No. COA17-516 THIRTIETH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Jackson
	)	12 CRS 51720, 1362
MR. GEORGE LEE NOBLES	)	

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DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

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I. THE STATE LACKED JURISDICTION TO TRY MR. NOBLES.

A. North Carolina Does Not Have Concurrent Jurisdiction.

The State incorrectly claims that even if Mr. Nobles is an Indian, the State of North Carolina had concurrent jurisdiction over him. (St. Br. at 21-26)

In support of its contention that North Carolina has concurrent jurisdiction for crimes committed in Indian country that fall under the federal Major Crimes Act (MCA), 18 U.S.C. §1153, the State cites North Carolina cases and a law review article that preceded the United States Supreme Court decision in *United States v. John*, 437 U.S. 634, 57 L.Ed.2d 489 (1978), which established that where jurisdiction exists under the MCA, state jurisdiction is

precluded.[1] *See also State v. Smith*, 328 N.C. 161, 165, 400 S.E.2d 405, 407 (1991) ("[w]hether the United States has acquired jurisdiction is a federal question").

John concerned whether the federal government had exclusive jurisdiction over a Choctaw Indian for a crime committed on the Choctaw reservation. The State of Mississippi contended the reservation was not "Indian country" because the Mississippi Choctaws were a remnant of a larger group of Indians, removed from Mississippi; federal supervision over the Choctaws had not been continuous; and a treaty extended Mississippi citizenship to Choctaws. The Supreme Court rejected these contentions and held that the MCA vested exclusive jurisdiction in the federal courts and precluded the exercise of state criminal jurisdiction over enumerated offenses committed on Choctaw land.

The Fourth Circuit applied the reasoning of *John* in *EBCI v. Lynch*, 632 F.2d 373 (4th Cir. 1980), in which North Carolina attempted to collect income and property taxes from members of the *EBCI*.

The Court explained that

> the members of the [EBCI] have a dual status. They are citizens of North Carolina. Nevertheless, they are a federally recognized Indian tribe, and the land on

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[1] The State also cites *State v. Dugan*, 52 N.C. App. 136, 277 S.E.2d 842 (1981), decided after *John*. (St. Br. at 24) However, *Dugan* concerned a traffic offense that would not be covered by the MCA.

> which they earn their livelihood is a federally recognized Indian reservation held in trust for their benefit by the United States.

Id. at 378 (alterations added). Despite this dual status, the *Lynch* court rejected North Carolina's argument that the Treaty of New Echota, under which the Cherokee nation ceded their land east of the Mississippi to the federal government, established the state's right to impose the taxes at issue. The Court based its rationale on *John*, quoting extensively from that case and noting the parallels between the history of the Choctaws and the EBCI. *Id.* at 379 (quoting 437 U.S. at 652-54, 57 L.Ed.2d at 502-03). The Court also ruled that although *John* was a criminal case and *Lynch* was a civil case, *John*'s rationale was applicable to the issue in *Lynch*. *Id.* at 379-80.

Relying on *John*, the Court rejected the State's contentions:

> [F]or the purposes of reconciling the dual status of the Cherokees as citizens of North Carolina and as Indians living on a federally held reservation, the rationale of *John* is controlling. We therefore cannot accept North Carolina's argument that the Treaty of New Echota establishes the state's right to impose the taxes at issue. *John* held that in the face of subsequent federal statutes, the Treaty at Dancing Rabbit Creek did not inalterably fix the relationship between the Choctaws and Mississippi. So, too, we hold that in light of similar federal statutes, the dominion of North Carolina over the [EBCI], established by the 1835 Treaty of New Echota, is not immutable.

Id. at 380.

The Court noted that "[i]n its brief, North Carolina acknowledges that *John* casts doubt on the viability of *United States v. Hornbuckle*, 422 F.2d 391 (4th Cir. 1970),[2] which held that the state has concurrent criminal jurisdiction over the [EBCI]," *id.* at 379 n.34, and that "North Carolina correctly points out that . . . 18 U.S.C. §1153" is a "preemptive statute[ ]." *Id.* at 380. In the current case, the State has taken a legal stance that contradicts its prior stance. The State has supplied no rationale for this complete turnaround.

In summary, there can be no question that when the MCA applies, federal jurisdiction is exclusive of state jurisdiction, absent federal legislation granting jurisdiction. *See Negonsott v. Samuels*, 507 U.S. 99, 102-03, 122 L.Ed.2d 457, 463-64 (1993) (citing *John*; other citations omitted) ("As the text of §1153 . . . and our prior cases make clear, federal jurisdiction over the offenses covered by the [MCA] is 'exclusive' of state jurisdiction."); *Administrator v. United States EPA*, No. 96-71083, No. 97-70012, 1998 U.S. App. LEXIS 35314, at *26-27 (9th Cir. Aug. 10, 1998) (in *John*, "the Supreme Court considered whether the state could exercise jurisdiction over crimes committed by Indians on reservation lands" and "conclud[ed] that it could not"); *Langley v. Ryder*, 778 F.2d 1092, 1096 n.2 (5th Cir. 1985) (citing *John*) ("The [MCA], provides a basis for federal prosecution of both [defendants], and . . . preempts state jurisdiction. . . . Therefore, Louisiana has no jurisdiction to

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[2] *See* State's Br. at 24-25 (relying on *Hornbuckle*).

prosecute [the defendants]."); *Wildcatt v. Smith*, 69 N.C. App. 1, 3 n.1, 316 S.E.2d 870, 872 n.1 (1984) ("By 1979, growing activism on the part of members of the [EBCI], coupled with recognition by the state that it could no longer assert jurisdiction over felonies occurring on Indian reservations in the light of *United States v. John* . . . , led to a request for federal permission to establish a tribal court system."); Felix S. Cohen, Cohen's Handbook of Federal Indian Law §9.03[1] (Lexis 2017) (Cohen) (citations omitted) ("As a general rule, states lack jurisdiction in Indian country absent a special grant of jurisdiction. The [MCA] . . . create[s] federal criminal jurisdiction that is exclusive of the states; that is, if federal jurisdiction exists under . . . [that] statute[ ], the states lack concurrent criminal jurisdiction to prosecute the same conduct.").

B. Mr. Nobles Has Demonstrated Tribal or Government Recognition as an Indian.

Mr. Nobles demonstrated tribal or government recognition as an Indian sufficient to satisfy the second prong of *United States v. Rogers*, 45 U.S. 567, 11 L.Ed.1105 (1846).

The State advocates adopting overly strict requirements for satisfying the second *Rogers* prong and has focused on an exacting adherence to factors developed by the lower federal courts – which are not binding on this Court – rather than focusing on the test set out in *Rogers*, which is binding. For example, the State contends that the fact that Mr. Nobles attended Cherokee tribal schools doesn't "count" toward the second *Rogers* prong because that "school system is open to non-Indian students." (St. Br. at 30) However, the

"reserved only to Indians" factor used by the federal courts is only a single factor that may be considered with respect to the second *Rogers* prong: tribal or government recognition as an Indian. The government – through the Bureau of Indian Affairs (BIA) – considered Mr. Nobles to be an Indian with respect to funding for the school. (D. Opening Br. at 16-17) Therefore, although non-Indian students could attend Cherokee tribal schools, the BIA recognized Mr. Nobles as an Indian student, resulting in increased BIA funding to the schools. (Supp 43-44)

The State also claims that Mr. Nobles did not receive medical services reserved only for Indians because "[t]hose medical services . . . are also provided to first descendants." (St. Br. at 30) The State's analysis is circular and assumes that only enrolled tribal members are "Indians" under federal law, which is incorrect. (D. Opening Br. at 26) The definition of "Indian" with respect to the IHS includes not only enrolled tribal members, but also a "descendant, in the first or second degree, of any such member[.]" 25 U.S.C. §1603. Accordingly, the IHS, a federal government agency, considers Mr. Nobles to be an Indian, and provided him with services reserved only to Indians. *See* 25 U.S.C. §1601, *et seq.*

In any event, *Rogers* does not require that a person receive benefits reserved only to Indians to satisfy the second *Rogers* prong, only that the tribe or federal government has recognized him as an Indian. As set out in Mr.

Nobles Opening Brief, pp. 23-24 & 32-36, Mr. Nobles has been recognized by both the EBCI and the federal government as an Indian.

The State relies on the opinion of Myrtle Driver that First Descendants are not Indians. (St. Br. at 32) Driver's opinion notwithstanding, and as acknowledged by the State (St. Br. at 16-18), the tribal government has bestowed upon First Descendants benefits not available to non-Indians. In addition, the tribal court system considers all First Descendants to be Indians. (Rpp 149a-c) Driver also testified that "our belief is that the government promised us health, education and welfare to Indian people, which would be Native American, not the descendants." (8/9/13p 145) Nevertheless, the federal government has in fact bestowed these benefits on EBCI First Descendants. (D. Br. at 16-17, 19)

With respect to the second *Rogers* prong, the State relies on two cases that have applied rigid analyses that this Court need not adopt. In *State v. LaPier*, 242 Mont. 335, 790 P.2d 983 (1990), the court listed numerous ways in which LaPier, a "Pembina descendant," had been recognized by the tribe and government as an Indian, then the court inexplicably discounted some of these factors from its analysis, such as that LaPier had received services from the IHS and was previously treated as an Indian in federal court.[3]

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[3] In federal habeas review, the district court denied LaPier's habeas petition. The Ninth Circuit Court of Appeals affirmed the denial. However, the Ninth Circuit did not reach the question of whether LaPier had satisfied the second *Rogers* prong

As in *LaPier*, the majority in *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009) found that Cruz, the son of an enrolled tribal member, was not "Indian enough" despite tribal and government recognition as an Indian, and having lived and attended school on the reservation. The majority refused to consider tribal benefits for which Cruz was eligible but did not utilize. The dissent disagreed with the majority's analysis, especially that the majority disregarded the tribe's recognition of Cruz through making benefits available to him based on his descendant status. The dissent noted that the actual test is not that set out in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988) and other lower federal court cases, but "whether the *tribal authorities* recognize [Cruz] as an Indian, not whether he considers himself one." 554 F.3d at 852 (Kozinski, C.J., dissenting). *See also United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009) (citation omitted) (jury instruction that "'a person must have some degree of Indian blood and must be recognized as an Indian by the Indian tribe and/or the Federal government' . . . is the two-part *Rogers* test, and we agree it provides the essential elements of a proper instruction. Beyond that, the *St. Cloud* factors may prove useful, depending upon the evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance[.]").

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because the Court determined that LaPier did not have Indian blood from a federally-recognized tribe. *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993).

The *Rogers* test is based on the political relationship between the federal government and federally-recognized Indian tribes. *United States v. Antelope*, 430 U.S. 641, 646, 51 L.Ed.2d 701 (1977). It is not based on a checklist of requirements that make a person "Indian enough." The analyses of *LaPier* and *Cruz* ignore *Rogers*' focus on this political relationship. For example, while some modern-day Indians may choose to participate in traditional tribal events, if they choose not to this should not count against them if they otherwise have some Indian blood and have been recognized by the tribe or the federal government as an Indian.

In this regard, the State also supports its argument that Mr. Nobles is not an Indian by quoting a sentence from *United States v. Stymiest* out of context: "Holding oneself out as an Indian by submitting to tribal court jurisdiction or seeking care at a tribal hospital or participating in tribal community activities is relevant to being recognized by the tribe, but it is not otherwise sufficient to satisfy the political underpinnings of the *Rogers* test." (State Br. at 36) (quoting *Stymiest*, 581 F.3d at 764; emphasis added). The *Stymiest* court was discussing whether the jury instruction given in that case was too loosely worded and might allow jurors to find that a person is an Indian based on insufficient evidence, such as minimal participation in tribal activities, and that such a finding would not "satisfy the political underpinnings of the *Rogers* test." 581 F.3d at 763-64.

The State further claims that *EBCI v. Lambert*, 3 Cher. Rep. 62 (2003) "did not hold that all first descendants of the EBCI meet the second *Rogers* prong as a matter of law" because the "the court determined that additional evidence was required" besides the parties' stipulation that Lambert was not an enrolled tribal member, and the Court then "held a hearing" and "applied the *St. Cloud* factors to determine whether the second *Rogers* was met[.]" (St. Br. at 36-37) (citations omitted). However, the only evidence personal to Lambert discussed in the opinion was that she was a First Descendant, and that "she is the Plaintiff in . . . a case currently pending on the Court's civil docket." 3 Cher. Rep. at 63. All of the other evidence noted applied to First Descendants *in general*. *Id.* at 62-63. As discussed in Mr. Nobles' Opening Brief, pp. 23-24, besides noting that Lambert herself was a plaintiff in a court case, the Court's analysis focused on whether the tribe had recognized First Descendants categorically as Indians.

The State also claims that even if *Lambert* held that all First Descendants are under the jurisdiction of the tribal court, this is only one factor to be considered under *Rogers*. However, the EBCI's assumption of jurisdiction over criminal defendants must comport with how an Indian is defined under federal law for jurisdictional purposes. Cohen, §9.04. Accordingly, the EBCI bases its jurisdictional analysis on *Rogers*. 3 Cher. Rep. at 64-65. Thus, if all First Descendants are subject to the jurisdiction of the EBCI tribal court, they are by definition Indians under *Rogers*.

In summary, Mr. Nobles is an Indian under *Rogers*. Under well-settled United States Supreme Court precedent, jurisdiction for this case lies in federal court.

II. THE TRIAL COURT ERRED BY DENYING MR. NOBLES' REQUEST FOR A SPECIAL VERDICT.

The State claims that this issue is not preserved for review because defense counsel did not use the words "special verdict" but instead "filed a motion to submit the issue of subject matter jurisdiction to the jury without specifying how the issue should be submitted." (St. Br. at 40 n.6) (citations omitted). A special verdict is the logical way that such an issue would be presented to the jury, *see State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977), and the defense motion specifically requested that "the special issue of subject matter jurisdiction" be submitted to the jury. (2Rp 272) Moreover, from the discussion of the motion at trial, it is evident that the parties and the trial court contemplated that if the motion were granted, the jury would be instructed on jurisdiction, and that a "special issue" would be submitted to them. (3/24/16pp 513-26)

The State also claims that this issue is not preserved because the defense did not submit a written request for a special instruction. (St. Br. at 43) However, because this issue is jurisdictional, this Court may address it even without any request for an instruction at all. (D. Opening Br. at 47-48)

The State also claims that "the issue of whether a person is an Indian for purposes of federal criminal jurisdiction is a mixed question of law and fact," and that therefore, "the trial court did not err by not instructing the jury on the issue of subject matter jurisdiction." (St. Br. at 42) The State cites *State v. Darroch*, 305 N.C. 196, 212, 287 S.E.2d 856, 866 (1982), stating that *Darroch* held that "the defendant was not entitled to an instruction on jurisdiction where his jurisdictional challenge raised a legal question rather than a factual one involving the location of the crime[.]" (St. Br. at 42) *Darroch* is distinguishable from this case.

The Court held in *Darroch* that "there was no dispute as to where the principal offense, the murder, occurred. Because the locus of the principal offense was not challenged, no instruction on the burden of proof on that issue was required." *Id.* at 212, 287 S.E.2d at 866. In this case, there was a dispute as to whether Mr. Nobles was an Indian, and evidence was produced at an evidentiary hearing supporting both parties' contentions. Notwithstanding the fact that the trial court made a preliminary ruling that Mr. Nobles was not an Indian, because a reasonable juror could find that Mr. Nobles is an Indian, Mr. Nobles had the right to have the evidence evaluated by the jury to determine whether he was a non-Indian beyond a reasonable doubt. *Batdorf.*

Finally, the State claims that "defendant is entitled to no relief because he failed to show he was prejudiced by the trial court's failure" to instruct the jury on jurisdiction. (St. Br. at 43) (citing G.S. §15A-1443(a)). Initially, the

State has cited the wrong prejudice standard. While instructional issues are normally evaluated under the regular trial prejudice standard, *e.g.*, *State v. Fletcher*, ___ N.C. ___, ___, 807 S.E.2d 528, 537 (2017), if an error "amounts to a violation of [a] defendant's constitutional rights, it is prejudicial unless the State shows the error was harmless beyond a reasonable doubt." *State v. Barlowe*, 157 N.C. App. 249, 253, 578 S.E.2d 660, 662 (2003) (citing G.S. §15A-1443(b)) (denial of motion for continuance). Here, if Mr. Nobles is an Indian and was tried by the wrong sovereign, his rights under the United States Constitution were violated. (D. Opening Br. at 21) This violation is itself the prejudice: Mr. Nobles was tried by a court with no power to do so. Such an error always requires reversal. *E.g.*, *Murphy v. Royal*, 866 F.3d 1164, 1233 (10th Cir. 2017); *State v. Smith*, 328 N.C. 161, 169, 400 S.E.2d 405, 409-10 (1991).

III. THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS MR. NOBLES' STATEMENT.

The State claims the trial court was within its authority to deny the suppression motion because it was filed two days late. (St. Br. at 48-49) However, this was not mentioned by the trial court or the prosecutor at the suppression hearing. (3/22/16pp 315-36; 3/23/16pp 339-81) The trial court rendered a ruling from the bench, denying Mr. Nobles' claim on the merits and not on the basis that the motion was filed late, and the trial court subsequently entered a written Order reflecting that ruling. (3/24/16pp 496-98; 3Rpp 434-45) The trial court later entered a second written Order, for the first time

mentioning the late filing, and summarily denying the suppression motion on that basis. (4Rpp 474-75)

The trial court's summary denial was null and void. The trial court's second Order was entered after entry of judgment was complete and was thus invalid. The second Order recites that it was "entered" on March 24, 2016, the day the trial court's ruling was announced from the bench, and that it was "signed" on June 18, 2016. (4Rp 483) However, because the summary denial of the suppression motion was not announced from the bench or set out in the first Order, it was necessarily entered after entry of judgment was complete, and likely out of session and out of term. *See State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012); *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984). Moreover, the second Order's summary denial of the suppression motion based on the late filing is also invalid because it does not reflect the merits ruling from the bench. *See In re J.C.*, 236 N.C. App. 558, 563, 783 S.E.2d 202, 205 (2014) (written order vacated where it did not accurately reflect ruling from the bench). Finally, because the summary denial was null and void, the State is essentially raising the late filing issue for the first time on appeal, which it cannot do. *State v. Cobb*, ___ N.C. App. ___, ___, 789 S.E.2d 532, 536-37 (2016).

With regard to Mr. Nobles' reliance on *State v. Taylor*, ___ N.C. App. ___, 784 S.E.2d 224 (2016), the State avers that "the fact that this Court addressed and factually distinguished cases cited by the defendant in *Taylor* does not mean this Court agreed with their analyses, nor does it constitute citing cases

with 'favor.'" (St. Br. at 55) Logically, there would have been no reason for this Court to cite these cases and engage in extensive discussion of them – without stating that this Court disagreed with their reasoning – if this Court did not find their reasoning persuasive as to what constitutes an unambiguous request for counsel. Indeed, this Court's statement that "Had defendant asked the question – 'Can I speak to an attorney?' – before or after his phone conversation, [*United States v. Lee*, 413 F.3d 622 (7th Cir. 2005)] and [*United States v. Hunter*, 708 F.3d 938 (7th Cir. 2013)] would become much more factually similar," *Taylor*, ___ N.C. App. at ___, 784 S.E.2d at 230, suggests that this Court would have ruled differently if the defendant "did not make [his] request[ ] within the context of a simultaneous conversation with a third-party." *Id.*

CONCLUSION

Defendant respectfully contends the trial court's denial of his motion to dismiss for lack of jurisdiction must be reversed; he must be granted a new trial; and/or a remand is necessary for correction of a clerical error.

This the 7th day of February, 2018.

(Electronically Filed)

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CERTIFICATION OF COMPLIANCE WITH RULE 28(J)(2)(A)(2)

I hereby certify that the foregoing Defendant-Appellant's reply brief complies with Appellate Rule 29(j)(2)(A)(2) in that, according to the word processing program used to produce this brief (Microsoft Word), the document does not exceed 3,750 words, exclusive of cover, index, table of authorities, signature block, certificate of compliance, certificate of service, and addendum.

This the 7th day of February, 2018.

(Electronically Filed)

Anne M. Gomez
Assistant Appellate Defender

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Reply Brief has been filed pursuant to Rule 26 by electronic means with the Clerk of the North Carolina Court of Appeals.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's Reply Brief has been duly served pursuant to Rule 26 by electronic means upon Kathleen N. Bolton, Assistant Attorney General, kbolton@ncdoj.gov.

This the 7th day of February 2018.

(Electronically Filed)

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