

NO. 14-3888
Criminal

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

JUSTIN JANIS,

Appellant.

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

The Honorable Jeffrey L. Viken
Chief United States District Judge

APPELLEE'S BRIEF

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Justin Janis appeals his conviction on one count of assaulting a federal officer. He argues the district court erred in denying his motion to dismiss the indictment and for judgment of acquittal, claiming the tribal officer he assaulted was not enforcing federal law at the time of the assault in this case and, therefore, was not a federal officer. Janis also contends the district court erred by instructing the jury that the tribal police officer was a federal officer at the time Janis assaulted her.

The Government opposes Janis's argument. Under this Court's longstanding precedent, whether a tribal officer is acting as a federal officer is a matter of law. Also, the district court properly instructed the jury on the legal issue of whether the tribal officer was a federal officer, properly leaving to the jury the factual determination of whether the officer was engaged in the performance of her official duties.

The Government also 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. If oral argument is allowed, the Government requests equal time to that granted to Janis.

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JURISDICTIONAL STATEMENT

Justin Janis appeals a final district court judgment following a jury trial. Janis was charged with committing a federal offense—assaulting a federal officer. The district court had federal subject matter jurisdiction over this case by virtue of 18 U.S.C. §§ 111 and 3231. Following the jury’s guilty verdict on August 28, 2014, the district court imposed sentence on December 17, 2014. DCD 74, 90, 93. Judgment was entered on that date. DCD 93. Janis timely appealed on December 29, 2014. DCD 94. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.¹

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 denoted by the letters “AB,” followed by the appropriate page number. References to the transcript of Janis’s jury trial will be denoted as “Tr. Trans.,” followed by the appropriate page number. References to the Exhibits from Janis’s jury trial will be denoted by the letters “Exh.” followed by the appropriate exhibit number.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DENYING JANIS'S MOTION TO DISMISS OR FOR JUDGMENT OF ACQUITTAL

United States v. Schrader, 10 F.3d 1345 (8th Cir. 1993)
United States v. Roy, 408 F.3d 484 (8th Cir. 2005)
United States v. Drapeau, 644 F.3d 646 (8th Cir. 2011)
25 U.S.C. §§ 2802-04

II. WHETHER THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY

United States v. Bettelyoun, 16 F.3d 850 (8th Cir. 1994)
United States v. Drapeau, 644 F.3d 646 (8th Cir. 2011)

STATEMENT OF THE CASE

Janis was indicted in the United States District Court for the District of South Dakota, Western Division, on February 19, 2014, charged with one count of Assault on a Federal Officer. DCD 1, 2. This matter was tried to a jury on August 26-28, 2014. DCD 76.

Before the trial, Janis filed a motion to dismiss the Indictment, arguing the district court lacked jurisdiction over the case because Oglala Sioux Tribe (“OST”) Officer Ann Mousseau was not acting as a federal officer at the time of the offense alleged. DCD 27. Janis attached to the motion an OST police report by Officer Mousseau, dispatch logs, and a video recording of the incident. DCD 27, Attachments A, B, C. Janis argued “Officer Mousseau was not acting as a federal

officer at the time of the assault; she was there acting as a tribal officer enforcing tribal law.” DCD 27 at 3-4. He further argued, “Because tribal officers engaged in the performance of tribal law enforcement are not *de facto* federal officers, this Court should dismiss the indictment in this case and return jurisdiction to the tribal courts.” *Id.* at 4. Janis acknowledged, “Because this is a ‘threshold legal question,’ the Court should address it prior to a jury trial.” *Id.*

The United States responded and also submitted the Bureau of Indian Affairs (“BIA”) law enforcement contract and related documents for the relevant time period. DCD 30, 34. After Janis replied, the district court issued an order denying the motion to dismiss. In the order, the district court initially noted, “Whether [a tribal law enforcement officer] was a federal officer within the meaning of § 111 [is] a question of law for the court.” DCD 43 at 2 (quoting *United States v. Drapeau*, 644 F.3d 646, 653 (8th Cir. 2011)). The court cited statutory authority that the BIA is responsible for providing, or assisting in providing, law enforcement services in Indian country, and that the BIA may contract with tribal agencies to assist in enforcing federal or tribal laws. *Id.* (citing 25 U.S.C. §§ 2802(a) and 2804(a)(1)).

At the trial, Officer Ann Mousseau testified she was working as a police officer for the OST Department of Public Safety (“OSTDPS”) on November 27,

2013, when she responded to a call regarding a liquor violation at the Janis residence involving Janis, his brother, Jeff Janis, Jr., and his father, Jeff Janis, Sr. Tr. Trans 56, 60-61, 65. Alcohol is not allowed on the Pine Ridge Reservation. Tr. Trans. 63. Officer Mousseau was on duty and in uniform while performing her police functions that evening. Tr. Trans. 61. A woman outside the residence advised Officer Mousseau to get backup because they had barricaded the door, then led Officer Mousseau to the door of the home, which the woman unlocked. Tr. Trans. 67-68. 70.

Officer Mousseau partially opened the door and wedged her foot in it as Janis pushed against it. Tr. Trans 80-81. She could smell a strong scent of alcohol coming from Janis. Tr. Trans. 82. She was concerned about Janis and others pushing against the door and breaking her foot. Tr. Trans. 83. After Officer Mousseau deployed her mace, those inside got her foot out and closed the door. Tr. Trans. 84. After Officer Mousseau opened the door again, Janis pushed her on the shoulder, then hit her and struck her on the neck. Tr. Trans. 85-87. Officer Mousseau deployed her taser, but it did not incapacitate Janis. Tr. Trans. 88-89. She then used several “drive stuns” on Janis’s leg in an attempt to bring him to the ground and gain compliance. Tr. Trans. 89-91. Janis continued trying to kick Officer Mousseau. Tr. Trans. 91-92. Officer Mousseau ultimately was able to get

Janis under control and arrested him. Tr. Trans. 93-94. Janis was charged with seven tribal charges related to the incident. Tr. Trans. 95-96.

The encounter was captured on a video recording from a camera Officer Mousseau wore on her uniform. Tr. Trans. 71-72; Exh. 1. The recording was played to the jury at different points during Officer Mousseau's testimony as she described the events surrounding the assault. Tr. Trans. 55-130.

The parties stipulated that "at the time of the act alleged in the Indictment, Ann Mousseau was employed by the Oglala Sioux Tribe as an officer with the Department of Public Safety and was doing what she was employed by the Tribe to do." DCD 68; Tr. Trans. 149.

Additional facts will be added as necessary.

SUMMARY OF THE ARGUMENT

The district court did not err in denying Janis's pretrial motion to dismiss or motion for judgment of acquittal. The court properly determined the threshold legal questions of whether the law enforcement contract between the OSTDPS and the Secretary of Interior was a proper delegation of authority pursuant to federal law, and the manner in which the BIA has designated particular tribal officers to perform under that contract. Based on its review of the contract and precedent from this Court, the district court properly concluded the contract was a valid

delegation of authority, and that the officer was authorized under the contract to enforce federal and tribal law.

Having rendered its legal conclusion about the officer's status, the district court did not err in instructing the jury. After the district court determined the legal issue of whether the law enforcement contract was valid and that the officer qualified pursuant to that contract for federal officer status, the remaining factual issue was whether she was acting within the scope of her employment. The court properly instructed the jury that it must answer that factual question: whether the officer was employed by the Oglala Sioux Tribe and engaged in performance of her official duties.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING JANIS'S MOTION TO DISMISS AND FOR JUDGMENT OF ACQUITTAL.

A. Standard of Review

This Court reviews *de novo* the “threshold legal question” of whether a tribal officer qualifies as a federal officer pursuant to 18 U.S.C. § 111. *See United States v. Luedtke*, 771 F.3d 453, 455 (8th Cir. 2014) (citing *United States v. Roy*, 408 F.3d 484, 491 (8th Cir. 2005)) (noting *de novo* review applies to “the ‘threshold legal question’ of whether a state employee qualifies as a person assisting a federal

officer under 18 U.S.C. § 111”). The Court reviews *de novo* the denial of a defense motion for judgment of acquittal. *Drapeau*, 644 F.3d at 652.

B. The District Court Properly Determined the Threshold Legal Question of Whether a Tribal Officer Qualified for Federal Officer Status

The Secretary of the Interior (“Secretary”), acting through the BIA, is “responsible for providing, or for assisting in the provision of, law enforcement services in Indian country” 25 U.S.C. § 2802(a). Before 1976, the BIA historically was the primary provider of law enforcement services in Indian country, including the Pine Ridge Indian Reservation. *United States v. Schrader*, 10 F.3d 1345, 1350 (8th Cir. 1993); *United States v. Danley*, No. CR 11-10029, 2011 WL 6935341, at *1 (D.S.D. Dec. 30, 2011). That year, pursuant to the Indian Self-Determination Act of 1975, the BIA entered into a contract² with the Oglala Sioux Tribe Public Safety Commission (“OSTPSC”), in which the OSTPSC agreed “ ‘to provide the entire gamut of law Enforcement Services’ on the Reservation, including the arrest of ‘violators of Tribal Penal Code provisions, Federal and State law.’ ” *Schrader*, 10 F.3d at 1350 (quoting 25 U.S.C. § 450f). Tribal officers are deemed to be federal officers for certain purposes when they are either cross-

² Agreements of this type are known as “638 contracts,” so named after the public law number assigned to the 1975 Indian Self-Determination Act. *United States v. Schrader*, 10 F.3d 1345, 1350 (8th Cir. 1993).

deputized or employed pursuant to a contract between the BIA and the tribal law enforcement agency. *See Schrader*, 10 F.3d at 1350 (concluding tribal officers “were federal officers for purposes of § 111 when they encountered defendants because they were engaged in law enforcement activities and were acting pursuant to a 638 contract that delegated BIA’s tribal law enforcement duties to OSTPSC”).

“In 1990, Congress passed the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801–2809, ‘to clarify and strengthen the authority of the law enforcement personnel and functions within the [BIA].’ ” *Id.* (quoting S. Rep. No. 167, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 712, 712). These statutes permit the Secretary of Interior to charge BIA employees with a wide range of law enforcement authority. *Id.* (citing 25 U.S.C. § 2803). Further, the Secretary may contract with a particular tribe to assist the BIA in enforcing tribal laws. *Id.* The Secretary also may authorize a tribal police officer “to perform any activity the Secretary may authorize under section 2803.” *Id.* (quoting 25 U.S.C. § 2804(a)).³ The Secretary is required to “establish procedures to enter into memoranda of agreement for the use (with or without reimbursement) of the personnel or facilities of a . . . tribal . . . agency to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe

³ Section 2804(a) later was amended, and this language was placed in subsection (a)(2). 28 U.S.C. § 2804(a)(2).

that has authorized the Secretary to enforce tribal laws.” 28 U.S.C. § 2804(a)(1). These statutes specifically provide that, when acting pursuant to this authority, “a person who is not otherwise a Federal employee shall be considered to be an employee of the Department of the Interior only for purposes of . . . sections 111 and 1114 of Title 18.” *Schrader*, 10 F.3d at 1350 (quoting 25 U.S.C. § 2804(f)).

Whether a tribal police officer is a federal officer within this statutory scheme is a question of law for the court. *Drapeau*, 644 F.3d at 653 (citing *United States v. Oakie*, 12 F.3d 1436, 1440 (8th Cir. 1993)). “When the government relies upon 25 U.S.C. § 2804(f) to establish that the assaulted tribal officer is a federal officer for purposes of § 111, the court must determine threshold legal questions—whether the tribal contract, and the manner in which BIA has designated particular tribal officers to perform under that contract, qualify under 25 U.S.C. § 2804(a).” *United States v. Bettelyoun*, 16 F.3d 850, 853 (8th Cir. 1994).

In 2013, the BIA and the OSTDPS⁴ had entered into a contract for provision of law enforcement services. DSD 34-1, 34-2.⁵ The contract provided, “[t]he

⁴ Although in *Schrader* the contracting party for the Oglala Sioux Tribe was the OSTPSC, the OSTDPS is the contractor under the contract relevant to this case. See DCD 34-1 at 1, 34-2 at 1.

⁵ The original contract term of the 638 contract covered the period from October 1, 2007, through September 30, 2010. DCD 34-2 at 66 § 3. A re-authorization of the contract extended its terms through fiscal year 2013. DCD 34-1 at 1.

purpose of this contract is to ensure that the professional, effective and efficient law enforcement . . . are provided by the Oglala Sioux Tribe” DCD 34-2 at 27 § 2.A. It continued, “[b]y executing this Contract, [OSTDPS] is agreeing to provide for the protection of lives and property for persons visiting or residing within the exterior boundaries of the Pine Ridge Indian Reservation.” *Id.* Under the contract, OSTDPS was delegated authority to enforce, among other things, the Oglala Sioux Tribe Law and Order Code. *Id.* § 2.B.3. The contract requires OSTDPS to assist “the [BIA], and other federal, tribal and state law enforcement officials in the investigation of tribal, state or federal offenses that occur on the reservation.” *Id.* at 29 § 2.F. Moreover, the contract required OSTDPS “ensure that the Patrol Division of Law Enforcement (uniformed police) . . . shall enforce the Oglala Sioux Tribe Law and Order Code” *Id.* at 32-33 § 2.I.3.a.

“Congress passed § 111 ‘to protect both federal officers and federal functions.’ ” *Luedtke*, 771 F.3d at 455 (quoting *United States v. Feola*, 420 U.S. 671, 679, 95 S. Ct. 1255 (1975)). The federal function at issue here was providing law enforcement services in Indian country. *Roy*, 408 F.3d at 491 (concluding city police officer acting under 638 contract between tribe and BIA “was undoubtedly performing a federal function—the provision of law enforcement services on

Indian land” . . . and thus he was entitled to federal officer status as a threshold matter”).

The evidence in this case was undisputed that Officer Mousseau was employed by the Oglala Sioux Tribe as a police officer with the OSTDPS on the night Janis assaulted her. DCD 68; Tr. Trans. 149. The parties further stipulated Officer Mousseau was doing what she was employed by the Tribe to do at the time. DCD 68; Tr. Trans. 149. Officer Mousseau also testified she was employed as a Corporal by the OSTDPS and that she was employed under the 638 contract. Tr. Trans. 56, 106. Accordingly, Officer Mousseau was a federal officer under 18 U.S.C. § 111. The district court committed no error in so concluding, and appropriately left for the jury’s consideration the factual issue of whether Officer Mousseau was on duty and acting within the scope of her job duties.

Janis argues there was no evidence the Oglala Sioux Tribe authorized the Interior Secretary to enforce tribal laws. AB at 8. This argument is belied by the statutory scheme related to law enforcement in Indian country and the very 638 law enforcement contract in place in 2013. The authority and responsibility to provide law enforcement service in Indian country belongs to the Secretary. “The [Secretary], through the [BIA], is charged with providing or assisting in the provision of law enforcement services on Indian lands.” *Roy*, 408 F.3d at 489

(citing 25 U.S.C. § 2802(a)). Under the Indian Law Enforcement Reform Act of 1990, the Secretary may enter into agreements for use of personnel or facilities of a tribal agency to assist in providing law enforcement services in Indian country. *Id.* (quoting 25 U.S.C. § 2804(a)); see *Bettelyoun*, 16 F.3d at 852 (noting that in the Indian Law Enforcement Reform Act, Congress authorized the Secretary to contract with Indian tribes to assist BIA in enforcing tribal laws and may authorize tribal officers to carry out law enforcement functions the BIA would otherwise perform).

The law enforcement services provided by OSTDPS under the 638 contract are the functions the BIA was responsible to provide, including enforcement of tribal law. When performing those functions, tribal officers are given “the same protection under 18 U.S.C. § 111 that Congress has afforded” a BIA officer, “regardless of whether the officer is enforcing a tribal, state, or federal law, so long as he is engaged in the performance of his official duties rather than ‘a personal frolic of his own.’ ” *Schrader*, 10 F.3d at 1350-51 (quoting *United States v. Heliczner*, 373 F.2d 241, 245 (2d Cir.), *cert. denied*, 388 U.S. 917, 87 S. Ct. 2133 (1967)).

Further, to the extent tribal consent to enforcement of tribal laws by the BIA were required, that the Tribe entered into the contract with the BIA shows its

consent to BIA enforcement of tribal law. The contract requires the OSTDPS to assist “the [BIA], and other federal, tribal and state law enforcement officials in the investigation of tribal, state or federal offenses that occur on the reservation.” DCD 34-2 at 29 § 2.F. Moreover, the contract required the OSTDPS “ensure that the Patrol Division of Law Enforcement (uniformed police) . . . shall enforce the Oglala Sioux Tribe Law and Order Code” *Id.* at 32-33 § 2.I.3.a.

Janis concedes the validity of the 638 contract. AB at 8. He also concedes that if Officer Mousseau were acting under the authority granted by the Secretary, she would be a federal officer. AB at 8. Under the valid 638 contract, Officer Mousseau was performing the federal function of enforcing tribal law on the night she was assaulted. As a police officer with the OSTDPS, she was therefore acting under the authority granted by the Secretary under that contract. Because she was acting under this authority, she is considered an employee of the Department of Interior for purposes of § 111. *See Schrader*, 10 F.3d at 1350 (quoting 25 U.S.C. § 2804(f)) (noting a person not otherwise a federal employee “shall be considered to be an employee of the Department of the Interior only for purposes of . . . sections 111 and 1114 of Title 18”). The district court did not err in denying Janis’s motion to dismiss or motion for judgment of acquittal.

II. THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY.

A. Standard of Review

“We review the district court’s formulation of the ‘jury instructions for abuse of discretion and its interpretation of law *de novo*.’ ” *United States v. Cornelison*, 717 F.3d 623, 626 (8th Cir. 2013) (quoting *Kahle v. Leonard*, 563 F.3d 736, 741 (8th Cir. 2009)).

B. The District Court Properly Formulated the Jury Instructions Based on Precedent from this Court

As explained above, whether a particular officer is “a federal officer within the meaning of § 111 [is] a question of law for the court.” *Drapeau*, 644 F.3d at 653. But the question of “[w]hether [the officer] was acting as a federal officer and whether he was performing federal ‘investigative, inspection, or law enforcement functions’ at the time of the assault or acting outside the scope of his employment, [are] fact questions for the jury.” *Id.*; see *Bettelyoun*, 16 F.3d at 853 (holding “the ultimate issue of fact—whether the assaulted tribal officers were engaged in the performance of duties authorized by the Secretary of Interior at the time of the assault—is still for the jury”). “In other words, the court should instruct the jury as to the classes of persons who are federal officers under 18 U.S.C. § 1114, as modified by 25 U.S.C. § 2804(f), leaving the jury to decide

whether the government proved beyond a reasonable doubt that the assault victims were in fact federal officers who were engaged in the performance of their official duties.” *Bettelyoun*, 16 F.3d at 853.

The issue before the Court was squarely decided in *Bettelyoun*. There, before trial, the defendant moved to dismiss the assault charge, arguing tribal officers were enforcing tribal laws at the time of the assault, and were not federal officers under § 111. *Bettelyoun*, 16 F.3d at 852. The trial court denied the motion to dismiss. *Id.* At trial, the defendant objected to the court’s instruction that “[t]ribal officers who are employed by a tribe under a contract with the Bureau of Indian Affairs and who are specially commissioned deputy officers by the Bureau of Indian Affairs are federal officers for the purposes of 18 U.S.C. § 111” *Id.* The Court noted, “[w]hen the government relies upon 25 U.S.C. § 2804(f) to establish that the assaulted tribal officer is a federal officer for purposes of § 111, the court must determine threshold legal questions—whether the tribal contract, and the manner in which BIA has designated particular tribal officers to perform under that contract, qualify under 25 U.S.C. § 2804(a).” *Id.* at 853.

The Court ruled the ultimate issue of fact of “whether the assaulted tribal officers were engaged in the performance of duties authorized by the Secretary of Interior at the time of the assault” remains a question for the jury. *Id.* “In other

words, the court should instruct the jury as to the classes of persons who are federal officers under 18 U.S.C. § 1114, as modified by 25 U.S.C. § 2804(f), leaving the jury to decide whether the government proved beyond a reasonable doubt that the assault victims were in fact federal officers who were engaged in the performance of their official duties.” *Id.* Because the district court had followed that procedure, the Court ruled “there was no plain error; indeed, there was no error at all.” *Id.*

Here, the district court followed the procedure outlined in *Bettelyoun*. After reviewing the 638 contract, it properly determined the threshold legal issue of whether Officer Mousseau qualified as a “federal officer” under § 111, concluding that she did. *See* DCD 43 at 8; *see* DCD 70 at 4 (Instruction 17) (instructing jury “Ann Mousseau was a federal officer at the time alleged in the indictment”). The court nowhere, however, instructed the jury that Officer Mousseau was acting as a federal officer at the time of the assault. It then presented to the jury the factual question of whether Officer Mousseau was an officer with the Oglala Sioux Tribe and whether she was acting within the scope of her duties as a tribal officer. *See* DCD 70 at 4 (Instruction 17).

The evidence showed that, on the night she was assaulted, Officer Mousseau was employed by the OSTDPS as a police officer whose duties include supervision

of other officers along with regular police duties. Tr. Trans. 56, 60. She had completed training at the Indian Police Academy, as required under the 638 contract, as well as other law enforcement trainings. Tr. Trans. 57-59; DCD 34-2 at 34 § (j)(4). Thus, she was doing what she was employed by the Tribe to do—her work as a police officer. See *Drapeau*, 644 F.3d at 653 (quoting *United States v. Street*, 66 F.3d 969, 978 (8th Cir. 1995)) (“Whether [officer] was acting as a federal officer and whether he was performing federal ‘investigative, inspection, or law enforcement functions’ at the time of the assault or acting outside the scope of his employment, were fact questions for the jury.”). Under this Court’s precedent, the district court did not erroneously take from the jury consideration of an essential element of the crime charged. The determination of whether Officer Mousseau qualified as a federal officer was a threshold legal issue for the district court, and the issue of whether she was an officer with the OSTDPS and whether she was doing what she was employed by the Tribe to do were factual questions the jury decided against Janis. Thus, no error occurred in the trial court’s instructions to the jury.

CONCLUSION

Based upon the foregoing, the Government respectfully requests Janis's conviction be affirmed.

Dated this 24th day of April, 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 3,724 words.

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CERTIFICATE OF SERVICE

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

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