IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-3754

UNITED STATES OF AMERICA,

Appellee,

v.

DUANE BIG EAGLE,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

HONORABLE ROBERTO LANGE
UNITED STATES DISTRICT COURT JUDGE

APPELLANT'S BRIEF

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SUMMARY OF THE CASE

From 2002 to 2006, Duane Big Eagle was the elected chairman of the Crow Creek Sioux Indian Tribe. A four-count indictment charged that he participated in two separate and distinct bribery conspiracies, one in 2005 and one in 2008 and that he committed two crimes of bribery during those conspiracies. The indictment expressly stated that the object of the 2005 conspiracy was to take bribes from a contractor named Royal Kutz and the object of the 2008 conspiracy was to elicit bribes from a contractor named Archie Baumann. Prior to trial, Big Eagle made motions in limine to prohibit the admission of any evidence of crimes not charged in the indictment and specifically, evidence of any crimes involving any contractor other than Royal Kutz or Archie Baumann. The trial court denied the motions, ruling that evidence of briberies and kick-backs involving contractors not named in the indictment was not "other crimes" evidence under Rule 404(b). The court ruled that Rule 404(b) was inapplicable because such evidence was intrinsic evidence of the crimes charged. In the trial, evidence of bribes paid by contractors who were not mentioned in the indictment was admitted without any limiting instructions, without the pretrial notice required by Rule 404(b), and without having to meet the foundational requirements for other crimes evidence.

The fundamental issue in this appeal is whether evidence of conspiracies that were not charged in the indictment, involving contractors not mentioned in the indictment, was properly admitted as intrinsic evidence of the crimes charged or whether such evidence was extrinsic other crimes evidence under Rule 404(b).

REQUEST FOR ORAL ARGUMENT

The Appellant requests 30 minutes of oral argument. This case involves an important question of law and is a case of significant public importance in Indian country.

CORPORATE DISCLOSURE

No non-government corporation is a party to this appeal and therefore no corporate disclosure is required under FRAP Rule 26.1.

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JURISDICTIONAL STATEMENT

This appeal is from a final criminal judgment. This court's jurisdiction is based on 28 U.S.C. §1291, which provides for jurisdiction over a final judgment from a U.S. District Court.

An indictment charged the Appellant Duane Big Eagle with two counts of Conspiracy to Commit Bribery of a Tribal Official, in violation of 18 U.S.C. §371, and two counts of Bribery Involving an Agent of an Indian Tribal Government, in violation of 18 U.S.C. §666(a)(1)(B), 2. Jurisdiction in the district court was based on 18 U.S.C. §3231.

After a trial before a jury, Duane Big Eagle was convicted on Counts I and III, both charging conspiracy to commit bribery of an agent of an Indian tribe and on Count IV, aiding and abetting the bribery of an official of an Indian tribe. He was found not guilty as to Count II, accepting a bribe on December 13, 2005.

On November 30, 2011, the trial court imposed a prison sentence of 36 months, a term of supervised release, and payment of restitution.

On December 13, 2011, Duane Big Eagle filed a timely notice of appeal.

STATEMENT OF THE ISSUES

I.

Whether testimony from government witnesses about defendant's involvement in bribery and kick-back conspiracies that were not charged in the indictment was intrinsic evidence of the crimes charged, rather than extrinsic evidence of other crimes, wrongs and acts under F.R.E. Rule 404(b).

United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997)

United States v. Swinton, 75 F.3d 374 (8th Cir. 1996)

United States v. Williams, 95 F.3d 723 (8th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1996)

II.

Whether the trial court's denial of defendant's motions in limine to exclude evidence of crimes not charged in the indictment because of the government's failure to give the defendant pretrial notice of its intent to offer such evidence, as required by Rule 404(b), constituted error that substantially prejudiced the defendant's right to a fair trial.

Unites States v. Clarke, 564 F.3d 949 (8th Cir.), *cert. denied,* 130 S.Ct. 651 (2009)

United States v. Vega, 188 F.3d 1150 (9th Cir. 1999)

United States v. Robinson, 110 F.3d 1320 (8th Cir. 1997)

United States v. Carillo, 660 F.3d 914 (5th Cir. 2011)

III.

Whether government witness Craig McClatchey's testimony concerning an uncharged bribery conspiracy that began in 2002 and ended in April 2005 was an integral part of the immediate context of the crimes charged in the indictment.

United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997)

United States v. Swinton, 75 F.3d 374 (8th Cir. 1996)

United States v. Williams, 95 F.3d 723 (8th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1996)

STATEMENT OF THE CASE

After a trial, a jury found Duane Big Eagle guilty of conspiring with contractor Royal Kutz and others to commit bribery of a Tribal official in 2005, as charged in Count I of the indictment; of conspiring with contractor Archie Baumann and others to commit bribery of a Tribal official in 2008, as charged in Count III; and of aiding and abetting the payment of a bribe to a Tribal official on October 21, 2008, as charged in Count IV.

On November 30, 2011, the court sentenced Mr. Big Eagle to 36 months of imprisonment, 3 years of supervised release and payment of $21,500.00 in restitution.

Mr. Big Eagle appeals his conviction.

STATEMENT OF FACTS

From 2002 to 2006, Duane Dale Big Eagle was the elected chairman of the Crow Creek Sioux Tribe. In the trial, the government sought to prove that Big

Eagle had committed offenses related to two separate and distinct conspiracies.

Count I charged that a bribery conspiracy had existed from July 19, 2005 to December 13, 2005; that the object of that conspiracy was "to insure that Kutz Construction would be awarded substantial tribal monies in relation to the construction and improvement of school buildings" through the bribery of Duane Big Eagle and Scott Raue, the Superintendent of the Crow Creek Tribal Schools District; and that the tribal chairman, Duane Big Eagle, had participated in that conspiracy with Royal Kutz, Raue and others.

Count II charged that during that conspiracy, on December 13, 2005, Big Eagle accepted a bribe from Royal Kutz.

Count III charged that a bribery conspiracy had existed from May 2008 to October 21, 2008; that the object of that conspiracy was to have contractor Archie Baumann pay bribes to tribal council members to reward them for their having approved certain loan agreements made between Baumann and the Tribe in the past and to influence them to negotiate a future contract with Baumann's company, First Dakota Enterprises, to construct school buildings.

Count IV charged that during that conspiracy, on October 21, 2008, Big Eagle aided and abetted the payment of a bribe to tribal council members.

At trial, the defense did not dispute the existence of the conspiracies charged in Counts I and III. The defense was that Big Eagle had not joined those conspiracies and that Norman Thompson and Scott Raue, the government witnesses who testified that he did, testified falsely as to Big Eagle's involvement.

In the Appellant's brief, the conspiracy charged in Count I will be referred to as "the Kutz Construction conspiracy" and the conspiracy charged in Count III will be referred to as "the First Dakota Enterprises conspiracy."

Duane Big Eagle's pretrial motions

Prior to trial, Big Eagle filed written motions in limine in which he moved the court, pursuant to F.R.E. Rules 402, 403, and 404 to preclude the government from offering any evidence of crimes or bad acts not charged in the indictment and evidence of crimes or bad acts involving any contractor other than Royal Kutz or Archie Baumann. [Add. 3.1-3.4]. In his motions in limine, he specifically moved to exclude any testimony from architect Craig McClatchey, who had paid bribes to Raue from 2002 to April 2006, on the grounds that McClatchey had no involvement in either the Kutz Construction conspiracy or the First Dakota Enterprises conspiracy. In addition to challenging the evidence of uncharged crimes as propensity evidence prohibited by Rule 404(b), Big Eagle also objected to evidence involving McClatchey and other contractors who were not named in the indictment on the grounds that the government had not served any notice of its intent to offer any other crimes evidence under Rule 404(b).

Prior to trial, in a pre-trial conference, the court considered the defendant's motions in limine. [TR 6:22- 35:13]. At that conference, defense counsel also moved the court to order the government to make a "reasonably specific" proffer of evidence, to comply with the notice requirement of Rule 404(b), as to what "alleged bad acts by Duane Big Eagle they want to offer into evidence that falls

outside of what is charged in the indictment." [TR 17:8-20:5]. The defense also moved to excluded any testimony from government witness Craig McClatchey as to out of court statements made by Raue to McClatchey that inculpated Duane Big Eagle as the moving force behind Raue's demands for kick-backs from McClatchey, on the grounds that such statements were hearsay and were not admissible as a co-conspirator's statement because they were not made in furtherance of, or during, any conspiracy charged in the indictment. [TR 25:18-26:23].

The government had conceded in its response to the defendant's motion in limine that it had not served the defendant with any Rule 404(b) notice, but opposed the defendant's motions in limine and his motion to compel such notice on the grounds that evidence of conspiracies and crimes involving contractors other than Kutz and Baumann was intrinsic evidence of the crimes charged and therefore, Rule 404(b) was not applicable. [TR 27:2-32:31].

The Court agreed with the government's argument and ruled that Rule 404(b) had no application to the evidence (as yet unspecified) that the government would offer to show that Big Eagle had taken bribes and kick-back money from McClatchey and other contractors not named in the indictment. The Court ruled that such evidence was intrinsic evidence of the crimes charged in the indictment, rather than other crimes evidence under Rule 404(b). The court denied all Big Eagle's motions, except his motion to prohibit McClatchey from testifying that when he was introduced to Big Eagle in a restaurant that Big Eagle had made a

remark to McClatchey that McClatchey, in retrospect, believed was intended to convey a threat to McClatchey's young daughter. The court stated "the government has said it's not going to put in evidence that McClatchey had his 11-year-old daughter there and that a statement that maybe McClatchey perceived as a threat to his daughter occurred." The trial judge ruled that that evidence would not be allowed, but otherwise denied all Big Eagle's motions and allowed the government to adduce testimony from McClatchey and other witnesses concerning bribes and kickbacks paid by contractors other than Kutz and Baumann. [TR 25:8-17; 32:15-33:11].

The evidence presented at trial

In the trial, a significant amount of evidence of conspiracies, bribes and kick-backs that were not charged in the indictment was admitted as substantive evidence of Duane Big Eagle's guilt of the offenses charged, without any limiting instruction as to how the evidence might be considered by the jury, without having been subjected to the foundational requirements of Rule 404(b), and without any Rule 403 balancing of probative value against the danger of undue prejudice. Rather than limiting the presentation of its evidence to prove that Big Eagle and others had received bribes from Royal Kutz to insure that Kutz Construction would receive substantial tribal monies or that Big Eagle had joined a conspiracy in which Archie Baumann paid bribes to tribal council members to insure that First Dakota Enterprises would receive construction contracts from the Tribe, the government presented evidence to prove that Big Eagle and others were involved in an

overarching conspiracy to receive bribes from virtually every contractor that did business with the tribal schools over a six-year period.

The government began its presentation of evidence by eliciting testimony from the case agent, Anthony Hoben, that he had investigated a number of bribery and kick-back conspiracies involving corruption of tribal council members on the Crow Creek reservation and eight defendants had pleaded guilty to bribery and theft charges arising from that investigation. [TR 43:16-46:24].

The Kutz Construction conspiracy

In 2005, the Chief Executive Officer and Superintendent of the Crow Creek Tribal Schools was Scott Raue. After a fire damaged the dormitory at the Tribal School in Stephan, South Dakota in April 2005, Raue was given the authority to award no-bid contracts to contractors and businessmen to do construction and other work at the Tribal School. Raue testified that he was a gambling addict and much of the bribery and kick-back money he took from contractors and businessmen doing work for the Crow Creek Tribal Schools went to feed his addiction. Raue estimated that he took over $300,000 in kick-backs and bribes from various contractors. [TR141:13-142:1;143:21-18].

One of those contractors was Royal "Shorty" Kutz, who owned Kutz Construction company out of Highmore, South Dakota. Kutz was called to testify as a witness for the government. Kutz had pleaded guilty and been convicted of paying bribes to Scott Raue. Kutz testified that when he was doing construction work for the Tribal School in 2005, on more than one occasion, Raue pressured

him for money. Kutz testified that Raue never came out and stated that the payments were to insure that Raue would continue to allow Kutz to do work at the school. Instead, Raue always "had a lot of hard luck stories." Raue always told Kutz that he needed the money for some personal crisis, such as a sick child who needed medical treatment. [TR 80:17-81:8]. Raue also told Kutz that these cash payments to Raue were loans; he never talked about bribes. [TR 81:4-8]. Raue never told Kutz the money was for anyone other than himself. [TR 81:9-11].

Kutz testified that, after the fire at the school in April 2005, he gave money to Raue on about four occasions. [TR 67:14-15]. Sometimes he would hand Raue cash at the school and sometimes he would leave cash in a shed in his back yard and Raue would come by and pick it up. [TR 67:16-68:5].

Kutz testified that Duane Big Eagle never asked him for any money: "I've worked there for years, and he's never asked anything." [TR 81: 15-20]. Kutz also testified that in all his dealings with Raue, Raue never made any mention of Duane Big Eagle getting any money. [TR 81:15-16]. At no time did Raue make any claim or suggestion to Kutz that any of the money he was getting from Kutz was to be shared with Duane Big Eagle or that Duane Big Eagle was directing Raue to get money from Kutz. [TR 85:18-23].

Other than Craig McClatchey, the architect, the only two witnesses who testified that Duane Big Eagle was involved in a conspiracy to get kick-back money from Kutz were the government's cooperating witnesses, Scott Raue and Norman Thompson, Sr. Thompson was a former tribal council member. At the time

of trial, both Raue and Thompson were serving prison sentences. Raue had received a reduction of his prison sentence as a result of his cooperation and Thompson hoped to receive a reduction of his sentence in return for his cooperation and testimony against Big Eagle.

Raue and Thompson's testimony was not limited to evidence about the Royal Kutz kick-back conspiracy in 2005 or the Baumann bribery conspiracy in 2008. Instead, they both testified as to their own and Big Eagle's involvement in schemes to extract bribes from several contractors or businessmen other than Kutz and Baumann. Although some of the testimony was elicited to prove conspiracies involving specifically identified contractors other than Kutz and Baumann, much of the testimony was of a general nature in which the witness was asked to give, and did give, testimony about "the contractors".

For example, after Scott Raue testified that he had been authorized to award no bid contracts to contractors after fire damaged the school in April 2005, the following testimony was elicited by government counsel:

> Q. Was there anything in common about them, about why you chose those contractors?
> A. Yeah. They were contractors we had used in the past and contractors who had helped pay bribes to myself and the tribal council members.
> Q. Okay. So these were people that you knew you could count on to have kickbacks made?
> A. Yes, sir.
> Q. Who did you hire?
> A. We hired Shorty Kutz out of Highmore, McClatchey–Mr. McClatchey was our architect; Guest Electric; First Dakota Enterprises.
> Q. That's Mr. Baumann?
> A. Yes. We also hired Nystrom Electric, Klein's Office Supply. I think that's most of them. Oh. And the home–the modular company out of Watertown.

Q. How did you make this worthwhile for these contractors to get the work and pay kickbacks?
A. Basically, what we would do is–for example, let's say a project would cost a hundred thousand dollars. I'm just using that as a round figure. The tribal council would tell me how much money they needed from an individual contractor for a kickback. Like, let's say they needed $30,000. They wanted 30,000 of the hundred thousand dollars. So I would end up doing a contract with the contractor for $150,000. So they would give me $30,000 back, and they would still make a profit of 20–$20,000. That's just an example of how it would work.

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Q. Did the council make direct approaches to the contractors?
A. In the beginning, when we first started this process, they did; but by 2004 and `05, I was always the one who talked to all of the contractors.
Q. Now, when we talk about the council, were everyone that you named that were on the council in 2005 getting money back?
A. No.
Q. Okay. Who on there was primarily getting–
A. Norman Thompson.
[There was an objection.]

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THE COURT: You're answering the question to whom you gave money to; is that right?
THE WITNESS: Yes.
THE COURT: All right. Go ahead.
A. Norman Thompson, Randy Shields, and Duane Big Eagle. [1]

[TR 95:6-97:11].

Norman Thompson's testimony also dealt largely with a general wide-ranging scheme to extract bribes and kick-backs over a period of years from contractors other than Kutz and Baumann.

Thompson testified that one time he had witnessed Raue give money he said

[1] It was undisputed that Randy Shields was not a member of the tribal council in 2005. He was elected to the tribal council in 2006. [TR 98:16-21].

he had gotten from Kutz to Duane Big Eagle. Thompson testified that on one occasion, in 2005, Raue came to Big Eagle's place of business, the North Shore Bait shop, and had paid cash Raue said he had received from Kutz to Thompson, Randy Shields, and Big Eagle. [TR 269:5-270:13]. That was the only testimony Thompson gave as to seeing any money from Kutz going to Big Eagle. The rest of his testimony was about a wide-ranging overarching general scheme to extract bribes from contractors, including contractors not named or referred to in the indictment.

McClatchey testimony

Craig McClatchey was an architect from Colorado who testified that he had paid bribes to Scott Raue in return for being allowed to do architectural work for the school. He testified that he had begun paying Raue bribes in 2002 and that he stopped paying in April 2005 (three months before the Kutz Construction conspiracy began in July, 2005). [TR 242:10-243:20].

McClatchey testified that in June 2002, six months after he started doing work for the tribal school, Raue had asked him to "loan" him some money. Raue said he needed to borrow $2000 because his son needed major hospitalization work and the money had to be in cash. [TR 233:25-235:5]. McClatchey paid him $2000 in cash. Later, when McClatchey demanded repayment, Raue told him that he was not going to repay the "loan" and that in fact, "the chairman" was demanding that McClatchey should pay significant cash kick-backs to Raue whenever he was paid for work done and that Raue would then distribute the money to "the chairman"

and "the council". [TR 236:14-237:4]. After that, McClatchey paid Raue between $80,000 and $120,000 in cash kick-backs. He made his last payment to Raue in April 2005. [TR 237:19-238:4].

Raue never spoke to Duane Big Eagle about paying kick-backs or anything else except for one brief conversation when he met Big Eagle after he had stopped paying bribes to Raue. McClatchey testified that he had seen and spoken to Duane Big Eagle on only one occasion in his life, in the summer of 2005, in a bar-restaurant in Pierre. At that time, McClatchey was not doing any work for the Tribal School and he had stopped paying bribes a few months earlier. McClatchey testified that he was seated at a table with Scott Raue, an engineer named Hahn, and McClatchey's daughter; that Duane Big Eagle came over to the table and immediately after Raue introduced him to McClatchey, Big Eagle stood behind McClatchey's daughter and said "You're going to play ball with us, right, Craig?" McClatchey testified that when that comment was made, he had no idea what Big Eagle might have been referring to. [TR 239:22-241:8].

In summation, the government argued that the comment by Big Eagle was proof of Big Eagle's guilt of the crimes charged in the indictment.

The First Dakota Enterprises conspiracy

As charged in Count III of the indictment, the conspiracy involving Baumann and First Dakota Enterprises began in May 2008 and continued to October 21, 2008. [Add. 2.6]. In 2008, Archie Baumann, a construction contractor doing business out of Fort, Pierre, South Dakota, owned and ran First Dakota

Enterprises. [TR 167:17-20]. Baumann was regularly being pressured by Norman Thompson, who was a member of the Crow Creek tribal council, to pay him bribes and to also pay bribes to recently elected council member Randy Shields and to the recently elected tribal chairman, Brandon Sazue. [TR 185: 19-23]. Baumann testified that over a period of months, he did pay cash to Thompson, Shields and Sazue, primarily because he hoped to influence Thompson, Shields and Sazue to use their power as council members to get the Tribe to pay Baumann money that was owed to him by the Tribe for work he had done in the past and also to influence them to give his company work in the future. [TR 181:12-24].

In 2008, Duane Big Eagle was no longer chairman of the Crow Creek Sioux Tribe and had not been in tribal government since 2006. [TR 198:17-24]. There was no dispute at trial as to this fact: Big Eagle had no involvement in the Norman Thompson-Baumann bribery conspiracy before October 21, 2008, when he showed up at the First Dakota Enterprises office. [TR 224:1-10].

On October 21, 2008, the chairman of the Crow Creek Sioux Tribe was Brandon Sazue. [TR 372:22-25]. Sazue had previously accepted money from Baumann but after having second thoughts, had agreed to cooperate with federal investigators who were investigating Baumann and corruption involving Crow Creek tribal council members. [TR 373:8-10; 375:9-15]. Unbeknownst to the conspirators, Sazue had secretly tape-recorded conversations among himself, Baumann, Thompson, Shields, and others in which cash payments to council members were discussed. [TR 376:21-377:22]. Big Eagle was never involved in

any of those conversations until October 21, 2008. [TR 379:18-21].

On that date, Shields, Thompson, Sazue, and a former councilman named Loren Fallis came to Baumann's office to ask Baumann for money. [TR 184:2-8]. Duane Big Eagle was also present at Baumann's office. Baumann testified that Big Eagle had come to his office to ask if Baumann would give him work as a consultant. [TR 190:25-191:1]. Big Eagle had not come to the office with Thompson, Shields or Sazue. It was a disputed fact in the trial as to whether Big Eagle had been asked to come to the office to participate in the meeting or whether his presence there on that particular day when Thompson and the others came to see Baumann was a matter of chance. Sazue testified that when he came to the meeting he had no idea that Big Eagle would be there and he was surprised to see him. [TR 380:5-12].

Scott Raue was also there at the First Dakota Enterprises office because after he had been indicted and fired from his job as school superintendent, he had gone to work for a construction company that was for all intents and purposes run by Archie Baumann. [TR 107:21-108:11]. He was present during some of the conversation that was recorded by Sazue.

Sazue's tape-recording of conversations involving Thompson, himself, Shields, Fallis, Raue, Baumann and Big Eagle was played and placed in evidence. It lasted about an hour and a half. When Sazue arrived, Big Eagle and others were already present.

As can be heard from the tape, Baumann was not present during the first part

of the recorded conversations. Both before Baumann joined them and while he was with them, both Big Eagle and Thompson complained of being "broke" and needing money. Before Baumann joined them, Thompson said he was going to ask Baumann for a loan. [TR 357:4-5]. After Baumann joined them, Thompson and others expressed their need for "help" from Baumann. Big Eagle told Baumann he had taken in two grandchildren to raise and he had no source of income. [TR 226:13-25].

On the tape-recording, while Duane Big Eagle was present, there was no explicit discussion of bribery or any corrupt *quid pro quo*. [TR 225:19-23].

Baumann agreed to write a check, with the understanding that the amount of the check would be divided among all five of the Crow Creek men who were there–Fallis, Big Eagle, Thompson, Sazue and Shields. [TR 236:14-237:4]. Big Eagle agreed that the check could be made out to him. Baumann wrote a check for $5,000 dollars to Duane Big Eagle. [TR 226:9-10]. Big Eagle left and cashed the check, and then gave $1,000 to Thompson, $1,000 to Fallis, $1000 to Sazue, $1,000 to Shields and kept $1,000. [TR 227:24-228:3].

In trial, the main in dispute fact as to the charges in Count III and IV was Duane Big Eagle's knowledge and criminal intent: whether Duane Big Eagle knew that the money he was giving to Thompson, Sazue, and Shields was bribe money paid as a *quid pro quo* to influence them to use their political power to benefit Baumann, rather than a loan or a hand-out, and whether Big Eagle knowingly intended to aid and abet Baumann to pay a bribe to Thompson, Shields and Sazue.

SUMMARY OF ARGUMENT

The indictment charged that Duane Big Eagle joined two separate criminal conspiracies to commit bribery of a tribal agent and that he committed two acts of bribery committed during those conspiracies. The indictment charged that the object of the conspiracy charged in Count I was to accept bribes from a contractor named Royal Kutz in 2005 and that the object of the conspiracy charged in Count III was to have tribal council members receive bribes from a contractor named Archie Baumann. The indictment did not charge a continuing overarching conspiracy to receive bribes from contractors generally or from any contractors other than Kutz and Baumann.

The fundamental legal error in this case was that the trial court allowed the government to present evidence that Big Eagle was involved numerous crimes and kick-back conspiracies for which he was not indicted, ruling that such evidence was intrinsic evidence of the crimes charged, rather than Rule 404(b) evidence of other crimes. In ruling that evidence of other crimes was intrinsic evidence not covered by Rule 404(b), the court allowed the government to offer evidence of an extensive overarching bribery conspiracy involving numerous contractors who were not referred to in the indictment, although the indictment did not charge that Big Eagle was involved in any such overarching conspiracy or that such a conspiracy existed.

Prior to trial Big Eagle made written and oral motions to prohibit the government from offering any evidence of crimes or other wrongs or acts not

pleaded in the indictment; he specifically moved to preclude the government from offering evidence of crimes or other acts involving any contractor other than Kutz and Baumann. Big Eagle made those motions on the grounds that Rule 404(b) of the Federal Rules of Evidence (F.R.E.) prohibited such evidence because it would have no probative value other than to prove the accused's propensity to commit crimes similar to the ones charged in the indictment. Big Eagle also objected to the admission of other crimes evidence because the government had given the defense no pretrial notice of its intent to offer other crimes evidence, or a description of such evidence, as required by Rule 404(b).

The court denied Big Eagle's motions in limine to exclude evidence of uncharged crimes, ruling that evidence of bribes paid by other contractors was intrinsic evidence of the crimes charged, not Rule 404(b) evidence. That ruling allowed the government to introduce evidence of uncharged crimes as substantive evidence of the crimes charged, without any limiting Rule 404(b) instruction, without the pretrial notice required by Rule 404(b), and without having to meet the foundational requirements for the admission of other crimes evidence.

In this appeal, Duane Big Eagle contends that such evidence was not intrinsic evidence; it was prohibited propensity evidence that should have been excluded under Rule 404(b)

Big Eagle contends that evidence of uncharged crimes involving contractors other than Kutz and Baumann was not "intrinsic" evidence because it was not inextricably intertwined with either the 2005 Kutz kick back conspiracy or the

2008 Baumann bribery conspiracy. Therefore, that evidence was extrinsic evidence of other acts, wrongs and crimes under Rule 404(b).

The trial court's error substantially prejudiced Duane Big Eagle's right to a fair trial and requires reversal of his convictions.

STANDARD OF REVIEW

A trial court's ruling that the admission of evidence of crimes not charged in the indictment is not governed by Rule 404(b) because such evidence is intrinsic evidence of the crimes charged is reviewed by this Court for abuse of discretion. United States v. Clarke, 564 F. 3d 949, 957 (8th Cir. 2009).

ARGUMENT

I

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED THAT EVIDENCE OF BRIBES, KICKBACKS AND CONSPIRACIES NOT CHARGED IN THE INDICTMENT WAS INTRINSIC EVIDENCE OF THE CHARGED OFFENSES, RATHER THAN EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS UNDER F.R.E. RULE 404(B).

F.R.E. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during the trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 404(b) applies only to "other crimes, wrongs or acts" than those

charged in the indictment. It "does not extend to evidence of acts which are 'intrinsic' to the charged offense." United States v. Maxwell, 642 F.3d 1096, 1100 (8th Cir. 2011), quoting Advisory Committee's Notes on F. R.E. Rule 404(b). "This is because such acts are not truly separate bad acts that show propensity, but are intrinsic evidence which is inextricably intertwined with the crime charged." United States v. Heidebur, 122 F.3d 577, 579 (8th Cir. 1997).

"Because this is evidence of the conspiracy itself, ... the inference sought to be foreclosed by Rule 404(b), that a person of demonstrated criminal character can be presumed to have acted in conformity with that character, is not raised where the challenged evidence directly supports the existence of the charged criminal conspiracy without regard to the defendant's criminal character." United States v. Aranda, 963 F.2d 211, 214 (8th Cir. 1992).

The fundamental issue to be decided in this appeal is whether evidence that Big Eagle was involved in kick-back and bribery conspiracies with contractors other than Shorty Kutz and Archie Baumann was intrinsic evidence that was "inextricably intertwined" with the Kutz Construction conspiracy charged in Counts I and the First Dakota Enterprises conspiracy charged in Count III or whether such evidence was evidence of other crimes under Rule 404(b). Heidebur, above, at 579. If evidence that Big Eagle took kick-backs from McClatchey, Guest Electric, Nystrom Electric and other contractors not named in the indictment was not inextricably intertwined with the two conspiracies charged in Counts I and III, then such evidence was not intrinsic to the charged offenses; it was extrinsic

evidence of other acts and crimes not charged in the indictment, under Rule 404(b).

This Court and other United States Courts of Appeal have articulated the test for determining whether evidence is intrinsic evidence of the crimes charged in an indictment, rather than extrinsic Rule 404(b) evidence, in various ways. In general, "[a]n act is *intrinsic* to a charged offense if the act is inextricably intertwined with the charged offense, when both acts are part of a single criminal episode, or when the other acts were necessary preliminaries to the crime charged." J. Weinstein and M. Berger, *Evidence*, ¶404(b)[2][c]. (Italics in the original.)

In this Circuit, whether evidence of other bad acts is intrinsic to the crimes charged depends of whether the evidence of other acts or crimes is "an integral part of the immediate context of the crime charged" (United States v. Williams, 95 F.3d 723, 731 (8th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1996)); United States v. Bass, 794 F.2d 1305, 1312 (8th Cir. 1986), *cert. denied*, 479 U.S. 869 (1986)); whether evidence of other acts is "inextricably intertwined" with the crimes charged (United States v. McGuire, 45 F.3d 1177, 1188 (8th Cir. 1995), *cert. denied*, 515 U.S. 1132 (1995)); whether the evidence of other acts is "so blended or connected, with the one on trial as that proof of one incidentally involves the other; or explains the circumstances; or tends logically to prove any element of the crime charged" (United States v. Bettleyoun, 892 F.2d 744, 746 (8th Cir. 1989)); whether the evidence of other crimes was "an inextricable part of the government's case" as to the charged offenses (United States v. Johnson, 463 F.3d 803, 808 (8th Cir. 2006)); and whether exclusion of the evidence "would have prevented the

prosecution from presenting [to the jury] 'a coherent picture of the facts of the crime in issue.'" (United States v. Heidebur, 122 F.3d 577, 579 (8th Cir. 1997), quoting United States v. Williams, above, at 731.)

Framed in plain language, the issue is whether the evidence of criminal agreements with contractors not mentioned in the indictment was "part and parcel" of the conspiracies that were charged in the indictment. United States v. Kravchuk, 335 F.3d 1147,1155 (10th Cir. 2003).

Here, the indictment charged that Duane Big Eagle knowingly participated in two separate conspiracies. Count I charge that during a five-month period in 2005, while he was chairman of the Tribe, Duane Big Eagle conspired with Royal Kutz, Scott Raue and others known and unknown to the grand jury to have Kutz Construction pay bribes to Tribal agents to get work at the Tribal School. Count III charged that in 2008, when he was no longer in tribal government, Duane Big Eagle conspired with Archie Baumann, Norman Thompson, Randy Shields, Scott Raue and others known and unknown to the grand jury to have Baumann pay bribes to Tribal council members to reward them for approving loans and to influence them to give business to his construction company, First Dakota Enterprises, in the future.

The indictment identifies the object of the conspiracy charged in Count I:

OBJECT OF THE CONSPIRACY

> It was the object of the conspiracy, its methods and means, to insure that Kutz Construction would be awarded substantial tribal monies in relation to the improvement and construction of school buildings, and that payment for that construction would be released to Kutz Construction, through the

> bribery of the Chairman of the Crow Creek Sioux Tribal Council and a member of the Crow Creek Tribal School Board, DUANE DALE BIG EAGLE, and the Chief Executive Officer and Superintendent of the Crow Creek Sioux Tribal School District, SCOTT RAUE.

The overt acts in furtherance of the conspiracy charged in Count I allege that Royal Kutz paid bribes to school superintendent Scott Raue to get contracts to do work at the Tribal School and that Raue passed some of the money he received from Kutz to Duane Big Eagle.

The indictment identifies the objects of the conspiracy charged in Count III:

> OBJECTS OF THE CONSPIRACY
>
> It was the first object of the conspiracy, its methods and means, that Archie Baumann would enter into a loan agreements [*sic*] with the Crow Creek Sioux Tribe, with the loan agreements containing lucrative repayment terms, and thereafter, to reward the tribal officials for approving the loan agreements and the repayment terms, by making personal cash contributions, or kick-backs, to tribal officials.
>
> It was the second object of the conspiracy, its methods and means, that First Dakota Enterprises would negotiate a profitable construction contract with the Crow Creek Sioux Tribe for the construction of school buildings, and thereafter, to reward the tribal officials for their role in approving the contract and to facilitate payments, Archie Baumann, doing business as First Dakota Enterprises, would make personal cash distributions, or kick-backs, to tribal officials.

Each of the overt acts set forth in Count III charge that Archie Baumann paid bribes in 2008 to influence Tribal council members to give him and First Dakota Enterprises favorable treatment in the future and to reward them for favorable treatment in the past.

The indictment does not charge that Big Eagle joined a general widespread overarching conspiracy to extract kick-backs from any and all contractors who did

work for the Tribal school over a period of years. The indictment charges two specific discrete conspiracies with two well-defined objectives involving two and only two contractors. The indictment does not charge that Big Eagle conspired with any contractor other than Royal Kutz and Archie Baumann.

In trial, however, a large part of the government's evidence, indeed the primary theme of the government's case, was that when Big Eagle was tribal chairman in 2005, not only did he conspire to accept kick-backs from Royal Kutz, he also conspired to receive and did receive bribes from several other business owners and contractors, including architect Craig McClatchey, Guest Electric Company, Nystrom Electric, Klein Office Supplies, and a modular home company out of Watertown. Evidence involving other contractors than Kutz was not an integral, inextricable part of the Kutz Construction conspiracy. The other contractors had no involvement in the conspiracy in Count I, the object of which was to have Kutz pay Raue and Big Eagle kick-backs. Evidence involving other contractors giving bribes to Raue and Big Eagle in 2005 to get work at the tribal school was not an integral, inextricable part of the First Dakota Enterprises conspiracy in 2008, the object of which was to have Baumann pay cash bribes directly to Thompson, Shields and Sazue.

To be admissible as "intrinsic" evidence, such evidence would have to be "an integral part of the immediate context" of all four of the crimes charged (United States v. Williams, 95 F.3d 723, 731 (8th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1996)) and be "inextricably intertwined" with both the Kutz Construction

conspiracy and the First Dakota Enterprises conspiracy, as well as with the separate acts of bribery charged in Count II and IV (United States v. McGuire, 45 F.3d 1177, 1188 (8th Cir. 1995), *cert. denied*, 515 U.S. 1132 (1995)).

This Court reviewed the question of whether other acts evidence was intrinsic evidence or other acts evidence under Rule 404(b) in United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997). In that case, the defendant was charged with possession of sexually explicit photographs of his minor stepdaughter. Over the defendant's objection, the government offered evidence that the defendant had had sexual contact with the stepdaughter, arguing that such evidence was intrinsic evidence of the crime charged because it provided "context" and motive and explained the relationships of people involved in the case. This Court rejected the government's argument that the defendant's sexual contact with his stepdaughter was "inextricably intertwined" with the crime charged and reversed. This Court ruled that although evidence of the sexual contact may have provided some background, it was not "an integral part" of the defendant's possession of the photos. "Without this testimony, the jury was in no danger of not receiving 'a coherent picture of the facts' of the charged crime." Heidebur, at 579, quoting United States v. Williams, 95 F.3d at 731 (8th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1996).

Heidebur stands for the proposition that evidence of other crimes, wrongs or acts is not inextricably intertwined with a charged offense merely because such evidence may provide "context" or "background" or because it may help to explain

the "relationships" between the participants. The real question is whether such evidence so inextricably intertwined with the crimes charged that admission of evidence of uncharged crimes is necessary to provide the jury with a coherent picture of the facts of the crimes charged in the indictment.

Here, evidence that Duane Big Eagle joined a conspiracy to extract bribes from Craig McClatchey, Guest Electric, Nystrom Electric, Klein Office Supplies, an un-named construction contractor out of Watertown and a general class of coconspirators referred to as "the contractors" was not necessary to provide the jury with a coherent picture of the facts of either the Kutz Construction conspiracy or the First Dakota Enterprises conspiracy. Evidence of other contractors' agreements to pay kick-backs in return for work contracts was not inextricably intertwined with the evidence of the conspiracy whose object was to extract bribes from Royal Kutz or the conspiracy whose object was the payment of bribes by Archie Baumann. Evidence of conspiracies and crimes not charged in the indictment was not in any way necessary to explain the relationships that existed between the people involved in the Kutz Construction conspiracy or the First Dakota Enterprises conspiracy. Evidence as to the Kutz Construction conspiracy and the First Dakota conspiracy could have been presented without any evidence of uncharged crimes involving other contractors without in any way leaving the jury with a confused or incomplete understanding of the crimes charged in the indictment. The other crimes evidence that was admitted as substantive evidence of Duane Big Eagle's guilt had no probative value except to prove the defendant's propensity to commit such

crimes.

In this case, evidence that Big Eagle had committed similar offenses with other contractors in 2005 was not "an integral part of the immediate context " of any of the offenses charged in the indictment. United States v. Williams, above. That is especially true with regard to the First Dakota Enterprises conspiracy in 2008, which was different in many ways from the Kutz Construction conspiracy, including the fact that Big Eagle was alleged to have played only a minor role in the First Dakota Enterprises conspiracy by passing a bribe on one occasion from Baumann to Thompson, Shields and Sazue. As in Heidebur, the evidence of uncharged crimes was simply not necessary to present the jury with a coherent picture of the facts regarding the charged offenses. If the jury had not heard evidence that Duane Big Eagle had also conspired to take bribes from Craig McClatchey, Guest Electric, Nystrom Electric, Klein's Office Supply and from a general class of unidentified co-conspirators referred to as "the contractors," the jury would have been in no danger of not receiving "a coherent picture of the facts" of the Kutz Construction conspiracy or of the First Dakota Enterprises conspiracy. Heidebur, at 579.

In United States v. Swinton, 75 F.3d 374 (8th Cir. 1996), this Court held that evidence of other crimes was properly admitted as intrinsic evidence because the indictment alleged that Swinton was involved in a single scheme to defraud financial institutions. Swinton, a real estate entrepreneur and building contractor, was charged with and convicted of seven counts of bank fraud in violation of 18

U.S.C. §1344. The indictment alleged that Swinton was engaged in a single overarching sham sale scheme: Swinton would have purported buyers seek loans to buy residential properties, making false representations to get the loans; immediately after purchasing the properties, the buyers would transfer the properties to Swinton by a quitclaim deed; Swinton then defaulted on the loans, which were insured by the government, thus leaving the government with the losses.

During trial, the government introduced evidence concerning seven property transactions in which Swinton was involved but for which he had not been indicted. Over the defendant's objection that the government had not given pretrial 404(b) notice, the district court admitted these uncharged transactions into evidence as intrinsic evidence of the plan, scheme, or artifice for which Swinton was charged, and ruled that Rule 404(b) was not applicable because the evidence of other transactions was not "other acts" evidence governed by that rule.

This Court held that evidence of other transactions was intrinsic evidence not governed by Rule 404(b) because the evidence concerning the other uncharged transactions went directly to an element of the crime of bank fraud—the existence of a scheme or artifice—and the indictment charged Swinton with conducting a continuing scheme to defraud. In Swinton, the offenses charged were not isolated acts; they were part of the single continuous overarching scheme to defraud that was charged in the indictment.

In Swinton, this Court also ruled that evidence involving one transaction was

not intrinsic evidence because "the Government did not show that this property was a part of the same overall scheme or that it was blended with one of the charged counts in any way other than the fact that [a co-conspirator] and Swinton were both participants." Swinton, at 379. [2]

The critical fact that distinguishes Big Eagle's case from that of Swinton is the fact that in Swinton, the indictment expressly alleged that Swinton was involved in a single continuing scheme to defraud. Here, the indictment did not charge that Big Eagle was involved in a single continuous overarching conspiracy to accept kick-backs from contractors. The indictment charged that Big Eagle joined two, discreet and separate criminal conspiracies, the objects of which were clearly defined and identified in the indictment: to have Kutz pay bribes to Big Eagle and others in return for tribal school contracts and to have Baumann pay bribes to tribal officials to reward them for past benefits and to obtain future benefits for First Dakota Enterprises.

Evidence of kick-backs paid by McClatchey in 2002 and by Guest Electric, Nystrom Electric, Klein's Office Supply and other contractors in 2004 and 2005 was not offered to prove the existence of a single overarching conspiracy that had been charged in the indictment. Although the government evidently sought to prove the existence of such a conspiracy, no such conspiracy was charged in the indictment.

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[2] Although this Court found that the evidence of that transaction should not have been admitted, it ruled that the error was harmless.

Ultimately, this issue and all the issues raised in this appeal turn on one question: what conspiracies and crimes are actually charged in the indictment?

The indictment alleged that in 2005 Big Eagle joined a conspiracy, the object of which was to accept bribes from Royal Kutz and that in 2008, he joined a conspiracy, the object of which was to have tribal officials receive bribes from Archie Baumann.

The question then becomes whether evidence of other crimes involving other contractors was an inextricable and integral part of the immediate context of the Kutz Construction conspiracy and the First Dakota Enterprises conspiracy. If it was not, then the evidence should have been ruled inadmissable under Rule 404(b).

This Court should hold that the testimony that Duane Big Eagle had conspired to accept bribes from Craig McClatchey, Nystrom Electric, Guest Electric, Klein's Office Supply and other un-named contractors was not inextricably intertwined with any offense charged in the indictment. That testimony was extrinsic evidence of other acts under Rule 404(b). Such extrinsic evidence played a major role in the government's case and therefore, its erroneous admission significantly prejudiced Duane Big Eagle's right to a fair trial.

II

THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION IN LIMINE TO PROHIBIT THE GOVERNMENT FROM OFFERING OTHER CRIMES EVIDENCE BECAUSE OF THE GOVERNMENT'S FAILURE TO PROVIDE PRETRIAL NOTICE UNDER RULE 404(B) WAS ERROR WHICH SUBSTANTIALLY PREJUDICED DUANE BIG EAGLE'S RIGHT TO A FAIR TRIAL.

"In criminal cases, Rule 404(b) requires the prosecution to give pretrial notice, unless the district court excuses the notice at trial, regarding the 'general nature' of any Rule 404(b) evidence the government 'intends to introduce at trial.'" United States v. Clarke, 564 F.3d 949, 957 (8th Cir.), *cert. denied,* 130 S.Ct. 651 (2009), quoting Rule 404(b).

Pretrial notice of intent to offer such evidence, along with a general description of such evidence, is expressly mandated by Rule 404(b). The rule provides that other crimes evidence may be admitted for purposes other than showing bad character or propensity, "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during the trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Moreover, this Court has stated that the notice must be clear enough to permit pretrial resolution of issues of its admissibility. United States v. Robinson, 110 F.3d 1320, 1325-26 (8th Cir. 1997). Pretrial notice must be provided to the defense in order to "reduce surprise and promote early resolution on the issue of admissibility." Robinson, at 1326.

The Advisory Committee Note on Rule 404(b) warns that satisfying the notice requirement is a condition precedent to admissibility. "[T]he offered evidence is inadmissible if the court decides that the notice requirement has not been met." Advisory Committee Note on 1991 Amendment, §404App.03[2]. "Pre-trial notice, or an excuse from the district court for failing to give notice, is a

condition to the admission of other acts evidence." United States v. Vega, 188 F.3d 1150, 1154-1155 (9th Cir. 1999).

If the government has failed to comply with the pretrial notice required by Rule 404(b), a trial court's admission of other crimes evidence is an abuse of discretion. United States v. Carillo, 660 F.3d 914, 927-928 (5th Cir. 2011).

Here, the government conceded that it had not provided pretrial notice under Rule 404(b), but opposed the motion on the grounds that evidence relating to kick-backs paid by other contractors was intrinsic evidence not covered by Rule 404(b).

The trial court denied the defendant's motions in limine, ruling that Rule 404(b) was not applicable to the evidence relating to crimes involving other contractors. The court also denied the defendant's oral motion at the pretrial conference for an order directing the government to make an offer of proof that would comply with the requirements of Rule 404(b).

The issue for this Court to decide is whether the trial court abused its discretion in allowing the government to introduce evidence of crimes for which the defendant was not indicted, in spite of the fact that the government had not provided Big Eagle with the pretrial notice required by Rule 404(b).

In United States v. Vega, 188 F.3d 1150 (9th Cir. 1999), the Ninth Circuit ruled that it was reversible error for the trial court to allow the government to introduce other acts evidence without fulfilling its obligation to give reasonable pretrial notice as required by Rule 404(b). The Court of Appeals set forth a series of questions to determine if the admission of other acts evidence violated the Rule

404(b) notice requirement and if so, whether reversal was required.

First, was the challenged evidence "other acts" evidence under Rule 404(b)? Here, as discussed above, testimony that Big Eagle was involved in uncharged conspiracies with McClatchey, Guest Electric, Nystrom Electric and other contractors was not intrinsic evidence of the crimes charged in the indictment; it was evidence of other acts, wrongs and crimes under Rule 404(b).

Second, did the defendant request 404(b) notice? Big Eagle filed a written request for such notice prior to trial [Doc. #9 in the district court file] and made an oral request for such notice at the pre-trial conference on the motions in limine.

Next, did the government fulfill its obligation to "provide reasonable notice in advance of trial . . . of the general nature of any such evidence it tends to introduce at trial", as required by Rule 404(b)? The government has conceded that it did not give the defendant any notice under 404(b).

If notice was requested and the government did not provide such notice, the court must then determine the consequence of the government's failure to fulfill its obligation under Rule 404(b). In Vega, the court determined that the proper consequence for the government's failure to give pretrial notice was that the evidence could not be introduced at trial.

Finally, the court must determine whether the court's error in allowing the evidence to be admitted without requiring pretrial notice was harmless.

Here, the court's failure to hold the government accountable for its failure to comply with the notice requirement of Rule 404(b), which was compounded by its

denial of defendant's motion for an offer of proof from the government as to what evidence of uncharged crimes it intended to offer, substantially prejudiced the defendant. The court's error allowed the government to play "hide the ball" from the defendant. It forced him to try the case without knowing what evidence he would have to confront until it came out in testimony. Big Eagle's trial strategy could not adequately address other acts evidence since he did not have general notice of the specific acts that would be offered. This prejudiced his ability to investigate the other acts evidence and to prepare to cross-examine witnesses who would present such evidence.

It also deprived him of any pretrial opportunity to argue against the admissibility of such evidence under F.R.E. Rules 402, 403, and 404. "To be admissible under 404(b), the evidence must be: (1) relevant to a material issue; (2) proved by a preponderance of the evidence; (3) higher in probative value than prejudicial effect; and (4) similar in kind and close in time to the crime charged." United States v. Campbell, 937 F.2d 404, 406 (8th Cir. 1991). The failure to provide the defense with the pretrial disclosure required by Rule 404(b) deprived Big Eagle of the opportunity to have the court analyze the other crimes evidence prior to trial to determine its admissibility. Had he been given the opportunity to challenge evidence of uncharged crimes prior to its admission, the trial court may well have limited or excluded such testimony in its entirety. If the court allowed the evidence to be presented, every time such evidence was introduced, Big Eagle would have been entitled to a jury instruction that such evidence could only be considered for

the limited purpose of proving the defendant's intent or knowledge.

The evidence of Duane Big Eagle's guilt on any of the three charges for which he was convicted was far from overwhelming. The government's proof that Big Eagle was involved in the Kutz Construction conspiracy depended almost entirely on the testimony of Raue and Thompson, two cooperating witnesses whom the government conceded in its summation were both "liars", "crooks" and "confidence men." [Government's final argument, TR 19:5-10].

At one point in his testimony, after being confronted with a letter written by Thompson to the prosecuting attorney which directly contradicted his testimony, defense counsel asked Thompson if he had just lied to the jury. Thompson invoked his Fifth Amendment right to refuse to answer the question on the grounds that the answer could tend to incriminate him. [TR 305:5-306:16].

The government's theory that Duane Big Eagle knowingly aided and abetted Baumann to pay a bribe, rather than a handout or a loan, to Thompson, Shields and Sazue on October 21, 2008, also depended largely on Raue and Thompson's testimony about statements that were not recorded on the tape-recording that came into evidence.

Without the testimony from McClatchey, Raue, and Thompson that Big Eagle had engaged in other similar offenses, the jury might well have concluded that the evidence was insufficient to convict Duane Big Eagle of any of the crimes charged in the indictment.

This Court should hold that the trial court erred when it denied Duane Big

Eagle's motion to exclude evidence of uncharged crimes in spite of the government's failure to give the pretrial notice mandated by Rule 404(b). That error substantially prejudiced Big Eagle's right to a fair trial.

III

CRAIG MCCLATCHEY'S TESTIMONY OF AN UNCHARGED BRIBERY CONSPIRACY THAT BEGAN IN 2002 AND ENDED IN APRIL 2005 WAS NOT AN INTEGRAL PART OF THE IMMEDIATE CONTEXT OF ANY OF THE CRIMES CHARGED AND ITS ADMISSION AS INTRINSIC EVIDENCE SUBSTANTIALLY PREJUDICED DUANE BIG EAGLE'S RIGHT TO A FAIR TRIAL

Of all the evidence of uncharged crimes that was admitted as intrinsic evidence, none was more unduly prejudicial than the testimony of Craig McClatchey. Over Big Eagle's objection, architect Craig McClatchey was allowed to testify that from 2002 to April 2005, he paid between $80,000 and $120,000 in cash kick-backs to Scott Raue and that Raue told him that the tribal chairman had directed Raue to demand kick-backs from McClatchey. This evidence was admitted as intrinsic substantive evidence of the crimes charged in the indictment, all of which were alleged to have occurred after McClatchey had stopped paying kick-backs to Raue.

The issue for this Court to decide is whether McClatchey's testimony of a kick-back conspiracy not charged in the indictment was "an integral part of the immediate context" of both the 2005 Kutz Construction conspiracy and the 2008 First Dakota Enterprises conspiracy. United States v. Williams, 95 F.3d 723, 731 (8th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1996).

1.

The trial court erred in denying Big Eagle's motion in limine to exclude all testimony from Craig McClatchey.

Prior to trial, in addition to his general motion to exclude all evidence of crimes involving contractors other than Kutz and Baumann, Big Eagle filed motions in limine to specifically prohibit any testimony from architect Craig McClatchey.

The trial judge, ruling that McClatchey's testimony was intrinsic evidence and not 404(b) evidence of uncharged crimes [TR 23:4-25], denied the defendant's motion in limine.[TR 32:15-18].

The testimony of Craig McClatchey did not touch on or refer in any way to either the Kutz Construction conspiracy or the First Dakota Enterprises conspiracy. All his testimony related to a kick-back scheme that was not charged in the indictment, which began in 2002 and which ended before the Kutz Construction conspiracy began in mid-July 2005.

McClatchey testified that starting in 2002, three years before the fire at the school, he had done architectural work for the Tribal School at the request of Scott Raue. He testified that about six months after he began work in 2002, Scott Raue asked McClatchey to lend him some money to help him with medical expenses for a sick child. Some time after McClatchey gave Raue $2000 in cash, when he asked Raue for repayment, Raue told McClatchey that he was not going to pay him back and furthermore, "the chairman" (whom he never named) wanted McClatchey to

pay kick-back money to Raue if he wanted to continue to work for the Tribal School.[TR 233:10-237:3]. McClatchey eventually stopped paying Raue kick-backs some time before the fire at the school in April, 2005, even though he accepted a contract to do work on the re-construction project after the fire.

McClatchey's testimony of his criminal agreement with Raue in 2002 was not inextricably intertwined with either of the conspiracies charged in the indictment. None of McClatchey's testimony had anything to do with the Kutz Construction conspiracy or the First Dakota Enterprises conspiracy. There was no need to have McClatchey explain the details of his own crime in order to have the jury understand the conspiracies involving Kutz and Baumann. It was only relevant to prove the defendant's propensity. McClatchey's testimony was not intrinsic evidence of the crimes charged. It was other crimes evidence which should have been ruled inadmissable.

In addition to the inherently prejudicial effect of other crimes evidence, the prejudice to the defendant was compounded by the trial court's rulings that allowed McClatchey to testify as to inadmissible hearsay statements by Raue that inculpated Big Eagle and to which allowed McClatchey give testimony of a comment of Big Eagle that was so ambiguous that it lacked any probative value, but which the government argued proved Big Eagle's guilt of the crimes charged.

2.

The trial court erred in denying the defendant's motion in limine to prohibit any testimony from McClatchey as to out of court statements made by Raue to McClatchey inculpating Big Eagle.

The trial court's error in ruling that Rule 404(b) was not applicable to McClatchey's testimony led directly to the admission of inadmissible hearsay inculpating the defendant.

In the pre-trial conference, defense counsel, as part of his motion in limine, moved to preclude McClatchey from testifying that Raue had made out of court statements to McClatchey that "the chairman" had directed him to get kick-backs from McClatchey. Counsel argued that these statements by Raue to McClatchey were inadmissible hearsay, rather than admissible co-conspirator statements under F.R.E. 801(d)(2), because they were not made in the course of, or in furtherance of, any conspiracy charged in the indictment. The court denied the motion.

McClatchey testified that Big Eagle had never personally directed him to pay kick-back money. But McClatchey was allowed to testify that Raue had told him in 2002 that "the chairman" wanted McClatchey to pay kick-backs to Raue. Those out of court statements by Raue to McClatchey were offered to prove that Duane Big Eagle had in fact directed Raue to demand money from McClatchey.

These out of court statements of Raue inculpating Big Eagle in the Raue-McClatchey kick-back scheme were not admissible either as intrinsic evidence or as a coconspirator's statement. First, they were offered to prove a conspiracy that was not charged in the indictment. Therefore, the statements were other crimes evidence under Rule 404(b). Secondly, they were not co-conspirator statements under F.R.E. Rule 801(d)(2), since they were made by Raue to McClatchey in 2002 and not during the course of, or in furtherance of, either the 2005 Kutz

Construction conspiracy or the First Dakota Enterprises conspiracy of 2008.

Without the testimony from McClatchey that Raue had told him that Big Eagle had told Raue to get kick-backs from McClatchey, McClatchey had no reason to believe that Big Eagle was involved in Raue's scheme to "shake down" McClatchey. McClatchey's testimony as to Raue's statements inculpating Big Eagle was extremely prejudicial inadmissible hearsay that, in itself and in conjunction with the rest of his testimony, substantially prejudiced Big Eagle's right to a fair trial.

3.

The trial court erred in denying the defendant's motion in limine to prohibit any testimony from McClatchey as to a comment he said had been made to him by Big Eagle in 2005.

In his motion in limine, Big Eagle also moved specifically to prohibit any testimony from McClatchey as to what he would say transpired at the one and only time he ever saw or spoke to Duane Big Eagle: that when he was introduced to Big Eagle in a restaurant in the summer of 2005, Big Eagle put his hands on McClatchey's daughter's shoulders and said 'You're going to play ball with us aren't you, Craig?' Defense counsel further moved to prohibit McClatchey from testifying as to his opinion that the comment or question was intended to convey a threat to McClatchey's daughter.

Again basing his ruling that McClatchey's testimony was intrinsic evidence and not 404(b) evidence of uncharged acts [TR 23:4-25], the trial judge denied all the defendant's motions in limine, except insofar as the government was ordered

not to elicit testimony about McClatchey's interpretation of Big Eagle's comment to him as a threat to his daughter. [TR 32:15-18].

> THE COURT: The government has said it's not going to put on evidence that McClatchey had his 11-year-old daughter there and that a statement that McClatchey maybe perceived as a threat on his daughter occurred. That's–that's not going to come in. The statement seems like it should come in; but the context where one person might think it a threat involving a child, that's not going to come in.
>
> [TR 25: 8-17].

When he testified, the government elicited testimony from McClatchey that McClatchey had lunch in a bar or restaurant with Raue and an engineer named Rick Hahn in Pierre. At first, McClatchey did not mention the fact that his daughter was present. The government elicited that testimony by a leading question.

> Q. ... You were with Mr. Hahn and your daughter, I believe?
> A. That is correct.
> Q. And Mr. Raue?
> A. That's correct.
>
> [TR 240: 21-25].

McClatchey then testified that Big Eagle came over to their table, Scott Raue introduced him as Duane Big Eagle, Tribal Chairman of the Crow Creek Tribal Council, and they had a very brief conversation that may have lasted a couple of minutes. McClatchey testified that Big Eagle said "Hi" and "Nice to meet you", then walked behind McClatchey's daughter "and looked at me straight in the eye, without smiling, and said, 'You're going to play ball with us, aren't you Craig?' And at the time I didn't know what he was doing or what he meant."

> [TR 242: 2-8].

The comment attributed to Big Eagle was made without any context as to what he might have been referring. There was no testimony from McClatchey that there had been any conversation before, during or after Big Eagle came over to his table about the school project or the payment of bribes. McClatchey testified that neither he nor anyone at the table even responded to the comment or discussed it in any way. Therefore, there was no clarifying context or basis for interpreting the comment as a reference to anything in particular, let alone anything criminal. Most importantly, McClatchey himself testified that at the time he did not understand Big Eagle's comment to refer to any kick-back scheme: "at the time I didn't know what he was doing or what he meant." [TR 242:2-8].

The admission of this testimony, which was not in reference to any crime charged in the indictment, was extremely prejudicial. In addition to the fact that it was so ambiguous under the circumstances as to have little or no probative value, it was also used in the government's final rebuttal summation to subtly but effectively convey the very conclusion of an intent by Big Eagle to threaten McClatchey's child that the Court had prohibited:

> "I tell you, ladies and gentlemen, when the chairman put his hands on his daughter's shoulders and looked him in the eye and said, 'You are going to play ball with us, aren't you, Craig?" that's something that would stick with you." [3]
>
> [Government's rebuttal summation, TR 49:14-17].

This Court should hold that all testimony from McClatchey, including

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[3] In fact, McClatchey gave no testimony that Big Eagle had put his hands on McClatchey's daughter. [TR 242:1-8].

testimony of Raue's out of court statements to McClatchey and his testimony that Big Eagle had made an ambiguous comment to him, was inadmissible other crimes evidence under Rule 404(b) and that the erroneous admission of McClatchey's testimony about crimes not charged in the indictment substantially prejudiced Duane Big Eagle's right to a fair trial.

CONCLUSION

The Appellant Duane Dale Big Eagle respectfully urges this Honorable Court to reverse and remand for a new trial.

DATED this 5th day of March, 2012

/s/ *Dana L. Hanna*
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because:

this brief contains 11,133 words, excluded the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the typeface requirements of Fed.R.App.P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in 14 points and New Roman Times.

DATED this 5th day of March, 2012.

/s/ *Dana L. Hanna*
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, I electronically filed the foregoing Appellant's Brief with the clerk of the court for the United States Court of Appeal for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Dana L. Hanna*
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