Nos. 13-3221, 13-2410, 14-1039

Criminal

In the

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID JOHN MARTIN,
GESHIK-O-BINESE MARTIN, and
EDWARD McCABE ROBINSON,

Appellants.

Appeal from the United States District Court for the

District of Minnesota

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Defendants David Martin, Geshik-O-Binese Martin, and Edward Robinson were convicted by a jury for their roles in the robbery and murders of Craig David Roy, Sr. and Darla Ann Beaulieu on the Red Lake Indian Reservation on January 1, 2011. Defendants Geshik Martin and Edward Robinson were each convicted of two counts of murder and robbery. They were sentenced to two consecutive mandatory terms of life imprisonment for the murder convictions and a concurrent sentence of 180 months for the robbery conviction. Defendant David Martin was convicted of robbery, after the jury acquitted the defendant of the murder counts. He was sentenced to 160 months imprisonment for the robbery conviction.

In this appeal, the defendants claim various errors occurring before, during, and after trial. The defendants jointly claim that the district court erred in its ex parte communications with the jury venire prior to the jury being selected and sworn. Further, the defendants make separate challenges to their convictions. Each of the defendants' joint and individual claims lacks merit, and the district court's judgment should be affirmed. The United States submits that 15 minutes is sufficient to present oral argument on the issues raised by defendants.

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STATEMENT OF THE CASE

At approximately 9:30 p.m. on a cold and snowy January 1, 2011, law enforcement and fire personnel from the Red Lake Department of Public Safety were dispatched to the Craig Roy, Sr. residence, which was located within the exterior boundaries of the Red Lake Indian Reservation, on the report of a house fire. (Tr.[1] 408-10.) On arrival, emergency personnel observed a fully engulfed residence. (Tr. 410.) Law enforcement noted some footprints and tire tracks in the yard that were quickly filling with the falling snow. (Tr. 411-12.)

While assessing the scene, emergency personnel learned that two individuals may be in the burning residence and called the Deputy State Fire Marshall. (Tr. 413, 444.) At daybreak on January 2, 2011, the Deputy Fire Marshall and law enforcement searched the rubble that once was the Roy residence. (Tr. 448-49.) They found the remains of two individuals, later identified as Craig David Roy, Sr., also known as "Crusher," and Darla Ann Beaulieu, were pulled from the debris in the area where the master bedroom had been. (Tr. 414, 454-55.) Autopsies performed the following day revealed that Roy and Beaulieu were murdered prior to the fire. (Tr. 1315, 1329-30.)

[1] Citations to "Tr." refer to the trial transcript in this case.

Background

Although never married, Roy and Beaulieu were in an on-and-off relationship for more than 25 years that produced three children. (Tr. 480-82.) Beaulieu was a bus driver, and Roy was a housing subcontractor for the Red Lake Band. (Tr. 484-85.) Roy also sold crack cocaine on the reservation for the year prior to his death. (Tr. 487.) When together, Beaulieu lived with Roy. (Tr. 483-84.) However, in late 2010, Beaulieu and Roy separated, and Beaulieu got her own home on the reservation. (*Id.*) David Martin ("David") moved in with Roy around Thanksgiving 2010 to assist Roy with his subcontracting work. (Tr. 494, 1483.)

On New Year's Eve, Roy, Roy's sometimes girlfriend Jill Cobenais, and David celebrated the New Year with Greg Good, Vickie Neadeau, and a few others at Good's house. (Tr. 704-06, 889.) Beaulieu arrived at the Good residence to see Roy in the morning hours of January 1, 2011. (Tr. 890.) Beaulieu and Cobenais argued and fought in Good's kitchen, and Roy assisted Beaulieu in the fight. (Tr. 708-09, 1490-91.) Neadeau attempted to help Cobenais, but Roy assaulted Neadeau. (Tr. 709-11, 1492.) Neadeau sustained a cut across her head, a lump on her arm, and a sore wrist as a result of the assault. (Tr. 713.)

During and after the fight, everyone dispersed from Good's house. Later on in the day, Beaulieu and Roy re-united and stopped by their son's residence. (Tr. 503-04.) Good was with Beaulieu and Roy. (*Id.*) All three were intoxicated. (*Id.*) Beaulieu and Roy told their son that they were going to drop off Good and head to Roy's residence to go to sleep. (*Id.*) This was the last time that Beaulieu and Roy were seen alive.

A Plan to Commit Robbery

A New Year's party was also held at Ann Beaulieu's ("Ann") residence on January 1, 2011. (Tr. 934-35.) At the time, Edward Robinson ("Eddie"), Geshik Martin ("Geshik"), and Terin Stately were living with Ann. (Tr. 532-33, 932-33.)

The party continued into late afternoon and evening. The four roommates were joined by Nicole Robinson ("Nicole"), George Martin ("George"), Misty Oakgrove, Kevin Needham ("KJ"), David, and others. (Tr. 538, 748, 836-37, 1495.) Geshik, Stately, and David picked up bruised and beaten Neadeau and brought her to the party. (Tr. 713.)

Neadeau quickly became the center of attention when asked about her injuries. (Tr. 541, 753, 840-41, 939.) Neadeau told her story to the partygoers who were standing and sitting in the combined kitchen and living area of Ann's house. (Tr. 753-55, 842-43, 940.) Geshik and others were upset about the

brutal assault. (Tr. 542, 544, 755, 844, 941.) Geshik exclaimed that "we" should get revenge on Roy for the assault on Neadeau. (Tr. 544, 941.)

As the partygoers continued drinking, using drugs, and talking about Neadeau's assault, the conversation of revenge turned to robbery. (Tr. 538-715-16, 751-52, 846, 939.) David told Geshik he knew where Roy kept his cocaine. (Tr. 544-45, 942.) David also reported that Roy kept a gun in his home. (Tr. 546.) A plan was concocted to travel to Roy's house under the guise of getting David's clothes. (Tr. 544-45, 760, 848, 942.)

Stately agreed to drive "the boys" - Geshik, Eddie, David, George, and KJ - to Roy's residence. (Tr. 547-548.) Geshik, Eddie, David, George, KJ, and Stately left Ann's residence with nothing but a plan to "get David's clothes," a ruse to gain access to Roy's drugs and money." (Tr. 547-548, 717, 755, 845, 946.)

The Murders, Robbery, and Fire

During the drive to Roy's house, Geshik, Eddie, David, George, and KJ discussed the plan to knock on the door to get David's clothes, and the others would rush in behind him. (Tr. 548-50.)

The snow was too deep to drive into Roy's driveway, so Stately parked on the main road. (Tr. 550.) Geshik, Eddie, David, George, and KJ piled out of

the vehicle. (Tr. 551.) Geshik told Stately that no one would be hurt as the men began the walk down Roy's driveway. (*Id.*)

Stately waited alone in the car alongside the driveway to Roy's residence for approximately 10-20 minutes. (Tr. 552.) Stately talked to her brother and smoked marijuana. (*Id.*) In her rear-view mirror, Stately saw KJ emerge from the driveway and stand on the road. (Tr. 553.) Minutes later, Geshik, Eddie, David, and George came from the Roy residence. (Tr. 554.) Eddie had a long gun. (*Id.*)

Geshik, Eddie, David, George, and KJ piled into Stately's car. (*Id.*) Stately asked "the boys" what had happened. (Tr. 555.) From the front seat, Geshik and Eddie told Stately to drive and not worry about what happened. (*Id.*) As Stately pulled the car onto road, she looked over her shoulder to see a bright light coming from Roy's residence. (*Id.*)

Stately drove Geshik, Eddie, David, George, and KJ directly back to Ann's house, arriving about two hours after they had left. (Tr. 558, 759, 948.)

Concealment of the Murders and Robbery

Geshik, Eddie, and George had blood on them when they returned. (Tr. 948-51.) They also had a long gun and a bag of crack cocaine. (Tr. 562, 739, 955-956.) Geshik went directly to the bathroom to shower and change clothes. (Tr. 558, 762, 952.) Eddie and George also showered and changed clothes.

(Tr. 560-61, 949-51.) Geshik and Eddie grabbed garbage bags and ordered David, George, KJ, and Stately to put their clothes in the bags. (Tr. 951.) David, Stately, and KJ did not want to throw their clothes in the bags. (Tr. 559, 865) The two garbage bags were observed by the front door. (Tr. 559, 762, 951.)

The following morning, George, KJ, and Oakgrove were gone. (Tr. 859.) Neadeau and Nicole wanted a ride to leave the residence. (Tr. 720, 767.) David used Stately's car to drop off Neadeau and Nicole. (*Id.*) As Neadeau was riding in the back of the car, she told David and Nicole that there was blood in the backseat. (Tr. 720.) Nicole observed drops of blood in the front passenger seat of the vehicle. (Tr. 768.) Upon his return to Ann's residence, David cleaned Stately's car. (Tr. 569, 966.)

Later in the morning of January 2, 2011, David left Ann's residence and arrived on foot at Greg Good's residence. (Tr. 877.) Good asked David whether he had heard about Roy and Beaulieu. (Tr. 878.) David told Good that "he was going to go to prison for the rest of [his] life." (Tr. 881.) David nodded his head up and down when Good asked David if he had anything to do with Roy and Beaulieu's deaths. (*Id.*) Good left the residence and contacted law enforcement. (Tr. 886.) David was arrested at Good's residence with crack cocaine and a knife. (Tr. 917.) While in custody at the Red Lake Jail in the

days after the murder, David told Travis Varney that Geshik and Eddie owed him either drugs or money after robbing Roy. (Tr. 1118.)

Charges and Trial

In the days after the remains of Roy and Beaulieu were discovered, a medical examiner determined that Roy had died as a result of 26 stab wounds. (Tr. 1299.) Beaulieu sustained 14 stab wounds. (Tr. 1327.) Both Roy and Beaulieu had been murdered prior to the fire. (Tr. 1313-15, 1329-30.) Although not able to tell how the fire started, the Deputy Fire Marshall determined the cause of the fire at Roy's house was arson with the fire likely originating in the kitchen area. (*Id.* 463-65.)

With no forensic evidence from the crimes, law enforcement continued to pursue leads with the various witnesses and defendants. As time passed and relationships fractured, Ann and Stately provided further information to law enforcement about the events of January 1, 2011, and thereafter. (Tr. 676, 966-67.) Separately, Ann and Stately reported that in the days after the murders Geshik and Eddie broke down the gun taken from Roy's and tossed the parts along the Walking Shield road. (Tr. 571, 596, 960-61). Law enforcement searched the area, but did not locate any pieces of a firearm. (Tr. 425, 435.)

In August 2012, Geshik, Eddie, David, George, KJ, and Stately were charged for their roles in the deaths of Roy and Beaulieu on January 1, 2011.

(Dist. Ct. Doc. No. 1.) Geshik, Eddie, David, and George were charged with several counts of murder, and all defendants were charged with robbery. Stately pleaded guilty to robbery and testified at trial. (Dist. Ct. Doc. No. 148.)

While awaiting trial, Eddie met Ray Brown at the Sherburne County Jail. (Tr. 1142.) Eddie told Brown that he was in custody because he robbed a male and female, and stabbed the woman with a knife. (Tr. 1144-45, 1147.)

Jury selection began on February 25, 2013. KJ pleaded guilty to robbery before the jury was sworn. (Dist. Ct. No. 248.) Geshik, Eddie, David, and George proceeded to trial. Prior to and during trial, Defendant Edward Robinson made several motions for severance due to antagonistic defenses among co-defendants. (Dist. Ct. Doc. No. 238; Trial Tr. 398, 1347, 1554, and 1603.) Each motion was denied by the district court.

As the jury selection neared an end, the 51-person jury venire was assembled in a jury assembly room while the parties exercised their peremptory challenges. (Tr. 287-88.) District Court Judge Frank ("Judge Frank") requested permission from the parties to thank the potential jurors for their service. (Tr. 289.) Judge Frank cautioned that the jurors may have questions about judges and the court system, but he would remain "hands off" on cases. (*Id.*) No defendant objected to the proposal by Judge Frank as long as the conversation was recorded by the court reporter. (*Id.*) Judge Frank then spoke

with the jury venire and answered some questions from potential jurors. (Tr. 290-309.)

During the course of the nine-day trial, Defendant Geshik Martin testified and claimed that he, Eddie, David, George, and KJ went to the Roy residence to retrieve David's clothes on January 1, 2011.[2] (Tr. 1363-64.) Geshik further claimed that he alone stabbed Roy and Beaulieu in self-defense after Roy became violent. (Tr. 1368-74.) Geshik claimed that Eddie, David, George, and KJ were not in Roy's residence at the time of the murders. (*Id.*)

Defendant David Martin also testified and claimed that he was only went to Roy's residence on January 1, 2011, to gather his clothes. (Tr. 1497-98.) Because David was fearful of Roy, Geshik, Eddie, George, and KJ traveled with him to Roy's residence. (Tr. 1501-02.) David testified that he, Eddie, George, and KJ were not in the residence when Roy attacked Geshik, requiring Geshik to defend himself. (Tr. 1502-03.)

Through counsel, Defendants Edward Robinson and George Martin claimed no knowledge of a robbery and no presence in the Roy residence during the murders. (Dist. Ct. Doc. No. 273, pp. 19-20.)

[2] During preliminary questioning by his counsel, Geshik Martin admitted that he was an Indian. (Tr. 1352.)

Convictions and Sentences

After a little more than two days of deliberation, the jury returned its verdicts. Defendants Geshik Martin and Edward Robinson were convicted of all counts of murder and robbery. (Dist. Ct. Doc. Nos. 274, 276.) Defendant David Martin was convicted of robbery, but acquitted on all counts of murder. (Dist. Ct. Doc. No. 278.) Defendant George Martin was acquitted on all counts. (Dist. Ct. Doc. No. 282.)

Geshik Martin and Edward Robinson were each sentenced to consecutive terms of life imprisonment for the murder convictions and a concurrent term of 15 years imprisonment for the robbery conviction. (Dist. Ct. Doc. Nos. 319, 396.) David Martin was sentenced to 160 months imprisonment for the robbery conviction. (Dist. Ct. Doc. No. 345.)

SUMMARY OF THE ARGUMENT

Defendants David Martin, Geshik Martin, and Edward Robinson jointly claim that the district court violated Fed. R. Crim. P. 43(a), which gives a defendant the right to be present during all stages of trial, and denied them their Fifth Amendment right to due process and Fourteenth Amendment right to equal protection of the law, when the district court communicated with the jury venire while the parties exercised their peremptory challenges. The Defendants waived their right to be present when the Defendants knew about the communication in advance, had the chance to thwart the proposed communication, and raised no objection to the communication. Moreover, the content of the district court's communication did not sacrifice the fundamental fairness of the trial or substantial rights of the Defendants. Therefore, Court should affirm the Defendants' convictions.

Defendants also raise numerous individual claims of error. These individual claims are meritless, and the Court should summarily reject them. Defendant Geshik Martin claims that the parties' stipulation regarding Indian Status was insufficient to allow a reasonable jury to find beyond a reasonable doubt that he was an Indian. Further, the Defendant claims that the court failed to determine whether he knowingly and voluntarily agreed to the stipulation. The Defendant signed the stipulation. The Defendant testified regarding his

Indian status. Further, the Defendant did not object when the jury was instructed that he stipulated to his Indian status, he never contested the statement that he was an Indian person, and there was no reasonable probability that, had counsel not stipulated to his Indian status, the Government could not prove his Indian status.

Defendant Edward Robinson claims that, because his theory of defense was antagonistic to that of his co-defendants and the case was complex, conducting a consolidated trial denied him the right to a fair trial. Defendant is unable to show real prejudice because antagonistic theories of defense do not create prejudice *per se* and the district court provided appropriate limiting instructions.

Defendant Edward Robinson also claims the Government's reference in its closing argument to testimony of Defendants Geshik Martin and David Martin's testimony constituted an indirect reference to his failure to testify thereby depriving him of a fair trial. When placed in context, the Government's comment would not "naturally and necessarily" be taken by the jury as a statement about Defendant Robinson's failure to testify. The Government's comment during closing arguments referred only to the testimony of other witnesses and was made in an effort to discredit the testimony given by co-Defendant Geshik Martin.

Defendant David Martin claims that the district court abused its discretion when it failed to instruct the jury on the proposed lesser-included charge of Theft of Government Property. Defendant's proposed instruction of the lesser offense of theft of government property fails the well-established test followed in the Eighth Circuit for determining when a lesser included instruction is appropriate. Namely, the lesser-included elements are not identical to the greater-offense elements; no evidence was presented at trial that would justify conviction of the lesser offense; and no evidence was presented that the jury could find the defendant innocent of the greater and guilty of the lesser-included-offense.

Finally, Defendant David Martin claims that the district court erred in assessing a six point enhancement pursuant to U.S.S.G. § 2B3.1(b)(3)(C) because the district court considered conduct for which Defendant was acquitted, namely first and second degree murder, and he could not have foreseen that the planned robbery would result in permanent or life-threatening bodily injury to another. Eighth Circuit caselaw clearly forecloses the Defendant's argument that use of acquitted conduct is erroneous. Further, based on the evidence presented at the trial, the district court could determine that injury sustained was foreseeable.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ITS COMMUNICATION WITH THE JURY VENIRE PRIOR TO THE JURY BEING SELECTED AND SWORN

Each of the Defendants on appeal claims that the district court[3] erred when Judge Frank met with the 51-person jury venire without the parties' presence and provided information about the court systems and jury service. Defendants contend his ex parte discussions, made before the jury was selected, violated Federal Rule of Criminal Procedure 43(a), which gives a defendant the right to be present during "every trial stage." Further, Defendants also claim portions of the district court's communication were improper and denied their Fifth Amendment rights to due process and Fourteenth Amendment rights to equal protection of the law.

This claim should be rejected. There was no violation of Rule 43(a) since the communication with the jury venire was akin to preliminary instructions made prior to a "trial stage."[4] Moreover, each Defendant waived his right to be present under Rule 43(a). Further, the district court did not error in the content of its communication with the jury venire. As such, no violation

[3] District Court Judge Donovan Frank presided over this matter at trial.
[4] The Government does not concede that the communication occurred at trial stage.

of the Defendants' rights pursuant to the Fifth Amendment, Fourteenth Amendment, or Rule 43(a) exist.

A. Standard of Review

The Defendants claims that they had a right to be present during the statements to the venire are reviewed for abuse of discretion. *United States v. Moe*, 536 F.3d 825, 829 (8th Cir. 2008). The defendant's claims that improper legal advice was given to the jury is also reviewed for abuse of discretion, viewing all of the district court's instructions as a whole. *United States v. Poitra*, 648 F.3d 884, 887 (8th Cir. 2011). When a defendant fails to object, and in fact affirmatively agrees to his absence, the claim must be reviewed for plain error. *Id.* (citing *United States v. Pirani*, 406 F.3d 543, 549-50 (8th Cir. 2005); *see also United States v. Harris-Thompson*, 751 F.3d 590, 597-98 (8th Cir. 2014). Thus, to prevail, a defendant must demonstrate "(1) error, (2) that it is plain, and (3) that affects substantial rights." *Id.* Additionally, if the defendant demonstrates these three factors, a correction will be made on if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

B. The Statements to the Jury Did Not Violate Rule 43(a)

A defendant has a due process right to be present at a proceeding to whenever his presence is "required to ensure fundamental fairness or has a

relation, reasonably substantial, to the fullness of his opportunity to defendant against the charge." *Harris-Thompson*, 751 F.3d at 597 (quoting *United States v. Gagnon*, 470 U.S. 522, 527 (1985)). Federal Rule of Criminal Procedure 43(a) codifies this fundamental right. *Gagnon*, 470 U.S. at 527. A defendant may waive his Rule 43(a) right to be present by failing to object to a district court's proposed communication with the jury. *Harris-Thompson*, 751 F.3d at 597; *see also United States v. Behler*, 14 F.3d 1264 (8th Cir. 1994). Here, the Defendants not only failed to object to the district court's proposed communication, the Defendants voluntarily acquiesced to such communication without their presence. (Tr. 289-90.)

In *Behler*, the defendant agreed to a discussion between the judge and the jury without his presence in an attempt to ferret out potential jury tampering. *Behler*, 14 F.3d at 1267 (8th Cir. 1994). The ex parte communication was recorded. *Id.* On appeal, the Court found that Behler waived his right to be present for the communication because the defendant knew about the communication in advance; had a chance to participate, but declined to do so; and raised no objection. *Id.* at 1268. Similarly, in *Harris-Thompson*, the defendant initially acquiesced to a communication between the district court and jury without his presence, but then later claimed a Rule 43 violation because the district court went beyond the anticipated topics. *Harris-*

Thompson, 751 F.3d at 596-98 (8th Cir. 2014). Again, the Court found that the defendant waived his right to be present during the communication. *Id.* Further, the Court found that the district court's communication with the jury did not sacrifice fundamental fairness to the defendant. *Id.*

Similarly, Defendants David Martin, Geshik Martin, and Edward Robinson waived their right to be present when the district court communicated with the jury venire. At trial, Judge Frank asked for permission to thank the jury venire. (Tr. 289.) Further, Judge Frank indicated that the jury venire "will ask questions about what is a State Judge, what is a Federal Judge." (*Id.*) Based on Judge Frank's general request, the Defendants were on notice about the potential scope of communication in advance and were given an opportunity to thwart the communication. (Tr. 289.) Nonetheless, the Defendants failed to object. (*Id.*) Thus, the Defendants claims of a violation of Rule 43 are without merit.

As the Defendants accurately argue, the Supreme Court and the Eighth Circuit presume ex parte communications to be prejudicial. *United States v. Dockter*, 58 F.3d 1284, 1287 (8th Cir. 1995); *Rushen v. Spain*, 464 U.S. 114, 119 (1983); *Remmer v. United States*, 347 U.S. 227, 229 (1954). However, not all communications with the jury are prejudicial ex parte communications.

Behler, 14 F.3d at 1268. Regarding ex parte communications, *Rushen* also says,

> "The mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication."

464 U.S. at 125. Here, if the communication occurred at a trial stage, the Defendants waived their right to be present during the communication between the district court and the jury. *See Gagnon*, 470 U.S. at 527. Thus, no deprivation of a constitutional right occurred. And, for the reasons set forth below, fundamental fairness was not sacrificed based on the nature of the district court's communication.

C. The District Court Did Not Err In Its Communication with the Jury Venire

The Defendants claim that the district court committed error because the communication went beyond "thank you" and touched upon cases and the primary functions and duties of a jury. The Defendants focus on four areas of the district court's communication with the jury: (1) discussion of high-profile cases (Tr. 298, 300); (2) comments that juries "usually always make the right decision" (Tr. 295); (3) comments concerning lawyer stereotypes (Tr. 295); and (4) comments concerning jury nullification (Tr. 301.). For the reasons

discussed below, the Defendants' claims of error are meritless. The convictions should be affirmed.

As part of the jury selection process, federal district courts provide information to potential jurors without the parties being present. The venire members are instructed on legal principles, such as the presumption of innocence, the burden of proof, and the right of criminal defendants not to testify. They are instructed on legal procedures, such as a jury selection, presentation of evidence, and jury deliberation. The venire also gets practical instruction, such as where to be at certain times, what they can talk about, and prohibitions against conducting their own investigation. Importantly, potential jurors are told how important their role is and how appreciative the court and the parties are for their service.

In the District of Minnesota, these preliminary, ex parte instructions and discussions are made in several ways. Potential jurors are provided an opportunity to watch "Called to Serve," a twenty minute informational video which discusses the processes of jury summons and selection as well as the functions, responsibilities, and importance of juries in the American Legal System.[5] Supreme Court Chief Justice John Roberts, Justice Samuel Alito, and former Justice Sandra Day O'Connor are featured in the video, and numerous

[5] *See* www.mnd.uscourts.gov/JuryInfo/jury.shtml.

legal principles are touched upon, including jury nullification. These preliminary instructions to the jury venire are ordinary, and there is no claim that these instructions constitute a part of the trial.

Here, the district court's communication with the jury venire is akin to the preliminary instructions provided prior to a "trial stage." The district court did not address any subjects that were not already discussed in the "Called to Serve" video nor did the district court say anything which Chief Justice Roberts, Justice Alito, or Justice O'Connor had not already said. Further, informational resources available to jurors, such as the District of Minnesota's Petit Jury Handbook and a Frequently Asked Questions document reiterate topics discussed during the district court's communication with the jury.[6] Again, the district court simply repeated what the jury venire had already learned from these resources. Thus, there was no error.

With regard to the Defendants' specific claims of error, any references made to high-profile cases were made in an attempt to educate the jury venire on the right of jurors and the processes of trial. For example, the district court's discussion of the O.J. Simpson case focused on the process of sequestration, an issue discussed in the Frequently Asked Question (FAQ). (Tr. 298.) Further, the district court used the Marilyn Manson case to demonstrate to the jury

[6] *See* www.mnd.uscourts.gov/JuryInfo/FAQ-Jury.shtml and www.mnd.uscourts.gov/JuryInfo/handbook-petit.shtml.

venire that jurors have the right to discuss the case after the close of the trial, which is addressed in section of the Petit Jury Handbook titled "After The Trial." (Tr. 299-300.)

The district court's comments about juries usually reaching the correct verdict and lawyer stereotypes are no different than the comments made by Justice Samuel Alito in the "Called to Serve" video, wherein Justice Alito states:

> "What we ask jurors to do, um, are things that they're really experts on. They are more expert than we judges are…our legal system is based on the idea that they can, they can, hear a witness testify and make a good judgment about whether that witness is telling the truth or whether the witness really remembers."

Here, the district court saying that juries usually always make the right decision was not erroneous because juries are "really experts on" what the legal system asks them to do. (Tr. 295.) Further, if jurors are experts, then it follows that juries are not easily tricked by lawyers. (*Id.*) At the most basic level, both Justice Alito and the district court reassured the jury venire that they, as citizens, could handle the extraordinary responsibility of returning a verdict in a criminal case.

Finally, the district court's comments about jury nullification similarly can be found in several informational resources available to jurors. (Tr. 301.) Two separate sections within the District of Minnesota's Petit Jury Handbook

address the issue of jury nullification. Under the section titled "The Eight Stages of Trial," the handbook reads: "the jury should maintain its objectivity and base its verdict upon the testimony and exhibits received in evidence at trial." Additionally, under a section titled "The Jury's Verdict," the handbook says, "it is the jury's duty to decide the facts in accordance with the principles of law laid down in the judge's charge to the jury. The decision is made on the evidence introduced, and the jury's decision on the facts is usually final." Id. None of the handbook's references to jury nullification condone a jury engaging in this power. Moreover, the "Called to Serve" video does not condone jury nullification either. Justice O'Connor says of her experience with jurors, "they were willing to serve as trial jurors and they wanted to do what they were supposed to do as trial jurors: listen to the evidence, and make a decision." As such, Judge Frank's comments discouraging jury nullification, among other comments, were not erroneous and do not warrant granting new trials or evidentiary hearings.

D. The District Court's Communication with the Jury Venire Did Not Impact the Defendants' Substantial Rights

No fundamental or substantial rights were sacrificed when the district court communicated with the jury venire while the parties exercised their peremptory challenges. *See Behler*, 14 F.3d at 1268-69. As previously discussed, the district court's references to high-profile cases were made in the

context of the procedures of a trial and the rights of jurors. At no point did Judge Frank discuss the facts of Defendants' cases and in no way did this discussion affect the jury's ultimate verdicts. (Tr. 299-300.)

Second, the district court's comments that juries "usually always make the right decision" did not affect the jury's ultimate verdicts reached in this matter. (Tr. 295; Geshik Br. 57; David Br. 23.) An evaluation of the jury's deliberation process shows that the district court's comments did not leave the jury with the impression that they would automatically reach the correct verdict. Notably, the jury deliberated for more than two days. There would be no need to deliberate for so long if Judge Frank's comments had left the jury with the idea that they need not have any "self-doubt nor reassess their decision." *See Atwood v. Mapes*, 325 F.Supp.2d 950, 971 (N.D. Iowa 2004) (holding that defendant failed to show judge's ex parte communication with jurors was harmful error; "the jury still deliberated for a full two days – a fact which, in the absence of any evidence of actual prejudice, forecloses the inquiry into whether the juror's impartiality was compromised."). Further, the jury asked insightful questions during deliberations which demonstrates they were thinking critically about the evidence presented at trial and evaluated the guilt of each Defendant separately as required in the jury instructions. (Dist. Ct. Doc. No. 285, Jury Question dated March 11, 2013.) If the district court's comments had any

effect, the jury would have no doubt about their decision and, thus, would not have sought guidance from the court. Finally, the jury acquitted Defendant David Martin of first and second degree murder, and acquitted Defendant George Martin of all counts. The jury therefore distinguished guilt between the several Defendants. The comments also did not give jurors the impression that, if they felt one Defendant was guilty, that the other must necessarily be guilty as well.

Third, the district court's comments concerning lawyer stereotypes effectively ensured jurors that justice would be done by emphasizing the rarity of such trickery. The role of the jury is to weigh evidence and make credibility determinations. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Given the responsibilities of the jury, it is up to them to determine whether or not they believe a given defendant's case or if they are being "tricked" by the lawyers. As evidenced in David Martin's acquittal on both first and second degree murder charges, the jury distinguished the Defendants' guilt pertaining to the individually charged crimes by weighing evidence and making credibility determinations.

Lastly, the district court's comments concerning jury nullification are not enough to deduce that the jury engaged in nullification in this case in order to convict Defendant David Martin of robbery. (Tr. 301-02.) After

acknowledging that jury nullification may occur, the district court reminded the jury that he has the power to overrule a jury's verdict if it appears they engaged in jury nullification. (Trial Tr. 301.) Later in trial, the district court instructed the jury that they were not to reach a verdict through any means other than applying the evidence presented at trial to the applicable law, saying "[y]ou are forbidden to be governed by sentiment, prejudice, public opinions, or public feelings." (Dist. Ct. Doc. No. 273, p. 2.) The circumstances surrounding the jury's deliberations show that the Defendant David Martin's substantial rights were not affected. Again, the jury deliberated for more than two days and acquitted David Martin of first and second degree murder shows that Judge Frank's comments on jury nullification did not change how the jury approached their duties in this case.

Further, the district court's comments on the concerning jury nullification did not deprive Defendant Geshik Martin of his substantial right of equal protection under the law. Jury nullification is "only a power that the jury has and not a 'right' belonging to the defendant, much less a substantial right." *United States v. Horsman*, 114 F.3d 822, 829 (8th Cir. 1997) (quoting *United States v. Gonzalez*, 110 F.3d 936, 947 – 48 (2d Cir. 1997)). *See also United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983) (holding that defendants are not entitled to an instruction on jury nullification) (citing *United States v. Wiley*,

503 F.2d 106, 107 (8th Cir. 1974)). While it may have been ill-advised for the district court to comment on jury nullification to the jurors, these comments did not affect Defendant Geshik Martin's substantial rights.

In total, the substance of the district court's communication with the jury venire, as well as the circumstances at trial, demonstrate that the ex parte communication in question could not, and did not influence the jury's perception of the case or their ultimate verdict. An analysis of the case law cited by Defendants shows how this case presents a different problem.

All Defendants rely heavily on *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978) in their argument that Judge Frank's ex parte communication constitutes harmful error. However, the communication examined in *Gypsum* was much more coercive in nature. Especially suspicious was the fact that the jury from *Gypsum* returned a guilty verdict the day after the ex parte communication after being unable to reach a verdict for several days. *Id.* at 433. Unlike the communication in *Gypsum*, Judge Frank's interaction with the jury was not coercive in nature and did not concern the facts of the case nor the ultimate verdict. Additionally, Judge Frank instructed the jury, "[i]f during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of either party, I instruct you to disregard it." (Dist. Ct. Doc. No. 273, p. 2.) These differences make Judge Frank's ex parte

discussion distinguishable from that in *Gypsum* and show that the ex parte communication in this case is harmless error.

Defendants also rely on the court's decision in *Remmer* which granted a hearing to determine whether an unnamed person's ex parte communication with a juror was harmful to the defendant. However, the court's decision to grant the hearing was tied into the fact that no record indicating the extent of the ex parte communication existed and therefore a hearing was needed to, "determine the circumstances surrounding the incident and its effect on the jury." *Remmer*, 347 U.S. at 228. Unlike *Remmer*, a complete transcript of the ex parte communication between Judge Frank and the jury exists, and as discussed above, the conversation did not affect the substantial rights of Defendants. Further, there were never any comments made by Judge Frank which implied to the jurors that a certain verdict was preferred and nothing interfered with the jurors' ability to exercise their functions.

Ample evidence exists to show that the ex parte communication the district court had with jurors during impanelment did not affect Defendants' substantial rights. As such, the Defendants are not entitled to new trials or evidentiary hearings on the matter.

II. THE PARTIES' STIPULATION CONCERNING DEFENDANT GESHIK MARTIN'S INDIAN STATUS, TO WHICH THE DEFENDANT KNOWINGLY AND VOLUNTARILY AGREED, WAS SUFFICIENT TO ALLOW A REASONABLE JURY TO FIND BEYOND A REASONABLE DOUBT THAT DEFENDANT GESHIK MARTIN WAS AN INDIAN

At trial, the Government was required to prove, for each offense charged in the indictment, that the Defendant Geshik Martin was an "Indian" as outlined in 18 U.S.C. § 1153. *See United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (quoting *United States v. Rogers*, 45 U.S. 567, 572-73 (1846))(an "Indian" is defined as an individual having (1) some Indian blood, and (2) recognition as an Indian by a tribe or the federal government or both). At trial, Defendant stipulated with the Government that he was an Indian:

> 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.

(Gov't Ex. 60.) The Defendant signed the stipulation and did not object to its admission at trial. He now contends, however, that the parties' stipulation was insufficient to prove the element of his Indian status beyond a reasonable doubt because the stipulation did not list the criteria that establish one's Indian status. Defendant Martin also argues that the district court erred in admitting the stipulation he signed saying he is an Indian without ensuring that the defendant

knowingly and voluntarily agreed to its admission. These claims are without merit and should be rejected.

A. Defendant's Stipulation Was Sufficient To Establish His Status as an Indian Person

1. Standard of Review

Claims questioning the sufficiency of the evidence are reviewed de novo, "viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." *United States v. Teague*, 646 F.3d 1119, 1122 (8th Cir. 2011) (quoting *United States v. Piwowar*, 492 F.3d 953, 955 (8th Cir. 2007) (internal quotation marks omitted)). Further, "[i]f any interpretation of the evidence would allow a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt, we must uphold the verdict." *Id.*; s*ee also United States v. McCloud*, 590 F.3d 560, 565-66 (8th Cir. 2009). "Therefore, even [i]f the evidence adduced at trial rationally supports conflicting hypotheses, [this Court will] refuse to disturb the conviction." *United States v. Wilson*, 619 F.3d 787, 795 (8th Cir. 2010) (quoting *United States v. Thomas*, 593 F.3d 752, 760 (8th Cir. 2010) (internal quotation marks omitted). Here, the Defendant did not seek a judgment of acquittal, thus the plain error standard applies. *United States v. Clark*, 646 F.2d 1259, 1267 (8th Cir. 1981).

2. Defendant Has Not Demonstrated That His Stipulation to Indian Status Was Insufficient To Prove That Element of the Charged Crimes Beyond a Reasonable Doubt

The stipulation, signed by Defendant Martin, was sufficient to prove beyond a reasonable doubt that Defendant is, in fact, an Indian. As stated in *Fenix v. Finch*, 436 F.2d 831, 837 (8th Cir. 1971), "[i]t is well settled that stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them […] The general rule is that parties are bound by stipulations voluntarily made and that relief from such stipulations after judgment is warranted only under exceptional circumstances." In finding that no exceptional circumstances existed to warrant relief from a stipulation of facts, the court in *United States v. 3,788.16 Acres of Land, More or Less, in Emmons Cnty, N.D.*, 439 F.2d 291, 295 (8th Cir. 1971), noted that, "[n]o effort was made at any time in the trial court to obtain relief from the stipulation."

Here, Defendant Geshik Martin made no attempt to repudiate his stipulation to Indian status at any time throughout trial despite having ample opportunity to do so. In fact, the Defendant affirmatively told the jury that he was an Indian. (Tr. 1352.) Further, the Defendant did not object when the Government entered the stipulation to Indian status into the record (Tr. 1237-38); when instructions were discussed at the charge conference; or when the district court read the instructions to the jury, wherein the district court

instructed the jury that the government had to prove beyond a reasonable doubt that the "defendant is an Indian," then instructed the jury that:

> The Governments and the Defendants have stipulated; that is, they have agreed that each Defendant is an Indian. You must therefore treat this fact as being proven as relating to Counts 1 through 5.

(Tr. 794; Dist. Ct. Doc. No. 273, p. 26). The jury was not further instructed as to the *Rogers* definition of "Indian," and no party requested such an instruction. As such, no exceptional circumstances exist that would warrant Defendant's requested relief from the stipulation.

A case from the Ninth Circuit addresses the sufficiency of a stipulation to Indian status. On motion for a certificate of appealability, the defendant in *United States v. Red Star*, CR 10-60-GF-SEH, 2013 WL 458316, *1 (D. Mont. Feb. 6, 2013) asserted that his trial counsel was ineffective as his attorney did not object or move for acquittal in light of the government's failure to prove that the defendant had Indian Blood or Federal recognition. *Id.* (Stipulation signed by defendant stated, "[t]he defendant […] is an enrolled member of the Fort Peck Tribe. He is enrolled under Identification Number 206-U014376, and thus, he is an Indian person."). In denying defendant the right to appeal, the court emphasized that the defendant was present when the jury was instructed that he stipulated to his Indian status, he never contested the statement that he was an Indian person, and there was no reasonable probability that, had counsel

not stipulated to his Indian status, the jury would have failed to find that defendant was an Indian. *Id.*at *3.

By the same token, Defendant Geshik Martin was present when the jury was told he had stipulated to Indian status (Trial Tr. 1237-38), he did not object to the statement that he was an Indian person, and there is no reasonable possibility that the Government would not have been able to prove Geshik Martin's Indian status in the absence of the stipulation. The only reason no evidence was presented by the Government in an effort to prove Defendant's Indian status is because Defendant stipulated to being an Indian person.

Viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences that support the verdict demonstrates that Defendant's stipulation to Indian status was sufficient. Thus, there was no plain error on the part of the district court. As such, Defendant's argument on this issue is meritless, and the Court should affirm Defendant's conviction.

B. Defendant Martin Knowingly and Voluntarily Stipulated to his Indian Status

1. Standard of Review

Stipulations to an element of a charged offense must be knowingly and voluntarily entered into. *United States v. Stalder*, 696 F.2d 59, 62 (8th Cir. 1982). Courts have found that, "[t]he important question is whether the

defendant knew what he was doing when he entered into the stipulation." *Id.* Determining if the stipulation was entered into knowingly and voluntarily is reviewed de novo. *United States v. Selvy*, 619 F.3d 945, 949 (8th Cir. 2010) (de novo review used to determine whether defendant knowingly and voluntarily waived his rights in a plea agreement). Here, however, the Defendant did not object to the stipulation to his Indian status, the issue has not been preserved. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Therefore, the claim is reviewed for plain error.

2. Defendant Geshik Martin Knowingly and Voluntarily Stipulated to His Indian Status

Defendant Geshik Martin argues that his conviction must be overturned because the district court did not sufficiently inquire as to whether he had knowingly and voluntarily signed the stipulation concerning his Indian status. Importantly, the Defendant does not claim that he signed the stipulation inadvertently or without sufficient knowledge.

While it is true that that a defendant's stipulation to an element of the offense must be made knowingly and voluntarily, there is no requirement that courts must question defendants as to the voluntariness of entering into any stipulation of fact. As the Ninth Circuit stated in *United States v. Ferreboeuf*:

> [W]e hold that when a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court

> may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation.

(emphasis added). *Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980). In this case, the district court read the stipulation to Indian status in open court in the presence of Defendant Geshik Martin (Tr. 1237-38), the defendant's counsel agreed to the stipulation (*Id.* 1241), and no objection was made at the time the stipulation was made nor at any subsequent time throughout the trial. As such, the District Court could reasonably assume that the defendant understood the content of the stipulation and therefore his substantial rights were not affected.

In finding that the defendant knowingly and voluntarily entered into stipulations concerning two elements of the charged crime, the court in *United States v. Muse*, 83 F.3d 672, 678 (4th Cir. 1996) similarly relied on the fact that the Government read the stipulations to the jury and that the defendant did not object to the instruction. The court emphasized that "the district court's instruction did not result in the removal of the stipulated elements from the jury's consideration because the jury was still required to consider and return a verdict finding the defendant guilty of all of the elements of the offense, his theory is without support." *Id.* at 681.

In this case, the district court correctly listed Defendant Geshik Martin's Indian status as an essential element of each of the charged crimes in its jury instructions. (Dist. Ct. Doc. No. 273, pp. 21, 23, 26.) Further, the district court correctly instructed the jury about the stipulation to the defendant's Indian status. Accordingly, Defendant's substantial rights were not affected by the admittance of the stipulation in question.

Moreover, during a pre-trial hearing, the Government stated that in order to prove Defendant's Indian status it would be required to show that his bloodline derived from a federally-recognized tribe, and that Defendant had tribal or Government recognition as an Indian. (Pretrial Hrg. Tr. 80.) This statement was sufficient to inform Defendant of the proof needed to establish this element of the charged crime as well as the likelihood that the Government would succeed in so establishing this element. Finally, the district court asked whether "all defense counsel agree to the stipulations to the ones that are signed off on?" (sic) (Trial Tr. 1241), to which Defendant's attorney answered affirmatively. This inquiry on the part of the district court, in conjunction with the aforementioned circumstances, demonstrates that Defendant Geshik Martin knowingly and voluntarily stipulated to his Indian status. As no plain error was made on the part of the district court, Defendant Martin's motion for new trial should be denied.

Finally, Defendant Martin fails to make a convincing argument on this issue because his reliance on case law is misguided. Defendant first cites to *United States v. Stalder*, 696 F.2d 59, 60 (8th Cir. 1982), in which the defendant stipulated to "every fact alleged in the indictment, thereby effectively admitting his guilt." In order to ensure that the defendant was aware of the consequences of such action, defense counsel asked the defendant if he understood what would happen as a result of his stipulations, to which the defendant answered affirmatively. *Id.* at 60-61. Defendant Martin's situation is distinguishable from the defendant in *Stalder* since Defendant Martin stipulated to only one element of the charged crimes.

While the court in *Stalder* states that district courts need to ensure that stipulations are knowingly and voluntarily entered into, the court imposes a higher standard of inquiry when the stipulations in question amount to an effective guilty plea. *Id.* at 62 ("All of this is not to say that the district courts must not take care to determine that stipulations by defendants, <u>particularly stipulations that leave no issue of fact to be tried</u>, are voluntarily and intelligently entered into.") (emphasis added). Defendant Martin stipulated to only one element of the charged crimes, therefore the level of inquiry required to ensure his knowledge and voluntariness in entering into the stipulation is lower than the inquiry made in *Stalder*.

Defendant's reliance on *United States v. Lawriw*, 568 F.2d 98, 105 n.13 (8th Cir. 1977), is likewise problematic as the defendant Lawriw also stipulated to each fact alleged in the indictment. As stated above, Defendant Martin only stipulated to one element of the charged crimes. More troubling about Defendant's reliance on *Lawriw* is that the court opinion does not address the level of inquiry made into the defendant's knowledge and voluntariness in stipulating to each fact alleged in the indictment. *Id.* With no discussion concerning the level of inquiry made by the trial court, Defendant Geshik Martin asks this Court to assume that the *Lawriw* court questioned the knowledge and voluntariness of that defendant more than the district court here questioned this defendant. To blindly accept this assumption would be erroneous.

Defendant Geshik Martin has failed to demonstrate that the stipulation he signed stating that he is an Indian person was not entered into knowingly and voluntarily. As persuasive case law and the circumstances of this case show, the defendant knowingly and voluntarily signed the stipulation in question. As such, there was no plain error on the part of the district court and the defendant's substantial rights were not affected. Therefore, the defendant's argument on this issue should be rejected and his convictions should be affirmed.

III. THE DISTRICT COURT DID NOT ERR IN REFUSING TO SEVER DEFENDANT EDWARD ROBINSON'S TRIAL FROM HIS CO-DEFENDANTS' TRIAL

Defendant Edward Robinson appeals the district court's denial of his motion to sever his trial from his co-defendants' trial. Robinson argues that, because his theory of defense was antagonistic to that of his co-defendants and the case was complex, conducting a consolidated trial denied him the right to a fair trial. Specifically, Robinson claims that his theory of defense was antagonistic because although Robinson denied being at the scene of the murders, his co-defendants' argued that every defendant was present at the scene of the murders and was either merely present or acted in self-defense.[7] Thus, these antagonistic theories usurped Robinson's Fifth Amendment right to remain silent. Further, defendant claims that the case was complex because the trial involved four defendants charged with serious crimes, three theories of defense, and many witnesses testifying to continually changing stories. Due to this complexity, the jury would be unable to compartmentalize the evidence against Robinson. Given relevant case law and the circumstances of this case, Defendant's claims are without merit and this Court should affirm the district court's denial of Robinson's motion to sever.

[7] Robinson's theory of defense at the close of trial was that he was merely present in the car that traveled to the murder scene on January 1, 2011, but did not cause, or aid or abet, in the murders or robbery. (Dist. Ct. Doc. No. 273, p. 19.)

A. Standard of Review

A district court's ruling on a motion to sever is reviewed on appeal for an abuse of discretion. *United States v. Munoz*, 894 F.2d 292, 294 (8th Cir. 1990). In order to reverse a denial of severance, the defendant must show the joint trial resulted in real prejudice. *United States v. Davis*, 534 F.3d 903, 916 (8th Cir. 2008). To demonstrate real prejudice, Robinson must show (1) his defense was irreconcilable with that of his co-defendants or (2) the jury was unable to compartmentalize the evidence as it relates to the separate defendants. *Id*. at 916-17. Defendants carry "a heavy burden" in demonstrating that severance is necessary. *United States v. Swinney*, 970 F.2d 494, 500 (8th Cir. 1992).

B. Defendant Robinson Has Not Demonstrated Real Prejudice

Fed. R. Crim. P. 14(a) allows courts to sever properly joined defendants' trials if joinder of the defendants appears to prejudice a defendant or the government. However, Eighth Circuit case law has established that severance of trials is usually inappropriate. *See United States v. Casteel*, 663 F.3d 1013, 1018 (8th Cir. 2011) (quoting *United States v. Al-Esawi*, 560 F.3d 888, 891 (8th Cir. 2009)) ("Only in an unusual case will the prejudice resulting from a joint trial be substantial enough to outweigh the general efficiency of joinder.") In this case, Defendant Robinson has not shown that the joinder of his trial with his co-defendants resulted in real prejudice. As such, Defendant Robinson's

claims are without merit and this Court should affirm the district court's denial of Defendant's motion to sever.

Eighth Circuit case law has held that the assertion of conflicting defense theories in multiple-defendant cases is not enough to constitute real prejudice and does not warrant severance of trials. In *United States v. Sandstrom*, 594 F.3d 634 (8th Cir. 2014), the appellate court affirmed the district court's denial of the defendants' motions to sever trials despite the fact that the two defendants relied upon antagonistic theories of defense. In reaching this decision, the court reasoned that, "the defendant must show 'something more than the mere fact that his chances for acquittal would have been better had he been tried separately.'" *Id.* at 644 (quoting *United States v. Wint*, 974 F.2d 961, 966 (8th Cir. 1992). Like the defendants in *Sandstrom*, Defendant Robinson has failed to show anything more than the mere fact that he stood a better chance of acquittal if he had been tried separately from his co-Defendants. In light of *Sandstrom*, Defendant has not carried the heavy burden of showing that he was entitled to a separate trial.

As discussed in *Zaifro v. United States*, 506 U.S. 534, 538-39 (1993), a case relied upon by Defendant in his brief, "[m]utually antagonistic defenses are not prejudicial per se. Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if

any, to the district court's sound discretion." The Court goes on to say, "[w]hen the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but […] less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.* at 539. The *Zaifro* court ultimately held that severance was not warranted even in light of the fact that the defendants relied upon mutually antagonistic defenses.

Similarly, the district court in Defendant's case employed the less drastic measure of limiting jury instructions to cure any risk of prejudice that may have arisen as a result of the consolidated trial. Most notably, the district court instructed the jury that they must consider the individual charges and the different evidence against each Defendant separately during their deliberations. (Dist. Ct. Doc. No. 273, p. 17.) Further, the district court repeatedly instructed the jury when evidence would apply only to a particular defendant. (Tr. 594, 603, 679, 881, 914, 956, 967, 1143-44.)

Robinson's complexity argument also fails. In *Casteel*, the Eighth Circuit held that, as the jury in the case was able to adequately compartmentalize the evidence against the individual defendants, the defendants were not entitled to separate trials. 663 F.3d 1013 (8th Cir. 2011). "In assessing the jury's ability to compartmentalize the evidence against joint defendants, we consider the complexity of the case, whether any of the

defendants was acquitted, and the adequacy of the jury instructions and admonitions to the jury." *Id.* at 1018 (quoting *United States v. Ghant*, 339 F.3d 660, 666 (8th Cir. 2003)) (emphasis added).

This case may have been complex, as Robinson contends, but by applying the factors set forth by *Casteel* and *Ghant*, it is clear that the jury in Robinson's case was able to compartmentalize the evidence presented at trial. For example, Defendant David Martin was acquitted of first and second degree murder charges. This shows that the jury compartmentalized the various evidence presented at trial and found that Defendant David Martin was not guilty of murder while his co-defendants were guilty.

Further, the instructions given to the jury by the district court were very similar to those given in *Casteel*, and therefore were adequate to ensure that the jury considered each Defendant's case separately from the others and applied only the applicable evidence to each particular Defendant. *See, e.g.*, Tr. 594, 603, 679, 881, 914, 956, 967, 1143-44; Dist. Ct. Doc. No. 273, p. 17. The court in *Casteel* "instructed the jury to '[k]eep in mind that you must give separate consideration to the evidence about each charge against each Defendant.'" *Casteel*, 663 F.3d at 1019; s*ee also United States v. Bradley*, CR. 09-50029-20-KES, 2010 WL 346384, (D.S.D. Jan. 22, 2010) (in a discussion concerning the jury's ability to compartmentalize evidence in a multi-defendant trial,

"[g]enerally, the risk that a joint trial will prejudice one or more of the defendants 'is best cured by careful and thorough jury instructions.'"); *Davis*, 534 F.3d at 916-17 (quoting *United States v. Mickelson*, 378 F.3d 810, 817-18 (8th Cir. 2004)).

Moreover, the jury's note to the court during deliberations is proof that the jury in Robinson's case adequately compartmentalized the evidence presented at trial. The note says: "We can not agree with Count 1-4 for Edward Robinson with regard to count 5 for Edward Robinson we have a verdict How should we move forward?" (sic) (Dist. Ct. Doc. No. 292, Jury Question dated March 11, 2013.) Robinson relies on this note in his brief as evidence that his right to a fair trial was denied because of the consolidated trial (Robinson Br. at 30.) However, this argument fails. The jury was initially unable to reach a verdict as to Counts One through Four in Robinson's case which shows that the jury was methodically considering whether or not the evidence presented at trial had proven beyond a reasonable doubt each and every element of the charged offenses as they related to Defendant Robinson.

If, as Defendant Robinson argues, the jury had been unable to compartmentalize the evidence thereby allowing the evidence presented against his co-defendants to "spill[] over to and color[] the case against" him (Robinson Br. 30) (quoting *United States v. Reeves*, 674 F.2d 739, 745 (8th Cir.

1982)), the jury would not have struggled in reaching its verdicts for Counts One through Four for Defendant Robinson. However, the jury was given appropriate limiting jury instructions by the district court which resulted in the jury considering the evidence presented as it applied the charged offenses against Defendant Robinson separately from his co-defendants.

A defendant carries a heavy burden in attempting to show real prejudice as a result from the denial of a motion to sever. *Swinney*, 594 F.3d at 644. Defendant's burden is particularly heavy because limiting instructions usually negate any real prejudice that may have resulted from the consolidated trial. *Sandstrom*, 594 F.3d at 539. Defendant's argument fails because relying on antagonistic theories of defense does not warrant granting separate trials, the district court gave appropriate limiting instructions to the jury, co-Defendant David Martin was acquitted of first and second degree murder charges, and the jury sought guidance from the court when they were initially unable to reach a verdict as to Defendant Robinson. For the foregoing reasons, Defendant Robinson has failed to show that real prejudice violated his right to a fair trial. As such, the district court did not abuse its discretion in denying Defendant's motion to sever pursuant to Rule 14(a) and this Court should affirm the lower court's ruling.

IV. THE GOVERNMENT'S COMMENT ON DEFENDANTS GESHIK MARTIN AND DAVID MARTIN'S TESTIMONY WAS NOT A COMMENT ON DEFENDANT EDWARD ROBINSON'S FAILURE TO TESTIFY AND DOES NOT WARRANT A REVERSAL OF HIS CONVICTION

Defendant Edward Robinson asserts that the Government violated his Fifth Amendment right to remain silent during its closing argument when the Government said, "[t]he only people that are actually going to talk about what occurred at the house are Geshik Martin and David Martin. That is who you heard from." (Tr. 1641.) Specifically, Robinson contends the Government's reference in its closing argument to testimony of Defendants Geshik Martin and David Martin's testimony constituted an indirect reference to his failure to testify thereby depriving him of a fair trial. His argument is meritless and should be rejected.

A. Standard of Review

Whether a prosecutor has unconstitutionally commented on a defendant's failure to testify is subject to de novo review. *United States v. Gardner*, 396 F.3d 987, 988 (8th Cir. 2005). If it is determined that the prosecutor unconstitutionally commented on a defendant's failure to testify, these comments are subject to harmless error analysis. *United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999). In this matter, however, Defendant Robinson

failed to object at trial to the Government's statement. Accordingly, the claim is reviewed for plain error.

B. Relevant Law

A prosecutor may not directly comment on a defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965). Moreover, indirect comments on the failure to testify amount to "a constitutional violation if they [1] manifest the prosecutor's intent to call attention to a defendant's failure to testify or [2] would be naturally and necessarily taken by a jury as a comment on the defendant's failure to testify." *Graham v. Dormire*, 212 F.3d 437, 439 (8th Cir. 2000).

A comment is "naturally and necessarily" taken as a comment on the defendant's failure to testify if "no one other than the defendant could have refuted the evidence in question." *Gardner*, 396 F.3d at 992. "[T]he question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury necessarily would have done so." *Id*. In determining whether either of these things has happened, the Court must pay "attention to the context of the prosecutor's remarks – the argument itself, and the larger context of the evidence introduced at trial." *United States v. Durant*, 730 F.2d 1180, 1184 (8th Cir. 1984) (citing *Williams v. Wainwright*, 673 F.2d 1182, 1184 (11th Cir. 1982)). Further, the district court has broad

discretion in dealing with closing arguments. *United States v. Miller*, 621 F.3d 723, 729 (8th Cir. 2010). The Eighth Circuit Court of Appeals has stated, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Gardner*, 396 F.3d at 992. When an indirect comment on the defendant's failure to testify is tenuous, "an instruction to the jury that the defendant has the privilege not to testify may be sufficient to eliminate any potential prejudice." *Robinson v. Crist*, 278 F.3d 862, 866 (8th Cir. 2002).

C. The Government's Comment During Closing Arguments Did Not Affect Defendant Robinson's Substantial Rights

Defendant's claim of error is made by taking the Government's statement out of context. In its closing argument, the prosecutor stated:

> "[T]he only people that are actually going to talk about what occurred at the house are Geshik Martin and David Martin. That is who you heard from. But, I challenge you to critically evaluate the testimony of Geshik Martin. And what you will find is that his account of events just is incredible. His account of events of what occurred at Craig Roy's house are impossible."

(Tr. 1641.) The Government went on to explain the various ways in which Defendant Geshik Martin's testimony is unreliable. *Id*. These comments did not call to the attention to Defendant Robinson's decision not to testify. Instead, the Government was emphasizing that Defendant Geshik Martin's

testimony was not credible. In the context of the statement as a whole and the closing argument as a whole, the jury would not have naturally and necessarily taken the statement to be a comment on Defendant's failure to testify. As such, Defendant's substantial rights were not violated, and he is not entitled to a reversal of his conviction. *See United States v. Montgomery*, 819 F.2d 847, 853 (8th Cir. 1987) (holding that prosecutor's indirect comments on defendant's failure to testify did not warrant granting a mistrial at the district court level; "The trial transcript indicates that the government was arguing that the only reasonable inference to be drawn from the evidence was that [defendant] was guilty of the allegation in the indictment.")

As in *Montgomery*, the Government in its closing argument was arguing that, given the incredible testimony given by Defendant Geshik Martin, the only reasonable inference to be drawn from the evidence was that Defendant Geshik Martin was guilty of the charged crimes. Given the context of the statement in question, it is clear that the Government did not intend to call attention to Defendant Robinson's failure to testify.

For the same reasons stated above, the Government's comment would not "naturally and necessarily" be taken by the jury as a statement about Defendant Robinson's failure to testify. To the jury, the Government was merely emphasizing the fact that the defense relied on an unreliable witness'

testimony in an attempt to refute the ample evidence presented by the Government during trial tending to show Defendant Geshik Martin's guilt. Additionally, this Court should not "lightly infer" that the jury would have drawn the most damaging meaning from the statement in question when there exists a plethora of other less-damaging interpretations. *Gardner*, 396 F.3d at 992.

Since the alleged indirect comment on Defendant Robinson's failure to testify is tenuous at best, a jury instruction that the defendant has the privilege not to testify may be sufficient to eliminate any potential prejudice. *Robinson*, 278 F.3d at 866. In its instructions to the jury, the district court said,

> The defendant in a criminal case has an absolute right under our Constitution not to testify.
>
> The fact that any defendant did not testify must not be discussed or considered by the jury in any way when deliberating and in arriving at your verdicts. No inference of any kind may be drawn from the fact that a defendant decided to exercise his privilege under the Constitution and did not testify.

(Dist. Ct. Doc. No. 273, p. 12.) Any potential prejudice that may have developed as a result of the Government's statement during its closing argument was surely dispelled given this instruction to jurors. As such, Defendant Robinson's substantial rights were not violated, and he is not entitled to a reversal of conviction. Finally, the Eighth Circuit has addressed this issue

in a similar case and has held that statements like the one made by the Government during closing arguments do not warrant a reversal of conviction.

In *United States v. Porter*, 687 F.3d 918 (8th Cir. 2012), the appellate court found that the prosecutor's comments during closing arguments were not an improper comment on the defendant's failure to testify. Initially the district court overruled the defendant's objection to the prosecutor's comment finding that it was not "an inappropriate comment on the defendant's right not to testify" because the statements referred to the testimony of others and not the testimony of the defendant himself. *Id.* at 922.

Affirming the district court's ruling, the appellate court said that the statement "was not a comment on [defendant's] failure to testify but instead was merely an analysis of the testimony presented." *Id.* Similarly, the Government's comment during closing arguments of Defendant Robinson's trial referred only to the testimony of other witnesses and was made in an effort to discredit the testimony given by co-Defendant Geshik Martin. Given the ruling in *Porter*, Defendant Robinson's substantial rights were not violated and therefore he is not entitled to a reversal of his conviction.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE DEFENDANT DAVID MARTIN'S PROPOSED JURY INSTRUCTION BECAUSE THEFT OF GOVERNMENT PROPERTY IS NOT A LESSER INCLUDED CRIME OF ROBBERY

Defendant David Martin argues on appeal that the district court erred in refusing to give his proposed lesser included instruction on theft of government property. Given the extensive case law on lesser included instructions, Defendant's argument is unfounded and should be rejected.

A. Standard of Review

Review of a district court's decision whether to instruct on a lesser included offense is subject to a deferential abuse of discretion standard. *United States v. Anthony*, 537 F.3d 863, 866 (8th Cir. 2008).

B. Eighth Circuit Case Law Shows That Theft of Government Property Is Not a Lesser Included Offense of Robbery

The Eighth Circuit has a well-established test for determining when a lesser included instruction is appropriate. A lesser included instruction is appropriate where: (1) a proper request is made; (2) the lesser-offense elements are identical to part of the greater-offense elements; (3) some evidence would justify conviction of the lesser offenses; (4) there is evidence such that the jury may find the defendant innocent of the greater and guilty of the lesser-included-offenses; and (5) mutuality. *United States v. Crawford*, 413 F.3d 873, 876 (8th Cir. 2005) (citing *United States v. Parker*, 32 F.3d 395, 400-01 (8th Cir. 1994)).

Given the use of the conjunctive word "and" in this test, all five elements must be fulfilled for the lesser included instruction to be appropriate. Analysis shows that Defendant David Martin's proposed instruction fails this five-part test. Specifically, elements two, three, and four of this test are not satisfied. Therefore, the district court did not abuse its discretion by refusing to give the proposed instruction and the defendant is not entitled to a new trial.

Element two of the test is not met by Defendant David Martin's proposed lesser included instruction on theft of government property as the elements of the lesser offense are not identical to any of the elements of the greater offense of robbery. The elements of robbery as read by the district court are: (1) the defendant took or attempted to take from the person or presence of another anything of value; (2) such taking or attempted taking was by force and violence, or by intimidation; (3) the defendant's act was committed within the exterior boundaries of the Red lake Indian Reservation; and (4) the defendant is an Indian. (Dist. Ct. Doc. No. 273, pp. 25-26.)

In contrast, the Defendant's proposed instruction on theft of government property lists as elements: (1) the defendant voluntarily, intentionally, and knowingly stole money and/or crack for his own use or use of another; (2) the money or crack belonged to the United States and had a value in excess of $1,000; and (3) the defendant did so with intent to permanently deprive the

United States of the use or benefit of the money or drugs and their collective value. (David Br. at 32). Since the elements of the two offenses are completely different, theft of government property is not a lesser included offense of robbery.

See also United States v. Herron, 539 F.3d 881 (8th Cir. 2008) (holding that defendant was not entitled to lesser included instruction on assault by striking, beating, or wounding as the elements of this lesser offense are not identical to the elements of the greater offense of assault with a deadly weapon. Specifically, assault by striking, beating, or wounding includes an element of physical contact that is not included as an element of assault with a deadly weapon); *United States v. Cady*, 495 F.2d 742, 747 (8th Cir. 1974) (refusing to give a lesser offense instruction, the court stated, "Thus the claimed included offense must have the same elements as, although fewer of those elements than, the charged greater offense."). Element two of the Eighth Circuit's test is not fulfilled, and therefore Defendant's argument on this issue fails.

Further, element three of the Eighth Circuit's test has not been satisfied. No evidence was presented during trial that would have allowed the jury to convict Defendant of the lesser offense of theft of government property as no evidence concerning the status of the United States' ownership of the crack

cocaine or money nor the monetary value of the stolen items was elicited from witnesses.

Element four also has not been satisfied to allow for Defendant David Martin's proposed lesser included instruction. As stated in *Hopper v. Evans*, 456 U.S. 605, 612 (1982) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)), "[t]he federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and acquit him of the greater.'" In this case, there is no way the jury could have rationally found Defendant guilty of the lesser offense of theft of government property while acquitting him of the greater offense of robbery. This is because a question of fact, that is, whether the crack cocaine which was stolen by Defendant was property of the Government or property of Roy, is not an element of the greater charge of robbery that the jury merely failed to find had been proven beyond a reasonable doubt. The element of ownership of the crack cocaine had no bearing whatsoever on the jury's finding that Defendant is guilty of robbery as this is not an element of the greater charge.

Moreover, no evidence was presented at trial concerning the value of the crack cocaine or the money, although the Government could have presented such evidence. It would not be proper to allow the jury to consider a lesser

offense for which little evidence had been presented. Accordingly, Defendant's argument on this issue fails and should be rejected.

As discussed in *Sansone v. United States*, 380 U.S. 343, 350 (1965), "[a] lesser-included instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction for the lesser-included offense." Again, this is not the case with Defendant. Unlike, for example, drug crimes where there exists an additional factual element a jury must find to convict for possession with intent to distribute rather than mere possession (i.e. the quantity of the drug in question), Defendant in this case requested an instruction which included additional and different facts which the jury would have to find proven beyond a reasonable doubt which were in no way related to the underlying charge of robbery.

Further, the *Sansone* court framed this opinion from the perspective of the greater offense; that is, in order to be considered a lesser included offense, the greater offense must contain an additional or a different element which the lesser included offense lacks while all other elements of the two offenses remain identical. In the current case, the instruction proposed by Defendant did not present a situation where there was merely one different or additional element in the greater offense than there was in the lesser offense; Rather, Defendant's proposed instruction would have required the jury to decide

whether completely different elements and questions of fact had been proven beyond a reasonable doubt in order to convict of the lesser offense of theft of government property. This is not what the Eighth Circuit has held to constitute a lesser included offense and therefore Defendant was not entitled to have his proposed instruction read to the jury.

Defendant's proposed instruction of the lesser offense of theft of government property fails the well-established test followed in the Eighth Circuit for determining when a lesser included instruction is appropriate. All five elements of this test must be met for a lesser included instruction to be appropriate. Since Defendant's proposed lesser included offense instruction fails to satisfy three of the five elements of the Eighth Circuit's test, Defendant's argument on this issue fails. As such, the district court did not abuse its discretion by refusing to include the lesser offense instruction and Defendant is not entitled to a new trial.

VI. THE DISTRICT COURT DID NOT ERR IN IMPOSING A SIX POINT ENHANCEMENT TO DAVID MARTIN'S SENTENCE PER U.S.S.G. § 2B3.1(B)(3)(C)

Defendant David Martin argues that the district court's six point enhancement pursuant to U.S.S.G. § 2B3.1(b)(3)(C) was erroneous because the district court considered conduct for which Defendant was acquitted, namely first and second degree murder, in its calculation of Defendant's 160 month

sentence. Defendant further argues that this six point enhancement was inappropriate as he could not have foreseen that the planned robbery would result in permanent or life-threatening bodily injury to another. Defendant's arguments on this issue fail and should be rejected.

A. Standard of Review

The district court's application of the sentencing guidelines are reviewed de novo. *United States v. Moore*, 565 F.3d 435, 436 (8th Cir. 2009). Sentencing decisions are reviewed "under a deferential abuse of discretion standard." *United States v. Pepper*, 518 F.3d 949, 951 (8th Cir. 2008). An abuse of discretion may exist if the district court "fails to consider a relevant factor […] gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors." *United States v. Kowal*, 527 F.3d 741, 749 (8th Cir. 2008) (quoting *United States v. Watson*, 480 F.3d 1175, 1177 (8th Cir. 2007)). As the district court did not engage in any of these proscribed conducts, there was no abuse of discretion in sentencing Defendant to 160 months imprisonment following his conviction for robbery. Therefore, Defendant's arguments fail and should be rejected.

B. The District Court Was Allowed To Consider Conduct for Which Defendant Was Acquitted in Imposing the Six Point Enhancement

Extensive case law exists to support the district court's use of acquitted conduct in enhancing Defendant's sentence. In *United States v. Watts*, 519 U.S. 148, 157 (1997), the court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."

Furthermore, the Eighth Circuit has addressed this issue and has also held that district courts may consider conduct for which a defendant has been acquitted. *See United States v. Whatley*, 133 F.3d 601, 606 (8th Cir. 1998) (finding that *Watts* only requires that district courts make "the factual findings necessary to support the relevant sentencing adjustments"). For his argument, Defendant relies on Judge Bright's concurrence in *United States v. Canania*, 532 F.3d 764 (8th Cir. 2008) which warns of the dangers in allowing sentence enhancement based on acquitted conduct, but Defendant fails to address the fact that the majority in *Canania* held that courts were free to consider acquitted conduct for purposes of sentence enhancement.

For the foregoing reasons, the district court did not abuse its discretion in considering conduct for which Defendant was acquitted in imposing a six point

enhancement for permanent bodily injury pursuant to U.S.S.G. §2B3.1(b)(3)(C). Accordingly, Defendant's sentence should be affirmed.

C. The Permanent, Life-Threatening Bodily Injuries Suffered by Roy and Darla Were Reasonably Foreseeable to Defendant

Defendant's argument that the violence which occurred during the robbery of Roy was not reasonably foreseeable is meritless. Significant evidence exists as to the foreseeability of the violence which occurred. U.S.S.G. §1B1.3 lists as factors to be considered in determining an appropriate guideline range for sentencing, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction." (emphasis added).

As the lower court stated, "Everyone knew, if not a murder, they knew there would be violence in that home and there would be injury in that home to one or both parties." (David Martin Sent. Tr. 36.) First and foremost, David Martin knew of Roy's predisposition for violence. Earlier in the same day as the robbery, Roy got into a physical altercation with Vickie Neadeau, a friend of Defendants and a previous girlfriend of David Martin, where Roy "just started hitting me with the chair […] broke the chair over me […] Then he picked up the weight and he hit me in the jaw with a weight," recalled Neadeau. (Tr. 709-710.) This incident left Neadeau with a cut on her forehead and a fractured wrist. (Tr. 713.)

Secondly, Defendant explicitly referenced the fact that Roy had a gun in his home during the initial discussions of the robbery. (Tr. 546.) There would be no need for Defendant to announce this fact if Defendant did not anticipate the possibility of Roy garnishing the weapon during the robbery. This comment by Defendant David Martin also demonstrates his knowledge that Roy would likely not acquiesce to the Defendants robbing him of his drugs and money.

Thirdly, Defendant knew that co-defendant Geshik Martin was a Mixed Martial Arts fighter and no stranger to physical violence. Therefore, the trial court was justified in determining that Defendant reasonably foresaw Geshik becoming violent with Roy in furtherance of the robbery.

Lastly, Defendant brought five other people with him to Roy's home and elected to go to the victims' home while both victims were present. There was no need to go to Roy's house that night; most of the Defendants were under the influence of drugs or alcohol, it was cold outside, and Defendant could have retrieved his clothes virtually any other time as he lived in the same house as Roy. Defendant easily could have waited until Roy was not home to retrieve his clothes, but he did not. The simple fact that Roy was home that evening, and that the Defendants' friend Vickie Neadeau had so recently been physically assaulted by Roy, alerted Defendant to the reasonably foreseeable chance that a

physical altercation resulting in permanent or life-threatening injury might occur.

The district court had valid reason for viewing these facts as evidence that Defendant reasonably foresaw a violent altercation taking place and therefore did not abuse its discretion in imposing a six point enhancement for permanent bodily injury per U.S.S.G. § 2B3.1(b)(3)(C).

CONCLUSION

For all the forgoing reasons, the judgment of the District Court should be affirmed with respect to each appellant.

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. The brief has 13,994 words proportionally spaced. The brief was prepared using Microsoft Word 2010.

Date: August 14, 2014

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CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on August 14, 2014, I electronically submitted/filed the **Brief of Appellee** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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