2023 WL 8258519 (C.A.10) (Appellate Brief)
United States Court of Appeals, Tenth Circuit.

UNITED STATES OF AMERICA, Plaintiff/Appellee,

v.

Craig Wallace WOOD, Defendant/Appellant.

No. 23-5027.
November 20, 2023.

On Appeal from the United States District Court for the Northern District of Oklahoma
The Honorable John F. Heil United States District Judge Case No. 4:21-CR-484-JFH

Response Brief Of The United States

Clinton J. Johnson, United States Attorney, Northern District of Oklahoma, Stacey P. Todd, CABA # 294566, Assistant United States Attorney, 110 West 7th Street, Suite 300, Tulsa, Oklahoma 74119-1013, 918.382.2700, Stacey.todd @usdoj.gov, for the United States of America.

*i Table of Contents

*v TABLE OF AUTHORITIES

Federal Cases

*1 Statement of Prior or Related Appeals

Wood has filed no prior or related appeals.

Statement of Jurisdiction

A grand jury charged Craig Wallace Wood with federal crimes occurring in Indian Country. Therefore, the district court had jurisdiction over the criminal case under 18 U.S.C. § 3231. A jury convicted Wood and the district court sentenced him to 105 months of imprisonment. Wood filed a timely appeal of his conviction. This Court has jurisdiction over his appeal under 28 U.S.C. § 1291.

Issues Presented for Appeal

1. Whether it was plain error for the district court to allow a domestic violence counselor to testify about the lethality assessment protocol used for safety planning with victims.

2. Whether the district court committed plain error to by admitting M.M.'s statements to medical providers that Wood had previously abused her.

3. Whether the district court abused its discretion by allowing a certificate of authenticity for Wood's Certificate of Indian Blood.

4. Whether Wood has shown any error, let alone cumulative error, warranting another trial.

***2 Statement of the Case**

I. After Craig Wallace Wood attacked his girlfriend, she panicked and ran away, telling multiple people what had happened.

A. Wood beat his girlfriend for hours, using a hairdryer, hair straightener, charging cord, and belt.

After getting drunk at a bar, Wood returned to his hotel room and over several hours, assaulted his girlfriend with an array of different objects seriously injuring her. At the time of the assault, Wood and M.M. had been intimate partners for approximately four years. (R. Vol. 2 at 40). In March 2021, Wood and M.M. were staying together at the Hampton Inn in Broken Arrow, Oklahoma. (R. Vol. 2 at 184). In the evening, M.M. and Wood walked from the Hampton Inn to a nearby bar. (R. Vol. 2 at 184). At the bar, M.M. and Wood consumed alcohol, but M.M. left the bar early because she was not feeling well. (R. Vol. 2 at 82, 138,184). Wood remained at the bar and continued to drink. Later that night, Wood returned to their hotel room intoxicated. (R. Vol. 2 at 45). A Hampton Inn employee, Elizabeth Shipe, observed that Wood was "hooping and hollering," when he got back to the hotel. (R. Vol. 2 at 39). Ms. Shipe saw Wood come into the hotel, buy snacks from the snack bar in the lobby and almost topple over, then proceed upstairs. (*Id.).*

***3** When Wood returned to the hotel room, he accused M.M. of "nodding" at other men and saying other men's names under her breath. (R. Vol. 2 at 138). Wood "lost it" on M.M. and began biting and punching her. (*Id.).* Wood then grabbed a series of objects, including a hairdryer, hair straightener, and charging cable, and struck her with them. (R. Vol. 2 at 138-139.) Wood broke the hairdryer into numerous pieces while using it to beat M.M. (R. Vol. 2 at 143 and 136). Wood also broke the hair straightener's ceramic plate while assaulting M.M. (*Id.).* After the assault, Wood told the M.M. to change out of her clothes and get in bed to keep M.M. from seeking help. (R. Vol. 2 at 139). M.M was so afraid that she stayed in bed until Wood fell asleep or passed out. (*Id.).* After Wood fell asleep, M.M. fled the room to get help. (*Id.* at 140).

B. Still terrified, M.M. sought help from the hotel's front desk clerk.

Ms. Shipe saw M.M. run to the front desk "in an absolute panic." (R. Vol. 2 at 37). "She came so quickly that it was almost like a cartoon character skidding to a stop, and she was pounding the bell right there at the front desk." (*Id.).* When M.M. was hitting the bell, it was "literally a nonstop pounding type of motion." (R. Vol. 2 at 46.) M.M. was terrified. (R. Vol. 2 at 38). Ms. Shipe tried asking her questions, but M.M. kept saying, "He's going to kill me. He's going to kill me. He'll kill you too." (R. Vol. 2 at 38-39). Ms. Shipe saw ***4** that M.M.'s eye was swollen. (*Id.).* M.M. begged Ms. Shipe to hide her behind the desk. (*Id.* at 49). Ms. Shipe hid M.M. in a nearby pantry that locks from the inside to protect her from Wood. (R. Vol. 2 at 39-40). Ms. Shipe said that she tried asking M.M. questions, but she was so terrified that she wasn't able to answer questions. (*Id.).* One thing M.M. did say was that she had known the man who did it for four years. (*Id.).* Through the locked pantry door, Ms. Shipe told M.M. she was calling the police; M.M. agreed. (*Id.).* M.M. was not displaying any signs or symptoms of being under the influence of alcohol, "she was just terrified, that's all." (R. Vol. 2 at 44).

C. Police officers found M.M. still hyperventilating and panicked.

Broken Arrow Police officers arrived shortly after and spoke with M.M. through the pantry door; eventually she let them into the pantry. (R. Vol. 2 at 41-42). Officer Lucas noted that as soon as he opened the door to speak with M.M., she was panicked, visibly shaking and crying. (R. Vol. 2 at 136). Anytime someone opened the door to the pantry, M.M. thought her boyfriend

was coming in to get her. (*Id.*) Several times while trying to speak with M.M., people would knock on the door and M.M. would immediately start panicking again. (*Id.* at 137). Officer Lucas eventually told the other officers to stop coming in because it was disrupting them, and it was taking so long to calm ***5** her back down every time they interrupted. (*Id.).* Officer Lucas observed that M.M. was distressed and hysterical, and "almost hyperventilating at times because of how panicked she was." (*Id.).* M.M. told police she was concerned Wood would find her and kill her for calling the police and stated she was so fearful that she believed the only way she could escape was to wait until Wood fell asleep so she could get to safety. (R. Vol. 2 at 139).

M.M., still panicked, told Officer Lucas that she and Wood had gone to dinner and drinks earlier that night. (*Id.* at 138). She didn't feel well and went back to the hotel early. (*Id.).* Wood arrived back at the hotel later, and when he got there, he "lost it and began biting and punching her." (*Id.).* Wood would assault her for a while and then stop and start accusing her of saying other men's names under her breath, and then he would resume assaulting her. (Id). M.M. said that Wood grabbed a hairdryer and started hitting her with it, and then started hitting her with a hair straightener, as well as other items around the room. (*Id.).* M.M. was still crying, emotional and hysterical while telling all of this to Officer Lucas. (*Id.* at 139). M.M. said she was struck with the hairdryer, hair straightener, belt, and a charging cord. (*Id.*) M.M. said that the hair dryer was broken after she was beaten with it. (*Id.* at 140). Wood then told her to take off all her clothes so that she couldn't leave the room, and to lay ***6** next to him in bed. (*Id.* at 139). M.M. said she was so afraid that she stayed there until he fell asleep or passed out before she was able to leave the room and get help. (R. Vol. 2 at 139-140).

D. In the hotel room, officers found physical evidence that corroborated M.M.'s account.

Officer Lucas went up to M.M. and Wood's hotel room and located Wood. (R. Vol. 2 at 140-141). The room was in disarray, with objects thrown all over the room, food on the walls, and items laying around all over the place. (*Id.* at 141). Wood was sleeping in the bed. (*Id.).* Officer Lucas located the hairdryer that had been broken into pieces, a phone that had been pulled off the wall, and the broken straightener. (R. Vol. 2 at 142-143). There was also a washcloth that appeared to have blood on it. (R. Vol. 2 at 144-145). He also found the belt and charging cord M.M. had described. (*Id.* at 145). Officers arrested Wood and transported M.M. to the hospital via ambulance. (R. Vol. 2 at 148.) Officer Lucas went to the hospital to speak further with M.M. and take photographs of her injuries. (*Id.* at 149-150; Gov't Exhs. 1-17). At the hospital, Officer Lucas asked M.M. to provide a handwritten statement about what had occurred. (R. Vol. 2 at 156). M.M. was unable to do so because she couldn't see, her eyes had swollen shut. (*Id.).*

****7 E. In the course of seeking treatment, M.M. recounted the assault and described her relationship with Wood to multiple medicalprofessionals.***

Medical professionals diagnosed M.M. with the following:

a. closed fracture of her nasal bone; (R. Vol. 2 at 80)

b. acute, nondisplaced fractures of the left lateral seventh, ninth, and tenth ribs; (R. Vol. 2 at 87)

c. healing fractures of the left lateral sixth, seventh and ninth ribs; (R. Vol. 2 at 87)

d. bilateral periorbital ecchymosis (bruising) and edema; (R. Vol. 2 at 85)

e. multiple areas of bruising and abrasions on her back and flank; (R. Vol. 2 at 85)

f. ecchymosis to her left lateral breast; (R. Vol. 2 at 85)

g. bruising and a cut on her left elbow; (R. Vol. 2 at 152)

h. bruised and swollen eyelids; (R. Vol. 2 at 84)

i. bruising on her arms/back; (R. Vol. 2 at 85); and

j. bite marks on her arms. (R. Vol. 2 at 109)

Dr. Melanie McCaroll, emergency department physician for Hillcrest Hospital, treated M.M. on March 17, 2021 after M.M. was brought to the emergency room via ambulance. (R. Vol. 2 at 80). M.M. told Dr. McCaroll that her boyfriend assaulted her after they went out drinking at a bar, that they were living in a hotel, and that she was hit with objects like a hairdryer, a belt, and a curling iron. (R. Vol. 2 at 82; Gov't Exh. 29). Based on x-rays and CT scans, M.M. was diagnosed with new left lateral fractures to ribs 7, 9, and 10, and healing fractures of the left sixth, seventh, and ninth ribs. (*Id.* at 87; Gov't Exh. 29). Medical records indicate that M.M. admitted "boyfriend has been ***8** aggressive before but states he has never beat her up like this before." (R. Vol. 2 at 59; Gov't Exhibit 31).

Dr. Roderick Purdie, a psychiatrist at Hillcrest Medical Center, also treated M.M. after the assault. (R. Vol. 2 at 104). Dr. Purdie did a consult on M.M. because she had been assaulted and wanted to be screened for depression and anxiety secondary to the assault. (*Id.* at 104-105). When meeting with a patient, Dr. Purdie has scripted questions that he asks regarding the patient's reason for coming to the hospital, depression, suicide, psychosis, substance abuse, psychiatric problems, and medical issues prior to arrival. (*Id.* at 104). When he asked about the cause of her injuries, M.M. told Dr. Purdie that she'd been assaulted at a hotel by her significant other. (R. Vol. 2 at 105). M.M. told Dr. Purdie that her boyfriend was paranoid, thought she had turned his own family against him, that she was speaking other men's names, and that he was going to kill her. (R. Vol. 2 at 104-105). When he asked about exacerbating social issues, M.M. told Dr. Purdie she had been with the abusive man for four years, and this is the same man who had caused her current injuries. (*Id.* at 107-108, *see also* Exh. 32). In his medical reports, Dr. Purdie noted that M.M. relayed that she had "been involved with an occasionally abusive boyfriend" and that "he was violent towards her a few weeks ago." ***9** (Gov't Exh. 32).

Registered Nurse Paige Frank also cared for M.M. after the assault. (R. Vol. 2 at 63). As part of triage, Nurse Frank asks abuse indicator questions. (R. Vol. 2 at 63). Everyone who comes into the ER is screened with these questions, and that more questions generate based on the patient's answers. (*Id.* at 64). These questions are general at the beginning, but then get more specific based on the patient's answers. (*Id.).* Nurse Frank asked M.M. these abuse indicator questions and documented them in the medical records. (*Id.* at 65; Gov't Exh. 30). In the screening, M.M. was asked if she was safe at home, safe in her relationship, had a safe location to go, and whether she wanted to go home to her partner. (R. Vol. 2 at 67). She answered no to all of those questions. (*Id.).* She was also asked if there was an escalation in the violence from her partner, and whether he has used weapons, alcohol, and drugs. (*Id.).* She answered yes to both questions. (*Id.).* M.M. told Nurse Frank that she was with her boyfriend at a hotel today and he was drunk, and she was assaulted. (R. Vol. 2 at 69-70; Gov't Exh. 29).

Registered Nurse Adrianna Caton was M.M.'s nurse after she was admitted to the hospital. (R. Vol. 2 at 120). As a case management nurse, Nurse Canton assists patients with their needs for resources and safety discharge plans. (*Id.).* ***10** M.M. told Nurse Caton that she and her boyfriend had been staying in a hotel, and he had assaulted her for several hours the night before. (R. Vol. 2 at 121). M.M. was in a lot of pain, she was very tired, and she was very scared. (*Id.*) Nurse Canton was present while M.M. met with a DVIS advocate, who did an assessment and worked on placement with M.M. (R. Vol. 2 at 122-123). They developed a safety plan, agreed M.M. would be discharged the next day, and M.M. would go to the Family Safety Center for a Domestic Violence Nurse Examination and placement in a women's shelter. (*Id.).* M.M. agreed with this plan. (*Id.).*

But before M.M. was discharged, Wood's mother came to see her at the hospital. (R. Vol. 2 at 123). After Wood's mother visited with her, M.M. advised Nurse Canton that she had changed her mind and did not want to file any type of charges, and no longer wanted to do the domestic violence nurse examination. (R. Vol. 2 at 124). Wood's mother did most of the talking during this conversation. (*Id.).* M.M. was discharged and left the hospital with Wood's mother. (*Id.).*

F. Wood made jail calls asking his mother to convey messages to M.M. and instructing M.M. to avoid being subpoenaed or testifying.

After his arrest, Wood repeatedly called M.M. and his mother from jail. (R. ***11** Vol. 2 at 168-169). Two days after the assault, Wood called his mother, and said, "Tell her I need her, k? Tell her I love her and it's my fault. I allowed it to get like this, I know better. I've seen it coming." (*Id.* at 170; Gov't Exh. 33A, clip one). In the same call, Wood told his mother, "Well, tell her I need her. You hear me? Tell her I love her and I'll go to court here in a little bit. I don't know what time I'll go, but I know I go today. So just tell her to do whatever she can for me." (Gov't Exh. 33A, clip two). Later in that call, Wood instructed his mother, "Tell her to help me." (Gov't Exh. 33A, clip three).

In another call, Wood instructed M.M. how to avoid being subpoenaed or testifying:

Wood: My biggest thing is that you have to not answer nothing. You know what I mean?

M.M.: yea.

Wood: I don't ... I know you can't get subpoenaed or it'll probably be that much worse.

M.M.: They can't force me to talk.

Wood: Ok, but what I'm saying, what I'm saying is... prevent that. Make sense?

M.M.: Yea. I took Friday off of work. I took Friday off. I'm [inaudible] because I didn't want to be there. We're moving everything tonight. Nobody knows where I'm... where I moved to. I haven't put in a change of address, I haven't... nobody knows.

Wood: I'm just saying, you got to take preventative measures to make sure this is [in audible]. It's in your hands basically.

M.M.: Well, I'm going to do everything I can to help you.

***12** ((R. Vol. 2 at 175; Exh. 33B, clip one). In the same call, M.M. told Wood, "I'm going to do everything I can to avoid getting subpoenaed. Everything I can to make sure you get out. They know I'm not cooperating." (Exh. 33B, clip 2).

In another call, Wood told his mother he had instructed M.M. to avoid being subpoenaed or testifying:

Ford: Well, like I told, eh, [M.M.], even if they do subpoena her, she can [redacted]. They cannot make her talk.

Wood: Yea.

Ford: You know what I mean?

Wood: Yea, but, that's not though, like I told her you're going to have to do everything you can not to get subpoenaed."

(R. Vol. 2 at 176; Gov't Exh. 33C).

II. A federal grand jury charged Wood with assaulting M.M.

A. Wood moved to exclude expert testimony about patterns of domestic violence.

A federal grand jury charged Wood with Assault with a Dangerous Weapon with Intent to Do Bodily Harm in Indian Country and Assault Resulting in Serious Bodily Harm in Indian Country. (Vol. 1 at 13). The indictment alleged that Wood assaulted M.M. with a dangerous weapon, by repeatedly beating M.M. with a hairdryer, a hair straightener, and electric cord, resulting in serious bodily injury. (*Id.* at 13-14).

***13** The government provided notice, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G), that it intended to introduce expert testimony from Lori Gonzalez, a domestic violence counselor. (Vol. 1 at 15). The notice detailed Ms. Gonzalez's education and experience and provided the details of her intended testimony. The notice stated that Ms. Gonzales would testify about the impact of trauma on victims and children who stay with an abuser, recantation, abuse patterns, escalating violence, the cycle of violence, and patterns of behavior exhibited by abusers and victims. (Vol. 1 at 16).

Wood moved to exclude Ms. Gonzalez from testifying, claiming that she was not qualified to offer expert testimony, that she did not author an expert report, that she never counseled the victim, and that *Daubert* was otherwise not satisfied. (Vol. 1 at 81-84). The district court took the issue under advisement and allowed supplemental briefing. (R. Vol. 2 at 276).

The government filed a supplemental expert notice. (R. Vol. 1 at 93-103). The supplemental notice included a *Daubert* analysis, as well as a further statement that Ms. Gonzalez's testimony would help the jury understand "the failure of M.M. to cooperate after a severe domestic violence incident, her repeated return to a romantic-type relationship with the defendant, and her failure to simply leave the defendant." (*Id.)*.

***14** The district court found that Ms. Gonzalez's education and experience satisfied Rule 702, that her proposed testimony was relevant and reliable, that there was no danger of unfair prejudice, and that the testimony had significant probative value and was likely to assist the jury. (R. Vol. 1 at 119-125).

B. The Court excluded some evidence under Rule 404(b), and the government elected not to introduce other 404(b) evidence.

The government filed a 404(b) notice indicating that it intended to use of Wood various prior convictions for kidnapping, threatening an act of violence, and interfering with emergency telephone call of an ex-girlfriend, as evidence of his preparation, plan, and identity. (R. Vol. 4 at 27). The Court excluded this evidence, subject to reevaluation if Wood testified. (R. Vol. 2 at 263).

The government also provided notice that it intended to admit evidence of Wood's prior abuse of M.M. through her children's testimony. (R. Vol. 4 at 33-34). The government later moved to withdraw this evidence on its own motion. (R. Vol. 2 at 262).

15** ***C. Before trial, the government indicated that it would prove Wood was Indian using a tribal status record.

Months before trial, the government provided Wood with a tribal status record from the Seneca-Cayuga Nation that showed he was an enrolled member by blood. (R. Vol. 2 at 17). Two weeks before trial, the government's trial brief stated that Wood's counsel had been contacted regarding Indian status and Indian Country stipulations, but had not yet responded. (R. Vol. 4 at 25). At the pretrial conference a week later, the government informed the district court that it had provided the defense with proposed Indian Country/status stipulations, and that defense counsel had responded, saying he "expects that nothing would be

stipulated do," however was not definitive. (R. Vol. 2 at 289). The district court stated it would allow the parties to continue to confer and discuss stipulations. (R. Vol. 2 at 290).

On the Saturday before trial, counsel for Wood definitively informed the government that he would not be stipulating to his Indian status. (R. Vol. 2 at 14). As a result, the government added to the witness list three possible witnesses who could lay the foundation for admission of Wood's tribal status record: Denise Sisco, Executive Director of the Seneca-Cayuga Nation; Joanna Hadley, Deputy Director of the Seneca-Cayuga Nation; and Leslie McCoy, the enrollment verification officer for the Seneca-Cayuga Nation. (R. Vol. 2 at 14; ***16** R. Vol. 3 at 26.) The government also filed an opposed motion in limine seeking a pretrial determination of Indian Country Land Status. (R. Vol. 1 at 88). Wood objected that the witnesses from the Seneca-Cayuca Nation were added late. (*Id.).* Before jury selection began, the district court announced that it would allow one of the government's witnesses to lay foundation for Wood's tribal status record. (*Id.).* The court also granted the government's motion to determine Indian Country status as a matter of law. (R. Vol. 1 at 126-127).

Before the jury was sworn, the government notified the court that it had received a certificate of authenticity for the tribal status record that had been previously produced to the defense in discovery. (R. Vol. 3 at 100-101). The government provided a copy of the certificate to Wood. (R. Vol. 3 at 100; Supp. R. Vol. 2 at 10). The certificate of authenticity was signed by Leslie McCoy. (Supp. R. Vol. 1 at 53). The court asked Wood's counsel if he'd like some time to look over the document, and counsel said he would. (*Id.).* The district court took an hour and fifteen recess to give defense counsel the opportunity to examine the certificate. (*Id.).*

Upon returning from the recess, the court asked counsel if he "had an opportunity to look at the exhibit that the government has provided concerning your client's tribal membership?" (R. Vol. 2 at 15). Counsel stated that he had ***17** reviewed the certificate of authenticity, but objected on various grounds related to authenticity. (R. Vol. 2 at 15-16).

The district court found that the tribal status record and the certificate of authenticity were signed by the same person, Leslie McCoy, and that the Court was satisfied McCoy had seen the document she was authenticating, that she was the custodian of records and the enrollment officer for the Seneca Cayuga Nation, and concluded that the certificate satisfied Rules 803 and 902. (R. Vol. 2 at 19).

D. At trial, M.M. claimed she did not remember the assault, other witnesses recounted the events she had described, and a domestic violence expert explained the cycle of violence.

At trial, M.M. testified that she had been dating Wood for "almost five years," (R. Vol. 2 at 182), and they had cohabitated since February of 2020. (R. Vol. 2 at 183). M.M. testified that Wood is Native American and is a member of the Quapaw and Seneca Cayuga tribes. (*Id.).* M.M. confirmed that she and Wood had been staying at the Hampton Inn, and that she was injured there and went to the hospital, acknowledging that she had broken ribs, a broken nose, black eyes, and bruising on her hands and arms. (R. Vol. 2. at 184-86). Even though she admitted that she and Wood were the only people in the hotel room, M.M. claimed not to remember how she received the injuries. ***18** (R. Vol. 2 at 184-85, 197). M.M. also claimed she did not remember telling police that Wood assaulted her, or running up to the front desk in the lobby and telling the hotel clerk that Wood had assaulted her and was going to kill her. (R. Vol. 2 at 190-91). She claimed not to remember telling Dr. McCarroll, Dr. Purdie, Nurse Canton, or Nurse Frank that Wood had assaulted her, or that he hit her with a hairdryer, hair straightener, belt, or charging cord. (R. Vol. 2 at 191). M.M. acknowledged that Wood's mother came to visit her in the hospital and took her home. (R. Vol. 2 at 188). M.M. admitted that since Wood's arrest, she had spoken with him on the phone several times each day. (*Id.).* When confronted about their conversations, initially M.M. denied telling Wood that she was going to do whatever she could not to get subpoenaed, that "they can't force me to talk," and that she would do whatever she could to help get him out. (R. Vol. 2 at 188-89, 192). After hearing the recording of the jail call, M.M. said she remembered making those statements. (R. Vol. 2 at 192; Exh. 33B).

Although M.M. denied remembering the events surrounding the assault, the Hampton Inn desk clerk, a police officer, two doctors, and two nurses all testified about their interactions with Wood and M.M., and about the details M.M. told them while in terror of Wood in the immediate aftermath of the ***19** beating, and while seeking medical treatment after the beating. *See* Section I(A) through (E), *supra.* The jury also heard the jail calls in which Wood told his mother and M.M. how she should help him and avoid being subpoenaed or testifying. *See* Section I(F), *supra.*

Because the Court had accepted the certificate of authenticity for Wood's tribal status record, the government introduced Wood's tribal status record using the certificate, obviating the need for Leslie McCoy to testify. (*Id.* at 17-19; Gov't Exh. 35).

Pursuant to its expert notice, the government called Ms. Gonzalez, who explained that domestic violence is a pattern of abusive behavior used to maintain power and control over another person. (R. Vol. 2 at 203). She then explained various myths and misconceptions about domestic violence, noting that victims of domestic violence are often blamed for staying in the relationship, and that victims internalize that blame. (*Id.* at 204). Ms. Gonzalez explained the cycle of violence inherent in domestic violence and its various phases: the honeymoon, tension build up, violent episode, apologies and promises to go to counseling and change. (*Id.* at 204-05). She described the cycle as an "up and down emotional roller coaster." (*Id.* at 205).

Ms. Gonzalez also testified that as part of her job as a domestic violence ***20** counselor she does safety planning with victims to address their safety needs, which includes doing a lethality assessment. (R. Vol. 2 at 202). She explained that a lethality assessment, also known as a danger assessment, is a twenty-question assessment tool used to evaluate the dangerousness of the situation and to assess safety needs. (R. Vol. 2 at 202-203). Ms. Gonzalez provided examples of these questions, including: 1) whether the abuse gotten worse over the last year, 2) if he owns a gun, 3) whether there was strangulation or sexual assault, 4) whether children were present, 5) whether the children are the abuser's or not, 6) whether there is substance abuse, 7) whether the abuser shows suicidal tendencies, 8) the employment status of the abuser, and 9) whether weapons were used. (R. Vol. 2 at 203). Ms. Gonzalez also testified that domestic abuse tends to change or escalate over time. (*Id.* at 206). Abuse starts less severe and progresses. (*Id.* at 207). Wood did not object to Ms. Gonzalez's lethality assessment testimony. (R. Vol. 2 at 203). Ms. Gonzalez testified that on average, a domestic violence victim will return to her abuser 7-10 times after an assault and explained reasons victims may return. (*Id.).*

***21 Summary of the Argument**

The district court did not commit plain error by allowing the general statements M.M. made to medical providers about her prior history of abuse, as this evidence is *res gestae* to the offense and helps to explain the parties' history, the victim's lack of cooperation, and the cycle of violence. Even if the statements were not *res gestae* and required notice under Rule 404(b), any plain error did not affect Wood's substantial rights, because the evidence did not affect the outcome of the trial, because other unchallenged evidence addressed the history of abuse, and overwhelming evidence established Wood's guilt of the charged assault and witness tampering.

Nor was it plain error for the district court to allow Ms. Gonzalez to testify about the lethality assessment tool. The government complied with the notice requirements of Rule 16(a)(1)(G) and stated that Ms. Gonzalez would be testifying about the cycle of violence and escalation of violence. Her testimony fell within the scope of that notice, and did not suggest that Wood was likely to kill M.M., particularly because few of the lethality factors were present in his case.

Finally, the district court also did not abuse its discretion by admitting documents showing Wood's Indian Status that were provided to the defense ***22** months before trial based on a certificate of authenticity produced before the jury was empaneled. The certificate of authenticity satisfied both Rule 803(6) and 902(11). Wood received additional time to review the certificate and did not request a continuance or additional time to challenge the certificate and has not provided any mechanism that he could have used to challenge the certificate had he been given additional time. Further, any error was harmless, because

M.M.'s testimony provided additional evidence of Wood's Indian status, and because if the certificate had been excluded, the government stood ready to call the individual responsible for the certification. Wood has failed to show any error, let alone cumulative error warranting another trial.

Argument

I. The district court did not commit plain error in allowing the generalized evidence about escalating abuse because it was res gestae.

A. Record Reference

Wood objected to the admission of the defendant's identity as part of the medical reports and testimony by the medical providers. (R. Vol. 1 at 78-79.) The district court overruled the objection and allowed the evidence. (R. Vol. 2 at 272-73.) Wood did not object to the testimony about the generalized ***23** escalation of abuse at trial but maintained his objection to testimony about his identity. (R. Vol. 2 at 69, 82, and 121). On appeal, he does not challenge the identity evidence.

B. Standard of Review

Wood did not object to the escalation of abuse testimony or exhibits during trial, therefore this Court should only reverse if the admission of the evidence was plainly erroneous. To prevail on plain error review, Wood must "establish: (1) the district court committed error; (2) the error is plain; and (3) the error affected his substantial rights." *United States v. Malone*, 937 F.3d 1325, 1327 (10th Cir. 2019). To be plain, an error must be clear or obvious. Once the three prongs are satisfied, this Court may correct the error only if "it seriously affects the fairness, integrity, or public integrity of judicial proceedings." *Id. (quoting Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)).

C. The district court did not commit plain error by allowing the introduction of the evidence because it is res gestae.

Intrinsic, or *res gestae*, evidence is broadly admissible "when it provides the context for the crime, is necessary to a full presentation of the case, or is appropriate in order to complete the story of the crime on trial by providing its immediate context." ***24** *United States v. Durham*, 902 F.3d 1180, 1224 (10th Cir. 2018) (quoting *United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015). Acts that are *res gestae* occur within the same time frame as the charged conduct, form a necessary preliminary to the charged crimes, provides "direct proof of the defendant's involvement in the charged crimes," or is "entirely germane background information, directly connected to the factual circumstances of the crime." *United States v. Gushing*, 10 F.4th 1055, 1075 (10th Cir. 2021). Such evidence is "inextricably intertwined with the charged crime such that a witness's testimony would have been confusing and incomplete without mention of the prior act." *United States v. Ford*, 613 F.3d 1263, 1267 (10th Cir. 2010) (citing *United States v. Johnson*, 42 F.3d 1312, 1316 (10th Cir. 1994)). Relevant *res gestae* evidence must simply meet the requirement of FRE Rule 403 and is excluded only if its "probative value is substantially outweighed by a danger of... unfair prejudice." Fed. R. Evid. 403 (emphasis added).

"[I]n enacting VAWA, Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes,' and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations." *Hernandez v. Ashcroft*, 345 F.3d 824, 836 (9th Cir. 2003) ***25** (quoting H.R. Rep. No. 103- 395, at 24 (1993)). "Congress, in other words, recognized that information about the dynamics of abusive relationships could help adjudicators evaluate facts more fairly." *Lopez-Umanzor v. Gonzales, 405* F.3d 1049, 1058 (9th Cir. 2005). The rule that governs other crimes evidence does not bar evidence that completes the story of the crime, that provides part of the context of the crime charged or is necessary to fully present the case, that explains the relationship of parties

or the circumstances surrounding a particular event, or when the evidence is part of the environment of the case such that it is necessary to complete the story of the crime. *See United States v. Edwards*, 159 F.3d 1117, 1129 (8th Cir. 1998); *United States v. Cook*, 745 F.2d 1311, 1317 (10th Cir. 1984).

Evidence of M.M. and Wood's relationship history was intrinsic to the charged conduct and was reasonably necessary for the government to tell a clear and comprehensible story regarding their relationship and M.M.'s lack of cooperation in the trial. The generalized statements M.M. made to medical providers in response to the abuse screening questions, her psychological history, and the cause of her injuries provided necessary background information that was directly connected to the factual circumstances of the crime, to explain the relationship of the parties and M.M.'s lack of ***26** cooperation, and were necessary to complete the story of the crime, and thus were admissible as *res gestae* and were not subject to notice under Rule 404(b). Eliminating M.M.'s answers to these questions would have provided the jury with incomplete information and left them to speculate as to what those answers might be- a much more dangerous alternative. The evidence about the course of their relationship was inextricably intertwined with the charged offenses, such that the medical providers' testimony and treatment and M.M.'s lack of cooperation at trial, would have been confusing and incomplete without it.

Res gestae evidence is only excluded if its probative value is substantially outweighed by a danger of unfair prejudice. Fed. R. Evid. 403; *United States v. Ford*, 613 F.3d 1263, 1268 (10th Cir. 2010). Unfair prejudice is that which "makes a conviction more likely because it provokes an emotional response in the jury or tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgement as to his guilt or innocence of the crime charged." *Id. citing United State v. Tan, 254* F.3d 1204, 1211-12 (10th Cir. 2001). In *Ford*, evidence of the details of defendant's escape from prison was allowed as *res gestae* to the crime charged in order to prove he was a fugitive. *Id.* at 1268. On appeal, Ford argued that "no probative facts... require an ***27** exploration of the inflammatory telling of a prison escape," and that the details of the escape should not have been allowed because it caused unfair prejudice. *Id.* The Court held that any additional "color" of the escape was necessary to show that Ford was a fugitive, and the probative value was not substantially outweighed by a danger of unfair prejudice. *Id.*

Here, no additional "color" was offered. The prior acts were generalized statements, not specific instances of conduct, and no other testimony or evidence was offered about the prior instances. Even if other details had been offered, such as details about the prior assaults, medical records to support the prior assaults, photographs of prior injuries, or other evidence offered, their probative value would still not have been outweighed by a danger of unfair prejudice. However here, where the evidence showed only that M.M. told medical providers about her living situation and escalating violence in the home, all comments which were necessary to her care and treatment, and to provide context to her later claims that she did not remember the abuse, admission of the evidence created no danger of unfair prejudice and the court did not commit error.!!!!

****28 D. Any error was not plain, because no Tenth Circuit caselaw bars res gestae evidence that pertains to an ongoing domestic relationship with a recent history of escalating abuse.***

For the error to have been plain, it would have to be "obvious under current well-settled law." *United States v. Perrault*, 995 F.3d 748, 776 (10th Cir. 2021); *United States v. Herrera*, 51 F.4th 1226, 1248 (10th Cir. 2022) (error is ordinarily considered "clear or obvious" only when the Supreme Court or this Court has addressed the issue). No well-settled law establishes that background information pertaining to the complaining victim and defendant's domestic history and relationship cannot be *res gestae.*

Wood is wrong that *United States v. Commanche*, 557 F.3d 1261 (10th Cir. 2009), supports his position. That case did not involve a domestic dispute, but rather involved Commanche drawing a box cutter on two unrelated opponents and asserting it was self-defense. (*Id.* at 1264.) At trial, the district court permitted evidence that Commanche had twice been convicted of aggravated battery after altercations which involved sharp cutting instruments, under Rule 404(b) to show his intent. (*Id.* at 1265). On appeal, this Court held that Commanche's prior convictions had no bearing on whether he acted in self-defense in this particular

instance, and thus was just offered to show conformity with his character. (*Id.* at 1268). Critically, neither the prior assaults ***29** nor the charged offense involved in *Commanche* were domestic in nature, and they all involved different victims. Had Commanche been in an intimate relationship with one of the complaining witnesses and had the two prior aggravated assault convictions been with the same complaining witness, *Commanche* may have had some relevance. But it involved none of the factors that made Wood's long-term abusive relationship with M.M. necessary for the jury to understand why she remained in the relationship, and why she testified that she did not remember the assault.

Tenth Circuit caselaw does not bar admission of generalized domestic history that provides context for the victim and defendant's domestic relationship, is not admissible as *res gestae* evidence, particularly where the victim is uncooperative. As such, any error is not plain.

E. Even if treating the history of Wood and M.M.'s relationship as res gestae was plain error, it did not affect Wood's substantial rights.

Even the error were plain, Wood cannot show that the evidence prejudiced him or that it affected the outcome of the trial, and thus it does not warrant reversal. The jury had overwhelming properly admitted evidence of Wood's abuse of M.M. and the severity of her injuries. *See United States v. Carter*, 973 F.2d 1509, 1516 (10th Cir. 1992) (assuming, but not holding, the trial court should have excluded evidence that Carter used an alias, was a fugitive, and ***30** had been present at another judicial proceeding, the Court failed to see how its admission impaired the jury's resolution of Carter's guilt or innocence, as his guilt was not only overwhelming, but unrefuted). The jury heard from twelve witnesses and was presented with 34 exhibits, including photographs of M.M.'s injuries and the weapons Wood used to inflict them. M.M. admitted that she was injured at the hotel (R. Vol. 2 at 185) but claimed that she did not remember how she sustained her injuries and conceded that she and Wood were the only people inside their hotel room that night. (R. Vol. 2 at 197). Despite M.M.'s change of heart, the jury was still able to hear her contemporaneous account via other witnesses that heard it from her in the hours after the assault. They also heard it from Wood, in his jail calls, and heard about his efforts to persuade M.M. to change her account: "Tell her I need her, k? Tell her I love her and it's my fault." (Gov't Exh. 33A). Wood called his mother and asked her to tell M.M. that it was his fault, and that he loves her, and that M.M. needed to "do whatever she can for me." (*Id.)*. Wood then attempted to obstruct justice, by repeatedly telling M.M. to avoid getting subpoenaed. (Gov't. Exh. 33B). Wood insisted to both M.M. and his mother that refusing to testify would not be enough, M.M. needed to "do everything you can not to get subpoenaed." (Gov't Exh. 33B and 33C).

***31** The testimony, photographs, medical records, and jail calls provided the jury with ample evidence to allow them to conclude that Wood beat M.M. repeatedly with various weapons until she was covered in bruises and had numerous broken bones. Where strong physical evidence, testimony from witnesses who encountered M.M. immediately after the assault, and inculpatory jail calls established Wood's guilt beyond a reasonable doubt, he cannot show that vague mentions of prior abuse affected the outcome of the trial. Wood has failed to show that substantial rights were affected, and any error that "does not affect substantial rights shall be disregarded." *Id. citing* Fed. R. Crim P. 52(a). Generalized testimony that the abuse had been escalating and had never been as severe on this occasion, does not outweigh the plethora of specific properly admitted evidence showing Wood's guilt of the charged conduct. Despite M.M.'s non-cooperation, ample evidence supported the conviction beyond a reasonable doubt.

Nor did the government's closing argument prejudice Wood by "rehash[ing] evidence of uncharged abuse." (Aplt. Br. at 26). Rather, the government merely reiterated the evidence that the jury had heard, without objection, during trial. This included statements M.M. had made to medical providers that her boyfriend "had been violent before but never this bad," "had ***32** never beat her up like this before," and how in response to a question about if the violence is getting worse or scarier or more often, M.M. said "yes." (R. Vol. 2 at 228 and 231). The government also listed M.M.'s injuries that were contained in the medical records, which diagnosed her with "a broken nose, that she had three newly broken ribs and three healing ribs.... That her eyes

were so black and swollen that she could not see out of them....” (*Id.)*. These three mentions about escalating abuse do not negate from the specific evidence of the assault, including M.M.'s contemporaneous statements detailing exactly how Wood had beat M.M., how M.M. was hysterical and thought Wood was going to kill her, the jail calls where Wood tells M.M. and his mother that M.M. needs to avoid being subpoenaed and not come to court, and the photographs of the weapons Wood used and the injuries he inflicted. (R. Vol. 2 at 227-237). All of this evidence was properly admitted without objection. The government did not make any inappropriate arguments or inferences, but merely cited evidence that was admitted at trial. In light of the strong evidence of Wood's guilt, passing references to *res gestae* uncharged abuse in closing did not alter the outcome of trial.

33** ***F. Any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

In any event, any error did not seriously affect the fairness or integrity of judicial proceedings. The record reveals no risk that the jury convicted Wood for his past crimes instead of the offenses at issue, and therefore any error does not affect the fairness, integrity, or public reputation of the judicial proceedings. The jury heard no specific information about the prior assaults, just generalized statements that there had been prior abuse. In contrast, however, they heard substantial specific testimony and other evidence, including pictures of the injuries and the implements used to cause them, establishing Wood's charged assault on M.M.

II. Ms. Gonzalez's testimony was consistent with the government's expert notice, and the district court did not commit plain error in allowing her testimony about the lethality assessment.

A. Record Reference

Wood moved to exclude Ms. Gonzalez's testimony based on her qualifications and the lack of data and testing. (R. Vol. 1 at 81-84.) The district court denied the motion and admitted the expert testimony. (R. Vol. 1 at 118-125.) Wood did not object at trial to Gonzalez's testimony regarding the lethality assessment. (See. R. Vol. 2 at 202-203).

34** ***B. Standard of Review

Wood did not object to the challenged testimony during trial, therefore this Court should only reverse if admitting the testimony was plainly erroneous. To prevail on plain error review, Wood must “establish: (1) the district court committed error; (2) the error is plain; and (3) the error affected his substantial rights.” *United States v. Malone*, 937 F.3d 1325, 1327 (10th Cir. 2019). Once the three prongs are satisfied, this Court may correct the error if “it seriously affects the fairness, integrity, or public integrity of judicial proceedings.” *Id. (quoting Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)).

C. The district court did not commit error by allowing Ms. Gonzalez's testimony because it was relevant and consistent with the government's notice.

At the time of trial, Rule 16 of the Federal Rules of Criminal Procedure required a party to turn over a “written summary of any testimony it intends to elicit from an expert witness.” Fed. R. Crim. P. 16(a)(1)(g) [1] (eff. Dec. 2020). The summary was not required to include every statement an expert would make at trial. *See United States v. Brown*, 592 F.3d 1088, 1091 (10th Cir. 2009).

“A party failing to comply with the requirements of Rule 16 is subject to ***35** sanction by the district court which may order” that a party be prohibited “from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.” *United States v. Charley*, 189 F.3d 1251, 1261 (10th Cir. 1999) (citing Fed. R. Crim. P. 16(d)(2) (internal quotation marks omitted)). But even where Rule 16 is violated, no sanction is warranted when the party requesting disclosure

has not been prejudiced. *Id.* at 1262. In determining the appropriate sanction for a Rule 16 violation, the courts consider: "(1) the reason for the delay, including whether the non-compliant party acted in bad faith; (2) the extent of prejudice to the party that sought the disclosure; and (3) the feasibility of curing the prejudice with a continuance." *United States v. Banks*, 761 F.3d 1163, 1198-99 (10th Cir. 2014) (*citing United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988) (internal quotation marks omitted)). Exclusion of expert testimony as a sanction is almost never imposed in the absence of a constitutional violation or statutory authority for such exclusion." *Charley* at 1262.

Here, Wood does not argue that the government failed to provide notice generally, nor could he. Several weeks before trial, the government provided notice that it intended to offer Ms. Gonzalez as an expert in domestic violence and provided Wood with a summary of Ms. Gonzalez's qualifications and ***36** expected testimony. (R. Vol. 1 at *15-17)*. This included that she has qualified as an expert in state court, and had testified about "the impact of trauma on victims and children who witness domestic violence, battered women's syndrome, reasons victims stay with an abuser, recantation, abuse patterns, escalating violence, the cycle of violence and patterns of behaviors exhibited by abusers and victims," and that she would "not testify as a fact witness, but to explain issues relevant to this case and disabuse jurors of common myths and misconceptions concerning domestic violence, including those mentioned above." (*Id.* at 16-17).

On December 18, 2021, after the court's oral invitation to provide additional information about the expert, the government filed a supplemental notice. (R. Vol. 1 at 93-103). This notice included that Ms. Gonzalez was expected to testify concerning "the effects of domestic abuse on the beliefs, behavior, and perception of the person being abused, and how such effects create a 'coercive interpersonal dynamic' that allows offenders to influence victims' actions. The use of this coercion can give perpetrators the ability to control victims' actions such as making the victim engage in illegal behavior or influencing her not to report or cooperate with law enforcement." (R. Vol. 1 at 105).

***37** These notices amply notified Wood about Ms. Gonzalez's testimony. Here, Wood does not argue that the testimony regarding the lethality assessment violated his constitutional rights; rather, he claims that it violated Rule 16 and prejudiced him. (Aplt. Br. at 54-57). But even if the expert notices failed to provide adequate notice about the lethality assessment, the district court did not plainly err in allowing Ms. Gonzalez's testimony where Wood was not prejudiced thereby. Wood's general assertion that he was prejudiced is belied by the record. As part of discovery, Wood received police reports, photographs, reports of interviews, medical records and jail calls related to the assault. This included medical records that contained the abuse indicator questions asked by Nurse Caton as well as M.M.'s statements to providers.

Given the materials provided in discovery, and the references in Ms. Gonzalez's expert notice to "abuse patterns, escalating violence, and the cycle of violence," Wood had ample notice that the government would present testimony regarding the escalation of domestic violence and could reasonably anticipate the line of questioning. Thus, Wood could not have been unduly surprised by Ms. Gonzalez's testimony about various factors indicating an escalation of violence, that show an increased risk of lethality. *See United States v. Moya*, 748 F. App'x 819, 823-24 (10th Cir. 2018) (unpublished) (considering ***38** surprise and ability to prepare for cross-examination as part of *Wicker's* prejudice inquiry; *see also Charley*, 189 F.3d at 1261-62 (defense not prejudiced where government timely disclosed expert witnesses but failed to provide summaries of their expected testimony).

Here, Ms. Gonzalez's testimony was consistent with the expert notice. The government's first notice stated that Ms. Gonzalez would testify about "the impact of trauma on victims and children who stay with an abuser, recantation, abuse patterns, escalating violence, the cycle of violence, and patterns of behavior exhibited by abusers and victims." (R. Vol. 1 at 16). The supplemental expert notice further explained the relevance of Ms. Gonzalez's testimony, and that she would explain "the failure of M.M. to cooperate after a severe domestic violence incident, her repeated return to a romantic-type relationship with the defendant, and her failure to simply leave the defendant." (R. Vol. 1 at 100).

At trial, Ms. Gonzalez testified to her experience as a domestic violence counselor, and to the standard assessment process that a counselor would go through in assessing a domestic violence victim. (R. Vol. 2 at 201-202). As a part of that discussion, she brought up the lethality assessment tool which she described as a tool she uses when helping victims make a safety plan. (R. Vol. ***39** 2 at 202). Ms. Gonzalez did not, however, offer an opinion as to whether any of the lethality factors were present in this case, or if the facts reflected a high risk of lethality. Further, while some of the factors she mentioned were present in this case, many were not. There was no evidence presented that Wood owned a gun, no evidence of strangulation, no evidence of sexual assault, no evidence of suicidality, no evidence of unemployment,[2] and no evidence that M.M.'s children were not Wood's children.[3] In fact, out of all the factors mentioned, only three were applicable in this case: abuse escalation, substance abuse, and use of weapons. Ms. Gonzalez did not testify whether any of the factors applied in this case, or if she thought M.M. was at a serious risk of death. In fact, after Ms. Gonzalez's brief mention of the assessment, neither party brought it up again during trial, including during closing arguments. Out of her approximately 16 pages of testimony, Ms. Gonzalez's testimony regarding safety planning and the lethality assessment took up approximately one page. (Vol. 2 at 202-203). The government neither argued nor implied that M.M. would die if the jury did not intervene.

***40** These factors are related to the escalation of abuse that occurs in domestic violence; that escalation process was referenced in both of the government's expert notices. The government's expert notice summary was not a verbatim recitation of the expert's testimony, nor was it required to be.

Nor can Wood show that Mr. Gonzalez's testimony was irrelevant. Rather, as the district court found, her testimony was highly relevant and designed to assist the jury, because "most jurors are unfamiliar with matters of domestic violence and behavior of victims." (R. Vol. 1 at 122). The average juror is unaware of the nuisances of domestic violence, and why victims stay in abusive relationships despite an escalation of violence. *See United States v. LaVictor*, 848 F.3d 428, 442 (6th Cir. 2017); *United States v. Young*, 316 F.3d 649, 658-59 (7th Cir. 2002); *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019); *United States v. Johnson*, 860 F.3d 1133 (8th Cir. 2017). Ms. Gonzales's testimony was offered to "account for the complex dynamics of domestic violence and demonstrate the various strategies of coercive control that an abusive partner would use against an intimate partner." (R. Vol. 1 at 123). It was also offered to explain "the effects of domestic abuse on the beliefs, behavior, and perception of the person being abused" and "the reasons victims of domestic violence stay with their abusers, don't fight back, and often ***41** become uncooperative shortly after the violent incident." *See United States v. Johnson*, 860 F.3d 1133, 1138-1140 (8th Cir. 2017). As such, it aided the jury in evaluating M.M.'s behavior and the charges against Wood. *Id.*

D. Even if Ms. Gonzalez's testimony on lethality assessments was plain error, it did not affect Wood's substantial rights.

Even if the failure to include the lethality assessment questions in Ms. Gonzalez's expert notices violated Rule 16, Wood cannot show that the testimony prejudiced him. For an error to have been prejudicial, it must have affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). Under plain error review, the defendant, rather than the government, bears the burden of persuasion with respect to prejudice. *Id.*

Wood cannot establish that a more specific notice of the scope of Ms. Gonzalez's testimony would have so changed his ability to cross examine her that it would have changed the outcome of the trial. *See United States v. Jones*, 739 F.3d 364, 370 (7th Cir. 2014) ("We need not consider whether the error [of admitting expert testimony without notice] could be considered plain, because [the defendant] cannot demonstrate that he would not have been convicted absent the error, or that the introduction of that testimony without complying with the expert testimony requirements resulted in a miscarriage of justice."). ***42** For all of the reasons set forth at pages 29-33, *supra*, in light of the overwhelming evidence of Wood's guilt, the passing mention of a lethality assessment did not affect the outcome of his trial. *See United States v. Carter*, 973 F.2d 1509, 1516 (10th Cir. 1992) (assuming, but not holding, the trial court should have excluded evidence that Carter used an alias, was a fugitive, and had been

present at another judicial proceeding, the Court failed to see how its admission impaired the jury's resolution of Carter's guilt or innocence, as his guilt was overwhelming).

E. Any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Moreover, the alleged error did not seriously affect the fairness or integrity of judicial proceedings. Brief testimony about an assessment that Ms. Gonzalez, who did not testify as a fact witness, performs with other domestic violence victims that she counsels did not affect the fairness or integrity of judicial proceedings, especially considering that of the nine factors Ms. Gonzalez mentioned, only three were arguably applicable in this case. Notably, neither party argued that any of the factors were applicable in this case, suggested there was an increased risk of lethality for M.M., or argued nor even suggested that M.M. might die if the jury were not to intervene. Because any error did not seriously affect the fairness, integrity, or public reputation of ***43** the judicial proceedings, the alleged error does not warrant reversal.

III. The district court did not abuse its discretion in allowing the certificate of authenticity to lay a foundation for the defendant's Certificate of Indian Blood

A. Record Reference

At trial, Wood objected to the certificate of authenticity on the grounds that: 1) the document was not notarized; 2) the certificate had been signed that same day, but the Certificate of Indian blood was signed in July, so he was concerned Leslie McCoy had not seen the document in five months; 3) there was a handwritten enrollment date and that raised issues of authenticity; and 4) that he had not received sufficient notice. (R. Vol. 2 at 15-16).

On appeal, Wood raises three issues: 1) that there was insufficient notice; 2) that the certificate of authenticity was incomplete; and 3) that there was a "close in time" issue. (Aplt. Br. at p. 33-44.)

B. Standard of Review

Because Wood objected to use of the certificate to authenticate his tribal status record, this Court reviews for an abuse of discretion. *United States v. Silva*, 889 F.3d 704, 709 (10th Cir. 2018). "A district court abuses its discretion when it issues an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.*, quoting ***44** *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 968 (10th Cir. 2001). Under the abuse of discretion standard, a district court's decision will be reversed "only if the court exceeded the bounds of permissible choice, given the facts and the applicable law in the case at hand." *Id.*, quoting *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007) (quotations omitted).

C. The district court did not abuse its discretion by allowing the certificate of authenticity to lay a foundation for the tribal status record.

Wood argues that the district court abused its discretion in admitting the certificate of authenticity for three reasons. Each reason is meritless.

1. Timeliness of the Certificate of Authenticity

While the certificate of authenticity was provided the morning of trial, the underlying tribal status record, also signed by Leslie McCoy, the Seneca-Cayuga enrollment officer, had been produced in discovery months earlier. As such a document can only be

introduced through testimony from a tribal officer or by using a certificate of authenticity, Wood could not have been surprised that the government, upon learning he would not stipulate to his Indian status, pursued both avenues for authentication. Either a live witness or a certificate of authenticity would have offered the same evidence: that the tribal status record was a record of a regularly conducted activity pursuant to ***45** Federal Rule 803(6). Further, the certificate of authenticity for admission of Wood's tribal status record was produced before the venire was sworn. It is well established that a jury trial begins when the jury is sworn. *Martinez v. Illinois*, 572 U.S. 833, 840 (2014).

When reviewing for abuse of discretion, the Court cannot reverse simply because a district court failed to make an entirely permissible choice. *Oklahoma ex rel. Edmonson v. Tyson Foods*, 619 F.3d 1223, 1232 (10th Cir. 2010). Wood argues that by the time the certificate of authenticity was disclosed, the government was "no longer allowed recourse to Rule 902(11)" and "was required to call a live witness to authenticate its proffered evidence of tribal membership and Indian Blood." (Aplt. Br. at 40.) Wood presents no authority stating that it was error as a matter of law for the district court to allow the government to present the certificate of authenticity rather than call a live witness to the stand. Moreover, where the government was prepared to call the Ms. McCoy, any error was harmless.

2. *The Certificate of Authenticity was complete.*

Nor, contrary to Wood's contention, was the certificate of authenticity incomplete. First, Wood argues that the "biggest problem" is that the blank section on the bottom of the certificate was not filled in, and therefore it fails to ***46** demonstrate "that the proffered evidence is genuinely what it purports to be. (Aplt. Br. at 41.) But Wood presents no justification as to why the attachment of the record to the certificate itself was not sufficient to satisfy this requirement. The Certificate of Authenticity repeatedly refers to the "records attached" as the ones being authenticated. Where the record was attached to the certificate attesting to their authenticity, there is no separate requirement that the blank section on the form must also describe the records.

Next, Wood argues that the certificate, which "tracked the bare language of Rule 803(6)," did not satisfy this Court's requirement that that the record must "be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant." (Aplt. Br. at 41-42, citing *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008).) To satisfy Rule 803(6) the records "must (1) have been prepared in the normal course of business; (2) have been made at or near the time of the events recorded; (3) be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) indicate the sources, methods and circumstances by which the record was made were trustworthy." *Id.* Here, Ms. McCoy signed the certificate and stated that 1) she was employed by the Seneca-Cayuga Nation; 2) her official title was ***47** enrollment officer; 3) She was a custodian of records for the Seneca-Cayuga Nation; 4) Each of the records attached was the original record or a true and accurate duplicate of the original record in the custody of the Seneca-Cayuga Nation, and she is a custodian of the attached records; 5) the record attached to the certificate were made at or near the time of the occurrence of the matters set forth; 6) the records attached were made by a person with knowledge of those matters; 7) such records were kept in the course of a regularly conducted business activity of the Seneca-Cayuga nation; and 8) such records were made by the Seneca-Cayuga Nation as a regular business practice. Ms. McCoy was also the signatory on the tribal status record as well as the tribal enrollment officer. All of this, taken as a whole, satisfies the four requirements of Rule 803(6) as set forth by this Court.

3. *There are no issues of "time and topic."*

Lastly, Wood is wrong that the certificate was incomplete because of "issues of time and topic." (Aplt. Br. at 42.) Wood argues that while the certificate states it was "made at or near the time of the occurrence of the matters set forth," R. Vol. 2 at 10, "the purported tribal record has a very recent date stamp (July 23, 2021), while averring that Mr. Wood enrolled in the tribe decades earlier (XX/XX/1995) and was born years before that ***48** (August 3, 1989.)" (Aplt. Br. at 42.) Wood claims that this

"leaves open the possibility that the record was created in 2021-or at least amended with a hand-written enrollment date-for the sole purpose of criminal prosecution..." (*Id.).* Wood's claim is pure conjecture. The certificate of authenticity signed by Leslie McCoy under penalty of perjury states that the record was made at or near the time of the occurrence of the matters set forth, and therefore satisfies Rule 803(6). Should Wood have wanted to challenge the foundation of the tribal status record, he could have requested time to question Ms. McCoy both out of court, or called her as a witness, as she was already scheduled to be a witness at trial. The district court found that the certificate of authenticity, prepared by the same individual who prepared the tribal status record, adequately satisfied the requirements of Rule 803(6). The Court is "especially deferential with respect to rulings on the admission of hearsay evidence." *United States v. Ary*, 518 F.3d *775, 785* (10th Cir. 2008), citing *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1017 (10th Cir. 2004) (quotation omitted). The district court's determination that the certificate of authenticity satisfied Rules 803(6) and 902(11) should not be disturbed because it did not make a "clear error of judgment or exceed the bounds of permissible choice in the circumstances." ***49** *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010).

While the trial court certainly could have declined to allow the certificate of authenticity to establish a foundation for the tribal status record, if it had done so, the government would have proceeded to call Leslie McCoy as a witness. Under the circumstances, the trial court made a permissible choice in the circumstances that was "not arbitrary, capricious or whimsical." *United States v. Gutierrez de Lopez*, 761 F.3d. 1123, 1132 (10th Cir. 2014).

4. Any error was harmless.

Even if it was error to allow the certificate of authenticity to lay the foundation for Wood's tribal status record, any error was harmless because M.M. also testified, based on their long relationship, that Wood is an Indian (R. Vol. 2 at 183).

IV. Wood has not shown any error, let alone cumulative error.

Cumulative error is present when the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as single reversible error. *United States v. Garcia*, 74 F.4th 1073, 1130 (10th Cir. 2023), citing *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003) (internal quotation marks omitted). In assessing the possibility of ***50** cumulative error, the Court can only consider "actual errors in determining whether the defendant's right to a fair trial was violated." *Id.; see United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) (en banc) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Wood has failed to establish two or more errors, so there can be no cumulative reversible error. However, any errors there may have been, even when accumulated, were harmless. Any error did not significantly strengthen the government's case, nor diminish Wood's case, and therefore no reasonable probability exists that the jury would have acquitted Wood absent the errors. Therefore, the cumulative impact of harmless errors is not so prejudicial as to overcome the overwhelming evidence supporting Wood's conviction and did not affect Wood's substantial rights.

Conclusion

For all the reasons set forth above, this Court should affirm Wood's conviction.

Statement Regarding Oral Argument

The United States does not request oral argument.

***51** Respectfully submitted,

CLINTON J. JOHNSON

United States Attorney

/s/ Stacey P. Todd

Stacey P. Todd, CABA # 294566

Assistant United States Attorney

110 West Seventh Street, Suite 300

Tulsa, Oklahoma 74119-1013

918.382.2700

Stacey.todd@usdoj.gov

Footnotes

1 Rule 16 was amended, effective December 1, 2022, to expand the requirements for expert notices; however, Wood does not contend that those expanded requirements applied at his December 2021 trial.

2 Although Mr. Wood may have been unemployed (Aplt. Br. at 55), no evidence of his employment status was admitted at trial.

3 No testimony on the children's parentage was elicited during M.M.'s testimony, though the jury could have implied parentage based on the children's ages.