters that were written on Jackson's behalf. Id. at 21, 28. Judge Frank sentenced Jackson to the statutory minimum consecutive sentence of 120 months for discharge of a firearm during the commission of a crime of violence. See Sent. T. at 2-3, 36-37. Judge Frank also gave Jackson a term of 30 months' consecutive to the ten year term for assault with a dangerous weapon. In doing so, the Court stated,

> I believe that 10 years is not only fair - - and I haven't gotten to the other count yet. But, I just want to make it clear that I didn't leave the impression well I don't think the Judge would give him ten years

> unless he was forced to. I would be giving 10 years on that count. So that brings us to the advisory sentence of 37-46 months. . . .
>
> I believe that anything less than a consecutive 30-month sentence would not - - would not promote respect for the law and would not - - when I put the 10 years with 30 months . . . because I don't believe there is any circumstances under which I could go less than 30 months, and promote respect for the law and provide a deterrence . . . .

Id. Judge Frank spoke at length about the reasons that he gave Jackson this sentence. He spoke about Jackson's background, his intelligence, the psychological efforts to assist him, his drug and alcohol abuse and community efforts through the Boys and Girls Club and Americorps. Id. at 30-33. The defendant appeals.

SUMMARY OF THE ARGUMENT

The Red Lake Indian Reservation was not diminished by the Congressional Act of 1905 because the Act merely granted a right-of-way to the railroad and Congress did not clearly express an intent to alter the Reservation boundaries. Railroad right-of-ways are expressly included in the definition of Indian Country.

Furthermore, the district court properly considered the factors in Title 18, United States Code, Section 3553(a) in imposing a below-range sentence. The defendant cannot carry his burden of establishing that this is the unusual case where the district court abused its discretion and imposed a substantively unreasonable sentence, especially where it varied downward from the advisory Guidelines range.

ARGUMENT

I. THE RED LAKE INDIAN RESERVATION WAS NOT DIMINISHED BY THE CONGRESSIONAL ACT OF 1905

A. Standard of Review

The issue raised by the defendant primarily involves questions of law that this Court reviews de novo, although any factual findings are reviewed for clear error. See Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1016 (8th Cir. 1999).

B. The Red Lake Indian Reservation Was Not Diminished

Title 18, United States Code, Section 1153(a) provides that an Indian who commits one or more of a number of offenses, including assault with a dangerous weapon, and does so "within Indian Country" is subject to the exclusive jurisdiction of the United States. For purposes of Section 1153(a), "Indian Country" is "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights of way running through the reservation...." 18 U.S.C. § 1151.

The defendant argues that the Congressional Act of 1905 ("Act of 1905"), which transferred land to the Minneapolis, Red Lake and Manitoba Railway Company, "diminished" the boundaries of the Red Lake reservation such that his

crimes were not committed in Indian County. See Def. Br. at 6-7. "Diminishment commonly refers to the reduction in size of a reservation." Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1017 (8th Cir. 1999). If a particular area of a reservation has been diminished, it is no longer part of the reservation, and thus, would no longer be considered Indian Country.

Then Chief Magistrate Judge Raymond Erickson issued a detailed Report and Recommendation that concluded that the Red Lake Indian Reservation had not been diminished by the Act of 1905 and recommended that Jackson's motion be denied. See generally Gov. Appx. United States District Judge Donovan W. Frank overruled Jackson's objection and adopted the Report and Recommendation. See CR 34-35. For the same reasons set forth in the Report and Recommendation, Jackson's argument fails. Namely, a review of the statute demonstrates that the Act of 1905 did not diminish the land.

Congress possesses plenary power over Indian affairs, including the right to modify or eliminate tribal treaty rights. See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)). Only Congress can modify the terms of an Indian treaty by diminishing an Indian reservation. Id. (citing United States v. Celestine, 215 U.S. 278, 285 (1909)). Congress' intent to diminish a reservation must be "clear and

plain." Id. Additionally, "when both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [the Courts] are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that old reservation boundaries survived the opening." Id. at 472. "Opening" generally refers to opening the reservation to settlement by non-Indians. See United States v. Erickson, 478 F.2d 684, 689 (8th Cir. 1973).

Transfer of title to reservation lands from Indians to non-Indians does not, by itself, alter the exterior boundaries of an Indian reservation. See Solem, 465 U.S. at 469-71; Erickson, 478 F.2d at 688. After a reservation is established, all tracts within it remain a part of the reservation until separated therefrom by an act of Congress. See Yankton Sioux Tribe, 188 F.3d at 1016; Erickson, 478 F.3d at 689. Neither a mere transfer of title to the property, nor the authorization of such a transfer by statute, expresses a congressional intent to diminish a portion of the Red Lake Indian Reservation from the rest of the reservation. See Solem, 465 U.S. at 470; Erickson at 688. Furthermore barring such act of Congress evincing an unambiguous intent to diminish, all land within the limits of a reservation, even if owned by non-Indians, is Indian Country. See Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 355-56 (1962). See also 18 U.S.C.

§ 1151(a) (The term "Indian country" as used in 18 U.S.C. § 1153 means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation . . .")

i. The Plain Language of the Act of 1905 Evidences No Intent to Diminish the Reservation.

Supreme Court precedents in this area have "established a fairly clear analytical structure for distinguishing those surplus land acts that diminished reservations from these acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." Solem, 465 U.S. at 470. The Court stated,

> Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. Diminishment, moreover, will not be lightly inferred.

Solem, 465 U.S. at 470 (1984); CR 15. Furthermore, where there is "**explicit reference to cessation** or other **language evidencing the present and total surrender** of all tribal interests" it strongly suggests diminishment. Id. (emphasis added).

Thus, the first step determining whether there has been diminishment is the plain meaning of the words in the Act of 1905. See Yankton Sioux Tribe, 522 U.S. at 344. In pertinent part, the Act of 1905 provides as follows:

> [T]here is hereby granted to the Minneapolis, Red Lake and Manitoba Railway Company * * * owning and operating * * * a line of railroad in the State of Minnesota, having its northern terminus at a point on the shore of Lower Red Lake, Minnesota * * * in the Red Lake Indian Reservation,* * * pursuant to the provisions of the Act of Congress approved March second, eighteen hundred and ninety-nine, entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes" [30 Stat. 990], the right to select and take from the lands of the Red Lake Indian Reservation grounds adjacent to its northern terminus * * * not to exceed in extent three hundred and twenty acres.
>
> * * *
>
> Sec. 2. That before title to said lands shall vest in the said railway company, and before said company shall occupy or use said lands, compensation therefor shall be made to the tribes of Indians residing upon the said reservation and to any individual occupant of any of said lands. The amount of compensation for said lands shall be ascertained and determined in such manner as the Secretary of the Interior may direct and be subject to his final approval.
>
> * * *
>
> Sec. 5. The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of intoxicating liquors in the Indian country, shall be in full force and effect throughout the territory hereby granted, until otherwise directed by Congress or the President of the United States, and for that purpose said tract shall be held to be and to remain a part of the diminished Red Lake Indian Reservation.

33 Stat. 708.

The Report and Recommendation correctly contrasts the U.S. Supreme Court precedents: The Solem v. Bartlett, 465 U.S. 463 (1984), line of cases that did not find a clear congressional intent to diminish an Indian reservation and the South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), line of cases that did find a clear congressional intent to diminish an Indian reservation. Unlike these two lines of cases, the present case does not involve opening up settlement of surplus lands by non-Indians. This case deals only with the limited transfer of land for a railroad right-of-way.

Consequently, the present case falls in with the Solem line of cases, and thus, the District Court correctly found that there had been no diminishment. In Solem, the applicable Act authorized the Secretary of the Interior to "sell and dispose" of an entire portion of the reservation at issue and provided for payment to the Indians in an amount to be determined. 465 U.S. at 472-73. Nonetheless, the Court held that this language failed to demonstrate a clear congressional intent to diminish the reservation. Id. In particular, when the Court compared the "sell and dispose" language to the "cede sell, relinquish and convey" language at issue in other cases, it found that the "sell and dispose" language did not sufficiently convey an intent to diminish. Id. (contrasting the language from DeCoteau v.

District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)).

If the language in Solem is not evidence of diminishment, it can hardly be argued that the Act of 1905 which only "granted" a railroad a portion of land pursuant to "An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes" is clear evidence of diminishment.

Jackson's reliance on Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) is misplaced. Gaffey involved the sale of unallotted surplus land pursuant to the General Allotment Act (Dawes Act). In order to encourage the assimilation of Indians, the Dawes Act allowed the Secretary of the Interior to negotiate with the tribes for the purchase of unallotted surplus land. Id. The federal government and representatives of the Yankton Sioux Tribe entered into negotiations concerning the sale of unalloted surplus lands. Id. at 1018. An agreement was reached to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation." Id. The agreement was then adopted by Congress in 1894.

There are several critical differences between the present case and Gaffey. First, the language used in the Act of 1905 did not include the strong and final language found in the Act under consideration in Gaffey to be evidence of diminishment such as "cede," "sell," or "relinquish." Furthermore, the present case did not involve unallotted surplus land or transfers of land pursuant to the Dawes Act. Id. The Act of 1905 merely granted land to the railroad for a right-of-way. That was the only purpose of the Act. The Act did not clearly diminish any part of the Red Lake Indian Reservation. Thus, pursuant to the Solem line of cases, there is no diminishment.

This type of argument has been raised in the past and rejected by this Court. In United States v. Standish, 3 F.3d 1207, 1208 (8th Cir. 1993), a murder defendant argued that he could not be prosecuted in federal court because New Town, North Dakota, was not Indian Country under § 1151(a). The defendant argued that the crime had been committed on lands that had been opened to homesteading by non-Indians. Id. The opened areas were no longer part of the reservation. This Court relied on a previous decision that held New Town, North Dakota, was still within the boundaries of the Fort Berthold Indian Reservation even though that section had been opened up for settlement by non-Indians. Id. (citing City of New Town v. United States, 454 F.2d 121, 125-127 (8th Cir.

1972)). This Court should reach the same result. The village of Redby is located within the boundaries of the Red Lake Indian Reservation. It is proper to prosecute the defendant under the Major Crimes Act, 18 U.S.C. § 1153(a), because the crime occurred in Indian Country, 18 U.S.C. § 1151.

ii. The Alcohol Prohibition Clause is Not Evidence of an Intent to Diminish the Reservation.

Jackson argues that the alcohol prohibition clause contained in Section 5 of the Act of 1905 supports finding diminishment. See Appellant's Brief at 10-11. Section 5 provides that:

> the laws of the United States..., prohibiting the introduction and sale of intoxicating liquors in the Indian country, shall be in full force and effect throughout the territory hereby granted,... and for that purpose said tract shall be held to be and to remain a part of the diminished Red Lake Indian Reservation.

Jackson argues that there would be no need to have such a provision prohibiting alcohol consumption if the lands were in fact still part of Indian Country because there was already a general prohibition on all reservations.

Although at first glance, the fact that the Act of 1905 contains the phrase "diminished Red Lake Indian Reservation" seems to be evidence of diminishment, upon further analysis, it does not demonstrate the required clear congressional intent to diminish.

First, when compared to the limited goal of the Act of 1905, which sought only to permit the railroad to pass through the reservation, such limited phrases are little evidence of clear Congressional intent. See Solem, 465 U.S. at 474 (comparing the goals of the Act at issue with limited nature of the identified phrases). In Solem, similar arguments were made with respect to the phrase "within the respective reservations thus diminished," which was contained in other provisions of the Act under consideration. Id. As noted by the Supreme Court, these isolated phrases are hardly dispositive. Id. "Moreover, as independent evidence of a congressional intention to diminish, such evidence is suspect." Id. at 475, n.18. The Court noted that the term "diminished" was not yet a term of art in Indian law. When Congress spoke of the 'reservation thus diminished,' it may well have been referring to diminishment in common lands and not diminishment of reservation boundaries.

Second, the phrase is used within only one section: the one dealing with the alcohol prohibition. This language is not included in the primary section which deals with the actual transfer of land. That section only "grants" land to the railroad without any language "ceding" or otherwise changing the bounds of the reservation.

It is true that in other cases, the courts have looked to these ancillary phrases as support for a finding of intent to diminish. However, in those cases, these ancillary phrases were coupled with clear language of diminishment as well as legislative and historical evidence of an intent to diminish. For example, in finding that the reservation had been diminished, in South Dakota v. Yankton Sioux Tribe, the Supreme Court had before it clear evidence of the congressional intent in the language of the transfer provision. Specifically, the Act provided that the tribe would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" for a fixed sum. 522 U.S. 350-51. In addition to that, the Court also considered the "surrounding provisions," including an alcohol provision, as some evidence of an intent to diminish. However, as the Report and Recommendation correctly notes, the clear congressional language of "cession" and "sum certain" were significantly more important to the determination. CR 25-27. The alcohol prohibition was secondary and, standing alone, did not establish a congressional intent to diminish. Id.

iii. Neither the Legislative History Nor the Subsequent Treatment of the Reservation Evidence an Intent to Diminish the Reservation.

Two other relevant considerations in interpreting the Act of 1905 include whether there is any evidence of intent contained in either the legislative history or the subsequent treatment of the land following the Act of 1905. First, Jackson points to no legislative history which supports his argument. The only legislative history of which the government is aware was noted in the Report and Recommendation. See Gov. Appx. 18. Specifically, Representative Steenerson made a statement that the Act of 1905 was intended "to extend [the Railway's] right of way, so as to give to it further terminals," and to "enable [the Railway] to acquire some more land for further terminal facilities." 39 Cong. Rec. 1854 (1905). Rights of way specifically fall within the definition of Indian Country under 18 U.S.C. § 1151(a).

Second, Jackson points to nothing in the record regarding how the land has been treated since 1905 which supports his argument of diminishment. An important consideration in South Dakota v. Yankton Sioux Tribe, was the change in the character of the land "[w]hen non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character[.]" 522 U.S. at 356. The Supreme Court noted that South Dakota assumed

jurisdiction over the ceded territory almost immediately after the passage of the 1894 Act and the State's jurisdiction has continued mostly unchallenged to the present day. Id. at 356-57. These factors are totally absent in the present case. Nothing in the record disputes that the land at issue has retained its Indian character since the Act was passed.

Importantly, the State of Minnesota made a claim of jurisdiction over the exact section of land at issue here, but the Minnesota Supreme Court rejected the argument after interpreting federal law. See State v. Lussier, 130 N.W.2d 484 (Minn. 1964). The Minnesota Supreme Court held that the land that was given to the railroad was still part of the Red Lake Indian Reservation. Lussier, 139 N.W.2d at 487. "We are of the view that the state places too great emphasis on the phrase 'diminished Red Lake Indian Reservation' as found in the [Act of 1905]. The reservation was, of course, diminished in the sense the land owned by the tribe was reduced; but the language of the act itself manifests an intention of Congress to treat the reservation, included patented land within it, as a unit." Lussier, 139 N.W.2d at 488.

Jackson's argument is that the indictment should be dismissed and the case can be prosecuted in state court. See Appellant's Brief at 7. The Lussier decision bars state prosecution of this offense. Of course, the Lussier opinion is not

binding precedent on this Court, but it does defeat the defense argument that state jurisdiction is appropriate and provides this Court with information on how this parcel of land has been treated by the State of Minnesota since at least 1964.

iv. Assuming Arguendo that the Court Holds that the Reservation Was Diminished, the Remedy Is A Remand for Further Factual Findings, Not Dismissal.

Finally, if this Court were to determine that the Act of 1905 had diminished the reservation, which it should not do for the reasons explained above, the remedy, dismissal, sought by Jackson is not appropriate. The District Court assumed, without deciding, that the assault took place on the land which was subject to the Act of 1905. See Gov. Appx. 8. Thus, the remedy is not dismissal, but a remand for factual findings as to the precise location of the assault.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A BELOW-RANGE SENTENCE

The defendant challenges his below-range sentence as substantively unreasonable. His claim is wholly without merit and should be summarily dismissed.

A. Standard of Review and Legal Framework

In reviewing a sentence, this Court "first ensure[s] that the district court 'committed no significant procedural error.'" United States v. Feemster, 572 F.3d

455, 461 (8th Cir. 2009) (en banc) (quoting Gall v. United States, 552 U.S. 38, 51 (2007)). In the absence of procedural error, this Court next reviews the sentence for substantive reasonableness under a deferential abuse-of-discretion standard. Gall, 552 U.S. at 41; Feemster, 572 F.3d at 461. A district court abuses its discretion when "it fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors." E.g., United States v. Watson, 480 F.3d 1175, 1177 (8th Cir. 2007). Where, as here, the defendant alleges no procedural error, this Court "bypass[es] the first part of [the] review and move[s] directly to review the substantive reasonableness of [the defendant's] sentence." United States v. O'Connor, 567 F.3d 395, 397 (8th Cir. 2009).

A sentence that falls within a properly calculated advisory Guidelines range is presumptively reasonable on appeal. United States v. San-Miguel, 634 F.3d 471, 475 (8th Cir. 2011). To be sure, where a district court has sentenced a defendant below the advisory Guidelines range, "it is nearly inconceivable that the court abused its discretion in not varying downward still further." United States v. McKanry, 628 F.3d 1010, 1022 (8th Cir. 2011).

The burden rests on the defendant to prove the sentence was unreasonable. United States v. Bolden, 596 F.3d 976, 984-85 (8th Cir. 2010). This burden is an onerous one: "The district court has wide latitude to weigh the § 3553(a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence." San-Miguel, 634 F.3d at 476; see also United States v. Reynolds, 643 F.3d 1130, 1136 (8th Cir. 2011).

B. The District Court Imposed a Reasonable Sentence.

The defendant was subject to a 10-year mandatory sentence for his discharge of a firearm during the commission of a crime of violence, pursuant to 18 U.S.C. § 924(c). By statute, this ten-year mandatory minimum term ran consecutive to any term of imprisonment imposed for the defendant's underlying crime of violence conviction, namely, his assault with a deadly weapon conviction. *Id.* § 924(c)(1)(A)(iii). His advisory Guidelines range for that conviction was 37 to 46 months' imprisonment. (Sent. Tr. 9.) The defendant urged the district court not to impose any additional sentence for the assault conviction and simply to impose the ten-year mandatory sentence for discharging a firearm during the commission of a crime of violence. (Sent. Tr. 22-23.) The district court rejected this invitation but did vary downward from the defendant's advisory range and imposed a 30-month term of imprisonment for his assault with

a deadly weapon conviction. (*Id.* at 40-41.) The district court expressly varied because of the length of time the defendant spent in county jail throughout the pendency of his federal prosecution. (*Id.* at 38.)

On appeal, the defendant claims the district court abused its discretion by not varying more than 7 months. (Def. Br. 14.) In support of this argument, he cites his troubled upbringing and his mental health issues. He made these same arguments to the district court. (*See* Def. Pos. on Sent., CR 43-48.) There is no question but that the district court considered them. For example, the district court noted it had read the parties' position pleadings and letters on behalf of the defendant. (Sent. Tr. 29.) It gave substantial attention to the defendant's personal background. (*Id.* at 30-33, 36.) Touching on the subjects raised in the defendant's position pleading, the district court explained:

> Let me discuss a couple of things that are not in dispute; but, the issue is even if they are not in dispute, what role should they play here in the sentencing this morning? First, there is really no dispute, sadly so, Mr. Jackson, that you are probably above average intelligence, bright young man. There is probably no dispute that you did better than most when you were in high school. Probably no dispute that you were picked on, sadly so, over the years.
>
> . . . .
>
> There isn't any dispute that a lot of those things happen. The real issue is, what effect, if any, should they have today on the sentence in terms of, well -- because I do have to individualize the

> case and look at someone as a human being, so there is no dispute about that.
>
> There is also no dispute . . . that whether the drug of choice on this sad evening was alcohol or marijuana or meth, because sadly meth has infiltrated at Red Lake, like it has every rural community. And it has long ago left the inner cities of Minneapolis and St. Paul and gone out. . . .
>
> . . . .
>
> However, even though I will suggest there is little dispute about meth, I will assume for purposes of my sentence that you were on meth. I respectfully reject the notion that it makes people do things. It does change personalities, it ruins lives; but, especially, if individuals know that when they use alcohol or drugs, they have violent tendencies, and especially if there are firearms in the neighborhood, whether it is in a vehicle or on a person, I have sadly had many cases over the years where when people drink or use drugs they always get into trouble.

(Sent. Tr. 30-33.)

The defendant's argument on appeal that his sentence is unreasonable fails because it is clearly established that a district court does not abuse its discretion simply because it does not accept a defendant's analysis of the § 3553(a) factors. E.g., United States v. Fronk, 606 F.3d 452, 454 (8th Cir. 2010). Where, as here, a district court is aware of and considers a defendant's arguments, it does not abuse its discretion in rejecting them. *Id.* at 454-55. Indeed, as noted above, "[t]he district court has wide latitude to weigh the § 3553(a) factors in each case

and assign some factors greater weight than others in determining an appropriate sentence." United States v. Bridges, 569 F.3d 374, 379 (8th Cir. 2009). This is not the "unusual case" where a district court abused its considerable discretion, especially where it varied downward and imposed a below-range sentence. Feemster, 572 F.3d at 464.

The defendant also argues that his attempt to earn a departure motion for substantial assistance pursuant to U.S.S.G. § 5K1.1 should have warranted a lesser sentence. (Def. Br. 15.) He does not allege that the government should have been compelled to file a 5K motion or that it acted in bad faith in not doing so.

The district court was made fully aware of the defendant's attempt to cooperate. The record reflects that the government sent a letter to the court detailing those attempts and explaining why it did not rise to the level of a substantial assistance motion. (*Id.* at 26-27.) The government also indicated that, while not worthy of a substantial assistance motion, it did not object to the district court's consideration of the cooperation attempts in the district court's § 3553(a) analysis. (*Id.* at 27.) The district court expressly considered the attempted cooperation but did not vary because of it. (Sent. Tr. 37 (setting sentence and stating "taking into account what we discussed at the sidebar," which was the defendant's cooperation).) The district court's decision not to vary based on the

attempted cooperation was not an abuse of discretion. See Bridges, 569 F. 3d at 379.

Instead, the district court carefully considered the § 3553(a) factors and varied from the advisory range of 37 to 46 months' imprisonment to 30 months' imprisonment, reasoning:

> I believe that 10 years is not only fair – and I haven't gotten to the other count yet. But, I just want to make it clear that I didn't leave the impression well I don't think the Judge would give him 10 years unless he was forced to. I would be giving 10 years on that count. So that brings us to the advisory sentence of 37 to 46 months. And I said in part because of the conference up here [concerning the defendant's attempted cooperation], I would mention my view on that. And so, I will state as follows. . . . . [T]aking into account what we discussed at the sidebar, I believe that anything less than a consecutive 30-month sentence would not – would not promote respect for the law and would not – when I put the 10 years with 30 months, I respectfully decline to give credit based upon the conversation here [concerning cooperation], because I don't believe there is any circumstance under which I could go less than 30 months, and promote respect for the law and provide a deterrence, even if not to you, Mr. Jackson, explaining to the world around us, whether it is Red Lake or another community, this is how serious this is when someone gets kicked and then they get shot. Here is, at a minimum, what should happen.

(Sent. Tr. 37.)

Clearly, the defendant would have preferred a lesser sentence, but this Court has recognized that "[a] district judge who favors a tough sentence is entitled to the same degree of deference as a district judge who opts for a lesser punishment."

United States v. Deegan, 605 F.3d 625, 634 (8th Cir. 2010). Indeed, this Court has noted that "[s]entencing judges are in a superior position vis-à-vis appellate courts to find facts and to judge their import under § 3553(a); they have institutional advantages over the appellate courts in making sentencing determinations; and the Supreme Court says they even gain insights that are not conveyed by the record." United States v. McDowell, — F.3d —, 2012 WL 1319529, at *2 (8th Cir. Apr. 18, 2012) (citing Gall v. United States, 552 U.S. 38, 51 (2007)). The district court in this case considered the heinous nature of the crime, the defendant's arguments at the sentencing hearing, both parties' position pleadings, the victim's statement, and the letters sent on behalf of the defendant. (See Sent. Tr. 37.) Upon careful consideration of the § 3553(a) factors, it concluded that nothing less than 150 months' imprisonment would serve the purposes of sentencing. (Id.) Imposition of this below-range, presumptively reasonable sentence was not an abuse of discretion, and the defendant's sentence should be affirmed.

CONCLUSION

The record before the district court clearly established that the elements of a federal criminal prosecution were present under Title 18, United States Code, Sections 1151(a) and 1153(a). The Red Lake Indian Reservation was not diminished by an act of Congress and the land within the boundaries of the reservation are "Indian country" under § 1151(a). Further, the sentence imposed by the District Court was reasonable. The defendant's convictions and sentence should be affirmed.

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. The brief has 6,112 words of proportional spacing. The brief was prepared using WordPerfect X4.

Dated: April 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012, I electronically filed the foregoing **Brief of Appellee** with the Clerk of the Court for the United States Court of Appeals for the eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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