

NO. 14-3890
Criminal

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,
vs.

SANTANA DRAPEAU,

Appellant.

Appeal from the United States District Court
for the District of South Dakota
Central Division

The Honorable Roberto A. Lange
United States District Judge

APPELLEE'S BRIEF

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Following a two-day jury trial, Santana Drapeau was convicted of two counts of Domestic Assault by a Habitual Offender, and one count of Simple Assault. He assaulted his longtime girlfriend on the Crow Creek Sioux Indian Reservation in May 2014. Drapeau committed that assault after having been convicted of at least two prior domestic violence assaults in tribal court.

On appeal, Drapeau raises two issues: that the district court erred by admitting facts underlying his three predicate domestic abuse convictions in tribal court, and that his uncounseled tribal convictions should not have been allowed to serve as predicate offenses under 18 U.S.C. § 117.

The district court did not abuse its discretion by admitting into evidence the facts underlying Drapeau's tribal convictions because those convictions were an essential element of the crimes charged in counts II and III. Drapeau's prior tribal convictions are also proper predicate convictions to sustain a charge under 18 U.S.C. § 117. The government respectfully submits the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument. Accordingly, the government does not request oral argument.

TABLE OF CONTENTS

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING LIMITED EVIDENCE OF FACTS GIVING RISE TO DRAPEAU’S TRIBAL COURT DOMESTIC ABUSE CONVICTIONS.	
II. WHETHER DRAPEAU'S UNCOUNSELED TRIBAL CONVICTIONS ARE PROPER PREDICATE OFFENSES UNDER 18 U.S.C. § 117.	
STATEMENT OF THE CASE.....	2
A. Facts Giving Rise to Drapeau's Charges	2
B. Pretrial Motions and Rulings	4
C. Dondee St. John's Testimony Concerning Three Prior Incidents of Domestic Abuse.....	6
SUMMARY OF THE ARGUMENT	10
I. THE DISTRICT COURT DID NOT ERR IN ALLOWING EVIDENCE OF DRAPEAU'S TRIBAL COURT DOMESTIC ABUSE CONVICTIONS, AN ESSENTIAL ELEMENT OF COUNTS II AND III OF THE INDICTMENT	11
A. Standard of Review.....	11
B. The district court properly admitted limited facts giving rise to Drapeau's tribal convictions	13

C. Drapeau's tribal convictions were also admissible under Rule 404(b)....	15
D. The district court did not plainly err by allowing the jury to determine whether Drapeau's tribal convictions constituted an assault against a spouse or intimate partner.....	17
II. DRAPEAU'S UNCOUNSELED TRIBAL COURT CONVICTIONS ARE PREDICATE OFFENSES UNDER 18 U.S.C. § 117	19
A. Standard of Review.....	19
B. The Court has squarely decided this issue	19
CONCLUSION	21
CERTIFICATE OF COMPLIANCE.....	23
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
<i>Burgett v. Texas</i> , 389 U.S. 109 (1967).....	20, 21
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	15
<i>United States v. Betterton</i> , 417 F.3d 826 (8th Cir. 2005)	14
<i>United States v. Bryant</i> , 769 F.3d 671 (9th Cir. 2014)	20, 21
<i>United States v. Cavanaugh</i> , 643 F.3d 592 (8th Cir. 2011)	11, 13, 19, 20, 21
<i>United States v. Hedger</i> , 354 F.3d 792 (8th Cir. 2004)	19
<i>United States v. Jandreau</i> , 611 F.3d 922 (8th Cir. 2010).....	15
<i>United States v. Mahasin</i> , 442 F.3d 687 (8th Cir. 2006).....	12
<i>United States v. Moore</i> , 38 F.3d 977 (8th Cir. 1994)	17, 18
<i>United States v. Mickelson</i> , 378 F.3d 810 (8th Cir. 2004).....	13
<i>United States v. Parish</i> , 606 F.3d 480 (8th Cir. 2010)	12
<i>United States v. Paul</i> , 217 F.3d 989 (8th Cir. 2000)	19
<i>United States v. Pirani</i> , 406 F.3d 543 (8th Cir. 2005).....	12
<i>United States v. Shavanaux</i> , 647 F.3d 993 (10th Cir. 2011)	20, 21
<i>United States v. Shillingstad</i> , 632 F.3d 1031 (8th Cir. 2011).....	16
<i>United States v. Street</i> , 548 F.3d 618 (8th Cir. 2008)	11
<i>United States v. Thomas</i> , 760 F.3d 879 (8th Cir. 2014)	15

<i>United States v. Williams</i> , 308 F.3d 833 (8th Cir. 2002).....	16
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STATUTES:

18 U.S.C. § 117.....	i, 1, 11, 13, 17,18, 19, 20
18 U.S.C. § 1153.....	1
18 U.S.C. § 3231.....	1
28 U.S.C. § 1291.....	1
Fed. R. Crim. P. 51(b).....	12
Fed. R. Evid. 404(b).....	4, 15, 16, 17

JURISDICTIONAL STATEMENT

Santana Drapeau appeals a final district court judgment following a jury trial. Drapeau, an Indian, was charged with committing federal offenses within the exterior boundaries of the Crow Creek Sioux Indian Reservation. The district court had federal subject matter jurisdiction over this case by virtue of 18 U.S.C. §§ 117, 1153 and 3231. Following the jury's guilty verdicts on October 10, 2014, the district court imposed sentence on December 22, 2014. DCD 55, 77.¹ Judgment was entered on December 22, 2014. DCD 78. Drapeau timely appealed on December 29, 2014. DCD 81. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

¹ References to the record will be as follows: The district court record will be denoted as "DCD" followed by the relevant docket number. Appellant's brief will be referred to as "AB," followed by the appropriate page number. References to the transcript of the pretrial conference will be denoted as "Pretrial Trans.," followed by the appropriate page number. References to the transcript of Drapeau's jury trial will be "Tr. Trans.," followed by the appropriate page number.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING LIMITED EVIDENCE OF FACTS GIVING RISE TO DRAPEAU'S TRIBAL COURT DOMESTIC ABUSE CONVICTIONS.

United States v. Mahasin, 442 F.3d 687 (8th Cir. 2006)

United States v. Shillingstad, 632 F.3d 1031 (8th Cir. 2011)

United States v. Williams, 308 F.3d 833 (8th Cir. 2002)

United States v. Paul, 217 F.3d 989 (8th Cir. 2000)

II. WHETHER DRAPEAU'S UNCOUNSELED TRIBAL CONVICTIONS ARE PROPER PREDICATE OFFENSES UNDER 18 U.S.C. § 117.

United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2011)

STATEMENT OF THE CASE

A. Facts Giving Rise to Drapeau's Charges.

On the evening of May 18, 2014, Drapeau was with his longtime girlfriend, Dondee St. John, and several others at a bonfire at a residence in Fort Thompson, South Dakota, celebrating a graduation. Tr. Trans. 40-41. The group was drinking and visiting around the fire. Tr. Trans. 41. Drapeau and his sister, Tessa Bad Moccasin, left the party for a short time. Tr. Trans. 43. Upon their return, Drapeau approached St. John, who was still sitting with others around the fire. Tr. Trans. 43-44. St. John testified that Drapeau became upset when she told him she did not want to leave the party. Tr. Trans. 44. Drapeau then struck St. John on the left side of her head, causing her to fall to the ground. Tr. Trans. 44, 108-09.

Several others at the party witnessed the assault and told Drapeau to leave. Tr. Trans. 45, 109-11, 127-28. Witnesses testified Drapeau retreated to his sister's vehicle and retrieved an aluminum bat. Tr. Trans. 115-16, 128-29. Drapeau held the bat while standing outside the vehicle and then eventually left the party. Tr. Trans. 115-16, 129.

St. John stayed at the party after Drapeau left. Tr. Trans. 46. St. John eventually returned to her residence in Fort Thompson. Tr. Trans. 46. At some point, Drapeau arrived at the residence. Tr. Trans. 48. St. John was sleeping on the couch when Drapeau arrived. Tr. Trans. 48. Drapeau woke up St. John and they both went to their bedroom. Tr. Trans. 48. While in the bedroom, Drapeau and St. John argued. Tr. Trans. 48-49. During their argument, St. John testified, Drapeau threw her onto their bed, held her down, and squeezed her neck. Tr. Trans. 50-54. Stanley Jannesse overheard the argument and testified he told Drapeau and St. John to "behave" but did not intervene. Tr. Trans. 55-56, 175-76.

Following the argument and assault, St. John walked to the residence of her mother, Shelley Taylor, and asked her mother to contact law enforcement. Tr. Trans. 56. Taylor reported she walked to St. John's residence, confronted Drapeau, and told him law enforcement was on the way. Tr. Trans. 186-87. As Taylor returned to her residence, she and St. John witnessed Drapeau use a bat to

shatter the windows of St. John's vehicle. Tr. Trans. 57-60,189, 191. Drapeau then left before law enforcement arrived. Tr. Trans. 62.

Drapeau was indicted on July 15, 2014, charged with Assault by Strangulation and Suffocation and two counts of Domestic Assault by an Habitual Offender. DCD 1, 2. This matter was tried to a jury on October 9-10, 2014.

B. Pretrial Motions and Rulings.

Prior to trial, the government filed a notice of its intention to offer, during its case-in-chief, the acts of domestic abuse for which Drapeau had been convicted in Crow Creek Sioux Tribal Court. DCD 30. Drapeau's convictions are, as set forth in tribal court records, "Domestic Abuse" in 2010, "D. Abuse" in January 2012, and "Domestic" in September 2012. Tr. Trans. 19-24. St. John was the victim in each of Drapeau's convictions. Tr. Trans. 30-36.

The government planned to ask St. John what happened to her in each incident that led to Drapeau's tribal convictions. *Id.* Because the government had the burden at trial of proving Drapeau had at least two prior domestic abuse convictions, the government did not consider Drapeau's tribal convictions to be Rule 404(b) evidence, but provided notice out of an abundance of caution. *Id.*

In response to the notice, Drapeau filed motions in limine, requesting the court exclude his prior domestic abuse and other bad acts allegations and his no

contest pleas and resulting judgments of conviction in tribal court. DCD 25. The government opposed the motion and the court heard argument on the motion at the pretrial conference. Pretrial. Trans. 10-12, DCD 40. The district court filed a written order on the motion. DCD 50.

As regards to Drapeau's tribal court convictions, the district court found:

without more evidence on what "domestic abuse" was committed or a stipulation, the Government has not proved the predicate conviction of an offense that would have been, if subject to federal jurisdiction, an assault against a spouse and intimate partner under 18 U.S.C. § 117. Some evidence would be required in each instance that the "domestic abuse" was in fact an assault and that the unnamed victim in the first conviction and St. John at the times of the two other tribal court convictions was a spouse or intimate partner.

Id. at 3. The court held "the Government ought to be allowed to present evidence that the three tribal court convictions in fact involved domestic assaults of a spouse or intimate partner, if Drapeau refuses to so stipulate." *Id.* at 6.

The district court also analyzed Drapeau's prior tribal convictions under the Eighth Circuit's four-part test for determining the admissibility of 404(b) evidence. *Id.* The court noted "[t]he evidence must be 1) relevant to a material issue; 2) similar in kind and not overly remote in time to the charged crime; 3) supported by sufficient evidence; and 4) such that its potential prejudice does not outweigh its probative value." *Id.* (citing *United States v. Williams*, 308 F.3d 833, 837 (8th Cir.

2002)). The district court found the first three prongs were satisfied and that the “real issue [was] whether the use of the circumstances surrounding the convictions is more unfairly prejudicial than probative under prong four.” DCD 50 at 8. The court concluded,

The prior convictions, to which Drapeau was unwilling to stipulate and indeed objected to admitting, show a final judgment for three prior instances of “Domestic Abuse,” “D. Abuse,” and “One count of Domestic.” These judgments are less prejudicial to the defendant in that they are a rather sterilized account of whatever occurred in those three instances. However, absent further definition of the crimes for which Drapeau was convicted, they fall short of proving that Drapeau committed an assault (as opposed to abuse) against a spouse or intimate partner. Thus, in the absence of other, less prejudicial evidence (such as a stipulation in *Old Chief* [v. *United States*, 519 U.S. 172 (1997)]), at least some evidence of the circumstances surrounding the prior convictions is highly probative to the case, indeed central to an essential element on Counts II and III, and thereby admissible. The danger of unfair prejudice, which can be mitigated through a limiting instruction, does not substantially outweigh the probative value of the evidence.

Id.

C. Dondee St. John’s Testimony Concerning Three Prior Incidents of Domestic Abuse.

At trial, the district court permitted the government to ask St. John limited questions regarding each prior tribal conviction. With regards to Drapeau’s 2010

conviction, the government confirmed with St. John she was the victim in that case. The court then read the following limiting instruction to the jury:

Ladies and gentlemen of the jury, you are about to hear testimony, the Court anticipates, about an alleged assault that occurred on a previous occasion by this Defendant. He is not on trial for that assault, and you cannot take into consideration the prior assault as evidence that he did anything wrong on May 18, 2014, that is, this is not evidence of any character or habit or bad acts or traits.

This is simply being received as evidence that there is a predicate offense, that is, that there is a previous conviction of an offense that – and you need to find this as part of the elements – that if it had been subject to federal jurisdiction would be an assault against a spouse or intimate partner. And that's the limited purpose for which the Court is receiving this evidence.

Tr. Trans. 31. The government then asked St. John the following questions:

- Q. Dondee, were you in a relationship with Mr. Drapeau back in late 2010?
- A. Yes.
- Q. And can you briefly tell the members of the jury what happened between you and Santana that resulted in this tribal conviction?
- A. He broke in my mom's windows and pulled me around by my hair.
- ...
- Q. Did he do anything else?
- A. Yeah. He hit me.

Tr. Trans. 31-32. The government then, after the court reminded the jury of the limiting instruction, asked the following questions of St. John regarding Drapeau's January 2012 conviction:

- Q. . . . Were you and Santana in a relationship in early 2012?
- A. Yes.
- Q. Okay. And were you living together?
- A. Yes.
- Q. Did you have any children with Mr. Drapeau at this point?
- A. One.
- Q. One child?
- A. (Nods head).
- Q. Okay. Are you the victim of this alleged – of this final conviction in Crow Creek Sioux Tribal Court?
- A. Yes.
- Q. Can you briefly tell the members of the jury what happened between you and Santana that resulted in this conviction?
- . . .
- A. He beat me up.
- Q. Where on your body did he hit you?
- A. In the face.

Tr. Trans. 32-34. The government then confirmed with St. John that she was the victim in Drapeau's September 2012 conviction and, after the jury was again reminded of the limiting instruction, asked the following questions:

- Q. Dondee, can you tell the jury what occurred between you and Santana that resulted in this conviction?
- A. He broke out my windows.

- Q. Where were you living at?
A. With my – or at my own place in Fort Thompson
Q. Was Santana living with you then?
A. Um-hum
Q. Was he doing anything to you when he broke out the windows?
A. No.
Q. Did he have anything?
A. Yeah. Whatever he used to break my windows out with.
Q. What was going on – can you tell the jury what was going on between you and Santana prior to him breaking out the windows?
A. Arguing
Q. Was he threatening you?
A. Yeah.

Tr. Trans. 35-36.

Following the close of evidence, the district court read the final instructions to the jury. Instruction Number three contained, in part, a limiting instruction to the jury regarding Mr. Drapeau's prior tribal court convictions:

When you were instructed that evidence was received for a limited purpose, you must follow that instruction. For instance, evidence of the defendant's three prior tribal court judgments of conviction and the circumstances behind those convictions were received for a limited purpose only. That limited purpose was as evidence of whether the defendant, on at least two separate occasions before May 18, 2014, had been convicted in an Indian tribal court of an offense that would be, if subject to Federal jurisdiction, an assault against a spouse or intimate partner, which is an essential element of Counts II and III.

DCD 54 (Instruction No. 3). The district court also included instructions defining “domestic assault” and “assault”:

The term “domestic assault” as used in Instruction Number 14 and 16 means an assault committed by (1) a current or former spouse, (2) by a person with whom the victim shares a child in common, (3) by a person who is cohabitating with or has cohabitated with the victim as a spouse, or (4) by a person similarly situated to a spouse of the victim.

An “assault” under Federal law is (1) any intentional and voluntary attempt or threat to do injury to another person, when coupled with the apparent present ability to do so, sufficient to put the person against whom the attempt is made in fear of immediate bodily harm or (2) any intentional or knowing harmful or offensive bodily touching or contact, however slight, without justification or excuse, with another’s person, regardless of whether physical harm is intended or inflicted or whether the victim has a reasonable apprehension of bodily harm.

DCD 54 (Instruction Nos. 18, 19).

For count I, the jury acquitted Drapeau of Assault by Strangulation or Suffocation, but convicted him of the lesser included offense of Simple Assault. Tr. Trans. 299, DCD 55. The jury also found Drapeau guilty of counts II and III, Domestic Assault by a Habitual Offender. Tr. Trans. 299-300, DCD 55.

SUMMARY OF THE ARGUMENT

The district court did not err in permitting St. John to testify about the facts that led to Drapeau’s underlying tribal convictions. At trial, the government had

the burden of proving each element of the offenses charged in counts II and III of the indictment, including that Drapeau, on at least two separate occasions, had been convicted in tribal court of an offense that would be, if subject to Federal jurisdiction, an assault against a spouse or intimate partner. The probative value of the evidence substantially outweighed any prejudice that might have accrued to Drapeau.

Drapeau's prior tribal convictions are also proper predicates to sustain a conviction under 18 U.S.C. § 117. This Court, in *United States v. Cavanaugh*, 643 F.3d 592, 605 (8th Cir. 2011) addressed the precise issue and held prior uncounseled convictions are admissible as predicate convictions to establish the habitual-offender elements of 18 U.S.C. § 117. The convictions should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ALLOWING EVIDENCE OF DRAPEAU'S TRIBAL COURT DOMESTIC ABUSE CONVICTIONS, AN ESSENTIAL ELEMENT OF COUNTS II AND III OF THE INDICTMENT.

A. Standard of Review.

This Court “review[s] a district court’s evidentiary rulings for abuse of discretion.” *United States v. Street*, 548 F.3d 618, 624 (8th Cir. 2008). This Court will reverse a district court’s decision to admit evidence of other crimes “only if it

can be shown that the ‘evidence clearly had no bearing upon any issues involved.’” *United States v. Mahasin*, 442 F.3d 687, 689 (8th Cir. 2006) (quoting *United States v. Green*, 151 F.3d 1111, 1113 (8th Cir. 1998) (further citations omitted)).

Drapeau also argues the district court erred in allowing the jury to determine whether his tribal convictions constituted an assault against a spouse or intimate partner. Drapeau raised this argument for the first time on appeal. “An error by the trial court, even one affecting a constitutional right, is forfeited—that is, not preserved for appeal—‘by the failure to make timely assertion of the right.’ ” *United States v. Pirani*, 406 F.3d 543, 549 (8th Cir. 2005) (quoting *United States v. Olano*, 507 U.S. 725, 731 (1993)). “To preserve an error for appellate review, an objection must be timely and must ‘clearly stat[e] the grounds for the objection.’ ” *Pirani*, 406 F.3d at 549 (quoting *United States v. Williams*, 994 F.2d 1287, 1294 (8th Cir. 1993); Fed R. Crim P. 51(b)).

Plain error review requires Drapeau to show (a) an error, (b) that is plain, and (c) affects his substantial rights, meaning that it affected the outcome of the case. *United States v. Parish*, 606 F.3d 480, 490 (8th Cir. 2010) (quoting *United States v. Cvijanovich*, 556 F.3d 857, 864 (8th Cir. 2009). “Even if there has been plain error affecting the defendant’s substantial rights, whether we notice the error is a matter of discretion, and we reverse for plain error only where the error

seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Mickelson*, 378 F.3d 810, 819 (8th Cir. 2004) (citing *Olano*, 507 U.S. at 736).

B. The district court properly admitted limited facts giving rise to Drapeau’s tribal convictions.

To sustain a conviction for Domestic Assault by a Habitual Offender, the government was obligated to prove, beyond a reasonable doubt, the following essential elements:

1. That on or about May 18, 2014, Santana Drapeau committed a domestic assault (as defined in Instruction No. 18) against Dondee St. John.
2. That on at least two separate prior occasions, Santana Drapeau had been convicted in an Indian tribal court of an offense that would be, if subject to Federal jurisdiction, an assault against a spouse or intimate partner; and
3. The alleged offense occurred in Indian country.

See DCD 54 (Instruction Nos. 14, 16); 18 U.S.C. § 117.

This Court, in *United States v. Cavanaugh*, 643 F.3d 592, 593 (8th Cir. 2011), noted that “as elements of the [18 U.S.C. § 117] the government must prove [the defendant] received a final conviction on at least 2 separate occasions in Federal, State, or Indian tribal court proceedings” for certain abuse offenses.²

² *Cavanaugh* is discussed in more detail in Section II.

Thus, not only were tribal convictions appropriate predicates, but they were *res gestae* of Drapeau's charged offense.

Drapeau's tribal judgments of conviction were insufficient on their own to satisfy the government's burden of proof in that they contained insufficient detail about the nature of the crimes. Thus, absent a stipulation from Drapeau, limited facts regarding the predicate convictions were needed to show that the convictions constituted assaults against a spouse or intimate partner. Drapeau chose not to stipulate to the predicate offenses.³

Under the circumstances, the district court did not abuse its discretion when it permitted St. John, the victim of each assault, to "describe enough to make clear that [the underlying conduct] would be an assault." Tr. Trans. 11. The district court also quelled any potential prejudice by giving a limiting instruction to the jury before St. John's testimony and also in its final instructions. *See United States v. Betterton*, 417 F.3d 826, 832 (8th Cir. 2005) ("A jury is presumed to follow its instructions and therefore the use of a limiting instruction decreased the danger that unfair prejudice will result from the admission of the evidence.") (internal quotation marks and citations omitted).

³ In fact, he told agents during his interview he did not believe two of the three domestic abuse convictions were "domestic." DCD 50 at 9, Tr. Trans. 274, 276.

Drapeau's reliance on *Old Chief v. United States*, 519 U.S. 172 (1997) is misplaced. "In *Old Chief*, the Supreme Court affirmed 'the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away.' " *United States v. Jandreau*, 611 F.3d 922, 924 (8th Cir. 2010) (citing *Old Chief*, 519 U.S. at 189). "However, the Court created a narrow exception to this rule in cases where the defendant's 'prior conviction is for an offense likely to support conviction on some improper ground.' " *Id.* (citing *Old Chief*, 519 U.S. at 191). "In such cases, the district court should allow a defendant to stipulate to the fact of the prior conviction and 'abuses its discretion if it spurns such an offer.' " *Id.* (citing *Old Chief*, 519 U.S. at 174). "The Court emphasized the narrowness of its holding, noting that 'a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense.' " *Id.* (citing *Old Chief*, 519 U.S. at 183).

C. Drapeau's tribal convictions were also admissible under Rule 404(b).

The facts underlying Drapeau's predicate convictions were also admissible under Fed. R. Evid. 404(b). "Rule 404(b) is a rule of inclusion, prohibiting only evidence that tends solely to prove the defendant's criminal disposition." *United States v. Thomas*, 760 F.3d 879, 883 (8th Cir. 2014) (citing *United States v. Young*,

753 F.3d 757, 768 (8th Cir. 2014)). “Rule 404(b) does not exclude evidence of prior bad acts that are probative of the charged crime.” *Id.* (citing *United States v. Heidebur*, 122 F.3d 577, 579 (8th Cir. 1997)).

This Court established a four-part test for determining the admissibility of evidence under Rule 404(b): “The evidence must be 1) relevant to a material issue; 2) similar in kind and not overly remote in time to the charged crime; 3) supported by sufficient evidence; and 4) such that its potential prejudice does not outweigh its probative value.” *United States v. Williams*, 308 F.3d 833, 837 (8th Cir. 2002).

In applying this test, the district court found Drapeau’s underlying tribal convictions were similar in kind, not overly remote in time, and “highly probative to the case, indeed central to an essential element of Counts II and III, and thereby admissible” DCD 50 at 8; *see also United States v. Shillingstad*, 632 F.3d 1031, 1033-35 (8th Cir. 2011) (finding the district court did not err in admitting evidence of defendant’s prior domestic violence convictions because the convictions were probative of defendant’s intent and absence of mistake or accident, and were close in similarity to the charged crime). St. John’s trial testimony showed that, indeed, Drapeau’s tribal convictions were much like the assaults charged in the indictment and were all against the same victim. They were relevant to show Drapeau’s intent

and absence of mistake or accident, and the district court did not abuse its discretion by admitting them under the alternative 404(b) theory.

The district court also properly weighed potential prejudice to Drapeau if the underlying facts were admitted. DCD 50 at 8. It found that any prejudice to him could be mitigated through a limiting instruction, which was given repeatedly during the course of the trial and also in the final jury instructions.

D. The district court did not plainly err by allowing the jury to determine whether Drapeau's tribal convictions constituted an assault against a spouse or intimate partner.

Drapeau, for the first time on appeal, argues the district court, not the jury, had the responsibility to determine whether his underlying tribal convictions qualified as predicate offenses under 18 U.S.C. § 117. AB 8. Drapeau did not raise this argument in his pretrial motions, at the pretrial conference, during trial, or as part of his Rule 29 motion; nor did he object to the jury instructions that set forth the elements of counts II and III. Drapeau cites no precedent for his position that it constituted reversible error for the district court to allow the jury to consider the question as a factual matter.

The cases cited by Drapeau are inapposite. Drapeau cites *United States v. Moore*, 38 F.3d 977, 979-80 (8th Cir. 1994), in which the district court determined that involuntary manslaughter was a crime of violence. *Moore*, 38 F.3d at 978. In

that case, the defendant argued that whether involuntary manslaughter was a crime of violence was a factual question for the jury to decide. *Id.* at 979. This Court found, however, that “[t]o determine the nature of [voluntary manslaughter] requires an examination of the elements which compose it. This analysis does not require an exploration of the underlying facts.” *Id.* at 979. That is, in *Moore*, the salient question surrounded the *nature* of the crime, not the underlying facts.

Also, unlike *Moore*, the very language of § 117 requires the government to prove beyond a reasonable doubt that a defendant had “a final conviction on at least 2 separate prior occasions in . . . Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction – (1) any assault . . . against a spouse or intimate partner.” 18 U.S.C. § 117. Here, to determine that factual issue, looking only to Drapeau’s underlying convictions was insufficient because they did not prove that “Drapeau committed an assault (as opposed to abuse) against a spouse or intimate partner.” DCD 50 at 8. It was not plain error for the district court to allow the jury to decide those facts.

Finally, contrary to Drapeau’s assertion, the district court properly instructed the jury regarding what qualifies as an assault under federal law. The court’s final instructions contained a clear definition of “assault” which provided the jury with the precise definition it needed to make the proper determination under § 117. *See*

United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000) (“jury instructions are evaluated in the context of the entire charge and a jury is presumed to follow all instructions”). Drapeau did not request or offer a jury instruction otherwise, presumably because he believed the jury had been properly instructed regarding the definition of “assault.”

II. DRAPEAU’S TRIBAL CONVICTIONS ARE PROPER PREDICATE OFFENSES UNDER 18 U.S.C. § 117.

A. Standard of Review.

This Court, in reviewing an issue already decided by another panel, will not reverse the prior panel’s decision. *United States v. Hedger*, 354 F.3d 792, 795 (8th Cir. 2004) (citing *United States v. Perkins*, 94 F.3d 429, 437 (8th Cir. 1996) (noting “one panel of the court cannot reverse another panel.”)).

B. This Court has squarely decided this issue.

As Drapeau concedes (AB 15-16), his argument is foreclosed by this Court’s holding in *United States v. Cavanaugh*, 643 F.3d 592, 603-04 (8th Cir. 2011), and he raises his argument on appeal for preservation purposes. *Cavanaugh* holds that prior uncounseled tribal court convictions may be used as predicate offenses for a criminal prosecution under 18 U.S.C. § 117. *Id.* “[I]n the absence of any other allegations or irregularities or claims of actual innocence surrounding the prior

convictions, we cannot preclude the use of such convictions in the absence of an actual constitutional violation.” *Id.* at 605.

The Tenth Circuit has also held uncounseled tribal court convictions are permissible convictions for purposes of § 117. *United States v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011) (finding that, because the Sixth Amendment does not apply in tribal court, using a tribal court conviction in a subsequent criminal prosecution does not violate the Sixth Amendment).

Drapeau admits *Cavanaugh* controls this point but argues it should be overruled as “irreconcilable with the Supreme Court’s prior holdings limiting the use of prior convictions obtained without counsel and rejecting prior convictions that may not be reliable.”⁴ AB 15-16 (citing *Burgett v. Texas*, 389 U.S. 109, 111 (1967); *United States v. Tucker*, 404 U.S. 443, 447 (1972)). Drapeau also relies on *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014), where the Ninth Circuit held that a defendant’s prior uncounseled tribal court domestic abuse convictions could not be used as predicate offenses under § 117. Thus, the Ninth Circuit’s decision created a split with this Court. *Bryant* is currently pending a petition for en banc

⁴ Rehearing and Rehearing En Banc was denied in *United States Cavanaugh*, 643 F.3d 592 (8th Cir. 2011). The Supreme Court also denied a petition for a writ of certiorari. *Cavanaugh v. United States*, 132 S.Ct. 1542 (2012).

review. *United States v. Bryant*, No. 12-30177, Petition for rehearing en banc (9th Cir. Dec. 15, 2014).

Burgett is distinguishable. Under *Burgett*, a “conviction obtained in violation of *Gideon v. Wainwright*[, 372 U.S. 335 (1963)]” cannot “be used against a person either to support guilt or enhance punishment for another offense.” 389 U.S. at 115. *Gideon* regarded the Sixth Amendment right to counsel against the States. The question was addressed in *Cavanaugh* and this Court reasoned that the Sixth Amendment has never been incorporated against Indian Tribes. See *Cavanaugh*, 643 F.3d at 603-04; *Shavanaux*, 647 F.3d at 997. Drapeau has not raised “any other allegations or irregularities or claims of actual innocence surrounding the prior convictions.” *Cavanaugh*, 643 F.3d at 605. As a result, Drapeau’s convictions on counts II and III should be affirmed.

CONCLUSION

Based upon the foregoing, the government respectfully requests the Court affirm Drapeau’s convictions.

Dated this 24th day of March, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 10.6.3, I certify that this brief was prepared using Microsoft Word.

I further certify that I have provided the foregoing brief to the Court via electronic filing of a PDF version of the brief. The PDF file has been scanned for viruses using Trend Micro OfficeScan Corporate Edition and is virus free.

I further certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,499 words.

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CERTIFICATE OF SERVICE

The undersigned attorney for Appellee United States of America hereby certifies that on March 24, 2015, Appellee's Brief was filed electronically with the Clerk of the Eighth Circuit:

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