IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 13-2410
Criminal

United States of America,

Appellee,

v.

Geshik-O-Binese Martin,

Appellant.

Appeal from the Judgment of the District Court
for the District of Minnesota, The Honorable
Donovan W. Frank, U. S. District Judge

APPELLANT'S BRIEF AND ADDENDUM

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

A jury convicted Appellant Geshik Martin of two counts of first-degree murder, under 18 U.S.C. 2, 1111, 1151 and 1153(a), and one count of robbery, under 18 U.S.C. 2, 1151, 1153(a) and 2111. The Court sentenced him to two consecutive life terms on the murder counts, and to fifteen years on the robbery count, concurrent to each of the life sentences, and a $100 special assessment on each count of conviction.

Martin requests oral argument because the resolution of the issues he raises — the insufficiency of the stipulation to Indian status to prove Indian status, the court's failure to inquire of him to determine that he knowingly and intelligently agreed to that stipulation, and also the denial of his right to be present at trial when the court addresses the jury on questions of law and the jury's capabilities will be facilitated by oral argument. He requests 15 minutes per appellant.

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JURISDICTIONAL STATEMENT

Geshik Martin appeals from the judgment of the United States District Court for the District of Minnesota, the Hon. Donovan W. Frank, U.S. District Judge, presiding. The Government invoked the District Court's jurisdiction by indictment under 18 U.S.C. §3231.

The District Court sentenced Geshik Martin on June 13, 2013, and the Clerk entered judgment June 21, 2013. Martin filed his notice of appeal June 24, 2013, timely under Federal Rule of Appellate Procedure 4(b).

Appellant invokes this Court's jurisdiction under 28 U.S.C. §1291, 18 U.S.C. 3742, and Rules 3 and 4 of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

I. Did the stipulation that Geshik Martin is an Indian suffice to prove the element of Indian status, an element of all the charged offenses, where his stipulation did not address the criteria applicable to establishing that status?

Apposite authority

United States v. Rogers, 45 U.S. 567 (4 How.) (1846)
United States v. Antelope, 430 U.S. 641, 97 S.Ct. 1395 (1977)
United States v. Stymiest, 581 F.3d 759 (8th Cir. 2009)

II. Did the District Court err in admitting the stipulation to Indian status without ensuring that Geshik Martin knowingly and voluntarily agreed to its admission?

Apposite authority

United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977)
United States v. Stalder, 696 F.2d 59 (8th Cir. 1982)

III. Did the District Court deny Geshik Martin his Rule 43 and Constitutional rights to be present at his trial when its contact with the jurors went into areas it had not advised Martin of, and does the record fail to show that the resulting presumptive prejudice was never dispelled?

Apposite authority

United States v. Gypsum, 438 U.S. 422, 98 S.Ct. 2864 (1978)
United States v. Peters, 349 F.3d 842 (5th Cir. 2003)

STATEMENT OF THE CASE

Relevant procedural history. Geshik Martin stood trial February 25-March 12, 2013, on a superseding indictment that charged him with two counts of first-degree murder under 18 U.S.C. 2, 1111, 1151 and 1153(a) (Counts 1 and 2), two counts of second-degree murder under 18 U.S.C. 2, 1111, 1151 and 1153(a) (Counts 3 and 4), and one count of robbery, under 18 U.S.C. 2, 1151 and 1153(a) and 2111 (Count 5). The jury convicted him on all counts.

The Court sentenced Martin to two consecutive life terms on Counts 1 and 2, and to 180 months in prison on Count 5, concurrent to Counts 1 and 2, and $100 special assessments on each of the three counts for which it imposed a sentence.

Rulings presented. Martin presents these (unobjected-to) rulings for review: 1) the Court's admission of a stipulation purporting to establish the element of Indian status (Vol. VI, 1241); 2) its failure to inquire of Geshik Martin to determine if he was knowingly, intelligently and voluntarily entering into this stipulation (Vol. VI, 1241), and 3) its *ex parte* contact with the jurors and prejudicial comments made to them (Vol. II, 289-309).

Relevant facts.

Officer Paul Kwako

Red Lake tribal police officer Kwako responded the night of January 1, 2011 at 9:30 p.m. to a fire at Craig Roy's home on the Red Lake reservation (Vol. III, 408).[1] The house was aflame when he arrived (Vol. III, 410).

Fire Marshal Kevin Mahle

Mahle investigated the fire the night it occurred (Vol. III, 444). Two extremely charred bodies were found the next morning in the in the basement, amongst burned debris (Vol. III, 454).

Craig Roy, Jr.

He is the son of the two persons found in the fire debris, Darla Beaulieu (aka "Sue"), and Craig Roy, Sr. (aka "Crusher") (Vol. III, 478-84). His mother and

[1] "Vol." refers to the trial transcript.

father had never been married to each other (Vol. III, 484). His father sold crack on the reservation, and he, Craig Jr., helped him (Vol. III, 486). David Martin began living with Craig, Sr. in 2010 (Vol. III, 494).

Terin Stately

She pled guilty to aiding and abetting the robbery of Crusher and testified under a plea agreement against Geshik Martin and his co-defendants, David and George Martin and Edward Robinson (Vol. III, 532). She was trying to avoid the up-to-fifteen years she could get (Vol. III, 532). On January 1, 2011, she was staying with her boyfriend, Geshik Martin, at the home of Adrianne (Ann) Beaulieu (Vol. III, 533). She had been going out with Geshik for two weeks (Vol. III, 533).

A party had been going on at Beaulieu's for three or four days non-stop, and it continued on New Year's Day (Vol. III, 536, 607). The partying included a lot of drug and alcohol use, including her own (Vol. IV, 608). She was in a fog as a result, and her memory was not reliable (Vol. IV, 611, 615). George and David Martin and Kevin Needham were also there (Vol. III, 536). Vicki Nadeau called and said she had been beaten up by Crusher and wanted a ride (Vol. III, 538-40). Stately and Geshik Martin went to pick her up (Vol. III, 538). Nadeau appeared beat up and had her (broken) arm in a sling (Vol. III, 540). She said Crusher had

beat her up (Vol. III, 541).

At Ann Beaulieu's house, Geshik and David Martin asked Nadeau what happened (Vol. III, 542). Stately did not remember Nadeau saying anything other than that she had been beaten up (Vol. III, 542). Geshik was upset by this, and said they should go get him (Vol. III, 542, 544). She heard David Martin say he knew where Crusher kept his dope, as he was living with Crusher, and that he could tell Crusher he was there to get his clothes (Vol. III, 544-45). He was telling this to Geshik, Ed Robinson and George Martin (Vol. III, 545). David Martin also said that Crusher had a gun at his house (Vol. III, 546).

Eventually, Geshik, David and George Martin, Needham (KJ) and Robinson decided to go to Crusher's home to rob him of his dope (Vol. III, 547). Stately drove them there in her car (Vol. III, 547). No one brought any weapons (Vol. III, 549). The drive took 20 minutes, and Stately parked at the end of the long driveway because she could not get in (Vol. III, 549-50). Everyone was talking, but Stately never heard anyone say what the plan was, except that David would say he would knock and ask for his clothes, and then the others would go in after he did (Vol. III, 550).

On arrival, Geshik told Stately no one would get hurt (Vol. III, 551). Stately waited in the car 10-20 minutes, smoked weed and called her brother (Vol.

III, 552). Then she saw Needham at the end of the driveway, then the others after a couple of minutes (Vol. III, 553). Geshik got in first, next to her in the front seat with Robinson, who now had a gun (Vol. III, 553-54). David and George Martin and Needham were in back (Vol. III, 554). When Stately asked what happened, Geshik said "Don't worry about it" and "drive" (Vol. III, 555). As she drove away, Stately saw a bright light behind her (Vol. III, 555).

They all returned to Ann Beaulieu's house (Vol. III, 558). There, Stately noticed blood on Geshik's arms, but did not look to see if anyone else had any blood on themselves (Vol. III, 558-59). Geshik and Robinson were telling the others to take their clothes off, and Ann Beaulieu put the clothes in a garbage bag (Vol. III, 559-60). Needham asked her for her jacket because he said it could have blood on it, and Geshik took it and put it in the bag (Vol. III, 560). All five men changed clothes, and showered, but she saw only Geshik shower, because he did that with her, and she did not see any injuries to him then (Vol. III, 560-61). After changing clothes the five men met in one of the bedrooms at Ann Beaulieu's house (Vol. III, 564). She did not see any drugs when they returned to Beaulieu's (Vol. III, 566). All those at the party that night had been drinking, smoking weed and taking pills, like percocet (Vol. III, 566).

Stately and Geshik slept together at Ann Beaulieu's that night (Vol. III,

567). The next morning Stately asked Geshik what happened the night before, and he said "they got killed. They died." He also said "they lit the house on fire" (Vol. III, 568). He told her not to tell anybody, and to be strong (Vol. III, 568). Later that day, after David Martin used Stately's car, he said it might have blood in it and should be cleaned (Vol. III, 569).

A couple days later, at Ann Beaulieu's, Stately saw the rifle or shotgun that Ed Robinson had brought back with him from Crusher's (Vol. III, 570). Ann Beaulieu had told Robinson and Geshik to get rid of it (Vol. III, 571, 598). They said they would (Vol. IV, 598). Stately saw it in parts on Beaulieu's couch (Vol. III, 571). Later, while riding in Beaulieu's car, Geshik, Robinson and Ann tossed the parts out (Vol. III, 571-72).

After Crusher's and Sue's deaths, the police continually stopped and jailed Stately for minor violations (Vol. IV, 604-05). She said Geshik had told her not to talk to the police, and that in November, 2011 he threatened to kill her if she did (Vol. IV, 605, 682). Based on these things, she talked to Officer Kwako about the case (Vol. IV, 605).

At trial, Stately claimed that her earlier statements about the incident, which were not consistent with the Government theory at trial as to what happened, were lies (Vol. IV, 639-40). For example, in a May 20, 2011 statement, she never

admitted driving to Crusher's home (Vol. IV, 640). Before the grand jury that same month, she told a story that was a lie compared to her testimony now (Vol. IV, 642-43). In February, 2012, she proffered that Geshik had gone to Crusher's house only to trade pills for dope (Vol. IV, 647-48). In August, 2012, she was arrested for robbery in connection with this incident, and then fled to North Dakota (Vol. IV, 649). In an October 26, 2012 statement, she said that she and the others had not gone to Crusher's house to rob him (Vol. IV, 650).

Stately testified she never would have gone to Crusher's house if she had known it was to rob him (Vol. IV, 654). But she changed her story to be consistent with the Government version of events, and was now saying she knew there would be a robbery because she had children and did not want to get life in prison (Vol. IV, 654, 692).

Vicki Nadeau

Nadeau, age 48, was David Martin's former girlfriend (Vol. IV, 703). She used crack at Gary Good's party on New Year's Eve, and passed out around 4:00 a.m. (Vol. IV, 706-07). When she awoke, Sue Beaulieu and Jill Cobenais were fighting (Vol. IV, 708). Then she, Nadeau , and Crusher got into a fight, and he broke a rocking chair over her head, and later hit her jaw with a dumbbell (Vol. IV, 710-11). Later on New Year's Day, she went to Ann Beaulieu's house on the

reservation with David Martin (Geshik's cousin) (Vol. IV, 713). Geshik Martin and Terin Stately were with David (Vol. IV, 713). Also at Ann Beaulieu's were Edward Robinson, George Martin (Geshik's brother), Kevin Needham (KJ), and Nicole Robinson (Vol. IV, 714). Nadeau was drinking alcohol that night and taking muscle-relaxant pills (Vol. IV, 722, 727).

She later heard Geshik and David Martin talking about going to Crusher's house to rob him of his cocaine (Vol. IV, 716). Geshik knew Crusher had beat her, Nadeau, but did not get mad, and just gave her a hug (Vol. IV, 745). Nadeau named as persons leaving the house to go to Crusher's the same persons Stately had (Vol. V, 716). She did not know where they went, but there had been talk of getting weed (Vol. IV, 716). Nadeau was sleeping when they returned, but awoke and saw Geshik had a bag of cocaine, though he always had one (Vol. IV, 717). She saw a long gun, too, but did not know who had it (Vol. IV, 739). She did not see Geshik or anyone else wash up after returning (Vol. IV, 743). The next day she got a ride from David Martin in Stately's car, and during the ride saw what looked like a smear of blood in the car (Vol. IV, 720).

Nicole Robinson

Age 20, she is Edward Robinson's cousin (Vol. IV, 747). On January 1, 2011, she went with him to Ann Beaulieu's house (Vol. IV, 747). They arrived

around 5 or 6:00 p.m., and Geshik and Stately arrived about an hour later (Vol. IV, 749). Vicki Nadeau arrived with David Martin, and Nadeau had a black bruise on her chin and a swollen arm (Vol. IV, 753). Nadeau said Sue Beaulieu or somebody had hit her with a chair (Vol. IV, 753). Geshik said this is my fam, or this is my auntie (Vol. IV, 755). Ten minutes later, Geshik, George and David Martin and Needham and Robinson headed out (Vol. IV, 755-56). They were gone for 2-3 hours (Vol. IV, 759).

Nicole heard Geshik tell David Martin to pretend like he was going there to grab his clothes, but she did not know where "there" was (Vol. IV, 760). She knew David was staying at Crusher's house, though (Vol. IV, 760). Only Ed Robinson and Geshik and George Martin returned that night (Vol. IV, 760). Geshik said he had to wash his hands (Vol. IV, 762). George Martin had two plastic bags for clothes, but Nicole did not know for what purpose (Vol. IV, 762). Then Geshik and George Martin left Ann Beaulieu's, and she, Nicole, stayed the night there with Ed Robinson (Vol. IV, 762-63). Nadeau saw no blood on Geshik, and did not see him change into different clothes, nor see whether he had any injuries (Vol. IV, 763-64). The same was true of George Martin and Ed Robinson (Vol. IV, 765).

Later that night, while Nadeau was asleep, Geshik and Stately came into her room and Geshik said "You wouldn't want to see the stuff I saw tonight, dawg"

(Vol. IV, 765). Stately was crying and said "We burnt them" (Vol. IV, 765). She heard someone say "We got to shoot the witnesses dead" (Vol. IV, 765-66). The next day, Nicole saw a spot of what looked like blood on the glove box of Stately's car (Vol. IV, 768).

Nicole admitted she was drunk that night, and on January 24, 2011 she told the FBI that Ed Robinson had gone to Bemidji the night of January 1, 2011, not with the others to Crusher's house (Vol. IV, 769).

Misty Oakgrove

Age 20, she testified that she was at Ann Beaulieu's when everyone learned of the assault on Nadeau, and that Geshik had no reaction to it (Vol. V, 844). Oakgrove had arrived at Beaulieu's with George Martin (Vol. V, 858). About a half-hour later, Oakgrove saw leaving Ann Beaulieu's house the same persons Stately had identified as leaving; they left after a guy she did not know said he wanted more weed and alcohol (Vol. V, 847). Those leaving said they were leaving to get those things (Vol. V, 847-48). One guy had said he was fighting with a roommate, but she did not remember if Geshik said anything (Vol. V, 847-48). A big guy said he wanted to get his clothes (Vol. V, 865). One of those who left took a board three feet long (Vol. V, 849).

Oakgrove saw a weapon when she first arrived, as Geshik pointed a gun at

her head (Vol. V, 849). It was a long gun, and he pointed it because he was drunk (Vol. V, 849). Oakgrove watched a whole movie before those who left returned (Vol. V, 851). Those who had left earlier returned to Beaulieu's, but Oakgrove was not sure Needham was among them (Vol. V, 852). They brought back weed and a fifth of brandy (Vol. V, 853). Geshik said he was going to take a shower, because he forgot to earlier (Vol. V, 852). She did not remember if anyone else showered (Vol. V, 853).

Greg Good

Age 55, Good was a cousin of Crusher Roy (Vol. V, 876, 892). Good got crack from him to sell (Vol. V, 8894). On Jan. 2, 2011, David Martin came to Good's house, and Good asked him if he knew what had happened to Crusher, and Martin said "yeah" (Vol. V, 878). Martin later said "I'm going to prison for the rest of my life" (Vol. V, 880). Good asked "why, did you kill him?" and Martin shook his head up and down (Vol. V, 880-81). Martin was playing with a knife, so Good called the police, who arrested him (Vol. V, 886).

Good said the fight between Jill Cobenais and Sue Beaulieu was over their relationships with Crusher (Vol. V, 897). He never saw Crusher hit Vicki Nadeau with anything (Vol. V, 898).

Sgt. Harlan Johnson

A Red Lake tribal police officer, Johnson testified about the arrest of David Martin on Jan. 2, 2011 at Good's house for public nuisance, based on Martin playing with a knife (Vol. V, 915). They took a black-handled steak knife from Martin's person, but Johnson admitted there was nothing to link it to the alleged murders (Vol. V, 919). The police also found a rock of crack (Vol. V, 919).

Adrianne (Ann) Beaulieu

Age 32, she was dating Edward Robinson as of Jan. 1, 2011 (Vol. V, 931-32). She held a party that New Year's Eve, attended by Geshik, David and George Martin, Terin Stately, Robert Demarrs, Misty Oakgrove, Nicole Robinson, Kevin Needham and Vicki Nadeau (Vol. V, 934). She also had a party New Year's Day, attended by these same people (Vol. V, 934). Pills and alcohol were being used by everyone throughout the partying (Vol. V, 936).

Vicki Nadeau arrived on New Year's Day with David Martin, and Nadeau was crying because she said Crusher and Sue Beaulieu (Ann's cousin) had beaten her up (Vol. V, 939). Geshik said in response that they're out now, and no one's going to do that to their family (Vol. V, 941). David Martin said he had just gotten back from going to get Crusher's stuff, and he knew what Crusher had and where he kept it (Vol. V, 942). She understood "stuff" to mean crack (Vol. V, 942). David said he wanted to get his clothes from Crusher's house (Vol. V, 942).

Stately, Ed Robinson, Kevin Needham, and Geshik, David and George Martin left to get David's clothes (Vol. V, 946-47). No one took anything with him (Vol. V, 947). About four hours later, around midnight, they returned (Vol. V, 947). Beaulieu saw no blood or injuries on David Martin, and the same was true of George Martin, but George went to shower right away (Vol. V, 949). Robinson had blood on his hands, pants, jacket and shoes, and no visible injuries (Vol. V, 950). After George showered and changed clothes, Ed Robinson showered, too (Vol. V, 951). The bloody clothes were put in a bag that Robinson had (Vol. V, 951).

Stately and Geshik also showered (Vol. V, 951). Geshik's pants and shirt had blood on them, but his hands were clean (Vol. V, 952). He had no visible injuries (Vol. V, 952). He changed clothes and put the ones he had been wearing in the bag with Robinson's (Vol. V, 952). Stately's jacket was covered in blood, and she was crying (Vol. V, 952). Geshik said "It's over" to Nadeau (Vol. V, 954). Geshik had brought a 12-gauge back (Vol. V, 950).

The next day Ann Beaulieu saw a big ball of crack in Geshik's hand, and he had money (Vol. V, 956). He, Robinson, George Martin, Kevin Needham and Terin Stately were in the bedroom at Ann Beaulieu's that Geshik was staying in, dividing up the crack (Vol. V, 957). (Vol. V,).

A couple days later, Robinson told Ann Beaulieu she would be mad at him because he killed her cousin (Darla (Sue) Beaulieu) (Vol. V, 959). About a week later, Robinson told Ann that Sue Beaulieu was standing naked on the bed and Crusher shot her, and that Geshik said he wanted to stay and shoot himself so that no one would get in trouble (Vol. V, 960). Ed Robinson said they had gone to Crusher's to get David's clothes (Vol. V, 960).

Ann saw the 12-gauge get disassembled by Geshik and Robinson in her living room (Vol. V, 960). Robinson said it had come from Crusher's house (Vol. V, 961). Ann was in the car with Geshik, Stately and Robinson when Robinson tossed the gun parts away (Vol. V, 961). Geshik was driving (Vol. V, 962).

The morning of Jan. 2, 2011, David Martin cleaned Stately's car with bleach (Vol. V, 966).

Ann Beaulieu did not initially tell the FBI about guns in her house or throwing away gun parts, but waited six months to disclose these things (Vol. V, 986). She admitted lying to the grand jury in this case (Vol. V, 996). She was a crack cocaine drug dealer (Vol. V, 997).

Lorene Gurneau

A member of the Red Lake Band, she regularly used crack between 2005 and 2011 (Vol. VI, 1096). She bought crack from Geshik Martin on Jan. 2, 2011,

and made two $20 buys and one $50 (actually $20) buy that day (Vol. VI, 1097-1102). She admitted that her error in saying the one buy was $50 had resulted from her crack-impaired memory (Vol. VI, 1104). She also bought from George Martin during this time (Vol. VI, 1102). Gurneau also told the authorities she bought crack from January to November, 2010 from Geshik Martin, but even the Government knew this was not true, and stipulated that it was factually impossible for her to have done that because Geshik Martin was not in Red Lake then (Vol. VI, 1107).

Travis Varney[2]

Age, 43, Varney was in jail at Red Lake the last week of 2011 (Vol. VI,). David Martin was there too, and two days before New Year's Day he told Varney that he had just gotten rid of one of the two ounces he and Crusher had obtained in Minneapolis, and they were going back for more,(Vol. VI, 1117). After New Year's Day, David Martin and Varney were again back in jail, and Robinson told him that he was owed money from what had been taken from Crusher's house, and that Geshik and Ed Robinson owed it to him (Vol. VI, 1182). Varney admitted that when he gave this information to the authorities he wanted to get out of jail to

[2] The Court instructed the jury to limit use of Varney's testimony just to David Martin (Vol.VI, 1116).

attend Crusher's funeral, that he was in jail for possessing drugs, and that he has a criminal record (Vol. VI, 1122, 1125-26).

Ray Brown

Age 25, Brown had a 2006 conviction for first-degree burglary and a 2007 conviction for being a felon in possession, and was testifying to get a sentence reduction because he had pled guilty to two 924(c) counts based on use of guns to commit pharmacy robberies, and thus faced a minimum sentence of 32 years (Vol. VI, 1137-41). He met Geshik Martin at Sherburne Jail in June, 2012 (Vol. VI, 1142).

Brown claimed that in August, 2012 Geshik said he and his cousin had robbed a male and a female with a knife to get drugs and money (Vol. VI, 1144). Brown said Geshik told him that the male did not want to give up these things so he, Geshik, grabbed the female and threatened her with a knife, and then stabbed the female, then they got what they came for and left (Vol. VI, 1147). Brown admitted to lying to the FBI about who had been involved in committing the pharmacy robberies with him, and about being a CRIPS gang member (Vol. VI, 1149, 1150-51, 1158).

Jermaine Edison[3]

He was in custody with Ed Robinson while the latter awaited trial (Vol. VI, 1190). Edison faced a career offender sentence in his own case (distribution of cocaine) and was looking for a sentence reduction (Vol. VI, 1185). He claimed that Robinson told him that in his own case he had tied people up while the others searched for drugs, and that they tortured them while they did that (Vol. VI, 1191). Robinson said he cut one of them (Vol. VI, 1191).

Stipulation

Geshik Martin stipulated that he is "an Indian," that Crusher Roy's residence was within the Red Lake Reservation, and that the jury must treat these elements as proven (Vol. VI, 1237, 1239).

Dr. Victor Froloff

He conducted the autopsies of Craig Crusher Roy and Darla (Sue) Beaulieu (Vol. VII, 1279, 1289). Much of each body was burned beyond recognition, and had a charcoal-like appearance (Vol. VII, 1292). Through examination and x-rays, he found 26 stab wounds on Roy's body (Vol. VII, 1296, 1299). Four were to the left side of his abdomen, five to the upper back and two to the lower back, three to

[3] The Court instructed the jury to limit use of Edison's testimony just to Ed Robinson (Vol. VI, 1190).

the right rib cage, four to the left rib cage, ten to his left chest, and three to the right chest (Vol. VII, 1296, 1299, 1300). His liver and lungs were penetrated (Vol. VII, 1300).

The wounds to the right chest were approximately 1 inch deep, to the liver they varied from 2 to 4 inches, to the left chest about 3.5 inches, and to the upper back slightly less than 2 inches (Vol. VII, 1309-10, 1336). They appeared to have occurred before the body was burned (Vol. VII, 1298). The wounds to the upper back were 1.8 inches deep (Vol. VII, 1336). He did not locate any defensive-type wounds, but much tissue had burned away (Vol. VII, 1311). Testing for carbon monoxide revealed Roy had died before the fire (Vol. VII, 1313). Cause of death was multiple stab wounds, and manner was homicide (Vol. VII, 1314-15).

Darla (Sue) Beaulieu's autopsy revealed no projectiles in her body and no blunt force to her head (Vol. VII, 1319). He found two stab wounds to the upper back about 3.5 inches deep, and three to the lower back that penetrated her liver, which were about 4 inches deep (Vol. VII, 1320, 1323-24). The wounds were before she burned, because she had significant bleeding into her lung (Vol. VII, 1322). Nine stab wounds were identified to the front torso, subcostal area (Vol. VII, 1325). They penetrated the liver, and were about 3.5 inches deep (Vol. VII, 1325). Fourteen stab wounds total were found (Vol. VII, 1327). Two of the

wounds to her top right shoulder were 1 inch and 3.6 inches in depth (Vol. VII, 1337-38). She did not have any apparent defensive wounds, in part because of tissue burning away (Vol. VII, 1327). Cause of death was stab wounds, and manner was homicide (Vol. VII, 1329). Froloff believed all the wounds had been caused by a knife, but he could not tell if more than one had been used (Vol. VII, 1330).

Defense Case

Geshik Martin

Age 30, he had a conviction in 2007 for possessing cocaine, but he never sold Lorene Gurneau cocaine in 2011 (Vol. VII, 1353-54). At the end of 2010, he was living with Terin Stately and Ed Robinson at Ann Beaulieu's home (Vol. VII, 1354). On New Year's Eve 2010, he was partying at Ann's house, drinking alcohol and smoking a little marijuana (Vol. VII, 1356). He was not using crack cocaine then or later in January (Vol. VII, 1356).

David Martin came over in the afternoon to Beaulieu's (Vol. VII, 1357). He mentioned that Crusher had beat up Vicki Nadeau (Vol. VII, 1358). Geshik went with David and Stately to pick up Nadeau (Vol. VII, 1359). Back at Ann's, Nadeau told Geshik what happened, she cried, and he hugged her (Vol. VII, 1359).

He had a little alcohol to drink that day and probably some marijuana, but did no crack or pills (Vol. VII, 1360).

Geshik knew Crusher Roy as a big guy who beat others up, and who used meth and crack (Vol. VII, 1360). He did not know if Crusher had a gun, and he, Geshik, did not have one at Ann Beaulieu's house (Vol. VII, 1361). At Ann's on New Year's Day 2011, Geshik's cousin David Martin told him that he worked for Crusher, and asked if he would help him go there and get his clothes, so he could get the money and crack that Crusher owed him (Vol. VII, 1363). Geshik did not want to go, but David seemed scared and lost, so he agreed to take him (Vol. VII, 1363).

He asked Stately to use her car, but she did not want to let him drive as he had crashed it recently, so she drove (Vol. VII, 1363-64). When Ed Robinson, Kevin Needham and George Martin heard about them leaving, they wanted to go along for the drive (Vol. VII, 1364). Geshik was just slightly buzzed, and did not bring anything with him (Vol. VII, 1364-65). He had not been to Crusher's before, and had only seen him around (Vol. VII, 1365). He had never met Darla (Sue) Beaulieu, either (Vol. VII, 1365).

At Crusher's, the long driveway was not plowed, so they all got out at the end of the drive and went to the house, except Stately, who turned the car around

(Vol. VII, 1366). Geshik told her they were just going to grab David's clothes (Vol. VII, 1366). David entered first, followed by Geshik and Robinson (Vol. VII, 1367). George Martin and Needham did not enter (Vol. VII, 1367). Crusher approached with a gun, followed by Sue (Vol. VII, 1367). He asked David "what the f--- do you want?" and David said he just wanted his stuff (Vol. VII, 1368). Crusher told them to leave, and when Geshik asked him why he would not give David his things, Crusher said "Who the f--- are you?" and pointed his gun at him (Vol. VII, 1368). David and Robinson ran out, and Geshik froze in place (Vol. VII, 1368-69). Crusher closed the door, and the asked Geshik if he thought he was "bad," while still pointing his gun at him (Vol. VII, 1369).

Crusher kept asking Geshik if he was "bad," and then racked the 12-gauge, pointed it at him, and acted as if he would shoot (Vol. VII, 1370). He pulled the trigger but nothing happened (Vol. VII, 1370). Geshik ran to the kitchen, but realized he had nowhere else to go, and grabbed a knife, as he could feel Crusher coming after him (Vol. VII, 1370). He turned around and Crusher was two arm-lengths away (Vol. VII, 1370). Sue was right with him (Vol. VII, 1371).

Crusher tackled him and slammed him into the counter, and Sue was helping him (Vol. VII, 1371). Geshik started stabbing him (Vol. VII, 1371). Crusher kept slamming him, trying to get him on the floor, and eventually succeeded, and started

to choke him (Vol. VII, 1371). Sue was trying to scratch and dig at his eyes and punch his head (Vol. VII, 1372). Geshik kept swinging the knife, at both of them, and then spun away (Vol. VII, 1372). He kept stabbing at Crusher, and then ran to a back room to jump out a window (Vol. VII, 1372).

But it was dark, and he could not see, and Crusher and Sue were right behind him (Vol. VII, 1372). Geshik turned around and started stabbing at them, as he thought they would kill him (Vol. VII, 1373). Crusher slammed him to the floor and landed on top of him, so Geshik pushed him away and then stabbed him in the back to get away (Vol. VII, 1373). Sue was attacking him from the side, so he stabbed at her, too (Vol. VII, 1373). He kept stabbing until he was the only one moving and then ran out the front door; as he left he grabbed the shotgun lying in the hallway because he did not know if Crusher would get up (Vol. VII, 1374-75). He left the knife in the house (Vol. VII, 1375).

When he got to the car, he noticed blood all over himself, and freaked out (Vol. VII, 1375). The others grabbed him and told him to settle down (Vol. VII, 1376). Back at Ann Beaulieu's, he took a shower, changed clothes, and then threw all the bloody clothes in a bag (Vol. VII, 1376). He asked the others if he got blood on them, and gave them clean clothes to change into (Vol. VII, 1376). He was scared, so he put the bag in the trunk of Stately's car, and then got drunk,

smoked a lot of weed, and took pills (Vol. VII, 1377).

He had injuries to his face and inside of his eyes from Sue's scratching him, to his head and back from being slammed, and to his throat from being choked (Vol. VII, 1378).

He never told anyone what happened, in part because he was not proud of what happened, and because in light of his record he was not sure anyone would believe him (Vol. VII, 1377). He felt that in the house he was fighting for his life, and if he had not done what he did, he would have been killed (Vol. VII, 1378). He had trained to be a mixed martial arts (MMA) fighter, but had had just two fights, the first months after this incident (Vol. VII, 1430).

Brian Sumner

Sumner, 28, lives in Red Lake, and described an encounter with Crusher Roy on July 29, 2008 when he was driving with his 18-month old son and his son's mom, in which Crusher fired a shotgun towards Sumner's vehicle as he, Crusher, drove by, accompanied by his son (Vol. VII, 1433-38). The shot went over the top of Sumner's vehicle, and Sumner dropped off his son and tried to get away, as Crusher continued to shoot at him (Vol. VII, 1439-40). Sumner got away, and reported the incident to the police, but that was the end of it (Vol. VII, 1442). Nothing Sumner knew of justified the shots Crusher fired at him (Vol. VII, 1442).

David Martin

Age 47, David Martin worked for Crusher Roy starting in 2000 as a laborer (Vol. VIII, 1480). Between 2000 and 2010, David spent most of his time in the Twin Cities (Vol. VIII, 1481). In the Fall of 2010, Crusher rehired him to do flooring work in Red Lake (Vol. VIII, 1483). He also wanted David help him find a source for crack cocaine (Vol. VIII, 1484). Crusher said he would get him some of the crack from the source so he, David, could sell it, and he, Crusher, would pay him $10 an hour for the construction work (Vol. VIII, 1486). David did not use crack, but he agreed to this (Vol. VIII, 1486). For convenience, he lived with Crusher (Vol. VIII, 1486). He had seen Crusher assault people for no reason (Vol. VIII, 1488).

The day before going to Greg Good's home on Dec. 31, 2010, Martin had obtained crack in the Twin Cities with Crusher (Vol. VIII, 1488). Martin stayed over at Good's New Year's party, and hung out there the next day and also the night of January 1, 2011 (Vol. VIII, 1489-90). He saw the fight on New Year's Day involving the three women (Vol. VIII, 1490). Crusher is 350 to 400 pounds, and he hit Vicki Nadeau over the head with a rocking chair and a free-weight (Vol. VIII, 1492). Martin went to Pam Martin's place and slept for 12 hours, and then went to Ann Beaulieu's house with Vicki Nadeau (Vol. VIII, 1496).

At Beaulieu's house, Nadeau said Crusher had beaten her up, and Geshik Martin gave her a hug (Vol. VIII, 1497). David Martin said he wanted to get his clothes from Crushers's home so he could return to the Twin Cities (Vol. VIII, 1497). David, Terin Stately and Geshik Martin decided to drive to Crusher's to get the clothes (Vol. VIII, 1498). Ed Robinson, George Martin and Kevin Needham asked to go with (Vol. VIII, 1499). No one discussed a robbery, and David had no weapon, though he was afraid of Crusher (Vol. VIII, 1500-01).

Once at Crusher's, Geshik followed him in, and then Robinson (Vol. VIII, 1502). Needham and George Martin did not follow (Vol. VIII, 1502). David saw Crusher come toward the door, telling them to leave once David said he wanted his clothes (Vol. VIII, 1503). David and Robinson left and ran to the car (Vol. VIII, 1503). Geshik followed five minutes later (Vol. VIII, 1503).

That night, David stayed at Ann Beaulieu's house, and the next day cleaned Stately's car with soap and water because Stately asked her to (Vol. VIII, 1501). By then, David knew something horrible had happened (Vol. VIII, 1507). Then he went back to Good's house (Vol. VIII, 1508). He took out a pocket knife, but did not threaten Good with it; he was just nervous (Vol. VIII, 1509). He told Good he might be going to prison for the rest of his life, and said that because he thought just being at the scene of a crime made him guilty, especially since the cops at Red

Lake can twist things (Vol. VIII, 1510).

David denied telling Travis Varney that Geshik and Robinson sold crack for him, and denied saying he had killed anyone (Vol. VIII, 1513-14). The crack taken from David when he was arrested the next day he had previously obtained from Crusher on Dec. 30, 2010 as payment (Vol. VIII, 1503).

SUMMARY OF ARGUMENTS

I. *Stipulation did not establish Indian status*

Geshik Martin stipulating that he is "an Indian" did not establish the Indian status element of each of the charged counts. Indian status depends on the defendant meeting a two-part test establish by case law, which requires that the Government show the defendant has sufficient Indian blood of a federally-recognized tribe, and has been recognized as an Indian by the Government or a tribe. Accordingly, a valid stipulation would have had to state those factors, or other information sufficient to establish Indian status under applicable precedent, and that as a result he agrees he possesses Indian status.

It does not cure the stipulation's shortcoming that it also says "the jury must treat these facts as having been proven at trial" and "The jury must treat this element of the offense as . . . proven". Because the stipulation was to Indian-status, and because that required proof of factors no lay juror would know had to

be present for Geshik Martin to have that status, the stipulation not addressing them means it could not logically and factually establish Indian status.

The stipulation not addressing the factors determinative of Indian status was plain error because just saying a person is an Indian obviously does not prove under governing case law that a person is an Indian under 1153. Martin's convictions must be set aside for insufficient evidence of Indian status.

II. *The court failed to ensure Martin entered into the stipulation knowingly and intelligently.*

This Court's precedent requires the trial judge to ensure that when defendants stipulate to an offense element, they do so knowingly and intelligently. The important question is whether the defendant knew what he was doing when he or she entered into the stipulation. Here, the trial judge made no inquiry at all of Geshik Martin or his counsel to determine whether the stipulation was knowingly and voluntarily entered into. In addition to this Court's precedent, Supreme Court precedent regarding proof of facts necessary to impose a mandatory minimum sentence (Martin faced mandatory life) makes it implicit that any waiver of such facts be knowing and voluntary, which the judge has the responsibility to ensure.

The trial judge's failure to make a simple inquiry as to whether Martin knew what Indian status entailed, that he believed the Government could prove it, and that he was willingly agreeing to the stipulation, precluded accepting it. Even if

the stipulation had not been insufficient to prove Indian status (see Arg. I), its inadmissibility precluded proof of that element, because the record contains no evidence independent of the stipulation that proves Indian status under the factors case law makes determinative.

Under applicable precedent, the trial court plainly erred in accepting the stipulation without the necessary inquiry. Because without the stipulation no evidence exists to support the Indian status element, Martin's conviction must be reversed for insufficient evidence.

III. *The trial judge's improper contact with jurors and improper statements*.

As peremptory challenges were occurring, the trial judge, *ex parte*, improperly discussed with the jurors subjects other than those he told counsel and the defendants he would, *i.e.*, thanking them for their service. The judge characterized jury nullification as jurors taking the law into their own hands, and said that juries almost always make the right decision. And the judge did not tell the defense he had made these statements, even though they went beyond the bounds of what he had said would discuss.

The judge's actions violated Geshik Martin's right to be present, which in turn violated his Fifth Amendment right to due process and Fourteenth Amendment right to equal protection of the laws. First, though a court does not

have to instruct a jury it has the power to nullify the evidence, Martin had a due process and equal protection right not to have his jury instructed that it could *not* exercise that power. Second, the judge's repeated statements that juries usually get it right resulted in Martin having a jury that thought whatever result it reached, it would be the right one, whether or not they carefully considered the evidence, and whether or not they were willing to question their conclusions.

It increased these dangers that the judge did not tell anyone that his discussion with the jurors had gone into improper subjects, which precluded the defense from questioning the jurors to determine prejudice, and to seek corrective instructions.

The record does not show that the trial judge's presumptively prejudicial contact with the jurors was not prejudicial. Geshik Martin must be retried, but in no event should his convictions be affirmed without a hearing in the district court to allow him to address and develop the prejudice issue.

ARGUMENT

I

The stipulation that Geshik Martin is an Indian did not suffice to prove the element of Indian status, an element of all the charged offenses, because the stipulation did not address the criteria applicable to establishing that status.

Standard of review

This Court reviews the evidence in a light most favorable to the verdict, and the evidence will be found insufficient only if no reasonable jury could have found the defendant guilty. *United States v. Barth*, 424 F.3d 752, 761 (8th Cir. 2005).

This Court reviews *de novo* the denial of a motion for judgment of acquittal challenging the sufficiency of the evidence. *United States v. Wells*, 646 F.3d 1097, 1102 (8th Cir. 2011). Where no judgment of acquittal was sought, this Court reviews for plain error whether the evidence sufficed to prove guilt beyond a reasonable doubt. *United States v. Clark*, 646 F.2d 1259, 1267 (8th Cir. 1981).

The stipulation

Geshik Martin signed a stipulation, received as Govt. Ex. 60, that said: "The United States of America, defendant Geshik-O-Binese Martin, and his attorney, Earl Gray, hereby agree that the following facts are true and the jury must treat

these facts as having been proven at trial: The defendant is an Indian. The jury must treat this element of the offense as charged in Counts 1 through 5 of the Superseding Indictment as proven."[4]

The prosecutor read this stipulation to the jury (Vol. VI, 1238), and the court instructed at the end of the case that "the Government and the Defendants have stipulated: that is, they agreed that each Defendant is an Indian. You must therefore treat this fact as being proved as relating to Counts 1 through 5" (Vol. IX, 1794).

What case law requires to establish Indian status

The Grand Jury that indicted Geshik Martin charged, under 18 U.S.C. 1153, that as to each offense, that Geshik Martin is an Indian. That statute reads in part "Any Indian who commits against the person or property of another Indian or other person . . . ." Proof of Indian status is a jurisdictional issue that the jury must resolve as an offense element. *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009).

Under 1153, "Indian" has a specialized meaning: a person with some degree of Indian blood and who has been recognized as an Indian by the tribe and/or the

[4] We attach the stipulation at Appellant's Addendum ("Add."), 1.

federal government. *Stymiest, id*. The second requirement involves consideration of a non-exclusive list of factors, which include tribal enrollment, receipt of assistance reserved only to Indians, enjoyment of the benefits of tribal affiliation, and social recognition as an Indian that results from living on the reservation and participating in Indian social life. *Stymiest*, citing *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988).[5]

This two-part test developed as a result of the Supreme Court's decision in *United States v. Rogers*, which stated that to be considered Indian for purposes of federal criminal jurisdiction a person must have a bloodline connection to an Indian tribe, and also a current social affiliation with it. 45 U.S. 567, 573 (4 How.) (1846).[6]

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[5] *Stymiest* says tribal membership is dispositive of this second part of the *Rogers* test, but nothing in the record, which includes the stipulation at issue here, shows that Geshik Martin had tribal membership. 581 F.3d at 764.

[6] The first part of the *Rogers* test requires a bloodline derived from a tribe that has federal recognition. *See,* Felix Cohen, *Handbook of Federal Indian Law,* Section 3.03[4] (LexisNexis 2005) ("The common test that has evolved after *United States v. Rogers*, for use with both of the federal Indian Country criminal statutes, considers Indian descent, as well as recognition as an Indian by a federally-recognized tribe"); *LaPier v. McCormick*, 986 F.2d 303, 304-05 (9th Cir. 1993) (Defendant lacked Indian status because his tribe was not federally recognized), citing *United States v. Antelope*, 430 U.S. 641, 646 n.7, 97 S.Ct. 1395, 1399 n.7 (1977) (Members of tribes whose official status has been terminated are not subject to jurisdiction under the Major Crimes Act). The Major Crimes Act includes 18 U.S.C. 1153. *Keeble v. United States*, 412 U.S. 205, 205-06, 93 S.Ct. 1993, 1994 (1973).

The stipulation to Indian status was incapable of proving the Indian-status element.

Because of the specialized meaning of "Indian" for purposes of prosecuting a person for a crime committed on an Indian reservation, a stipulation just to being an Indian establishes nothing. Persons who do not meet the *Rogers* test could still be, and are, regarded racially as Indians, as people use that term in common parlance. But they could not be convicted under Section 1153 for committing, on an Indian reservation, one of that section's specified offenses, which include all those for which the jury convicted Geshik Martin.

This is because the authority 1153 gives the Government to prosecute Indians for crimes allegedly committed in Indian country is not racially-based. Instead, Congress enacted 1153 on based on its authority to legislate conduct on Indian reservations, which stems from "the unique status of Indians as 'a separate people,' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of Indians' . . . ." *United*

Furthermore, citing *Antelope, id., St. Cloud v. United States* granted St. Cloud habeas relief because he should not have been prosecuted under 1153, owing to termination of his tribe's federal recognition. 702 F.Supp. at 1464-65. And in our case the Government acknowledged that the defendants' bloodlines must have derived from a federally recognized tribe (Feb. 20, 2013 Pre-trial Hrg. trans., 80).

States v. Antelope, 430 U.S. at 646, 97 S.Ct. at 1399.

A stipulation to Indian status thus differs from most stipulations, which typically state facts that have a commonly-understood meaning, which lay persons can readily apprehend. For example, in a drug-distribution prosecution, stipulating that the substance allegedly distributed is a certain drug, *e.g.*, cocaine, is all the stipulation needs to say. *United States v. Sims*, 529 F.2d 10, 11 (8th Cir. 1976) (Stipulation that the substances sold were cocaine and heroin sufficed to prove they were). But stipulating to Indian status involves not just an agreement as to the facts, but to their legal significance.

Therefore, a valid stipulation to Indian status would have said that, for purposes of 1153, the parties agree the defendant has sufficient Indian blood derived from a federally recognized tribe to qualify as an Indian, and that the defendant is recognized as an Indian by the tribe, or the federal government, or both. But the stipulation here does not contain any statements like these.[7]

It does not cure the stipulation's identified shortcoming that the stipulation says "the jury must treat these facts as having been proven at trial" and "The jury

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[7] We do not purport to specify the exact wording of a sufficient stipulation to Indian status. It could vary from case to case depending on the relevant available evidence, and the facts to which the defendant is willing to agree. The point is that the stipulation would have to establish Indian status in a way consistent with U.S. Supreme Court and Eighth Circuit precedent.

must treat this element of the offense as . . . proven". Again, when the stipulation is to an element that requires proof of factors that the jury would not realize had to be proven to establish the element, the stipulation's failing to address these factors means that it cannot logically and factually constitute proof of the element. It thus follows that saying it is a "fact" that Geshik Martin is "an Indian" has no significance and proves nothing. Stipulating that "this element" is "proven" is likewise meaningless, since that statement rests on the misapprehension that the stipulation establishes Indian status.

No other evidence sufficed to establish Indian status

Geshik Martin's testimony at trial that he is Native American, and that he grew up in Minneapolis and in Red Lake, Minnesota does not remedy the stipulation's insufficiency (Vol. VII, 1352-53). Saying he was Native American conveyed nothing about whether he was an Indian under the *Rogers* factors. As for his living for an unspecified time in Red Lake, he never said how long he lived there, whether he received assistance reserved only to Indians, enjoyed any benefits of tribal affiliation, or had social recognition as an Indian based on living on the reservation and participating in Indian social life. And no evidence exists that he is an enrolled Red Lake tribal member.

The specialized meaning of Indian status is why this Court's case law that stipulating to a fact waives any right to argue the insufficiency of the evidence on the element to which the stipulation pertains does not apply here, *e.g.*, *United States v. Oaks*, 236 F.3d 530, 542 (8th Cir. 2010) (Defendant's stipulation that he was a convicted felon precluded his contesting the sufficiency of the Government's proof that he was). Unlike the element of Indian status, whether a person is a convicted felon requires no application of factors unknown to the jurors.

United States v. Hawkins, 215 F.3d 858 (8th Cir. 2000) also lacks applicability. *Hawkins* held that by agreeing to a stipulation, a defendant waives any right to argue error on appeal. *Id*., 860. But *Hawkins* involved a dispute about whether the stipulation to prior-felon status should have referred to three felonies, as Hawkins stipulated, or just one, as he contended on appeal. This does not cover our circumstances, which is the stipulation's failure to address the factors that establish Indian status.

And for the same reason, case law like *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851 (2000) — which says a stipulation binds the parties and precludes assertion of error on appeal — does not apply. In *Ohler*, the Supreme Court said that stipulating to a fact amounts to the defendant presenting the evidence, the admission of which he cannot complain. 529 U.S. at 755-56, 120 S.Ct. at 1853.

But that circumstance is not like a stipulation containing none of the factors that establish the element to which the stipulation pertains, particularly where just admitting the element has been proven conveys nothing about the underlying factors that give the stipulated-to fact evidentiary meaning.

It does not affect our argument as to the stipulation's insufficiency that 18 U.S.C. 1152 permits a non-Indian to prosecuted for the offenses charged in this case if the victim is an Indian. (1152 says "This section shall not extend to offenses committed by one Indian against the person or property of another Indian.") The Grand Jury did not indict Geshik Martin under 1152, and the Government at trial, obviously, never contended that Geshik Martin did not have Indian status. To supply on appeal a jurisdictional allegation, and a theory of prosecution never previously asserted, would be a denial of his Sixth Amendment right to notice of and cause for the accusation, and the Fifth Amendment right to due process and a fair trial.

And *United States v. Whitehorse*, 316 F.3d 769 (8th Cir. 2003) does not permit these things to be supplied now. Whitehorse had been charged with sexual assault, and the jurisdictional statute cited was 1152. He argued that proving his non-Indian status was an offense-element. This Court said that it did not matter whether it was an element, since 1152 and 1153 are complementary, and his

conduct could be prosecuted federally whether or not he had Indian status. *Id*., 772-73.

First of all, this conclusion lacks validity, because it rests in significant part on the statement that Whitehorse, "like everyone else, is either an Indian or he is not" *Id*., 773. The matter does not admit of objective certainty. The *Rogers* test determines in federal criminal cases who is an Indian and who is not. Its application, particularly the social recognition factor, would not necessarily result in different juries making the same determination as to whether the same person has Indian status.

Second, and more importantly, the reason *Whitehorse* has no applicability to our case is that if the defendant is non-Indian, 1152 requires proof of the victim's Indian status. *United States v. Lawrence*, 51 F.3d 150, 151 (8th Cir. 1995) (citations omitted). Here, the Government alleged in the indictment that the victims were Indians, but it presented no proof of that. And the court's instructions did not list as an element that the victims were Indians (Vol. IX, 1791-93). For this reason and the others provided, it is not possible in this appeal to say the statutes are interchangeable, or that whether Geshik Martin is Indian or not, he could have been convicted under 1152.

Plain error

Geshik Martin did not move for judgment of acquittal under Fed. R. Cr. P. 29(a), or otherwise challenge the sufficiency of the evidence (Vol. VII, 1346, 1349). But this Court will review the sufficiency of the evidence for plain error. *United States v. Clark*, 646 F.2d 1259, 1267 (8th Cir. 1981).

Plain error requires a defendant to show an error that was plain, affected substantial rights, seriously affected the trial's fairness, integrity or public reputation, and which the defendant did not affirmatively waive. Fed. R. Cr. P. 52(b) and *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776-77 (1993). The stipulation here not stating the factors that constitute Indian status, that they were proven or admitted, and that therefore Geshik Martin was an Indian under 18 U.S.C. 1153, was plain error in light of the cases cited earlier that establish what Indian status involves, *e.g.*, *United States v. Rogers*, *id*.; *United States v. Stymiest*, *id*. And Geshik Martin never affirmatively waived the stipulation's deficiency. *Olano*, 507 U.S. at 733, 113 S.Ct. at 1777.

Viewing the evidence (the stipulation) in a light most favorable to the Government, no rational juror could have found Indian status proven beyond a reasonable doubt.

And the error affected Mr. Martin's substantial Fifth Amendment Due

Process Clause and Sixth Amendment jury-trial right to have the Government prove, and the jury find, beyond a reasonable doubt every element of the charged offense. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 2080 (1993); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 2313 (1995) (citing *Sullivan)*. Here, the stipulation was the only way the Government sought to prove Indian status. Convicting a defendant despite the absence of sufficient evidence to prove an element necessarily seriously affects the fairness, integrity and public reputation of judicial proceedings, particularly given the Constitutional nature of the right at issue here, so this Court should exercise its discretion to grant relief.

Because the deficient stipulation means the evidence of Indian status was insufficient as a matter of law, and that consequently no reasonable jury could have found Geshik Martin guilty, his convictions, all of which depended on proof of Indian status, must be reversed and vacated.

II

The District Court erred in admitting the stipulation to Indian status without ensuring that Geshik Martin knowingly and voluntarily agreed to its admission.

Standard of review

A stipulation to an offense-element must be knowingly and voluntarily entered into. *United States v. Stalder*, 696 F.2d 59, 62 (8th Cir. 1982). These determinations involve mixed questions of law and fact, to which *de novo* review applies. *United States v. Selvy*, 619 F.3d 945, 949 (8th Cir. 2010) (*de novo* review applied to whether defendant knowingly and voluntarily waived rights in a plea agreement); *United States v. Vest*, 125 F.3d 676, 678 (8th Cir. 1997) (Voluntariness of a guilty plea presents a mixed question of law and fact, which is reviewed *de novo*).

In any event, this Court reviews for plain error a trial court's failure to follow this Court's precedent requiring it to ensure that the defendant knowingly and voluntarily entered into the stipulation. Fed. R. Cr. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776-77 (1993).

What a court must do before receiving a stipulation

Stipulating to an offense-element does not necessitate an inquiry as thorough as that required by Fed. R. Cr. P. 11. *United States v. Lawriw*, 568 F.2d 98, 105 n.13 (8th Cir. 1977); *United States v. Stalder*, *id*., 696 F.2d at 62. But the Court's failure here to make any inquiry on these points fell short of what this Circuit requires of a trial judge, which is to "take care to determine that stipulations defendants, particularly stipulations that leave no issue of fact to be tried, are voluntarily and intelligently entered into." *Stalder*, *id*., at 62. Indeed, *Stalder* goes on to say that "A careful inquiry on the record should affirmatively show that the defendant knew what he was doing and understood the consequences of the stipulation." *Id*.

In *Stalder*, the defendant had agreed to a stipulated-facts trial to preserve an issue for appeal, but on appeal contended that he thought that he was only waiving a jury trial, and that some kind of contested trial would still occur. 696 F.2d at 61. But this Court found that the questioning the judge had conducted made Stalder's stipulation knowing and voluntary. The judge told Stalder that the stipulation meant he was waiving the right to a jury trial, admitting the stipulated facts were true, and that he was agreeing that if a trial were held the jury would find him guilty. *Id*. This satisfied what this Court requires. ("The important question is

whether the defendant knew what he was doing when he entered into the stipulation." *Id*.)

In *Lawriw*, the defendant contended that the judge should have treated his stipulated facts trial as a guilty plea and conducted a Rule 11 inquiry. 568 F.2d at 105 n.13. *Lawriw* said that Rule 11 does not apply in this context, but pointed out that the prosecutor and the trial judge had nonetheless sufficiently addressed Lawriw as to the rights she had surrendered by agreeing to the stipulation. *Id*. (*Lawriw* does not say what they said.)

The Constitutional dimension of the right given up when one stipulates to an offense element — the Fifth Amendment Due Process Clause and Sixth Amendment jury-trial right to have the Government prove all offense elements beyond a reasonable doubt, *see Sullivan v. Louisiana*, 508 U.S. at 278, 113 S.Ct. at 2080 (1993) — underscored the necessity that the trial judge here needed to conduct of Martin the relatively simple inquiry already required by this Court's precedent, so that the record would show that he knew what he was doing by stipulating. Doing so was also necessitated by the long-standing rule that of *Johnson v. Zerbst*, that a waiver requires and intentional relinquishment of a known right or privilege. 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

The District Court failed to determine that Geshik Martin knowingly and intelligently stipulated to Indian status.

Despite what this Circuit's above-cited cases require, before the trial judge accepted the defendants' stipulations to the offense-element of Indian status, he did nothing to determine whether Geshik Martin, or any other defendant, had knowingly and voluntarily agreed to stipulate to Indian status. After the prosecutor read the stipulations (Geshik Martin's stipulation to Indian status was Govt. Ex. 60, attached at Add. 1) (Vol. VI, 1237-38), the Court just asked "All defense counsel agree to the stipulations to the ones that are signed off on?" (sic) (Vol. VI, 1241). Geshik's counsel had already said "no objection." (Vol. VI, 1241). The Court here appeared only to be asking for confirmation that the stipulations the defendants had signed were the ones the Government had just offered.

If the trial judge had conducted the inquiry this Court's precedent requires, it would have asked Martin whether he had read the stipulation and discussed it with his attorney, whether he understood that by stipulating he was waiving his constitutional right to have the Government prove the element of Indian status, and by proof beyond a reasonable doubt, whether he understood what proof of Indian status involves, and whether he believed, in light of his understanding of that element, it could be proven if he did not stipulate.

Questions like these were important because Indian status presents a

complex question, subject to the two-factor *Rogers* test, the second-factor of which can have numerous sub-elements. It certainly is not like stipulating to a drug quantity, or to a prior conviction. And most persons who racially are considered Indian would not be able to describe the legal test for Indian status under 18 U.S.C. 1153. So to ensure a voluntary and intelligent stipulation, the trial judge should have made a record showing that Martin had been made aware of the issues raised by the questions posed in the preceding paragraph.

Not having done so, the trial judge had no basis to conclude that when he accepted Geshik Martin's stipulation to Indian status that Martin knew of any of these issues. Just Martin's signature on the stipulation, and the court reading the stipulation out loud, did not by itself show that he knew what he was doing when he signed it. Again, the stipulation simply made the conclusory statement that Geshik Martin "is an Indian," with no reference to the two *Rogers* factors.

Had the jury been required to decide Indian status, it would have been given an instruction that would have required it to apply those concepts, and to decide whether the Government's proof satisfied them beyond a reasonable doubt. No stipulation should have been accepted without Geshik Martin first being asked if he was aware of what the Government would have been required to prove if he did not stipulate.

And it did not show that Martin knew what he was doing that the prosecutor at a pre-trial hearing said that to establish Indian status the Government would have to prove that Martin's bloodline derived from a federally-recognized tribe, and that he had tribal or Government recognition as an Indian (the *Rogers* test) (Feb. 20, 2013 pre-trial hrg. trans., 80). This mere recitation of the test hardly informed Martin of what it takes to satisfy it, such as what facts are relevant, nor show that he believed and agreed these facts could be proven, and that his counsel had discussed any of this with him. A few brief questions to Geshik Martin and his counsel could easily have clarified all this.

And the prosecutor saying at the Feb. 20 pre-trial hearing, *id*., that whether a person has tattoos that have some connection to being an Indian did not suffice to attribute to Geshik Martin an awareness of what stipulating to Indian status means.

And we incorporate here what we said at pages 36-37 of this Brief about Geshik Martin testifying that he was "an Indian" and that he spent some (unspecified) time growing up in Red Lake, Minnesota (Vol. VII, 1352-53), and why that did not suffice to establish Indian status apart from the stipulation.

The mandatory minimum sentence of life necessitated a knowing and voluntary waiver.

The preceding discussion more than suffices to show that the trial judge

failed to ensure that Geshik Martin was knowingly and voluntarily stipulating to Indian status. But *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151 (2013) further demonstrates the necessity of a voluntary waiver, which the trial judge here failed to obtain. *Alleyne*, applying *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), held that facts that either establish or increase a mandatory minimum sentence must be proven beyond a reasonable doubt, or admitted-to by the defendant. 133 S.Ct. At 2161 ("A fact that increase a sentencing floor, thus, forms an essential ingredient of the offense").

Under 18 U.S.C. 1111, Martin's murder charges carried the mandatory minimum sentence of life imprisonment. Thus, proof of every element of the charged murder offense — including Indian status — was necessary to imposition of the life-imprisonment floor. Defendants can waive their *Apprendi* rights, but these waivers must, as with all relinquishment of Constitutional rights, be knowing and voluntary. *Blakely v. Washington*, 542 U.S. 296, 310, 124 S.Ct. 2531, 2541 (2004) ("nothing prevents a defendant from waiving *Apprendi* rights . . . [i]f appropriate waivers are procured"). Consistent with *Johnson v. Zerbst*, *id*., any waiver of the Constitutional right Martin had to have the Government prove all elements necessary to establishing liability for the mandatory life sentence had to be knowing and voluntary, which the record here shows the trial judge failed to

ensure.

Prejudicial effect of no inquiry

No basis exists to say that the error here in not addressing Geshik Martin to ensure he knew what the stipulation involved, and its consequences, did not prejudice him. Nothing in the record shows that the Government would have been able to prove Indian status without the stipulation. Although the prosecutor described one way she would try to establish that *George Martin* had Indian status for purposes of 18 U.S.C. 1153 — by showing he has Indian-related tattoos (Feb. 20, 2013 pre-trial hrg., 80-81) — she never said what the Government would present as to Geshik Martin.

The record thus permits no conclusion that, apart from the stipulation, the jury would have found that Geshik Martin had Indian status. Compare, *United States v. Poulack*, 236 F.3d 932, 938 (8th Cir. 932) (Even had Poulack not stipulated to drug-quantity, the jury would have found it had been proven).

The trial court plainly erred in admitting the stipulation

The *de novo* review this Court applies to questions of voluntary waiver of rights makes it apparent that the trial court erred in not conducting the above-

discussed inquiry that this Court's precedent requires before receiving a stipulation. Geshik Martin did not object to the trial court's failure to conduct this inquiry. But even if *de novo* review does not apply, review for plain error still necessitates a finding of prejudicial error and a new trial.

We incorporate here our statement of the Rule 52(b) plain-error rule discussed at pages 40-41 of this Brief. Here, the court committed plain error, which the above-cited precedents, *United States v. Stalder* and *United States v. Lawriw*, *id*., make apparent. And Martin did not affirmatively waive inquiry into whether he had knowing and intelligently agreed to stipulate. His just signing it without any inquiry to determine whether he knew what he was doing negates any idea of affirmative waiver.

The error affected Martin's substantial rights, because the right to have a stipulation to an offense element be knowing and voluntarily entered-into is a substantial right, which earlier-cited cases make clear, *e.g.*, *United States v. Lawriw*, 568 F.2d at 105 n.13; *United States v. Stalder*, 696 F.2d at 62; *Johnson v. Zerbst*, 304 U.S. at 464, 58 S.Ct. at 1023. *Sullivan v. Louisiana*, 508 U.S. at 278, 113 S.Ct. at 2080.

Therefore this Court should exercise its discretion to grant relief and vacate Geshik Martin's convictions for insufficient evidence, because without the

stipulation the Government had insufficient proof to establish Indian status (see Argument I, at pages 34-39 of this Brief). Not granting this relief would seriously affect the fairness, integrity or public reputation of Martin's trial because the improperly-admitted stipulation enabled the Government to avoid its Constitutionally-imposed burden to prove guilt beyond a reasonable doubt as to the Indian-status offense-element — a burden that the record does not demonstrate the Government would have met absent a valid and knowingly entered-into stipulation. Alternatively, but for the same reasons, Martin should be re-tried.

III

The District Court denied Geshik Martin his Rule 43 and Constitutional rights to be present at his trial when its contact with the jurors went into areas it had not advised Martin of, resulting in presumptive prejudice, which the record shows was never dispelled.

Standard of review

The trial judge discussed with the jurors legal questions and took questions that had nothing to do with what he had told the defendants he would discuss.[8] The judge never told the defense about this, so that they could at least have the opportunity to object, and to question the jurors to determine how the judge's *ex parte* statements about the law and other matters might affect their verdict. We agree with co-Appellant David Martin that the lack of an objection to what the trial judge discussed with the jurors, outside the presence of all defendants and counsel, does not mean plain-error review applies. See David Martin brief, page 22.

The standard of review here must be whether the Government can establish beyond a reasonable doubt that the trial judge's unauthorized contact with the

[8] All the jurors who decided Geshik Martin's case were among the prospective jurors the judge addressed in the jury-assembly room, as the attorneys and defendants in the other room were then making peremptory strikes in the courtroom. Vol. II, 289-90.

jurors — which was presumptively prejudicial, *United States v. Koskela*, 86 F.3d 122, 125 (8th Cir. 1996) — and his statements, were harmless, particularly since the rights affected here, due process, equal protection, and the fundamental right to be present, are of constitutional dimension. *Rushen v. Spain*, 464 U.S. 114, 117-18, 104 S.Ct. 453, 455 (1983). *See also, United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484 (1985) (Constitutional right to presence rooted in Confrontation and Due Process Clauses).[9]

Relevant facts

Co-Appellant David Martin in his Argument I describes the circumstances of the trial judge's contact with the jurors in a separate room while counsel and the defendants were exercising peremptory challenges, and without the presence of the defendants and their counsel. He bases this on the jury-selection transcript, Vol. II, 289-309. Rather than repeat here these facts, we incorporate here that summary, which appears at David Martin's brief, pages 17-21. We quote appropriate parts of it in the following argument to support our request for a new trial.

[9] Certainly abuse-of-discretion review cannot apply. The court had no discretion to discuss with the jurors inappropriate subjects, including jury nullification, in Martin's absence and without his permission.

The improper contact and statements require a new trial

The trial judge violated Geshik Martin's rights under Fed. R. Cr. P. 43(a)(2) to be present, because this rule makes jury impanelment part of the trial. And while this Court should not affirm his conviction without granting him a hearing to allow him to develop and argue the prejudicial effect of the trial judge's actions, and to request a new trial if appropriate, this Court should make a hearing unnecessary and grant a new trial outright, because the record shows that the prejudice that resulted from the judge's contact with the jurors was not harmless beyond a reasonable doubt.

Furthermore, it would be very difficult in any event to get jurors to admit that their guilty verdicts were affected by the judge's comments — if Geshik Martin were even able to ask these questions — because the jurors would feel enormous pressure not to have murder convictions overturned.

While we agree with David Martin's arguments concerning the impropriety of the judge's contact and the statements he made, and adopt that discussion, we focus here on additional reasons why the improper contact and statements prejudiced Geshik Martin, and should result in a new trial outright.

First, even though a defendant does not have a right to have a jury act to nullify the evidence or act on leniency, or even to be told it has this power, Martin

had a right *not* to have his jury told it would be "taking the law into its own hands" if it did so (Vol. II, 301). This is because the jury has a historic role as an intermediary between the State and criminal defendants. *United States v. Gaudin*, 515 U.S. at 510-11, 115 S.Ct. at 2314. So even though a court may tell a jury that if it believes guilt has been proven beyond a reasonable doubt, it must convict, no case we are aware of has held that the court may, on its own, take the initiative to directly condemn to the jury its power to nullify the evidence, or to return a verdict that reflects it power of lenity.

That the judge's condemnation came in response to a juror's question did not justify it, since the judge should have declined to answer the question. This is especially true in light of his not having told the defendants he would discuss questions of law with the jurors, and the obvious impropriety of doing so outside Geshik Martin's presence.

The judge's effectively instructing the jurors not to exercise their leniency/nullification power denied Geshik Martin the equal protection of the law, because no rational basis existed for his trial judge to tell his jury that it would be acting lawlessly if it exercised its power to nullify the evidence — where no other judges routinely, if ever, makes statements like this to jurors. *Blair v. Armontrout*, 916 F.2d 1310, 1328-29 (8th Cir. 1990) (A distinction between two groups of

defendants will be upheld if rationally related to a legitimate government interest). Nor could a court properly and on its own initiative do so. *Gaudin*, *id*. Here, no legitimate Government interest existed to make rational the distinction Geshik Martin's trial judge made.

Moreover, the judge improperly telling the jurors not to exercise their power to nullify the evidence by characterizing the exercise of this power as "taking the law into their own hands" prejudicially combined with other statements the judge made, and which together denied Geshik Martin due process of law and a fair trial.

These other statements were the judges repeated references to the jury almost always being right, and that if a mistake has been made, it was the judge who did it (Vol. II, 295, lines 11-13) ("juries usually always make the right decision . . ."). The trial judge kept repeating this, as when he referred to a verdict having to be overturned, stating "It is more common to experience — because then I suppose that could be an example of jury nullification. It is more common — because of something that happened during the trial, not by jurors, but by a mistake the Judge made . . ." (Vol. II, 302, lines 12-16).

The judge came back to this idea yet again, saying "It's pretty difficult or foolish to try to trick a jury. They almost always get it right. When they don't, it is probably not something they did, it is probably something the judge did . . . or

allowed the lawyers to do or prohibited them from doing" (Vol. II, 303, lines 4-8).

These "juries get it right" statements were improper on several levels, one being their tendency to ingratiate the judge with the jurors. Another is that the judge has no means by which he can even determine that juries "almost always get it right." And even more improperly, the statements led the jurors to believe they would automatically reach the "correct" result. Jury verdicts are not infallible, and a relatively significant number have over the years been shown to be erroneous. By implanting in the jurors a sense that they possessed almost unerringly correct judgment, the judge effectively told them that they need have no self-doubt, and need not reassess a decision that could have been based on just a first impression, or a misrecollection of the evidence. And it undercut the instructions the judge gave the jurors on how to deliberate (Vol. IX, 1798-1801).

All these things deprived Geshik Martin of the equal protection and due process all other defendants get, *i.e.*, a jury not led to believe that the decision it makes will almost always be correct, just because it was the decision it made.

The statement in *United States v. Allen*, 406 F.3d 940, 949 (8th Cir. 2005) that the possibility of jury nullification does not transform a harmless error into a prejudicial one does not negate our claim of a due process and equal protection denial. Unlike Martin's case, *Allen* did not involve a judge taking it upon himself

to condemn jury nullification, so as to deprive the jury of this power. And unlike in *Allen*, Martin did not have even the possibility of jury leniency or nullification, since the trial judge precluded the jury from even considering it.

The presumptive prejudice was not harmless

It does not require direct evidence to show that a judge's improper contact and statements deprived the defendant of a fair trial. In *United States v. Gypsum*, 438 U.S. 422, 98 S.Ct. 2864 (1978), the judge's *ex parte* contact with jury foreman about the jury's health evolved into unauthorized discussions about the court's wish for a verdict, thus encroaching on jury's authority, precluded the possibility of a hung jury, and required a new trial. *Gypsum* said this sort of contact "inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants." 438 U.S. at 461, 98 S.Ct. at 2885.

And in our case, as in *Gypsum*, the court's failure to let counsel know what happened (at least in *Gypsum* the judge made a partial report) precluded the opportunity to clear up the errors and improprieties in what the judge had said to the jurors. 438 U.S. at 461, 98 S.Ct. at 2886. This has significance, because the right to be present relates to the opportunity to have a fair and just hearing. *United States v. Gagnon*, 470 U.S. 526, 105 S.Ct. at 1484. Here the due-process and equal

protections denials that resulted prejudicially affected this opportunity. *United States v. Peters*, 349 F.3d 842 (5th Cir. 2003) further demonstrates that the record here makes it possible that the trial judge's contact and statements at issue here prejudiced Geshik Martin's right to a fair trial, and that this possibility suffices to grant relief. In *Peters*, a judge said during a meeting with the jury foreman that he desired a verdict. Counsel had not attended the meeting because the judge said he was just going to address the foreman's complaint about his treatment by fellow jurors. 349 F.3d at 845. The court also discussed supplemental instructions. *Id*.

Citing *Gypsum*, *Peters* reversed the convictions, finding that, as in *Gypsum*, the contact "may" have generated the "unintended and misleading impressions of the judge's subjective personal views. Although not overly or intentionally coercive, they were at least as objectionable as what the judge in *Gypsum* said." *Id*., at 848. *Peters* said "We are left with *the possibility* of this impression and the inability to correct it" (emphasis added). *Id*.

In our case, the trial judge's unauthorized contact with the jurors violated Geshik Martin's right to be present at all stages of his trial. His statements and instructions on the law gave the jurors an undeserved and irresponsible sense that whatever result they reached would be the correct one, and deprived them of their

inherent power to act with leniency. That the jurors entered some acquittals does not mean they relied on their power of leniency to nullify in doing so. The judge's actions were presumptively prejudicial, which the record and the Government cannot dispel. Under these circumstances, this Court must grant Geshik Martin a new trial. At the very least, it should not affirm without affording him a hearing to have the trial judge assess the prejudice and order a new trial if appropriate.

CONCLUSION

For the reasons discussed in each of the preceding Arguments, Geshik Martin requests that his conviction and sentence be set aside owing to insufficient evidence of Indian status, or because of the court failed to determine if Martin knowingly and voluntarily entered into the stipulation to Indian status, an element of all the offenses. Alternatively, he must be retried, owing to the improper *ex parte*, prejudicial comments to the jury affecting his due process and Fourteenth Amendment equal protection right to a fair trial.

Respectfully submitted:

Dated: February 28, 2014

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(A) and (B)(I) because it has no more than 13,792 words, exclusive of this compliance statement, table of contents, table of citations, statement with respect to oral argument, and the Addendum, as determined by the word processing system used to prepare this brief (WordPerfect 10). The electronic version of this Brief has been scanned for viruses and has been found to be virus-free.

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