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 REPLY BRIEF

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I

SUMMARY OF ARGUMENTS

Duane Big Eagle has made three assignments of error, each of which involves the admission of similar crimes evidence to which Mr. Big Eagle objected in pretrial motions in limine: (1) the trial court erred in allowing the admission of evidence of crimes and bad acts not charged in the indictment as intrinsic evidence of the briberies and conspiracies charged in the indictment; (2) the trial court erred when it denied his motion in limine to exclude evidence of uncharged briberies and conspiracies, in spite of the failure of the government to give pre-trial notice of its intent to offer such evidence as required by Rule 404(b) of the Federal Rules of Evidence; and (3) the trial court erred in ruling that testimony from Craig McClatchey concerning Duane Big Eagle's alleged involvement in an uncharged bribery conspiracy was admissible evidence.

As to each of the three claims of error raised by Duane Big Eagle in this appeal, the parties dispute the applicable standard of review

The district court's evidentiary rulings are ordinarily reviewed for abuse of discretion. United States v. Montgomery, 635 F.3d 1074, 1089 (8th Cir. 2011). The standard of review is for plain error if a defendant fails to preserve an error by not objecting before or during trial. United States v. White Bull, 646 F.3d 1082, 1091

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(8th Cir. 2011).

Prior to trial Mr. Big Eagle objected to the admission of uncharged crimes evidence in general and to the admission of Craig McClatchey's testimony in particular by filing motions in limine challenging the admissibility of the aforementioned similar crimes evidence. The parties argued the motions in a pre-trial hearing before the trial judge.

At that hearing, the court made rulings in which the court expressly limited the admission of evidence as to some uncharged criminal activity and expressly limited the subject matter of McClatchey's testimony, but otherwise allowed the admission of the evidence of uncharged crimes. The defendant did not renew his objections during the trial.

Federal Rules of Evidence (FRE) Rule 103(a) provides in relevant part: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

The government contends that the court reserved ruling on the motions in limine and the defendant should have renewed his objections during trial to preserve his claims of error. Mr. Big Eagle contends that he was not required to renew his objections to preserve the errors because the court made definitive

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rulings during the pre-trial hearing admitting McClatchey's testimony and other evidence that Mr. Big Eagle had been involved in briberies and conspiracies that were not charged in the indictment.

As to each of the three claims of error raised by Mr. Big Eagle, the issue to be decided is whether the trial court made a definitive pre-trial ruling on the record admitting the challenged evidence.

The proper standard for review is for abuse of discretion, but even if reviewed under a plain error standard, the court's decision to allow the government to present testimony from Craig McClatchey, Norman Thompson, and Scott Raue that Mr. Big Eagle had committed uncharged crimes, in spite of the government's failure to provide the pre-trial notice required by FRE Rule 404(b), without the court weighing probative value against undue prejudice under FRE 403, and without the court instructing the jury that such evidence was only to be considered for the limited purpose of proving intent and knowledge, was plain error that substantially prejudiced Duane Big Eagle's right to a fair trial.

I

EACH OF DUANE BIG EAGLE'S THREE CLAIMS OF ERROR SHOULD BE REVIEWED FOR ABUSE OF DISCRETION.

Prior to trial, Mr. Big Eagle filed written motions in limine to preclude the

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government from offering testimony and evidence of any crimes and bad acts not charged in the indictment. The defendant specifically moved to exclude any evidence extrinsic to the two conspiracies charged in the indictment, those involving kickbacks and bribes from Archie Baumann and Royal Kutz.

Three motions in limine (#3, #4, and #5) are at issue here.

One motion in limine (#3) was general in nature, objecting to the admission of any evidence of similar uncharged briberies or conspiracies. Two motions in limine (#4 and #5) specifically objected to the admission of testimony from Craig McClatchey, an architect who had paid kickbacks to Scott Raue, the school superintendent. All three motions in limine were made on the grounds that the evidence of uncharged crimes was inadmissible under FRE Rules 402, 403, and 404.

In his motion in limine #3 [Add. 3.2], Big Eagle made a general motion to prohibit the admission of any evidence about any alleged bribes paid to any contractor other than Kutz and Baumann. In motion #4 [Add. 3.2-3], Big Eagle specifically moved the court to prohibit any testimony from Craig McClatchey. In Big Eagle's motion in limine #5 [Add. 3.3-4], he moved to prohibit the government from offering McClatchey's testimony as to a question he claimed was made by Big Eagle and his interpretation of that statement as a threat to his

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daughter.

In general, in all three motions in limine, the defendant objected to the admission of the uncharged crimes evidence because such evidence was only relevant to prove the defendant's propensity to commit similar crimes, its probative value was substantially outweighed by undue prejudice, and the government had failed to provide the pre-trial notice required by FRE Rule 404(b).

In its written response to defendant's motions in limine and in its arguments at the pre-trial hearing, the government argued that McClatchey's testimony and the other evidence concerning the defendant's alleged involvement with corrupt contractors other than Kutz and Baumann was not evidence of uncharged crimes at all, that such evidence was intrinsic evidence that Mr. Big Eagle had knowingly participated in the Kutz and Baumann conspiracies, and that therefore FRE Rule 404(b) was not applicable.

In the pre-trial hearing on the motions in limine, the court first heard arguments on the general motion to exclude all evidence of briberies and conspiracies other than those involving Kutz and Baumann. Then the court addressed the defendant's motions to exclude the testimony of Craig McClatchey and made an express ruling, granting in part and denying in part motions in

limine #4 and #5.

> THE COURT: All right. The court understands your argument, Mr. Hanna. It somewhat brings us into the McClatchey testimony as well. 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 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 is a threat involving a child, that's not going to come in.* [TR 25:8-17]. [Emphasis added.]

The court then asked defense counsel if he wished to make further argument as to the motions in limine to exclude McClatchey's testimony. [TR 25:18-20]. Defense counsel argued the defendant's grounds for the motions and stated the fundamental grounds for his objections: "[I]n general, the McClatchey testimony should be precluded–all of it–because it is not one of the conspiracies alleged in the indictment, Your Honor." [TR 25: 21-26:23].

In response, the government argued that the testimony from McClatchey should be admitted because it was not other crimes evidence under FRE Rule 404(b); it was admissible as substantive *intrinsic* evidence of "a conspiracy to shake down contractors." [TR 27: 2-29: 4].

After considering arguments from both counsel, the court granted in part the defendant's motion to exclude McClatchey's testimony, prohibiting admission of McClatchey's testimony about his daughter, but otherwise admitting

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McClatchey's testimony. The court then went on to rule on the defendant's general motion to exclude evidence of crimes and conspiracies not charged in the indictment.

> THE COURT: The court's inclination is to grant the motion in limine only to the extent of prohibiting Mr. McClatchey from testimony about Mr. Big Eagle's comments being some threat to his daughter.
>
> The Court is going to allow some latitude to the government to put in intrinsic evidence, context-type evidence that necessarily is going to involve events outside of the conspiracy period, like who had what position and when, when contractors start doing business with the tribe, and on what projects, for example. Some of those–some of that is necessary to allow the jury to understand the context into which the core facts fit.
>
> The latitude might get a little bit–probably will get a little bit less when it comes to discussions of payments of money and bribery, particularly if that relates to something other than the Crow creek tribal School project of the second incident, that is the subject of the later conspiracy. For example, we are not going back to 1995 to talk about the belief that people had of Mr. Big Eagle receiving bribes then.
>
> So that is the preliminary ruling of the Court. The Court will make further rulings on objections as the case progresses.

[TR 32:15-33:12].

The record disproves the government's contention that the court reserved its rulings on the defendant's motions in limine until trial. At no time did the court state that it was reserving its ruling or deferring its ruling or declining to rule on the motions until the evidence was offered in trial. The court ruled that the McClatchey testimony was admissible, but for testimony about his daughter. As to the general motion to preclude any evidence as to other crimes, the court ruled that

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it would allow the government to offer "intrinsic evidence" as to contractors other than Kutz and Baumann. For purposes of FRE Rule 103(a), the court made a definitive ruling that McClatchey's testimony would be admitted. The court's ruling that testimony about Big Eagle's involvement with contractors other than Kutz and Baumann would also be admitted was also a definitive ruling for purposes of FRE Rule 103(a).

The fact that the court referred to these rulings as "the preliminary ruling of the court" does not make its ruling tentative or conditional, or not definitive for purposes of FRE Rule 103(a). Nor does the court's statement that it would rule on objections made during the trial mean that the court had not made a definitive ruling admitting the challenged evidence.

"[T]he advisory committee notes to Rule 103 clearly contemplate that rulings on motion *in limine* can be definitive for purposes for Rule 103 even though they may later be revisited." United States v. Ogles, 406 F.3d 586, n.2 (9th Cir. 2005). Here, the court's statement simply expressed its recognition that a trial court always retains its power to revisit a decision on a motion in limine when the evidence is offered at trial. "[I]*n limine* rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial." Ohler v. United States, 529 U.S. 753, 120 S.Ct. 1851, 1854, n.3 (2000). "Even though the

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court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision [on a motion *in limine*] when the evidence is to be offered." Fed.R.Evid. 103, Advisory Committee Notes.

Nor can the words "So that is the preliminary ruling of the court" be construed to mean that the court had declined to rule on the motions. Any ruling on a motion in limine is, by definition, a preliminary ruling. See: Black's Law Dictionary (8th edition, 2004), defining "in limine" as "preliminary; presented to only the judge, before or during trial" and a motion "in-limine" as a motion for an order "raised preliminarily, esp. because of an issue about the admissibility of evidence believed by the movant to be prejudicial." All rulings on motions in limine are preliminary rulings in that they that are subject to a court's inherent power to change a definitive ruling on a motion in limine during the course of trial.

Once the court specifically ruled that McClatchey's testimony was admissible and generally ruled that evidence involving other contractors was admissible intrinsic evidence, the defendant did not have to renew his objections during the trial in order to preserve the error for appeal. See: In re Air Crash At Little Rock Arkansas, 291 F.3d 503, 515 (8th Cir. 2002).

This case is clearly distinguishable from those cases in which a Court of

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Appeals held that a trial court had not made a definitive ruling for purposes of FRE Rule 103(a) when the trial court had expressly stated that it was reserving decision on the motion or had expressly stated on the record that its ruling was "tentative" or otherwise conditional. See: Walton v. Georgia's-Pacific Court, 126 F.3d 506 (3rd Cir. 1997), in which the district court expressly stated that its in limine rulings were "tentative".

In United States v. Malik**,** 345 F.3d 999 (8th Cir. 2003), the trial judge heard and made a ruling on a pre-trial motion in limine. The context of the ruling included giving directions to witnesses. This Court of Appeals ruled that the trial court's ruling was definitive. Malik, at 1001. Here, the context of the trial court's ruling included giving specific directions to the government that the witness McClatchey was not to testify about his interpretation of a question put to him by Big Eagle, thus making it clear that his testimony as to Big Eagle's statement would be admitted into evidence along with the rest of McClatchey's testimony. The trial judge also directed the prosecutor not to adduce evidence of corrupt agreements not involving the Crow Creek School or evidence of possible bribery crimes from 1995, thus making it clear that otherwise the testimony involving other contractors was admissible. As in Malik, the trial court gave specific directions as to the parameters of the testimony the court would allow the

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government to present. The court's statements on the record constituted definitive rulings on the defendant's objections to the uncharged crimes evidence in general and to McClatchey's testimony in particular.

Therefore, the objections were preserved and each of Mr. Big Eagle's three claims of error should be reviewed for abuse of discretion.

II

THE ADMISSION OF McCLATCHEY'S TESTIMONY AND OTHER EVIDENCE OF CRIMES, WRONGS AND ACTS NOT CHARGED IN THE INDICTMENT WITHOUT THE PROCEDURAL SAFEGUARDS REQUIRED BY RULE 404(b)WAS PLAIN ERROR.

Even reviewed under a plain error standard, the admission of McClatchey's testimony and that of Scott Raue and Norman Thompson that Duane Big Eagle had participated in crimes not charged in the indictment, without subjecting that evidence to a limiting instruction or any of the procedural safeguards required by FRE Rule 404(b), was reversible error.

FRE Rule 404(b) provides, in relevant part: "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,

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knowledge, identity, or absence of mistake or accident ***."

Here, the testimony of McClatchey, Raue, and Thompson as to Big Eagle's involvement in bribery and kickback agreements not charged in the indictment was textbook other crimes, wrong or acts evidence under FRE Rule 404(b). If it was admissible at all, it was only admissible for the limited purpose of proving intent, knowledge, and method.

At the pre-trial hearing on the defendant's motions in limine, the court noted that "the object of the conspiracy [charged in the indictment] is to insure that Kutz Construction would be awarded funds." [TR 29:5-23]. The court then asked the government what evidence the government intended to offer, other than McClatchey's testimony, as to other contractors not named in the indictment and for what purpose such testimony would be offered. The government responded by saying it would offer evidence to show "generically, how widespread was the corruption" and that such evidence was "intrinsic evidence" of a wide-spread conspiracy to get bribes from contractors, rather than Rule 404(b) evidence. Although the government argued that the evidence was not other crimes evidence under Rule 404(b), government counsel stated to the court that it wanted to offer such evidence to prove defendant's knowledge and intent to commit the crimes charged–precisely the limited purposes for which such evidence is admissible

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under Rule 404(b).

> THE COURT: So you believe that the evidence would come in on the intent to be part of a conspiracy and the knowledge of the existence of the conspiracy?
> MR. ROSTAD: Absolutely, Your Honor. And the method as to how the conspiracy operated.

[TR 30:25-31:2].

Evidence of uncharged crimes to prove intent, knowledge and modus operandi are precisely the limited purposes for which other crimes evidence can be admitted under Rule 404(b). Nevertheless, the government argued that a Rule 404(b) limiting instruction was not appropriate because in the government's view, evidence of widespread corruption involving McClatchey and other contractors was intrinsic evidence to prove the existence of the Kutz and Baumann conspiracies and the defendant's participation in those conspiracies. [TR 31:5-15].

If the McClatchey testimony and the other similar crimes evidence was admissible at all, it was only admissible under Rule 404(b), which meant that it was subject to exclusion because the government had not responded to the defendant's request for pre-trial notice. It should only have been admitted for the limited purposes of proving intent and knowledge and the court should have so instructed the jury. It should only have been admitted after the court had made a balancing analysis on the record of probative value against undue prejudice under

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Rule 403. Without those procedural safeguards that are required before Rule 404(b) evidence can be admitted, there is every probability that the jury considered the testimony as proof of defendant's propensity to commit similar crimes.

It was plain error for the court to accept the government's position that McClatchey's testimony and the other evidence of uncharged conspiracies and briberies was intrinsic evidence that was admissible to prove a vast wide-spread conspiracy to "shake down" contractors, rather than Rule 404(b) evidence of uncharged crimes. The fatal flaw in the government's argument is that the indictment did not charge the defendant with participating in a vast, wide-spread conspiracy to shake down contractors. It charged that when he was tribal chairman, he participated in a conspiracy to extract bribes from Royal Kutz and three years later, when he was no longer in tribal government, he participated in a conspiracy to extract bribes from Archie Baumann.

If this Court were to rule that evidence of bribes paid by McClatchey and other contractors is intrinsic evidence of the conspiracies whose objects were to extract bribes from Kutz and Baumann, it would effectively nullify Rule 404(b). It would mean that evidence of similar crimes would practically always be viewed as intrinsic evidence not subject to Rule 404(b). McClatchey's testimony in particular, as well as that of Raue and Thompson, about crimes that did not

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involve any attempt to extract bribes from either Baumann or Kutz was only relevant to prove propensity, to show the jury that if the defendant had taken bribes before, then he must have acted in conformity with his propensity to do so this time, too. Without a Rule 404(b) instruction, that was the foreseeable result of the admission of this evidence.

Although the government consistently argued at the pre-trial hearing, in its brief, and on appeal that Rule 404(b) has no application to the challenged evidence in this case, the government nonetheless argues on appeal that Mr. Big Eagle should have requested a Rule 404(b) instruction. It is true that after the court ruled that it would allow the government to offer "intrinsic evidence" from McClatchey and other witnesses as to crimes and acts not charged in the indictment, the defendant chose not to request a Rule 404(b) limiting instruction. There would have been no legal basis for such a limiting instruction, since the evidence had been admitted as intrinsic evidence of the crimes charged in the indictment, not as extrinsic evidence under FRE Rule 404(b).

Once the court has made a ruling on a motion in limine, "the parties are entitled to treat the ruling as the law of the case and to rely on it." United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993)(internal quotations omitted); Cook v. Hoppin, 783 F.2d 684, 691 n.2 (7th Cir. 1986). Here Mr. Big Eagle would

have had no basis in the law to request a Rule 404(b) instruction after the court had already ruled to admit such evidence as intrinsic evidence of the crimes charged, which necessarily meant that Rule 404(b) was not applicable to either the McClatchey testimony or the other testimony about the defendant's involvement in uncharged crimes. That pre-trial ruling was the law of the case and Duane Big Eagle had a right to rely on it. A request for a jury instruction that would have contradicted the court's prior ruling would have served no purpose.

Here, the government takes two directly contradictory positions. The government argues that the admission of evidence of uncharged conspiracies to get kickbacks from McClatchey and other contractors was not governed by Rule 404(b), but at the same time the government argues that the defendant should have asked for a Rule 404(b) instruction as to the limited purpose of such evidence. The government's directly conflicting arguments both highlight the fundamental error in the government's argument and prove plain error. If, as the government contends in its brief, a Rule 404(b) instruction would have been proper, that necessarily means that the testimony of McClatchey, Raue and Thompson was not intrinsic evidence of the crimes charged in the indictment; it was other crimes evidence under Rule 404(b) and its admission, without a limiting instruction or any of the procedural safeguards required by Rule 404(b), was plain error.

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By allowing the government to offer highly prejudicial evidence of bribes and conspiracies not charged in the indictment, without requiring the government to provide pre-trial notice, without making an on the record balancing test under FRE Rule 403, and without instructing the jury that such evidence was only to be considered for the limited purpose of determining whether the defendant knowingly and intentionally participated in the crimes charged in the indictment, the court committed plain error that substantially prejudiced the defendant's right to a fair trial.

CONCLUSION

The court should reverse Duane Big Eagle's convictions and remand for a new trial.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

this reply brief contains 3,799 words, excluded the parts of the replybrief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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

DATED this 14th day of May, 2012.

/s/ *Dana L. Hanna*

Attorney for Appellant

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2012, I electronically filed the foregoing Appellant's Reply 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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