CASE NO. 13-8028

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Case No. 13-8028
	)	
CASEY JAMES NOWLIN,	)	
	)	
Defendant-Appellant.	)	

On Appeal from the United States District Court
for the District of Wyoming
The honorable Nancy D. Freudenthal
Chief Judge
D.C. No. 12-CR-116-1F

APPELLANT'S OPENING BRIEF

Respectfully submitted,

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Defendant-Appellant

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Oral Argument is not requested

July 23, 2013

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STATEMENT OF RELATED APPEALS

There are no related appeals.

STATEMENT OF JURISDICTION

Nature of the Case

This is an appeal from a conviction by jury in a criminal case. Appellant-defendant Casey James Nowlin was represented in the United States District Court, for the District of Wyoming, by CJA court-appointed counsel Sean H. Barrett.

STATEMENT OF THE CASE

This case arises from a FBI investigation of a series of assaults occurring at a bon fire party in a remote area of the Wind River Indian Reservation, Wyoming, at or about 3 a.m. on the morning of April 22, 2012. Investigation resulted in a complaint being filed against Casey James Nowlin and co-defendant Lorenzo Roman on April 26, 2012. As to Nowlin, the complaint alleged six counts of assault. Count One alleged Assault Resulting in Serious Bodily Injury and Aiding and Abeting in violation of 18 U.S.C. §§ 113(a)(6) and 1153 and 2, Counts Two and Three alleged Assault with a Dangerous Weapon with Intent to do Bodily Harm and Aiding and Abetting in violation of 18 U.S.C. §§ 113(a)(3) and 1153 and 2, Counts Four, Five and Six alleged Assault with Dangerous Weapon with

Intent to Do Bodily Harm in violation of 18 U.S.C. §§ 113(a)(3) and 1153. Mr. Nowlin was arrested on related tribal charges on April 22, 2012 and on May 16, 2012 an Indictment was filed alleging the same six counts as in the complaint. On May 30, 2012 Nowlin had an initial appearance before U.S. Magistrate Judge Teresa McKee in Lander, Wyoming. Nowlin was arraigned on June 1, 2012, pled not guilty and was detained. Trial was set for July 30, 2012. Nowlin and the government filed a joint motion to continue vacate and continue trial date on the basis of defendant's need for additional time to locate and interview multiple potential witnesses as well as the need for trace, DNA and fingerprint analysis to be completed on a bloody stick, the trial was reset for October 23, 2012. On October 1, 2012 a second joint motion to continue trial was requested by Nowlin and the government on the basis of Nowlin's request that additional items present at crime scene be sent to the FBI crime laboratory for analysis and trial date was rescheduled for December 10, 2012.

Following jury selection, trial commenced on December 11, 2012 and on December 18, 2012 verdicts of guilty were entered finding Mr. Nolin guilty as to Counts One, Two, Three, Five and Six and not guilty as to count Four. Following rendition of the verdicts, a pre-sentence report was ordered and completed. On March 3, 2013 Nowlin was sentenced to 120 months imprisonment concurrent on Counts One, Two, Three and Five and 17 months as to Count 6 to be served

consecutive to sentences imposed on of all other counts for a total of 137 months imprisonment, 3 years supervised release concurrent on all counts with special conditions, $100 special assessment, $154,694.34 restitution concurrent on Counts One and Two, $100 special assessment and $2,44100 restitution joint and several with Lorenzo Roman as to Count Three, $100 special assessment and $3,731.00 restitution as to Count 5, and $100 special assessment, no restitution as to Count Six. Judgment and Commitment was entered on March 5, 2013, on March 15, 2013 Nowlin filed this Notice of appeal and this appeal follows.

STATEMENT OF FACTS RELEVANT TO ISSUES ON APPEAL

The government failed to present sufficient evidence to allow a jury to conclude, beyond a reasonable doubt, that Mr. Nowlin, as charged, was an "Indian" as that term is used in 18 U.S.C. §1153. Further, the Court took judicial notice of and read into evidence a prior statement made by Nowlin while appearing in a much earlier, unrelated criminal proceeding intending to evidence that Appellant was an "Indian" for purposes of 18 U.S.C §1153. The statement read to the jury by the Court did not include admissions as a matter of law which conferred Indian status upon Nowlin as that term is applied for purposes of federal criminal jurisdiction. The statement also included information from which the jury could clearly conclude Nowlin prior criminal arrests and convictions in both federal and

tribal courts and as to the offense conduct at issue Nowlin had acted in conformity with his prior convictions and was criminally inclined.

Finally, the Court allowed into evidence the testimony of two government witnesses as to unrelated prior bad acts or wrongs of Nowlin from which the jury could further conclude that Nowlin had not only been arrested on unrelated charges the same day as the assaults for which he stood trial but that Nowlin had the propensity act violent and aggressive and acted in conformity therewith in committing the instant offenses.

CITATION TO THE RECORD

The citation to the record in this case is to the Volume, page and line number. For example, Vol. II, #100, at 22 would refer to trial transcript Volume II, page 100 at transcript line 22.

STATEMENT OF THE ISSUES

1. There was insufficient evidence to prove beyond a reasonable doubt that Mr. Nowlin was an "Indian" as that term is used in 18 U.S.C. §1153.
2. The Court erred by reading into evidence and taking judicial notice of statements made by Mr. Nowlin in a much earlier unrelated federal criminal proceeding from which the jury could conclude Nowlin had prior arrests and

convictions and amounted to judicial instruction that such statements also established Nowlin was an “Indian” as that term is used in 18 U.S.C. §1153.

3. It was error on the part of the Court to allow testimony of two government witnesses regarding statements made by Mr. Nowlin from which the jury could conclude Nowlin had an unrelated arrest on the same day as the assaults at issue and that Nowlin was violent and aggressive and acted in conformity therewith in committing the instant offenses.

FIRST ISSUE: Insufficient evidence presented as to Appellant’s or victims “Indian” status under 18 U.S.C. §1153.

Summary of Argument

The government charged Mr. Nowlin pursuant to 18 U.S.C. §1153 which requires proof be submitted to the jury and proven beyond a reasonable doubt that Nowlin was an “Indian” as that term is used in 18 U.S.C. §1153. There was insufficient evidence presented at trial from which the jury could conclude that Nowlin was an “Indian” as required.

Standard of Review

The Court reviews a challenge to the sufficiency of the evidence *de novo*, but in doing so it owes considerable deference to the jury’s verdict. The Court asks only whether taking the evidence-- both direct and circumstantial, together

with the reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt. *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011)

Argument and Authorities

The Major Crimes Act, 18 U.S.C. §1153, establishes federal criminal jurisdiction over certain serious crimes committed in Indian country by Indian defendants. 18 U.S.C. §1153 reads, in pertinent part, as follows:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely . . . assault with a dangerous weapon, assault resulting in serious bodily injury . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

The term "Indian" as used in 18 U.S.C. §1153 is not defined by the statute and the determination as to whom is an "Indian" for federal criminal purposes is an issue of fact to be determined by the trier of fact under 18 U.S.C. §1153 and are elements the government must prove beyond a reasonable doubt. *United States v. Prentiss*, 273 F.3d, 1277 (10th Cir. 2001); *Scivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995). In the absence of a statutory definition the Tenth Circuit has applied a two-prong test to determine whether a person is an "Indian" for federal jurisdiction for crimes committed in Indian Country under 18 U.S.C. § 1153. "The

court must make factual findings that the defendant (1) has "some Indian blood" and (2) is recognized as an Indian by a tribe or by the federal government. *Id.* at 1280 (the *Prentiss* Court noted this test is derived from *United States v. Rogers*, 45 U.S. (4 How.) 567, (1846) and has not been overturned.) The first-prong is essentially the racial prong, requiring some biological identification as an Indian. At trial the government presented the testimony of Mr. George Shongutsie, the enrollment director for the Eastern Shoshone Tribe on the Wind River Indian Reservation (Vol. III, #753, at 3-4). Mr. Shongutsie testified that Nowlin's mother had 31/64ths total degree of Eastern Shoshone Indian blood (Vol. III, #763, at 3-4) and accordingly Nowlin himself had Indian blood. This was established through testimony regarding a blood redetermination initiated by Nowlin's mother which had raised her total degree of Eastern Shoshone Indian blood to 31/64th (Vol. III, #763 at 3-4 and #765 at 15-17) and family tree and lineage records of Nowlin's family (Vol. V, #759 at 3-9) (Vol. III, #758 7-11) establishing Nowlin was descended from tribal members (Vol. III, #759 at 1-2). Accordingly Mr. Nowlin had some degree of Indian blood although it was never established at trial whom Nowlin's biological father was (Vol. III, #777 at 8-11).

The second-prong is the non-racial prong which involves an evaluation of several different factors used to determine whether a person is recognized as an Indian by the tribe or government. In *St. Cloud v. United States,* 702 F. Supp.

1456, 1461 (S.Dak.1988) the court "gleaned from case law" factors to guide the analysis of the second *Rogers, supra,* criterion and listed the factors "in declining order of importance" to be: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying the benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life."

At trial Mr. Shongutsie testified that Nowlin's mother had made several attempts to enroll defendant (Vol. III, #770 at 7-17 and # 776 at 17-19) however such attempts were unsuccessful as Nowlin did not possess the requisite degree of Indian blood for enrollment and therefore was neither enrolled nor enrollable (Vol. III, #762 at 7-8) as the current enrollment ordinance required an applicant to possess at least ¼ degree of Indian blood ((Vol. III, #787 at 4-19). Nowlin's mother's attempts to enroll him included one application which did not identify the father of Nowlin (Vol. III, #776 at 17-24), two which named "Marcellas Jones" as the father (Vol. III, #777 at 1-2) and a fourth which named "Jerome Rooks" as Nowlin's father (Vol. III, #777 at 3-4). No evidence was presented that Nowlin had ever actually attempted to enroll himself. Mr. Shongutsie testified that Mr. Nowlin had tribal descendant status with his enrollment office (Vol. III, #763 at 20-22) as evidenced by a descendancy certification (Vol. V, #765 at 1) issued to Nowlin which was prepared by Mr. Shongutsie on April 26, 2012 at the request of

the FBI (Vol. III, #763 at 23-25 and #764 at 1-21) four days following Nowlin's arrest.

At trial, government witness Kathleen Keith testified as to medical services rendered and paid for by Indian Health Services ("IHS" hereafter) on behalf of Mr. Nowlin. Ms. Keith was employed as an administrative officer at the Wind River Services Unit, in Fremont County, Wyoming (Vol. V, #1118 at 9-14) which is a health clinic that provides medical care for federally recognized tribal members on the reservation in Fremont County and is operated by IHS (Vol. V, #1118 at 9-21). In that capacity, Ms. Keith testified she had reviewed the records of medical services provided to the name Casey Nowlin (Vol. V, #1126 at 8-16), those services being available to Native Americans whom are federally recognized tribal members or descendants of them, as well as commissioned corps officers who work for the clinics and their families (Vol. V, #1121 at 19 and #1122 1-11) even if they are non-Indian (Vol. V, #1148 at 10-14). Ms. Keith testified there are two types of services provided by IHS, direct services benefits and contract services (Vol. V, #1122 at 12-22). Direct services were outpatient services provided by two IHS Clinics in Fort Washakie and Arapahoe, Wyoming, on the Wind River Indian Reservation (Vol. V, #1120 at 23-24) and contract services which were services provided by clinics other than the direct service clinics and which also provided services not available at the direct service outpatient clinics (Vol. V, #1124 at12-

13). Ms. Keith testified she had reviewed the Wind River Service Unit's IHS records under the name Casey Nowlin (Vol. V, #1126 at 8-15) and that purchase orders had been submitted for payment through IHS contract services under that name totaling $12,099.95 (Vol. V, #1146 at 9-11) for five medical visits (Vol. V, #1150 at 16-18) between October 2008 and November 2009 (Vol. V, #1149 at 23 through #1150 at 9). In addition a Government Exhibit 10 was entered into the record as to IHS Eligibility Records (Vol. V, #1137 at 10).

Mr. Shongutsie testified that non-Indians could receive the IHS benefits discussed by Ms. Keith. Specifically, Mr. Shongutsie was asked whether non-Indians could benefit from IHS to which he responded "As long as they can prove they are descendants or an enrolled member or a non-Indian female with an Indian male if she's pregnant, then she's able to go to IHS." (Vol. III, # 780 at 2-5). When directly asked whether "descendants as non-Indians can get those services, correct?" Mr. Shongutsie responded "They can." (Vol. III, #780 at 16-20). Mr. Shongutsie further stated that in order for Nowlin to receive treatment through IHS or to be referred out a descendancy certification would be required by IHS in order to entitle him to such medical treatment. (Vol. III, #766 at 9-18)

At trial there was no evidence presented that Nowlin received any per capita payments, land rights, free housing, educational benefits or assistance or any other type of assistance reserved only for Indians. In fact, the evidence produced by the

government at trial did not establish receipt by Nowlin of any government assistance reserved exclusively to Indians whatsoever.

Mr. Shongutsie also testified that Nowlin had applied for a tribal fishing ID card on four occasions, once in 2011 (Vol. III, #768 at 3-5), once with no issue date listed (Vol. III, #768 at 14-16), once in 2006 (Vol. III, #768 at 20-23) and another time in 2003 (Vol. III, #768 at 25 and #769 at 1-3). Mr. Shongutsie testified that fishing ID cards were benefits a person may obtain as a tribal descendant to fish on the reservation and could only be exercised if descendants were accompanied by an enrolled member. (Vol. III, #766 at 25 and #767 at 1-8). When asked by counsel for the government "So as soon as your enrolled relative passes, even a tribal descendant can no longer go fishing on the reservation?" Mr. Shongutsie answers "No, not unless you go through the Fish and Game office to get their approval, I guess." (Vol. III, #772 at 15-17).

Government witness John Redman Jr. testified that he knew Mr. Nowlin because he had "seen him around" at pow-wows, casinos and parties (Vol. III, #596 at 6-12) although he could not recall when the pow-wow was where he purportedly saw Nowlin (Vol. III, #622 at 7-8) nor where the pow-wow was at (Vol. III, #622 at 13-14). Further, Mr. Redman could not identify by name anyone Nowlin was purportedly with at the pow-wow and simply stated that Nowlin was with "friends" whom he "guessed" looked like Indians (Vol. III, #622 at 16-21).

Redman also admitted he could not identify Nowlin's facial feature at the pow-wows, parties or casinos because Nowlin usually had his hood on. (Vol. III, #636 18-25 and #637 1-25).

Officer Michael Shockley testified that he knew Nowlin to hold himself out as an Indian because Nowlin's family lived in Fort Washakie. He believed Nowlin's grandmother to be an "O'Neil" and that Nowlin was at their residence for quite some time although he wasn't there currently and that Nowlin "hung out" with other Indians (Vol. IV, #1071 at 16-25). Shockley acknowledged that non-Indians also lived in Fort Washakie and non-Indians and Indians hung out together as well. (Vol. IV, #1072 at 8-22). Mr. Shongutsie testified that a lot of non-Indians go to pow-wows as it's more of a party than religious event (Vol. III, #783 at 10-18) and when asked whether living on the Wind River Reservation would be something that Indian people tend to do more than non-Indian people, answered "it is kind of a checkerboard reservation, so there's non-Indians that also live there." (Vol. III, #783 at 19-23).

Finally, the Court took judicial notice of and read into evidence a prior statement made by Mr. Nowlin during a change of plea hearing in a previous and unrelated criminal proceeding in the United States District Court, District of Wyoming before Judge Alan B. Johnson. The noticed plea occurred in 2003 when Nowlin had pled guilty to charges of assault with a dangerous weapon and assault

resulting in serious bodily injury (Vol. V, #1090 at 18-24) and the Court read the jury the following edited version of Nowlin's statement:

> "The Court hereby takes judicial notice of the fact that the defendant, Casey James Nowlin, has, with counsel before the Court, previously admitted under oath and under penalty that he is an Indian person. He stated under oath that he is not enrolled with an Indian Tribe, but that he is a member of the Shoshone Tribe. The defendant also stated under oath that he has lived on the Wind River Indian Reservation all of his life and attended Indian schools on the reservation. The defendant further stated that he submitted himself to the jurisdiction of the Shoshone and Arapahoe Tribal Court. Lastly, he stated he has received treatment through the Indian Health Services in the past." (Vol. VII, #1328 at 14-25 and #1329 at 1-5)

Nowlin did not meet the standard for tribal or government recognition of Indian status under §1153. Nowlin was a descendant member of the Eastern Shoshone Tribe but not an enrolled member. Nowlin was eligible for only limited benefits due to his descendant status such as entitlement to use IHS and a limited fishing ID. There was no evidence Nowlin received services or assistance reserved only for Indians. There was no significant nor reliable evidence presented that Nowlin participated in tribal cultural life.

SECOND ISSUE: It Was Error for the Court to Admit Evidence, through Judicial Notice, of Prior Statements Made By Mr. Nowlin In A Previous and Separate Criminal Proceeding to Establish Nowlin's Recognition as an Indian before a tribe or the federal government

Summary of Argument

The Court improperly took judicial notice of in-Court statements by Nowlin in an unrelated, much earlier and separate criminal proceeding from which the jury could easily determine that Nowlin had previous arrests and convictions in both tribal and federal court and improperly conclude that Nowlin acted in conformity therewith in committing the assaults for which he stood trial. Such statements further amounted to an improper judicial finding of Nowlin as an "Indian" by the Court.

Standard of Review

Court of Appeals reviews a district court's ruling on admissibility of evidence for abuse of discretion. *United States v. Bautista,* 145 F.3d 1140, 1151 (10th Cir.1998) "Although the abuse of discretion standard is deferential, abuse is shown where the decision was made upon a mistaken view of the law." *United States v. Allen*, 449 F.3d 1121, 1125 (10th Cir.2006). When a defendant objects to the district court's admission of evidence, Court of Appeals applies a nonconstitutional harmless error standard. *United States v. Jefferson*, 925 F.2d 1242, 1255 (10th Cir.1991). Under the harmless error standard the Court of Appeals examines whether the error had a substantial influence on the trial outcome or leaves the court in grave doubt as to whether it had such effect. *See Jefferson*, 925 F.2d at 1255. In making the harmless error assessment of the district court's admission of evidence, the entire record is reviewed de novo,

including context, timing and use of the erroneously admitted evidence at trial and how it compares to properly admitted evidence. *United States v. Blechman*, 657 F.3d 1052, 1067 (10th Cir.2011). The government has burden of demonstrating that the nonconstitutional error is harmless. *Id.* At 1068.

Argument and Authorities

The government requested permission from the Court in chambers on December 14, 2012 to present to the jury evidence of a statement made by Mr. Nowlin in 2003 while appearing before Alan B. Johnson in United States District Court, District of Wyoming, for a change of plea hearing regarding assault with a dangerous weapon and assault resulting in serious bodily injury in order to assist the government in presenting evidence of Nowlin's Indian status (Vol. V, #1090 at 5-24). The government further sought to present evidence that Nowlin had pled guilty in a juvenile matter in the United States District Court which arose on the reservation (Vol. V, #1091 at 17-25 and #1091 at 1092), an interview Nowlin had with FBI Agent Todd Dawson in 2002 where Nowlin advised Agent Dawson that his mother is enrolled and that Nowlin had been arrested on several occasions in the past by officers of the Wind River Police Department, BIA and spent time as a prisoner in the Wind River Police Department jail (Vol. V, #1092 at 5-12), that Nowlin had been arrested by the Wind River Police Department on at least 14

occasions between 2008 and 2012 and on 11 of those occasions pled guilty, no contest, forfeited his bond or was found guilty and on 8 of those occasions spent time in Wind River Police Department jail (Vol. V, #1092 at 13-20). The government further sought to admit Wind River Police Department jail booking information sheets where Nowlin's tribal affiliation is noted to be Eastern Shoshone (Vol. V, #1092 at 21-25 and #1093 1-4), and finally the government moved to present evidence that Nowlin had been previously arrested by Fremont County law enforcement and in their main names table in Fremont County's notes Nowlin's race is listed as Indian, religion as Native American church, and his address as listed as 362 Old Wind River Highway in Fort Washakie, Wyoming which is within the exterior boundaries of the reservation. (Vol. V, #1093 at 5-14). The government advised the Court "that is the information that we have that we feel we have to be allowed to present in some fashion to be able to meet our burden as to the element regarding Indian status." (Vol. V, #1093 at 19-21).

To support its position, the government cited the *Oliphant* decision noting that the tribal court and tribal detention center have no jurisdiction over a non-Indian person (Vol. V, #1093 at 24-25 and #1094 1-7), therefore if Nowlin was not legally recognized as an Indian he wouldn't have had the convictions in tribal court and lack of counsel at those times wasn't an issue because the test was the legal recognition of Nowlin as an Indian by the Tribe or Government as opposed to

Nowlin's alleged admission as to his Indian status (Vol. V, # 1094 at 8-22). The Government acknowledged that unfair prejudice could be created by the jury seeing his convictions as evidence of his bad nature or character, but even if they were prior wrongs or acts they were nonetheless admissible as 404(b) to prove identity. (Vol. V, #1094 at 23-25 and #1095 at 1-3). The government argued there was no prejudice because the Nowlin could simply stipulate to his Indian status, as analogous to *Old Chief*. The probative value was argued as being necessary because there were very few other ways for the government to prove legal recognition of Nowlin's status (Vol. V, #1095 at 4-22). Indeed, if not allowed to present the prejudicial evidence the government had limited avenue to pursue and it would eliminate the government's strongest evidence. (Vol. V, #1095 at 24-25 and #1096 at 1-5). The government again, however, admitted that the "potential for unfair prejudice is there" but argued the government would be unduly prejudiced if prevented from presenting that information (Vol. V, #1096 at 6-11). This position argues that the government will be prejudiced if not allowed to introduce inadmissible evidence.

The government cited *United States v. Shavanaugh* noting that tribal convictions are obtained through procedures that do not comply with the Constitution. These convictions meet Indian Civil Rights Act standards but do not meet with the Constitution standards. As a result tribal convictions do not violate

the Constitution and are analogous to this case (Vol. V, #1096 at 12-18). Finally, when asked by the Court how the government prioritized the information it sought to introduce, they advised its strongest evidence was Nowlin's admission under oath in front of Judge Johnson in the United States District Court (Vol. V, #1097 at 12-24). Finally, the government cited the *Diaz* case admitting the legal test is the recognition as an "Indian" by the tribe or by the federal court. (Vol. V, #1114 at 5-7).

Counsel for Nowlin advised the Court of the unfairness of admitting the in-court statement and the late notice provided Nowlin of the use of such information (Vol. V, #1101 at10-22) which also compromised Nowlin from challenging or rebutting the reliability of the statements defendant made as to Indian status during that proceeding without Nowlin being forced to testify (Vol. V, #1106 at 2-10) as to his prior faulty presumption that he was an Indian (Vol. V., #1111 at 7-24) for purposes of criminal prosecution. Counsel for Nowlin further argued that recognition by the government that you're an Indian is entirely different than Nowlin incorrectly assuming he is Indian for jurisdictional purposes and even advising (Vol. V, #1115 at 2-4) based upon that mistaken assumption. Further, Nowlin's Motion in Limine filed in advance of trial sought to exclude any reference to any prior convictions or bad acts of Nowlin's. (Defendant's First

Motion in Limine with Respect to Prior Convictions, Prior Incarceration, Prior Acts or Wrongs by Defendant, dated 12/09/2012, docket number 70).

The Court acknowledged the parties clearly had preserved their objections (Vol. V, # 1105 at 22-23) but advised it was leaning toward allowing in the statement of Nowlin at the change of plea hearing as admissions (Vol. V, #1106 at15-21, #1109 at 17-19, # 1112 at 6-11 and 20-25, #1113 at 1-2) of Nowlin as to his Indian status which could be articulated in a form of judicial notice (Vol. V #1109 at 17-18) while also noting that "there still may be a shadow that his proceeding may have been a criminal proceeding" (Vol. V, #1107 at 15-16).

In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 194 (1978) the Supreme Court held that Indian Tribes do not possess criminal jurisdiction over non-Indians. In *United States v. Wheeler*, 435 U.S. 313, 323 (1978) the Supreme Court implied that the inherent sovereignty of a tribe may only extend to its own enrolled tribal members. In *Duro v. Reina*, 495 U.S. 676, 679 (1990) the Supreme Court clearly held that a tribe's criminal jurisdiction extends only to tribal members. However, this limitation was expanded by Congress at 25 U.S.C. §1301 and tribal members may now be prosecuted regardless of tribal affiliation. *United States v. Prentiss*, 273 F.3d 1277, 1280 n.2 (10th Cir. 2001).

As a result and as per *Oliphant*, a tribe does not possess criminal jurisdiction over non-Indians, but that fact doesn't negate the possibility – even probability –

that on a number of occasions, including those involving Mr. Nowlin, the Tribal Court assumed the existence of jurisdiction in violation of not only *Oliphant* but also of *Wheeler*. Nor does Nowlin's submission to Tribal Court arrest and prosecution establish his identity as an Indian. Submission to authority no more establishes Nowlin's Indian status any more than arrest and prosecution for a misdemeanor in Paris establishes that Nowlin is French. A mistaken submission to authority and a mistaken, unchallenged and unproven assumption of jurisdiction does not establish jurisdiction. The tribal courts appear to have simply assumed jurisdiction of Nowlin in the past and no evidence was presented at trial, or likely even exists, to support such assertion of jurisdiction.

The same is true as to the United States District Court finding of and exercise of jurisdiction over Nowlin in a prior and separate criminal proceeding from 2003 from which Nowlin's statement was judicially noticed by the Court. The statement read into evidence by the Court failed to satisfy even the first prong of the two-part *Prentiss* test, that being that Nowlin needed to possess at a minimum some degree of Indian blood and biological identification as an Indian. Nowlin's statement judicially noticed did not attribute any degree of Indian blood to Nowlin nor did it establish any family ancestory or lineage to any degree whatsoever. Further, even if properly admitted as a mistaken admission of Nowlin, the statements judicially noticed clearly evidenced prior appearances by Nowlin in

separate, criminal related proceedings. In pertinent part, reading "Casey James Nowlin, has, with counsel before a Court, previously admitted under oath and penalty that he is an Indian person" and " The defendant further submitted himself to the jurisdiction of the Shoshone and Arapahoe Tribal Court" can clearly be read together or individually as indicating prior criminal proceedings. When included in that information are specific statements made by Mr. Nowlin in the prior federal criminal proceeding that he "admitted he is an Indian person" and "he is not enrolled with an Indian Tribe, but that he is a member of the Shoshone Tribe" in addition to "defendant has stated . . . he has lived on the Wind River Reservation all of his life, attended Indian schools on the reservation and . . . has received treatment through the Indian Health Services in the past" it is very difficult to believe the jurors did not easily conclude that Nowlin had been involved in a prior federal criminal proceeding considering those statements made by Nowlin included some of the very topics discussed addressed by government witnesses at trial and presented as evidence for the jury to take into consideration during deliberation when reviewing the jury instruction and elements to be proven rearding "Indian" status. Instruction No. 47(a), read, in pertinent part:

> "You are instructed that in order for the Defendant to be considered an "Indian" as required by the elements in Counts One through Six . . .the Government must prove beyond a reasonable doubt that:
>
> 1. The person in question has some Indian blood, such as being a blood relative to a parent, grandparent or great-grandparent who is clearly

identified as an Indian from a federally recognized tribe; and

2. The person in question has been recognized as an Indian by a tribe or by the federal government.

The second element above is whether a person is recognized as an Indian by a tribe or by the federal government or both. Among the factors that you may consider are, in declining order of importance:

1. Enrollment in a tribe;

2. Government recognition formally or informally through providing the Defendant assistance reserved only to Indians;

3. Tribal recognition formally or informally through subjecting the Defendant to tribal court jurisdiction;

4. Enjoying benefits of tribal affiliation; and

5. Social recognition as an Indian through living on the reservation and participating in Indian social life, including whether the Defendant holds himself out as an Indian.

It is not necessary that all of these factors be present. (Jury Instruction No. 47(a), dated 12/19/2012, docket no. 96).

The judicial notice of Nowlin's prior statement was unnecessary, prejudicial, and effectively constituted a judicial finding of Indian status.

Third Issue: It Was Error for the Court to Allow Evidence of Prior Wrongs, Bad Acts through the Testimony of Government Witnesses Noon and Shockley

Summary of Argument

It was prejudicial error on the part of the Court to allow into evidence the testimony of two government witnesses who testified as to prior bad acts and wrongs of Nowlin only hours after the assaults for which Nowlin was on trial and from which the jury could impermissibly conclude Nowlin acted in conformity with such wrongs and acts in committing the instant offenses.

Standard of Review

Evidence is proper if it tends to prove, among other things, motive, knowledge or intent. Fed.R.Evid. 404(b)(2). "[E]xclusion ofevidence under under Rule 403 that is otherwise admissible under the other rules is an extraordinary remedy and should be used sparingly." *United States v. Tan*, 254 F.3d 1204,1211 (10th Cir. 2001). "Admission of evidence under Federal Rule of Evidence 404(b) is reviewed under an abuse of discretion standard." *United States v. Morris*, 287 F.3d 985, 989-90 (10th Cir. 2002). A district court abuses its discretion when it commits an error of law. *United States v. Tran*, 254 F.3d 1204, 1207 (10th Cir. 2001).

Argument and Authorities

Prior to trial on December 9, 2012 defendant filed two motions in limine. In the first motion, Mr. Nowlin sought to exclude testimony with respect to defendant's character or reputation (Defendant's First Motion in Limine with

Respect to Character or Reputation Testimony dated 12/09/2012, docket number 69). The second motion asked the Court to prohibit the government from introducing evidence, making reference to or inquiring of any witness with respect to prior convictions, incarceration, wrongs or acts of Nowlin pursuant to Rule 12 F.R.Cr. P and F.R.E. 404(b). The motion detailed Nowlin's known arrest and conviction records as well as a handful of statements purportedly made by Nowlin to law enforcement officers and residents of a home where a rock throwing incident involving defendant occurred on April, 22, 2012. Involved in this incident were Officer Michael Shockley of the Wind River Police Department and Mr. Billy Noon, a resident of the home where the incident occurred. (Defendant's First Motion in Limine with Respect to Prior Convictions, Prior Incarceration, Prior Acts or Wrongs by Defendant, dated 12/09/2012, docket number 70).

Specifically, the motion advised that Officer Shockley had initially responded to a complaint of a rock having been thrown by Nowlin through the window of a residence at a trailer park in Riverton, Wyoming. Officer Shockley responded and upon arrival was advised by another law enforcement officer on the scene that Nowlin had stated he "wanted to go to the penitentiary." Officer Shockley took a heavily intoxicated Nowlin into custody, Nowlin mistook Shockley for another officer known to defendant and Nowlin asked why he was being arrested. Officer Shockley told Nowlin "You almost killed that guy last

night Casey" to which Nowlin responded "Why do you give a fuck about those guys? They jump people all the time!" and "Those fuckers do shit all the time and you don't do shit!" While on transport to jail Nowlin purportedly asked "Who is it that turned me in?" and "Doesn't matter, I'll find out in my papers" as well as "So, was these people drunk?" and "I wasn't even there! I was at my sisters!" Officer Shockley advised defendant that several people had described defendant to him as the person who had assaulted the people to which Nowlin responded "Don't nobody know me!" and "You ain't got shit! Iwas at my mom's house all night!" Nowlin further commented "You don't care about me! Every time you guys do this to me I lose everything. Last time I lost my family and my job. Why are you making this personal?" Officer Shockely advised he did not care about Nowlin or anything outside the application of the law. Nowlin further stated "I beat the fed rap twice and I'll beat this one two! When I get out I'm coming to your house and going to make it personal!" to which Shockley responded that if Nowlin came to his house he would shoot him so many times he would be hard to identify.

At a hearing in chambers on December 10, 2012 the government argued the statements made by Nowlin and overheard by Billy Noon, specifically "Well I don't care. I'm going to prison anyway" when being kicked out of Noon's residence were admissions of a party opponents under 801(d)(2)(A) and further quoted *United States v. Smalls* as holding that a district court should remain

mindful that the exclusion of evidence under Rule 403 that's otherwise admissible under the other rules is an extraordinary remedy and should be used sparingly. The argument, then, was that the evidence should be allowed as evidence of Mr. Nowlin's guilty state of mind (Vol. Ia, #24 at 25 and #25 at 1-16) while reassuring the Court that "the government would certainly never introduce any mention of any prior jail time, prior crimes, anything like that. We don't intend to introduce any sort of bad character evidence, anything of that nature." (Vol. 1a, #23 at 19-23).

Counsel for Nowlin argued that such evidence was impermissible evidence of Nowlin's bad character based upon an unrelated and irrelevant incident which did not amount to admissions. (Vol 1a, #25 at 17-25 and #26 at 1-3).

The Court overruled Nowlin's objection to the admission of the purported statements made by him and overheard by Billy Noon to the effect of "Well, I'm going to prison anyway" and "I don't care" while cautioning the government that the testimony was to be limited to the arrival of Nowlin at the residence, Nowlin walking into the residence uninvited which upset Mr. Noon and Nowlin's responses concerning the fight at the residence, the spitting, rock throwing or any of the other circumstances surrounding the encounter that could go to character or bad acts would be inadmissible. (Vol 1a, #37 at 19-25 and #38 at 1-2).

As to the statements purportedly made by an intoxicated Nowlin while in the back of the police car and specifically asking "Why am I being arrested?" being told "You almost killed that guy last night Casey" Nowlin purportedly responding "Why do you give a fuck about those guys? They jump people all the time and you don't do shit. I wasn't even there. I was at my sister's house. Don't nobody know me. You ain't got shit. I was at my mom's house all night. You don't care about me." (Vol 1a, #31 at 23-25 and #32 at 1-6) were admitted over defense objection with the caution that Nowlin's statement as to beating a fed rap twice was not admissible. (Vol. 1a, #38 at 8-14). The Court concluded that "the discussions that we have had today don't relate to prior bad acts but relate to comments made from which the jury could conclude or infer evidence of a guilty mind." (Vol. 1a, #38 at 23-25).

Here, the Court erred in concluding that the actions of Nowlin were not prior bad acts but rather hearsay exceptions evidencing Nowlin's of guilty state of mind. However, Nowlin's purported actions and statements clearly evidenced prior bad acts and that such conduct occurred only hours following the assaults for which Nowlin was on trial only further prejudiced him.

At trial, Noon testified in pertinent part, that a disturbance occurred at his home on April 22, 2012, he recalled the date by reviewing a police department report (Vol. IV, #1030 at 17-25 and #1031 at 1-3). A call went out from Mr.

Noon's residence to the police regarding the disturbance (Vol. IV, #1031 at 5-9). Noon further testified that Nowlin arrived at his home (Vol. IV, #1031 at 25 and #1032 at 1-6) and caused a disturbance by walking into his home without permission (Vol. IV, #1034 at 10-25 and #1035 at 1), acted aggressive (Vol. IV, #1035 at 16-17), walked in like he owned the place (Vol. IV, #1035 at 20), and ignored Noon's request to wait at the door (Vol. IV, #1035 at 25). Nowlin was acting like he had done something and was speaking with another resident about going to prison (Vol. IV, #1036 at 16-19). Noon testified he didn't like Nowlin's attitude (Vol. IV, #1037 at 2). Nowlin became aggressive when asked to leave and had to be pushed out the door by a female resident of the home (Vol. IV, #1037 at 4-10).

At trial Officer Shockley testified, in pertinent part, that after being arrested and during the transport to jail, Nowlin asked "Why am I being arrested?" to which Officer Shockley responded "You almost killed that guy last night, Casey." Nowlin responded, "Why do you give a fuck about those guys? They jump people all the time and you guys don't do shit." (Vol. IV, #1066 at 7-14). Nowlin then asked "So who is it that turned me in?" and "Oh, it doesn't matter I'll find out in my papers" (Vol. IV, #1067 at 21-24) and asks "Was those people drunk?" and "I wasn't even there. I was at my sister's house." (Vol. IV, 1068 at 22-24) When Nowlin was advised by Officer Shockley that several people had identified him as the assailant

he purportedly responded "Don't nobody know me" and "You guys ain't got shit. I was at my mom's house." Officer Shockley laughed and reminded Nowlin he had said he was at his sister's house earlier. (Vol. IV, #1069 at 13-24). Nowlin became upset, asked Officer Shockley why he had to make it personal to which Officer Shockley responded he was just applying the law (Vol. IV, #1070 at 1-3).

Billy Noon's testimony clearly evidenced prior bad acts which resulted in an emergency call to law enforcement due to a disturbance caused by Mr. Nowlin. Nowlin purportedly acted aggressive and belligerent, entered Noon's home without permission and had literally had to be pushed out of the residence by a female resident only hours after the alleged assault for which Nowlin was on trial. Officer Shockley's testimony portrayed a drunken and belligerent Nowlin making inferred threats towards whomever it was that identified him as the assailant as well as Officer Shockley. Clearly the jury could infer, at a minimum, that Mr. Nowlin was an aggressive, dangerous individual whom acted in conformity with these character traits and committed the assualts. "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even through such facts may logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. United States*, 335 U.S. 469, 472 (1948).

Conclusion

Based upon the foregoing, Casey James Nowlin respectfully asserts that his convictions of Counts One, Two, Three, Five and Six of the Indictment be reversed for the reasons stated.

Oral Argument

Oral argument is not requested.

DATED this 23rd day of July, 2013.

Respectfully submitted,
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellant's Opening Brief, as submitted in Digital Form is an exact copy of the written document filed with the Clerk and has been scanned for viruses using the Symantec Norton Antivirus and according to the program, is free of viruses.

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I hereby certify that on July 23, 2013, I electronically filed the foregoing Appellant's Opening Brief using the CM/ECF system which will send notification of such filing to the following e-mail address:

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ATTACHMENTS:

1. Indictment

2. Defendant Casey Nowlin's Motion in Limine with Respect to Character or Reputation Testimony

3. Defendant Casey J. Nowlin's Motion in Limine with Respect to Prior Convictions, Prior Incarceration, Prior Wrongs or Acts

4. Oral order by Court to allow testimony of Noon and Shockley

5. Oral order by Court to take Judicial Notice of statements by Nowlin in prior federal court proceeding

6. Judgment & Sentence

7. Notice of Appeal