IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **vs.** **DUANE BIG EAGLE,** **Defendant-Appellant.**	**C.A. 11-3754** **D.C. No.: CR 10-30088**

BRIEF OF APPELLEE UNITED STATES

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

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

In 2005, a fire at the Crow Creek Indian School destroyed some of the dormitory buildings. With federal funds, Tribal Chairman Big Eagle and the Tribe hired contractors who would kickback cash from inflated invoices. Big Eagle was at the center of the bribery. He was indicted for two conspiracies, one involving the kickback scheme with Kutz Construction after the 2005 fire, and another involving a similar kickback scheme with Baumann in 2008. But both conspiracies are tied together by the rampant corruption in the Big Eagle administration. Any contractor who wanted work had to be willing to pay Big Eagle and his co-conspirators bribes and kickbacks.

The issue is whether evidence from other contractors was intrinsic to the conspiracies involving Kutz and Baumann. At the *in limine* hearing, the district court agreed that the corruption was inextricably tied together, but it reserved ruling until trial. Big Eagle never objected further. On plain error, the convictions should be affirmed. The United States requests fifteen minutes of oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. Section 3231. This Court has jurisdiction under 28 U.S.C. Section 1291. Judgment was entered November 30, 2011. CR 106.[1] Big Eagle timely appealed on December 13, 2011. CR 112.

STATEMENT OF THE ISSUES

I. Whether the issues raised by Big Eagle concerning the admission of evidence under Rule 404(b) should be reviewed only for plain error.

United States v. Krapp, 815 F.2d 1183, 1188 (8th Cir. 1987).

II. Whether evidence of an agreement by Big Eagle and other tribal officials to solicit corrupt payments from contractors not named in the indictment was inextricably intertwined with and intrinsic to the charges of conspiracy to solicit bribes and kickbacks from Kutz and Baumann.

United States v. Johnson, 463 F.3d 803 (8th Cir. 2006).

III. Whether the "other contractor" evidence was separately admissible under Rule 404(b), and whether Big Eagle was unfairly prejudiced by its admission.

United States v. Clarke, 564 F.3d 949 (8th Cir. 2009).

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[1] "CR" refers to the District Court docket entry number.

IV. Whether the government violated the district court's order limiting the admission of evidence about a perceived threat Big Eagle posed to the daughter of a contractor who was being pressured to make kickback payments to Big Eagle and various tribal officials.

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

STATEMENT OF THE CASE

On October 13, 2010, Duane Big Eagle was charged with four counts related to solicitation of bribes and kickbacks on the Crow Creek Sioux Indian Reservation. CR 3. In Count I, the indictment charged that, from on or about July 19, 2005 until about December 15, 2005, Big Eagle, Scott Raue, and Royal Kutz, with other persons known and unknown, conspired to corruptly give contracts to Kutz Construction for work on the Crow Creek Indian Schools in return for bribes and kickbacks in violation of 18 U.S.C. § 371. In Count III, the indictment charged that, between on or about May of 2008 and about October 21, 2008, Big Eagle, Raue, Archie Baumann, Randy Shields, and Norman Thompson, Sr., with other persons known and unknown, conspired to corruptly give Baumann highly advantageous loan agreements and contracts for work on the Crow Creek Tribal Schools in exchange for bribes and kickbacks in violation of 18 U.S.C. § 371.

In Count IV, the indictment charged Big Eagle with knowingly aiding and abetting a corrupt payment to Randy Shields, Vice Chairman of the Crow Creek Sioux Tribe and a member of the school board, and Norman Thompson, Sr., Treasurer of the Tribal Council and a member of the school board, to influence their decisions on execution and payment of promissory notes, and to influence them to award a construction contract to Archie Baumann in violation of 18 U.S.C. § 666(a)(1)(B), and (2).

On August 1, 2011, the district court held a hearing on Big Eagle's motion *in limine* to exclude evidence about corrupt payments solicited from and made by other contractors. TR 1-33.[2] The district court reserved ruling on the motion and the case proceeded to trial. TR 32-33. After a four day trial, the jury convicted on Counts I, III, and IV. Big Eagle was sentenced to a term of 36 months. CR 111. Judgment was entered on November 30, 2011. CR 111. Big Eagle timely appealed on December 13, 2011. CR 112.

[2]"TR" refers to the trial transcript.

STATEMENT OF THE FACTS

A. Big Eagle's successor finds corruption in the administration of the Crow Creek Tribal School.

The Crow Creek Sioux Tribe has between 1200 to 1300 enrolled members. TR 45:8. Duane Big Eagle served as the chairman of the Crow Creek Sioux Tribal Council from May of 1992 through May of 1998 and from May of 2002 through May of 2006. TR 45:23-25, 46:1-6. He was again serving as chairman at the time of the trial in 2011. *Id.* Also serving on the tribal council during the 2002-2006 Big Eagle administration was Norman Thompson, Sr., Randy Shields, and Loren "Rocky" Fallis. TR 91:14-16.

The tribal chairman presides over all tribal council meetings and exercises the authority granted to him by the tribal council. TR 367:6-8. Where a tribal council vote is tied, the chairman breaks the tie. TR 367:10. Based on the Crow Creek Sioux Tribe policies and procedures, the chairman has power over the day-to-day operations, the discipline of employees, and the issuance of checks. TR 367:17-24. The chairman of the Tribe is also the chairman of the school board, the housing board, and the gaming commission. TR 368:12-15.

After the Big Eagle administration ended, Lester Thompson was elected tribal chairman in May of 2006. TR 367:25, 368:1-2. The financial condition of the Tribe was "very, very poor" when Thompson came into office. TR 368:5. The Crow Creek Tribal School was no exception. The Crow Creek Sioux Tribal School is a grant school that gets its money from the federal government. TR 90:23-25, 91:1-2. Despite an average yearly grant of between $8 and $12 million dollars, the school was in severe financial trouble. TR 94:11-18. The money was gone, it owed substantial back taxes, and it faced closure. TR 368:7-11.

After looking through the tribal books to find out where the school's money had gone, Lester Thompson called law enforcement because it was evident that there was a misuse of funds. TR 370:8-25, 45:9-14. An investigation of corruption at Crow Creek Sioux Tribe began and led to the conviction of eight individuals, including Raue, Kutz, Norman Thompson, Sr., Archie Baumann, and others. TR 45:9-14, 46:23-24, 47:2-3.

During Lester Thompson's administration, 2006-2008, the tribal council ceased doing business with contractors they believed may have

been involved in the corruption including Royal Kutz and Archie Baumann. TR 371:1-10.

B. After a fire at the Crow Creek School in 2005, Big Eagle and the tribal council hire contractors to do emergency repairs and extract kickbacks.

The governing body of the Crow Creek Tribal School Board is made up of the tribal council. Councilmen automatically become members of the school board. TR 91:2-11, 262:10-13.

In April of 2005, there was a fire at the Crow Creek Sioux Tribal School. TR 91:17-19. It did major damage to the dormitory. TR 91:22-25, 263:11-18. The fire also damaged other school buildings including the administration building. TR 263:23-24. Fixing the dormitory was an emergency. The school needed the dormitory to retain eligibility for funding. TR 94:1-7.

The school received $900,000 from the federal government and $3.5 million from insurance related to the fire. TR 93:15-23. The contracts to rebuild the dormitory did not have to go through any competitive bidding. TR 94:23-25, 95:1, 264:14-18. The tribal council, including Big Eagle, and Scott Raue, superintendent of the school, picked contractors who were willing to pay bribes to Raue and members

of the council. TR 95:2-17, 270:21-25, 271:1-16. Although the council gave Raue authority to hire contractors, the council controlled Raue's job and collaborated on his hiring decisions. TR 156:15-25, 157:1-7. After a time, Raue, Big Eagle, and, sometimes, councilman Norman Thompson, Sr. selected them. TR 264:20-24.

Big Eagle, Raue, and the tribal council hired a number of contractors to work on the emergency school repairs. They included Royal "Shorty" Kutz of Kutz Construction, architect Craig McClatchey, Guest Electric, Archie Baumann of First Dakota Enterprises, Nystrom Electric, and Klein's Office Supply. TR 95:14-21. McClatchey had worked on prior projects at Crow Creek and had been willing to make bribe payments. TR 100:19-20. The biggest contractors working on the post-fire projects were the construction contractors Kutz, Baumann, and Drifting Goose, a company owned by Baumann's girlfriend. TR 264:25, 265:1-10.

C. Contracts for work at the school were inflated with the understanding that the contractor would pay Big Eagle and the council kickbacks.

At trial, Raue described how the conspiracy worked. In the beginning Raue was more of a middleman who would tell the

contractors how much the council wanted, arrange the contracts, and deliver the payments. TR 96:9-20. If, for example, a project would cost $100,000, the corrupt council members would tell Raue how much money they wanted from a contract as a bribe or kickback, e.g. $30,000. TR 95:22-25, 96:1-8. Raue would then make the contract with the contractor for $150,000, collect $30,000 as the kickback, and leave the contractor with a $20,000 profit. TR 95:24-25, 96:1-8. Not all council members would get the bribe money. Raue shared bribe money with Big Eagle, Norman Thompson, Sr., and Shields. TR 96:24-25, 97:4-11. Raue was extracting bribes from contractors both before and after the fire of 2005. TR 144:9-15.

After the fire, during the summer of 2005, Raue continued to extract payments from the contractors. TR 97:22-24. The cash kickbacks were between $2,500 and $5,000. TR 98:1-3. Raue delivered the money to the other conspirators either individually or together. TR 98:4-24. He delivered Big Eagle's share at either of Big Eagle's two homes, and at times, Big Eagle came down to the school to get his money. TR 99:14-17.

D. Shorty Kutz, a non-Indian contractor, agrees to make kickback payments to Big Eagle and the tribal council.

Shorty Kutz, owner of Kutz Construction, had done work for the Crow Creek Sioux Tribe for years. TR 63:4-18. He is not a member of the Tribe and does not live on the reservation. TR 64:4-7. In April of 2005, Raue contacted him about working on the Crow Creek Tribal Schools after the dormitory fire. TR 64:8-19. Kutz agreed to make kickback payments in exchange for the work. TR 78:10-16, 87:15-17.[3]

It was the same basic scheme that applied to all of the contractors. Kutz paid Raue, who distributed kickbacks to Big Eagle and the participating council members, including Thompson, Sr., who remembered getting kickbacks on two or three occasions. TR 268:1-25, 269:1-4.

At times, Raue would deliver the kickback money to the Bait Shop at Fort Thompson where Big Eagle, and councilmen Randy Shields and Thompson, Sr. would be waiting. TR 270:2-16. Thompson, Sr. remembered when Raue came in and put the money on the pool table to distribute. *Id.* Raue kept $2,000 for himself, and doled out $2,000 to

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[3]Prior to his testimony, Kutz was convicted of bribery. TR 79:3-14.

Thompson, Sr., $2,000 to Shields, and $4,000 to Big Eagle, who got the most because he was the chairman. TR 270:2-16. He also remembered conversations with Big Eagle on many occasions about how to select contractors to keep money coming to the council members. TR 270:21-25, 271:3-23.

Kutz admitted to the scheme. He gave cash to Raue approximately four times while working on the school project. TR 65:21-25, 67:16-23. Sometimes he gave the cash directly to Raue, sometimes he left the cash under a bucket in Kutz's garage. TR 67:16-23. Kutz would leave a blade on top of the bucket as a signal to Raue that cash was under the bucket. TR 68: 2-5.

Kutz's pattern was to present a bill for payment for work on the schools and, as soon as he received a check from the Crow Creek Tribal accounts, he would deposit the check and withdraw cash in the amount of $8,000 to $10,000. TR 69-77. The following are examples of such transactions in 2005:

- July 19, $62,280 billed by Kutz, he was paid immediately, $10,000 in cash immediately withdrawn, TR 69-71;

- August 3, $62,730.04 billed, paid August 5, deposited immediately, $10,000 withdrawn, TR 72-73;[4]

- August 30, $64,839.60 billed, paid September 1, deposited Sept. 2, and $8,000 cash withdrawn, TR 73-74; and

- September 14, billed $74,906, paid September 17, deposited that same date and $10,000 in cash withdrawn, TR 74-75.

Raue even channeled Kutz's kickbacks through another contractor:

- December 12, billed $25,851 through Nystrom Electric at Raue's request, Nystrom pays that same date, money deposited that same date and $10,000 in cash withdrawn, TR 76-77.

According to Raue, he asked Kutz to bill through Nystrom to hide the money. TR 102:16-21.

Kutz admitted that Raue was shaking him down for money:

> Q. You were getting shaken down by Scott Raue, weren't you, sir? He was demanding payments in exchange for work?
>
> A. Yes. I guess you could say that, yeah.

[4] Big Eagle executed the requisition for this payment. TR 107:6-14.

TR 87:15-17. He admitted that he was troubled by being asked for money from Raue, yet Kutz did not go to the tribal council, or Big Eagle, to complain. TR 79:3-14.

Kutz denied having any relationship with Big Eagle. TR 78:18-25. Raue remembered things differently. Raue recalled driving with Big Eagle to Kutz's residence in Highmore at a time when Kutz and Thompson were not getting along. TR 101:20-25,102:1-10. Big Eagle went into the house and met with Kutz. *Id*. When Big Eagle came out to the vehicle, he told Raue that Kutz was back on and ready to work. TR 102:7-8. After that, Kutz continued to make bribe payments. TR 102:5-10. Raue recalls giving Big Eagle money from Kutz on several occasions. TR 127:10-12, 129:5-10.

E. Architect McClatchey also agrees to pay kickbacks to Big Eagle and the tribal council through Raue.

Craig McClatchey is an architect who worked on projects for the Crow Creek School. TR 100:12-18, 233:14-24. In June of 2002, Raue approached McClatchey for a loan of $2,000. TR 234:5-22. After several months, McClatchey asked him to repay the loan. TR 236:19-

25, 237:1-3. Raue told him he would not be paid back. *Id.* McClatchey remembered the conversation in his testimony:

> He said, "Oh, by the way, there won't be any paying back of that loan. As a matter of fact, from here on out, your invoice of $9,000, we want $3,000 back."
>
> And I said, "We? Who's the 'we'?"
>
> He says, "The tribal chairman." He did not name him. He just simply said, "The tribal chairman has decided, if you are to do any more work up here, you are an out-of-state person, you are not on the tribe-you know, you need to be giving us back a third of what you are paid," whatever my invoice was.

Id.

Eventually, McClatchey started paying kickbacks just like the other contractors. McClatchey testified that he resisted at first, but the Crow Creek Tribe was his only client. TR 237:16-18. McClatchey paid between $80,000 and $120,000 during the course of 20-30 invoices. TR 234:1-4. In exchange, McClatchey got several projects for the Crow Creek Tribal School between 2002 through 2005, including the gymnasium, dormitories, administration building, high school addition and others. TR 238:8-15.

Like Kutz, McClatchey also paid the kickbacks to the council and Big Eagle through Raue. As Big Eagle elicited at trial, McClatchey would send an invoice for work not done, Raue would send a check, McClatchey would cash it and send back the money. TR 148:1-12. McClatchey sent the cash by Federal Express to Raue's mother's house. TR 140:9-12. Raue also admitted to extracting bribes from contractors before and after the fire of April 2005. TR 144:9-15.

After the April 2005 fire, Rick Hahn a structural engineer contacted McClatchey about working on the Crow Creek School dormitory. TR 238:19-25. At this point, McClatchey had other clients and he did not want to pay extortion money. He indicated that he would only work on the project if Hahn agreed to be the person administering the contract. With Hahn managing the contracts, he thought he could avoid paying the bribes. TR 239:1-18.

Big Eagle however attempted to get McClatchey to continue with the bribes. At a restaurant in Pierre, Big Eagle approached McClatchey and asked "you're going to play ball with us, aren't you, Craig?" TR 249:3-11.

F. Baumann and First Dakota also pay kickbacks to Big Eagle and the tribal council until the Thompson administration.

Archie Baumann was a general contractor in commercial and residential construction through his business, First Dakota Enterprises, Inc. He is not an enrolled member of the Tribe and does not reside on the reservation. TR 167:13-23. After the fire in 2005, Baumann worked on projects at the school. TR 103:11-25, 168:3-15. This work was done through Drifting Goose Construction as prime contractor with Baumann as the subcontractor. TR 168:3-15.

Baumann and Big Eagle had been friends for many years. TR 206:6-8. Baumann helped out Big Eagle in the past because he was a friend and for "other reasons." TR 219:10-20.

At trial, Raue admitted that, in addition to Kutz and McClatchey, he collected kickbacks from Baumann, but generally Baumann would pay Thompson, Sr. and Big Eagle directly. TR 104:1-6.

In February of 2006, just before Big Eagle left office as chairman, Big Eagle signed a note borrowing money from Baumann for the Tribe and the school board in the amount of $200,000. TR 105:2-25. The note provided for the payment of very high interest and penalties with a

direct assignment from the insurance policies related to the school fire. The payment to Baumann in May 2006, just 3 months later, was $232,656, which reflected the high interest and penalty rates. TR 105:6-25, 106:1-2, 170:17-22. The payment also reflected a loan fee to Baumann of $25,000 plus an additional $5,000 per month until paid in full. TR 168:21-25, 169:1-12.

In May of 2006, Lester Thompson was elected chairman. Big Eagle was no longer on the tribal council. Neither was Norman Thompson, Sr. TR 107:15-20, 271:24-25, 272:1-4. While Lester Thompson was away from Crow Creek to lobby for more money after finding the coffers empty upon taking office, Randy Shields, who was on the new council, presented another check from Baumann to the Tribe for $300,000 along with a note that would provide for penalties of $1,000 a day after 30 days. When the new chairman returned, he expressed very strongly that the loan from Baumann was not a good deal for the Tribe. TR 369:8-23.

Under Lester Thompson's leadership the new council took steps to cease doing business with Baumann and Kutz. TR 371:1-10. Baumann did not do any work for the Tribe from 2006 to 2008. TR 171:2-8. Also,

Raue was let go from his job as superintendent in June of 2006, whereupon he started working for Baumann's girlfriend at Drifting Goose Construction. TR 107:21-25. Drifting Goose operated out of the same building as Baumann's company, First Dakota Enterprises. TR 108:1-11. Raue worked for Baumann even though he was paid by Drifting Goose. TR 108:16-25, 109:1.

G. After the Thompson administration, the corruption resumes.

In 2008, a new tribal council was elected. Brandon Sazue was elected chairman in May 2008. TR 171:9-13, 372:21-25. Sazue ran against Big Eagle for the chairman position and won. TR 378:23-25. Norman Thompson, Sr. was elected Treasurer. TR 272:5-8. Randy Shields was elected as Vice-Chairman. TR 373:12-15. That year, the Crow Creek Tribal School received about $9 million in funds from the Bureau of Indian Affairs, Bureau of Indian Education in Washington. TR 262:19-25.

Soon after Sazue was elected, Shields offered Sazue a check from a man Sazue did not know. TR 373:12-15. The check was from Archie Baumann. TR 373:16-24. Sazue did not ask Shields why he was

getting a check because his heart started beating real fast and Sazue had not asked for anything. TR 374:1-4. Soon after the first check, Shields and Thompson, Sr. came to Sazue with a $3,000 check from Baumann. Sazue was to cash it and give Shields $1,000, Thompson, Sr. $1,000 and keep $1,000 for himself. TR 375:21-25, 376:1-11. Sazue took and spent the $1,000. *Id*.

Sazue became even more concerned when the tribal council held a meeting in his absence and passed a resolution giving Sazue authority to sign contracts. TR 374:17-25. Sazue took his concerns to law enforcement and agreed to assist by wearing a wire to record conversations. TR 375:6-15; 376:12-24. At the start of his cooperation Sazue turned over $1,400 in cash he had received from Baumann. TR 50:14-16.

Thompson, Sr. testified that once he got back on the council in 2008, he was going back to Archie Baumann of First Dakota to get money. TR 272:9-16. Baumann's incentive to pay was to get the council to approve payment on outstanding loans and to consider Baumann's business for new contracts to build some houses at the school. TR 272:17-20. During that summer, Thompson, Sr. admitted to

receiving about $12,000 from Baumann, of which $3,000 went to Sazue. TR 273:8-21.

Baumann testified that Thompson, Sr. and Shields came to him to borrow money for the Tribe. TR 171:18-21. Baumann agreed to lend them $160,000, but said the penalties would be severe. TR 172:2-9. On June 18, 2008, Baumann transferred $160,000 from his personal account to the Tribe. TR 172:12-20. The next day, Baumann issued checks to Shields ($4,000), Thompson, Sr., and Sazue ($1,000). TR 172:22-25, 173:1-5. Baumann did not make "loans" to anyone else at the time. TR 173:17-25, 174:1-10. On July 17, 2008, the Crow Creek Tribe issued a check to Baumann in the amount of $209,271 to repay him for the one month loan of $160,000. TR 174:14-24.

Baumann wired an additional $50,000 to the Tribe on August 8, 2008. He did not have a repayment agreement signed at the time. TR 175:12-25. A day earlier, Baumann had written a check to Sazue for $3,000 which Shields picked up. TR 175:2-11. Also during that month, Thompson, Sr. and Shields told Baumann that the Tribe may have some carry-over funds and they wanted Baumann to give them a price to build some new houses for teachers at the school. TR 176:5-17.

Baumann had a contract drawn up for $383,740 to do the work. TR 177:3-12. Baumann also had his attorney prepare a note for the $50,000 loan that included interest and a $300 per day penalty which was already overdue before it was prepared and signed. Baumann never did receive a signed copy of the note. TR 180:2-17.

H. Sazue wears a wire to collect evidence of the kickback scheme.

On October 21, 2008, Sazue, wearing a recording device, went to First Dakota Enterprises. When Sazue arrived, Raue, Thompson, Sr., Rocky Fallis, Shields, Big Eagle, and Baumann were all there. TR 49:7-19, 111:11-13, 274:2-7. Raue was already under indictment for bribery related to bribery activities after the fire in 2005. TR 121:6-20. His trial was scheduled for December 2, 2008. TR 122:17-19.

Not all of the meeting was taped. TR111:17-18, 274:8-9. Prior to Sazue's arrival Thompson, Sr., Big Eagle, and Shields were discussing ways to get money out of Baumann. TR 274:17-25, 275:1-10. They discussed loans that would pay Baumann unfairly high rates and a contract to build houses as a way that would get Baumann to give them money. TR 150:6-25, 151:1-4. "We were supposed to get him some

contracts to start some houses. And if we wanted some money, then that's -- that would be the only way to get it." TR 276:1-9. They also discussed Raue's defense in the upcoming trial. TR 111:20-25, 112:1-9. Big Eagle took an active part in these plans and was going to be a witness in Raue's defense. TR 114:18-25, 151:20-25, 152:1-4.

Later, after Sazue arrived, the recording commenced and the group discussed how to get money to Big Eagle, who was no longer on the council. Baumann could just write the check to Big Eagle, they schemed, and then Big Eagle could cash and distribute the money to Thompson, Sr., Shields, and Sazue. TR 115:1-9, 186:1-17.

Baumann was nervous because Kutz, Raue, and Nystrom had all been indicted. TR 224:11-25. Baumann made out the $5,000 check to Big Eagle so that everyone, including Big Eagle, would get a piece of the action. TR 226:7-12, 275:8-20.

Sazue's tape recording, which was played for the jury, captured the conspiracy in action.[5] Several of the other contractors working in 2005 were discussed in the long conversation about Raue's defense. US

[5] A transcript was submitted to the jury to read along with the recording as exhibit 35-A. TR 397:10-25, 398:1-8. The transcript is submitted in the U.S. Appendix and cited to herein as "US App."

App. 25:1-3 and 18-24, 31:1-15, 32:11-20, 37:20-23. The parties also discussed how all of them, not just Raue, might need a defense. US App. 37:6-15. In trying to get Baumann to give them money, Big Eagle suggests putting a pen on top of Baumann's checkbook and trying to corner him. US App. 30:1-3. Thompson, Sr. talks about getting five, referring to $5,000. US App. 39:15-18. Big Eagle agrees that someone should have "dropped" Lester Thompson because he is "a hazard." US App. 39:1-8.

Finally, after much discussion, Big Eagle tells the group to put the check in his name. US App. 48:12-15. He states:

> Big Eagle: Yeah, yeah. Anyway, so, if you guys want me to do anything I'll do it.
>
> Baumann: Alright.
>
> N. Thompson Sr.: Well, want to write you a check in your name you know.
>
> Big Eagle: That's fine. No problem. I'm probably a stretched old man anyway.
>
> Baumann: So you a, when, when, when do you want to go to jail?
>
> Big Eagle: Anytime before December 2nd.

US App. 56:15-23.

As the conversation progresses, Baumann confirms that Big Eagle wants the check written to him. US App. 57:15-16. Baumann states "you boys are too expensive." US App. 59:12-13. Then Big Eagle asks Baumann to tell the bank to stay open until he gets there with the check. Baumann calls to make sure the money is in his account. US App. 58:7-14. Then, Baumann and Big Eagle state:

> Baumann: What do you want me to say this is for, you're so fxxxxxx ugly?
>
> Big Eagle: Consulting. Then you guys will (unintelligible) tonight.
>
> Baumann: I already have a consultant, Earl Bordeaux. He's already being investigated by the IRS, the FBI.

US App. 58:17-22. Big Eagle then proceeds to leave, cash the check, return and divvy up the $5,000 in cash – $1,000 to Sazue, $1,000 to Thompson, Sr., $1,000 to Shields, $1,000 to Rocky Fallis, and $1,000 to himself.

I. At a pre-trial hearing on Big Eagle's motion *in limine*, the court reserves its ruling on the admissibility of corrupt payments made by contractors other that Kutz and Baumann.

At issue prior to trial was a motion *in limine* by Big Eagle to exclude evidence of bribery and kickbacks by other contractors,

including McClatchey. Big Eagle argued that the evidence fell within Rule 404(b) and required formal notice pursuant to the Rule. CR 67, p. 3-5. The United States in response asserted that the testimony of contractors working on the school project was intrinsic, *res gestae* evidence and not subject to Rule 404(b). CR 70, p. 2-12. At the hearing on the motion *in limine* the court queried the United States about a protective instruction prior to trial. The United States indicated that it had no objection to a Rule 404(b) instruction:

> Your honor, I think that that would be a fine prophylactic move by the Court. If Mr. Hanna wants to offer up a 404(b) standard-type instruction, we have no problem with that at all. Because we do believe that the only reason we go outside the conspiracy in terms of time and, by Mr. Hanna's analysis, in terms of people, is to fully establish the relationship that exists between these men and the knowledge that the defendant had in what's going on.

TR 32:1-9. Big Eagle did not offer a Rule 404(b) instruction and ultimately withdrew the request at the close of trial. TR 455:20-21.

The Court indicated that it was inclined to allow the government to put on evidence of bribes solicited by Raue from similarly situated contractors because the indictment alleged a conspiracy related to the

Crow Creek Tribal Schools. TR 23:4-25. It ultimately ruled as follows on the motion *in limine*:

> 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 bit less when it comes to discussions of payments of money and bribery, particularly if that relates to something other than the Crow Creek Sioux Tribal School project or the second incident, that is the subject of the latter 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 rule of the Court. The Court will make further rulings on objections as the case progresses.

TR 32:15-25, 33:1-11.

J. The government never elicited testimony concerning a perceived threat to McClatchey's daughter.

After the fire in 2005, McClatchey tried to escape the tribal extortion. TR 239:2-10. He had asked Hahn to act as his intermediary,

but Big Eagle was not easily deterred. McClatchey testified that he met Big Eagle for the first time during the summer of 2005. TR 239:22-25, 240:1-2.

> Q. Tell us about that luncheon, sir. I take it the tribal chairman was not sitting with you at the table?
>
> A. No. What had happened is Rick Hahn had called me and said-
>
> Mr. Hanna: Objection Judge. He is not answering the questions that are put to him.
>
> A. Can you ask that again?
>
> The Court: I'll sustain the objection. Go ahead and ask the next question.
>
> Q. Sir, I understand that the chairman did not join you for lunch. You were with Mr. Hahn and your daughter, I believe?
>
> A. That is correct.
>
> Q. And Mr. Raue?
>
> A. That's correct.

TR 240:10-25. The United States made no other reference to McClatchey's daughter. The direct continued as follows:

> Q. Did the chairman say anything-did Duane Big Eagle say anything to you that related to either your prior payments or expectation of continued payments?

Mr. Hanna: Judge, that calls for speculation as to-

The Court: Overruled. He can answer yes or no.

Q. (By Mr. Rostad) Did the chairman say anything to you that you interpreted as referring to these extortion payments?

Mr. Hanna: Objection. Asks for a subjective interpretation of something.

The Court: Overruled.

A. He--well, the only thing that Duane-I mean, he politely waved and said "Hi" and "Nice to meet you," and then basically walked behind my daughter and--who was facing me at this table–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 241:15-25, 242:1-8.

There was no objection made by defense counsel to the daughter being mentioned in passing. Defense counsel did not ask for any cautionary instruction.

On cross, defense counsel revisited the meeting where McClatchey met Big Eagle:

Q. And he–your recollection is that he said, "Hi. Nice to meet you. Are you going to play ball with us, Scott–Craig?" Excuse me.

> A. Not exactly like that. What–he said, "Hi. Nice to meet you." And he waited a few moments. And then, like I said, he walked behind my daughter and put his hands on her shoulders and looked straight at me and said, "Now, you're going to play ball with us, aren't you, Craig?" And that's all he said.

TR 249:3-11.

K. The government's closing arguments regarding McClatchey did not violate the court's ruling on the motion *in limine*.

Big Eagle claims the United States violated the district court's order *in limine* in closing regarding the McClatchey meeting with Big Eagle and the perceived threat to McClatchey's daughter. Opening Br. p. 42. In the initial closing argument, counsel for the United States made no mention of McClatchey's daughter, and only stated, "I can't tell you enough not to remember the testimony of Mr. McClatchey, when he met Mr. Big Eagle and says, 'You're going to play ball with us, aren't you, Craig?' That's Duane Big Eagle, ladies and gentlemen. He is part of it." CL TR 19:18-21.[6]

It was defense counsel who pointed out that McClatchey's daughter was present when Big Eagle asked McClatchey if he was

[6]"CL TR" refers to the transcript of the closing arguments of counsel at trail.

going to "play ball." CL TR 35:22-25. Then, defense counsel argued that McClatchey remembered it wrong. "It didn't happen," he said. If it did, Raue and Hahn would both have remembered it. CL TR 36:1-21.

> In rebuttal, the government responded:
>
> And Mr. Hanna tries to pass off Mr. McClatchey as just a–kind of a guy that just didn't have a good story, didn't make any sense.
>
> 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.

CL TR 49:11-17. Defense counsel made no objection, did not move to strike, and sought no cautionary instruction. Further, defense counsel withdrew Big Eagle's request for a Rule 404(b) instruction. TR 455:20-21. The jury returned a verdict on August 4, 2011, finding Big Eagle guilty of Counts I, III and IV.

SUMMARY OF THE ARGUMENT

The lynchpin of every argument raised by Big Eagle on appeal is that the evidence about bribes and kickbacks from contractors other than Baumann and Kutz was "other acts" evidence within the meaning of Rule 404(b) of the Federal Rules of Evidence. But since the district

court reserved its ruling on that issue, Big Eagle was obligated to raise it again at trial. He failed to do so. Not only did he fail to object as the evidence was offered, he withdrew his objection during the settling of instructions. As a result, all of the issues on appeal are reviewed for plain error. Under that standard, Big Eagle must show prejudice of such magnitude that it altered the outcome of the trial. He cannot meet that high burden.

There was no error. The evidence in question, particularly the evidence from McClatchey, was intrinsic to the kickback conspiracies. Kutz and Baumann did what the other contractors did – they had to pay to play. Raue was their intermediary and Big Eagle and other corrupt members of the Tribal Council called the shots. The "other contractor" evidence in question was simply part of the same corrupt dealings that governed the Crow Creek School for years. It involved many of the same players who employed the same means to extract the same kind of kickbacks from a succession of contractors. It was not Rule 404(b) evidence at all. The recording played to the jury makes repeated references to other contractors and involves all persons

present discussing Raue's indictment for bribes involving other contractors.

Even if Big Eagle is correct that the evidence should have been considered "other acts" under Rule 404(b), it would still have been admitted. It was relevant to plan, motive, scheme, opportunity, and intent. And although Big Eagle complains that he did not receive formal notice of the government's intent to use it, he got the materials in discovery and he obviously had enough notice to raise the issue in a motion *in limine*. Again, there was no error, and even if there was, it was not plain error.

Finally, there was no misconduct or error in the government's closing argument. Big Eagle argued the McClatchey conversation did not occur. The prosecution merely clarified the record. There was no objection and certainly no plain error.

ARGUMENT

I. The standard of review is for plain error because Big Eagle did not preserve his objection to the admission of Rule 404(b) evidence.

Big Eagle's primary argument in this appeal is that the district court abused its discretion in admitting "other acts" evidence without

requiring notice under Rule 404(b). Opening Br. at 20. Big Eagle filed a motion *in limine* to bar evidence relating to any contractors other than Kutz or Baumann, specifically excluding any testimony from Craig McClatchey, or any evidence outside the time periods of the conspiracies alleged. CR 67, p. 3-5. The United States responded that the evidence was intrinsic evidence of the conspiracies and inextricably intertwined. Thus, it provided context to the charged conspiracies and was not subject to limitation under Rule 404(b). CR 70, p. 2-12.

Big Eagle asserts in his brief that the District Court denied his motion *in limine* under Rule 404(b). Opening Br. at 32 ("trial court denied the defendant's motion *in limine*, ruling that Rule 404(b) was not applicable to the evidence relating to crimes involving other contractors."). But that is not what happened. The district court reserved its ruling for "objections as the case progresses." TR 33:10-11. It held:

> 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 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 bit less when it comes to discussions of payments of money and bribery, particularly if that relates to something other than the Crow Creek Sioux Tribal School project or the second incident, that is the subject of the latter 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 32:15-25, 33:1-11. Thus, the district court held open the possibility that it would entertain further objections on the subject "as the case progresses."

Big Eagle made no further objections regarding testimony about other contractors or bribes at trial. In fact, Big Eagle elicited testimony about Raue receiving substantial bribes from many contractors before the fire of April 2005, as well as after. Then, at the close of the case, Big Eagle withdrew his Rule 404(b) instruction. Big Eagle forfeited his

Rule 404(b) objections, and the district court's decisions to admit evidence should be reviewed only for plain error in this appeal.

This Court faced a similar situation in *United States v. Krapp*, 815 F.2d 1183, 1188 (8th Cir. 1987). In *Krapp*, defendant filed a motion *in limine* seeking to exclude evidence of other violations of postal regulations unrelated to the crimes for which defendant was charged. *Krapp*, 815 F.2d at 1188. The district court did not rule on her motion and the defendant failed to renew her objections at trial. This Court found that because the defendant did not object when the evidence was admitted at trial, the review on appeal of the admission of such evidence was under a plain error standard. *Krapp* at 1188, citing to *United States v. Poston*, 727 F.2d 734, 740 (8th Cir. 1984).

Likewise, Big Eagle asserts that the United States improperly referred to McClatchey's daughter in rebuttal arguments. Again, that is not what happened, but in any event, Big Eagle did not object. "If an arguably improper statement made during closing argument is not objected to by defense counsel, this court will only reverse under exceptional circumstances." *United States v. Robinson*, 110 F.3d 1320, 1326 (8th Cir. 1997), *quoting United States v. Nabors*, 761 F.2d 465,

470 (8th Cir. 1985). If no objection is lodged, the comments are reviewed for plain error where a defendant is entitled to relief "only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id*. at 1326.

A review for plain error, requires a defendant to prove (1) error, (2) that was plain, and (3) that affected substantial rights. *United States v. Clarke*, 564 F.3d 949, 957 (8th Cir. 2009). A reversal under plain error is only warranted if the error prejudices the substantial rights of a party and would result in a miscarriage of justice if left uncorrected. *Id*. On evidentiary matters, appellate courts have "limited power to correct errors that were forfeited because they were not timely raised in district court." *United States v. Olano*, 507 U.S. 725, 731 (1993). "If an appellate court concludes that the ruling was plainly erroneous, the appellant has the burden of persuading a reviewing court that the error was prejudicial in that it 'affected the outcome of the district court proceedings.'" *United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996) *quoting Olano*, 507 U.S. at 736. Big Eagle cannot meet that high burden.

If this Court does not adopt the plain error standard, the standard of review would be under an abuse of discretion. *United States v. Yielding*, 657 F.3d 688, 701(8th Cir. 2011) ("We review a district court's evidentiary rulings for abuse of discretion, and reverse 'only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts.'" Citing *United States v. Cvijanovich*, 556 F.3d 857, 864 (8th Cir. 2009) (internal quotation omitted)).

Even if evidence is considered extrinsic, other acts evidence within Rule 404(b), the standard of review is the same; evidentiary decisions are reviewed for abuse of discretion and will be reversed only if the evidence tended to prove only propensity and not the elements of the crimes charged. See, *United States v. Thomas*, 398 F.3d 1058, 1062 (8th Cir. 2005).

The District Court decisions in this case were proper under either standard.

II. The other contractor evidence was intrinsic evidence of the crimes charged.

Big Eagle argues that the mention of a contractor, other than Kutz or Baumann, doing work on the Crow Creek Tribal School after the fire in 2005 is necessarily Rule 404(b) evidence. Since no formal Rule 404(b) notice was given, the argument follows, the evidence should not have been allowed. Opening Br. at 33. Big Eagle is wrong. His knowledge of the bribes and kickbacks from other contractors during his administration was intrinsic evidence of the crimes of conviction, particularly conspiracy. In addition, references to other contractors working on the Crow Creek School Project are inextricably intertwined throughout the evidence related to the Kutz and Baumann conspiracies.

Rule 404(b) applies "only to 'extrinsic' and not to 'intrinsic' evidence." *United States v. Johnson*, 463 F.3d 803, 808 (8th Cir. 2006), quoting *United States v. Swinton*, 75 F.3d 374, 377 (8th Cir. 1996). "[W]hen evidence is admitted under *res gestae*, Rule 404(b) is not implicated." *United States v. Riebold*, 135 F.3d 1226,1228 (8th Cir. 1998).

> We have held that where evidence of other crimes is "so blended or connected, with the one[s] on trial as that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore is not governed by Rule 404(b).

Swinton, 75 F.3d at 378, *quoting United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir. 1986).

Merely because other persons not named in the indictment testify that they too participated in similar activity with a defendant, does not make the evidence extrinsic. In *Johnson*, the Court addressed a similar case involving kickbacks. Johnson was charged with three counts of receiving kickbacks from three particular individuals who were not entitled to receive public benefits. *Johnson*, 463 F.3d 805-806. The district court allowed testimony from several other persons not named in the indictment who paid kickbacks to the defendant. *Id*. at 806.

In analyzing whether other kickbacks were properly admitted as "intrinsic" evidence, the court in *Johnson* found that "[e]vidence of other wrongful conduct is considered intrinsic when it is offered for the purpose of providing the context in which the charged crime occurred." *Id*.; *United States v. Forcelle*, 86 F.3d 838, 842 (8th Cir. 1996). Such

evidence is admitted because "the other crime evidence 'completes the story' or provides a 'total picture' of the charged crime." *Johnson*, 463 F.3d at 808. The court went on in *Johnson* to find that the receipt of kickbacks from other clients not named in the indictment was indispensable for providing the motive for the charges of mail fraud, and further provided an explanation of the crime. It found that such evidence was an inextricable part of the government's case and therefore the court did not abuse its discretion by allowing its admission into evidence. *Id*. The court also admitted evidence of overpayments under Rule 404(b) to show absence of mistake. *Id*.

As in *Johnson*, the explanation of how the contractor bribe scheme worked at the Crow Creek School during the Big Eagle administration was an inextricable part of the government's case. The evidence was properly admitted without objection during the trial. Moreover, Big Eagle solicited substantial details about the objectionable evidence on cross-examination in an effort to pin the blame for the bribes on Raue. *See e.g.* TR 144:9-15, TR 140:9-12, TR 148:1-12.

Evidence that explains the context and genesis of the crimes charged is admissible as *res gestae* and not governed by Rule 404(b). *See United States v. Roberts*, 253 F.3d 1131, 1133-1135 (8th Cir. 2001) (admission of robberies of defendant 7 years prior was *res gestae* evidence, rather than 404(b) evidence, because it helped explain genesis and execution of the bank robbery at issue, so it was not an abuse of discretion to admit the evidence); *United States v. Edwards*, 159 F.3d 1117, 1129 (8th Cir. 1998) ("Rule 404(b) does not bar evidence that completes the story of the crime or explains the relationship of parties or the circumstances surrounding a particular event," thus evidence of prior drug use and thievery properly admitted to explain relationship and why parties were at the scene of the fire).

In sum, Rule 404(b) does not bar evidence that completes the story of the crime or explains the relationship of the parties. *See United States v. Rock*, 282 F.3d 548, 551 (8th Cir. 2002); *United States v. Rodrequez*, 859 F.2d 1321, 1326 (8th Cir. 1988).

Thus, the evidence about other contractors during the Big Eagle administration explains the relationship of the parties for all counts and completes the story. *See United States v. Edwards*, 159 F.3d 1117,

1129 (8th Cir. 1998) ("Rule 404(b) does not bar evidence that completes the story of the crime or explains the relationship of parties or the circumstances surrounding a particular event."). Such "acts which are 'inextricably intertwined' with the charged crime are not extrinsic and Rule 404(b) does not apply." *United States v. Adams*, 401 F.3d 886, 899 (8th Cir. 2005), citing *United States v. O'Dell*, 204 F.3d 829, 833 (8th Cir. 2000).

Counts I and II dealt specifically with Kutz, but even those transactions involved other contractors. Some of Kutz's bills which led to bribes were laundered through Nystrom Electric. TR 76-77, 102:16-21. Nystrom Electric was also paying bribes for contracts and was later indicted with Raue. Nystrom and other contractors are mentioned in Sazue's recorded meeting that was played to the jury. Proper explanation of the bribes and kickbacks obtained from Nystrom and other contractors was admissible to explain the context of the corrupt payments to Kutz .

Raue was a go-between for the Tribal Council, Big Eagle, and the contractors. He solicited bribes from them and would deliver the cash to Big Eagle and the cooperating council members who were part of the

conspiracy. Big Eagle's knowledge of what Raue was doing with contractors working on the Crow Creek School during his administration, from May of 2002 to May of 2006, was relevant to the corrupt knowledge component of all counts in the indictment, especially conspiracy counts. It explained the relationship between Raue, Big Eagle, and certain other council members. It explained why, when Lester Thompson came into office in May of 2006, all of the money was gone and why he went to law enforcement.

The McClatchey testimony is also intrinsic. McClatchey made bribes and kickbacks during the Big Eagle administration. Although he was trying to avoid them after the fire in 2005, his conversation with Big Eagle about "playing ball" was intrinsic of the conspiracy with Kutz because it showed the agreement between Big Eagle and Raue. "You're going to play ball with ***us***, aren't you, Craig?" TR 242:1-8 (emphasis added). Raue was sitting there. That showed that Big Eagle had conspirators. At the same relative time, Big Eagle and Raue were shaking down Kutz for a chance at non-competitive bidding contracts on the school. That was intrinsic evidence appropriate for context and knowledge.

Raue and Norman Thompson, Sr., as co-conspirators with Big Eagle, both described how they shared the money they obtained from contractors, how they selected contractors who would pay bribes, and how Big Eagle was part of those discussions and took part in sharing the proceeds. Kutz was one of the contractors. The evidence of corrupt payments by other contractors provided context for the Kutz conspiracy charge.

Counts III and IV dealt with payments from Baumann. Again, at the time of the Baumann conspiracy, Big Eagle, Raue, Thompson, Sr., and Shields were extorting payments from any contractor they could. In the recorded October 21, 2008 meeting, Big Eagle and the others discussed the earlier indictments and many of the contractors who worked after the school fire in 2005, including Nystrom.
US App. 32:11-20, 37:20-23 (Guest); US App. 25: 1-3,18-19 (Patzer); US App. 32:11-20 (Kutz). Even though Big Eagle was out of power, he volunteered to distribute the kickbacks to get a piece of the action. The relationships between Big Eagle, the Council, and the corrupt contractors are inextricably intertwined because they were all part of

the "pay to play" rules that governed contracting on the Crow Creek School.

The interactions of the players in the taped 2008 meeting was relevant for another reason – they discussed their potential liability. Raue was under indictment. The recording shows how the conspirators discussed Raue's defense, and how the defense was not just for Raue, "It's not only him, it's for all of us." US App. 37:6-15. Raue was a central party in nearly all of the kickbacks because he was running the school. The discussion of his defenses tied in nearly all of the corrupt contractors together in one inextricably intertwined tale.

Finally, Big Eagle cites to *United States v. Heidebur*, 122 F.3d 577 (8th Cir. 1997) as the basis for his claim that information about other contractors after the fire should not have been admitted. In *Heidebur*, defendant was charged with knowingly possessing sexually explicit photographs of his step daughter. *Id*. at 578. His admission a week prior to having sexual contact with his step-daughter was found not to be inextricably intertwined with the elements of the crime for which he was charged, and not necessary to explain matters to the jury. *Id*. at 580. The crime charged in *Heidebur* did not involve a conspiracy. An

element of the crime was not proof of an agreement. The background of the crime was not complex, i.e. it did not include tribal government officials conspiring to take bribes for giving construction contracts. It did not include a recorded conversation involving many of the conspirators discussing many contractors and planning a way to continue bribes when a known investigation was ongoing. It did not include the complexity of Kutz billing through other contractors who also are involved in bribes. The facts in *Heidebur* are, therefore, distinguishable. The conspiracies charged in this case are much more similar to the fact situation in *Johnson*, than *Heidebur*. *See also United States v. Rodrequez*, 859 F.2d 1321, 1326-1327 (8th Cir. 1988) (testimony of wife of a conspirator about her husbands use of guns, shooting out window, and packaging of drugs and sales for her husband was not Rule 404(b) evidence).

Given the conspiracies charged, the jury had to understand the entire context of the extortion that Big Eagle and his conspirators were running. It was pay to play at the Crow Creek School and Baumann and Kutz were not the only players. The district court made no plain error.

III. The evidence was admissible under Rule 404(b).

Even assuming that the "other contractor" evidence offered was not directly tied to the crimes charged, it was nonetheless admissible under Rule 404(b) because it tended to prove material elements of the case. Evidence of other acts is admissible if it is offered for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake. Fed. R. Evid. 404(b). Rule 404(b) is a rule of inclusion, not exclusion, which favors the admission of relevant evidence. *United States v. Clarke*, 564 F.3d 949, 957 (8th Cir. 2009); *United States v. Hermes*, 847 F.2d 493, 497 (8th Cir. 1988). "The trial judge has discretion to admit prior acts evidence if it is relevant to a purpose other than the defendant's character, the evidence is clear and convincing, and the potential for unfair prejudice does not outweigh the probative value of the evidence. If the evidence is proffered on issues such as intent, knowledge or plan, the prior acts must be 'similar in kind and reasonably close in time to the offense charged' at trial...." *Hermes*, 847 F.2d at 497, *quoting United States v. Drury*, 582 F.2d 1181 (8th Cir. 1978).

Here, there is no question that the evidence was material to the elements of conspiracy. It showed motive, intent, the nature of the scheme, and opportunity. The other corrupt contractors showed how Big Eagle and the others conducted their "pay to play" scheme. With each contractor, they did the same thing. Kutz and Baumann had to pay off Big Eagle and his conspirators in order to get work with the Tribe. The other contractors had to do the same thing in the same way with the same group of Tribal extortionists.

A. The other acts evidence was not unduly prejudicial.

The acts complained of simply cannot be made so distinct as to be unduly prejudicial. "Prejudice in this context means a 'tendency to suggest decision on an improper basis.'" Fed. R. Evid. 403, advisory committee notes; *United States v. Ceballos*, 605 F.3d 468, 471 (8th Cir. 2010) (citing *United States v. Dunkin*, 438 F.3d 778, 780 (7th Cir. 2006)). What Rule 404(b) prohibits is the introduction of evidence of a past offense "to prove the character of a person in order to show action in conformity therewith," that is, to persuade the fact finder that the defendant committed the charged offenses because defendant "has a propensity to commit crimes," *Dunkin*, 438 F.3d at 780.

What was elicited from Big Eagle's co-conspirators and McClatchey was not evidence of his character, but evidence of their history together, much of which fell clearly within the time periods of the indictment. To the extent those events could be considered "other acts," they were not other acts admitted to show propensity or character. They were admitted to show knowledge, participation and involvement and therefore proper.

B. Big Eagle forfeited his claim of error by waiving the issue during the settling of instructions.

Big Eagle claims that the evidence was admitted "without any limiting instruction as to how the evidence might be considered by the jury." Opening Br. at 7. But Big Eagle offered no instruction during the trial or at the close of evidence. In fact, he withdrew his request before instructions were given. TR 455:20-21. This Court has "never found it to be plain error when a court does not give a limiting instruction of any kind *sua sponte* with respect to Rule 404(b) type evidence." *United States v. Joos*, 638 F.3d 581, 588 (8th Cir. 2011); see also *United States v. McGuire*, 45 F.3d 1177, 1188 (8th Cir. 1995) ("The trial court need not issue a prior crimes limiting instruction *sua*

sponte."). It is not plain error for the district court to not give the instruction when the defendant withdraws his request for the instruction. *United States v. Williams*, 994 F.2d 1287, 1290 (8th Cir. 1993).

There is thus no plain error, or even abuse of discretion, because the district court was right. This was not other acts evidence within the meaning of Rule 404(b). It was direct evidence; *res gestae* evidence. It was evidence inextricably intertwined with the accusations of the indictment. Even if mischaracterized as other acts evidence, it would have nonetheless been admissible to show association, intent, modus operandi, and the context of the conspiratorial scheme.

C. Big Eagle had actual notice of the other contractor evidence.

Big Eagle argues that since no formal Rule 404(b) notice was given, the other contractor evidence should not have been admitted at trial unless the district court found good cause for not giving the notice. Opening Br. p. 31. Assuming *arguendo* that the "other contractor" evidence fell within Rule 404(b), the prosecution was required to give pretrial notice, unless excused, of 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. 2009) (quoting Fed. R. Evid. 404(b)). Here, the district court found that some of the other contractor evidence was appropriate as intrinsic evidence which explained the context of the charges. It was left to Big Eagle to object at trial "as the case progresses." TR 32:19-25, 33:1-11. If Big Eagle had an objection related to notice, he needed to make it at trial.

Perhaps the reason Big Eagle failed to object at trial is that he obviously had notice. That is why Big Eagle filed a motion *in limine* in the first place. The policy behind the notice requirement of Rule 404(b) is "to reduce surprise and promote early resolution on the issue of admissibility." Fed. R. Evid. 404(b) cmt. *United States v. Green*, 275 F.3d 694, 701(8th Cir. 2001). Actual notice, as Big Eagle had here, is sufficient under the Rule. *Consider*, *Green*, 275 F.3d at 701 ("As we have already noted, the government gave Robinson's attorney reasonable notice of the Rule 404(b) evidence. The government provided a printout of the arrest record four months before trial and supplemented the information as it became available. The district court did not abuse its discretion by admitting the evidence."); *also*

United States v. Erickson, 75 F.3d 470, 478 (9th Cir. 1996) (notice sufficient where defendant had wholesale discovery that referenced other acts evidence).

Big Eagle had all of the witness statements prior to trial and conducted extensive cross-examination of them. For instance, he cross-examined McClatchey about three prior statements made to law enforcement and his history of bribery with Raue. TR 243:5-25- 249. There is no argument to be made that Big Eagle was prejudiced by surprise.

Moreover, in this case the United States had a good faith understanding that the evidence which Big Eagle asserts is 404(b), was in fact not within the confines of Rule 404(b), but rather was context evidence explaining the crimes and the relationships. The district court did not make a separate "good cause" ruling because it too was inclined to find the evidence was intrinsic *res gestae* evidence, and left it to Big Eagle to make objections as the trial progressed regarding the admission of other acts evidence. Big Eagle made no specific objection during trial. Thus, there was no plain error in allowing the "other contractor evidence."

IV. The government did not violate the district court's ruling by introducing the Big Eagle meeting with McClatchey and explaining it in closing argument.

The admission of the McClatchey testimony was also intrinsic evidence. After Big Eagle took office in May of 2002, McClatchey was solicited for bribes or kickbacks from Raue. Raue told him the "Chairman" wanted the money. Later when McClatchey had other clients and was no longer desperate for work from the Tribe, he tried to avoid the extortion. In the very summer after the fire, when the no-bid contracts were being awarded to contractors like Kutz, Baumann, and others, McClatchey met with Big Eagle and Raue. Big Eagle said "hello" in a friendly manner and moved directly across from McClatchey, looked him straight in the eye, and with a serious demeanor asked, "You're going to play ball with us, aren't you, Craig?"

On that evidence, the district court ruled, "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." TR 32:15-18. But that was it. The conversation itself was admissible. Reference to McClatchey perceiving a threat posed by Big Eagle toward his daughter was not.

At no time did the United States ask McClatchey if he interpreted Big Eagle's comments as a threat to his daughter. McClatchey did not testify that he interpreted the comments as a threat to his daughter. The United States did not elicit the age of McClatchey's daughter, who was 11 at the time.

Even though the government elicited testimony that the daughter was there at the meeting in an effort to get the witness on track after an unrelated objection by Big Eagle's counsel, there was no reference to any perceived threat posed by Big Eagle. *See* TR 239:22 through 242:8. It was only on cross, after Big Eagle revisits the conversation, that McClatchey described Big Eagle touching his daughter. TR 242:2-8. McClatchey stated, "And then, like I said, he walked behind my daughter and put his hands on her shoulders and looked straight at me and said, 'Now, you're going to play ball with us, aren't you, Craig?' And that's all he said." TR 249:7-11. Even then, Big Eagle did not object, ask to approach the bench, or seek any order from the court asking that the answer be stricken in whole or part.

Big Eagle alleges that there was also a violation of the limine order in closing. Again, the issue came up because Big Eagle raised it.

In his closing, Big Eagle pointed out to the jury that McClatchey's daughter and Hahn were supposedly present during the meeting. Big Eagle then argued that the conversation did not happen. He said that "[i]n real life if that had happened, he would have turned to Raue, either then or shortly thereafter, and said, 'What's this 'play ball' stuff?' It didn't happen. It doesn't make any sense. . . ." CL TR 36:9-12.

In rebuttal, in response to that argument, the prosecutor said:

> And Mr. Hanna tries to pass off Mr. McClatchey as just a - kind of a guy that just didn't have a good story, didn't make any sense.
>
> 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.

CL TR 49:11-17. This comment was made by the United States to show why McClatchey would remember the conversation.

Defense counsel did not object to this statement at the time, did not request the court to strike the statement, and requested no cautionary instruction. Defense counsel also did not submit a Rule 404(b) instruction and withdrew a request for any such instruction. TR 455:20-21. If an arguably improper statement is made during

closing argument and is not objected to by defense counsel, the Court will only reverse under exceptional circumstances. *United States v. Robinson*, 110 F.3d at 1326. "So long as prosecutors do not stray from the evidence and the reasonable inferences that may be drawn from it, they, no less than defense counsel, are free to use colorful and forceful language in their arguments to the jury." *Id*. at 1327.

The comments by the United States in rebuttal are not an exceptional circumstance. The Court instructed the jury that statements by counsel are not evidence. CR 87, instr. 3. The statement by the United States is an accurate statement of testimony in fact elicited by defense counsel during the trial. There was no error.

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CONCLUSION

There was no error admitting evidence at trial. The convictions should be affirmed.

Respectfully submitted this 24th day of April, 2012.

ERIC HOLDER
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Corel WordPerfect 12 and contains 10,833 words in proportional spacing in typeface of 14 points or more, and is therefore in compliance with Fed. R. App. P. 32(a)(7).

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2012, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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