IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 24-7030

UNITED STATES OF AMERICA,
***Plaintiff/Appellee*,**

v.

DENNIS HEBERT,
***Defendant/Appellant*.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE RONALD A. WHITE, UNITED STATES DISTRICT JUDGE
CASE NO. CR-22-00106-RAW

BRIEF OF PLAINTIFF/APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

CHRISTOPHER J. WILSON
United States Attorney

Linda A. Epperley, Oklahoma Bar No. 12057
Assistant United States Attorney
520 Denison Avenue
Muskogee, Oklahoma 74401
Telephone: (918) 684-5100
Facsimile: (918) 684-5150
linda.epperley @usdoj.gov

Attorney for Plaintiff/Appellee

February 24, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Pursuant to 18 U.S.C. § 3231, the district court had subject matter jurisdiction over the charges because Defendant committed his offenses in Indian Country within the Eastern District of Oklahoma. (Vol. I, *Superseding Indictment*, ROA at 113).[1]

Pursuant to 28 U.S.C. § 1291, courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The district court sentenced Defendant on March 28, 2024, and entered its written judgment on April 1, 2024. (Vol. I, *Judgment*, ROA at 205-211). Defendant/Appellant timely filed his notice of appeal on April 12, 2024. (Vol. I, *Notice of Appeal*, ROA at 212). *See* Fed. R. App. P. 4(b)(1)(A) providing that notice of appeal must be filed within 14 days of the entry of judgment.

---

[1] References to the record on appeal ("ROA") will be made as follows:

Volume I – Pleadings: by document title, followed by the page number(s) where the cited material appears in the consecutively paginated record, e.g. "Vol. I, *Motion*, ROA at 10";

Volume II – Sealed Pleadings: by paragraph number, followed by the page of the sealed record as it appears on the electronic file stamp, e.g. as "Vol. II, *PSR* ¶4, Sealed ROA at 2"; and

Volume III - Transcripts: by the page number(s), where "TT" refers to the trial transcript, e.g. "TT 4" and "ST" refers to the sentencing transcript, e.g. "ST 7."

Defendant/Appellant's brief will be referenced as "Def. Brf."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether There Was Sufficient Evidence of Defendant's non-Indian Status to Convict Defendant of Aggravated Sexual Abuse in Indian Country?

II. Whether the District Court Plainly Erred in Instructing the Jury on the Elements of the Crime – Including the non-Indian Status of Defendant?

III. Whether the District Court Plainly Erred in Allowing Testimony and Closing Argument Regarding Lack of Any Claim by Defendant That He Was an Indian?

COMBINED STATEMENT OF THE CASE AND FACTS

A. Procedural History

On May 10, 2023, the grand jury returned a one-count Superseding Indictment charging Defendant with Aggravated Sexual Abuse in Indian Country, in violation of 18 U.S.C. § 2241(c), 2246(2)(A), 1151, and 1152. (Vol. I, *Superseding Indictment*, ROA at 113).

In May 2023, Defendant proceeded to trial. (Vol. I, *Minutes of Proceedings – Jury Trial held on May 15-17, 2023*, ROA at 142-146). After two days of testimony, evidence, the jury heard closing arguments, received instructions, and returned a guilty verdict finding Defendant guilty. (Vol. I, *Verdict - Redacted*, ROA at 183). On March 21, 2023, the district court imposed a 360-month sentence, to be followed by a lifetime term of supervised release. (Vol. I, *Judgment and Commitment*, ROA at 205-207).

B. Factual Summary of the Charged Abuse and Evidence from Jury Trial

1. Summary of the Charged Abuse

Defendant's allegations of error in this appeal all center on the government's proof regarding his status as a non-Indian. Therefore, the facts of the aggravated sexual abuse proved at trial are recounted here in summary form as recounted in a government pre-trial filing:

> Late on July 21, 2021, B.P., the mother of six-year-old K.D., went into her bathroom to take a shower. Defendant, the stepfather of B.P.'s sister, K.B., followed her. Defendant told B.P. that K.D. "made a few comments" to him "about . . . [Defendant] putting his peepee in [K.D.'s] bottom." Defendant, who for the past three nights had slept in the same bedroom as K.D. and K.D.'s five-year-old brother, proposed to B.P. that he would "stay out of [her] boys' room and sleep on the couch." B.P. recalled that Defendant then made a "goofy look" at her as he asked, "Do I look like a pedophile?"
>
> B.P. suspected that there was more to the story. She was right. After Defendant left the bathroom, K.B. entered. K.B. looked "serious" and told B.P. that she had reviewed footage from the surveillance camera in the boys' bedroom. B.P. described the footage as showing Defendant "telling [K.D.] to be quiet and locking the bedroom door and shutting the camera off." A camera placed in the living room showed "K.D. running with his legs spread apart and hiking up [sic] as he runs out the door."
>
> Around this time, K.D. told two of his cousins (K.B.'s daughters) what Defendant had done to him after turning the bedroom camera off. As recounted by K.B. in a written statement, K.D. told his cousins that Defendant "asked K.D. to play house and had put [Defendant's] dick in [K.D.'s] mouth and butt." K.B. asked K.D. to confirm whether what he had told his cousins was true. He said that it was. Before K.B. could find B.P. to tell her what she had learned, Defendant stopped K.B. and told her that "he had already talked to" B.P. and that B.P. was taking a shower. K.B. told Defendant that she wanted to talk to B.P. anyway, and Defendant told her that the door to the bathroom was locked. It wasn't, and K.B. had the discussion with B.P. described above. B.P.

> took K.D. to the hospital that day. They were directed to the Pittsburg County Child Advocacy Center, where K.D. was medically examined and forensically interviewed. Over the course of two forensic interviews, K.D. explained that Defendant removed K.D.'s pants and inserted Defendant's penis into K.D.'s anus.
>
> The camera in K.D.'s bedroom is motion-activated. In several video clips, Defendant openly masturbates in his bed, often while K.D. can be seen in the other bed. At 9:27 a.m. on July 20, 2021, Defendant and K.D. are seen in Defendant's bed. Defendant appears to be touching and kissing K.D. At 9:23 a.m. on July 21, 2021, Defendant is seen looking at K.D. while holding a finger up to Defendant's mouth, gesturing for K.D. to be quiet. Defendant closes the bedroom door, locks it with a chain lock, and turns toward K.D., again gesturing for K.D. to be quiet. Defendant then moves immediately toward the camera and takes the camera down from its position on the center wall, obscuring its view. At 9:33 a.m., K.D. enters the living room from the bedroom area with a distinctive, waddle-like gait as B.P. described. At 9:35 a.m., Defendant is seen replacing the camera in K.D.'s bedroom.
>
> In his interview with Choctaw Nation Tribal Police Investigator Dakota Grantham, Defendant initially denied any impropriety, but, confronted with surveillance video from K.D.'s bedroom showing him holding and kissing K.D., he admitted that he kissed K.D. Defendant called this "an experiment," but conceded that he knew it was wrong to kiss K.D.

(Vol. I, *Gov. Notice of Other Child Molestation,* ROA at 14-16).

2. The Trial Testimony Relevant to Defendant's Non-Indian Status

The government presented testimony from four witnesses at trial addressing Defendant's Indian or non-Indian status.

a. Kara Byers

Kara Byers is Defendant's step-daughter (TT 104). Although she has known him "a very long time," they had not lived under the same roof until a week or two before the charged crime occurred. (TT 103, 152).

Defendant, who she spoke to regularly on the phone, called her after a fight with Ms. Byers' mother. (TT 106). He was "walking in Texas" and Ms. Byers offered him a place to stay until he could "get his own place." (Id.). She offered to let him stay temporarily in the home she had rented with the victim's mother. (TT 105). Ms. Byers testified she helped Defendant because he had helped her as an adult with her kids or paying a bill. (TT 108). "I felt that offering him a place to stay so he's not on the street would help him like, you know, he has helped me throughout, pretty much since I was an adult." (Id).

During the "very long" time she had known Defendant, Ms. Byers testified she had no knowledge of him being a member of any Indian Tribe. (TT 104). He had never, in all those years, mentioned he was an Indian. (Id.). She had, at one time, heard Defendant self-identify as "part Mexican." (Id.).

b. Choctaw Nation Criminal Investigator Dakota Grantham

Dakota Grantham, the law enforcement agent assigned to this case, has been a criminal investigator with the Choctaw Nation of Oklahoma since 2021, after a background in local law enforcement dating back to 2014. (TT 200). At the time he first met with Defendant about these allegations, Investigator Grantham knew the victim was an enrolled member of the Choctaw Nation. (TT 202). He also understood that persons holding "CDIB membership' were recognized by the federal

government and the tribe as a tribal citizen who holds an Indian status. (Id.).[2] He also understood a person can be both Hispanic and Native American. (TT 239).

Defendant was not under arrest when Investigator Grantham spoke to him. (TT 224). Investigator Grantham explained at trial he usually records all such interviews, but with the jurisdictional shakeup in Oklahoma after the *McGirt* decision, recording equipment for the 4-5 newly-added investigators was still "on order." (TT 255).

When Investigator Grantham made contact, he testified Defendant "just immediately started telling me everything." (TT 225). As soon as there was a pause in the conversation, Investigator Grantham administered the *Miranda* warning to Defendant, who signed a waiver form. (Id.). He asked Defendant, as he asks of each person he talks with in an investigation, about their race and tribal status. (TT 230 - 231). He did not specifically recall asking Defendant if he was a tribal member. (TT 231). When asked about his race, Investigator Grantham believes Defendant stated he was "White, maybe Hispanic". (Id.). After reviewing his report and refreshing his recollection, Grantham testified Defendant said he was "Latino, Hispanic." (TT 232).

---

[2] Erica Tomlinson, with the Choctaw Nation of Oklahoma's tribal membership department, explained to the jury the process and requirements for applying for membership with the Choctaw Nation and obtaining a CDIB card from the United States Bureau of Indian Affairs. (TT 259-261). They do not issue a non-membership letter, but can verify a person is not a member upon request. (TT 262).

On cross-examination, Investigator Grantham was asked if he called all the *McGirt* tribes in the area to see if Defendant was a member. (TT 239). Grantham explained it would be "nearly impossible" to contact each of the hundreds of tribes across the nation, so they typically call the "five majors" – "Choctaw Nation, Cherokee Nation, Chickasaw Nation, Seminole and Creek." (TT 239-240). Each tribe, he explained, has a computer database of CDIB members and can verify membership. (TT 230-231). While not "100 percent sure" he called all five in this case, he believed he did. (TT 240). He received no verification that Defendant was a member. (Id). Defendant never volunteered he was Indian or Native American. (TT 247).

c. Retired United States Deputy Marshal Chad Sensor

Now a Special Agent with the Office of Inspector General for the Social Security Administration, Chad Sensor was a Deputy United States Marshal in the Western District of Pennsylvania in 2023. (TT 254). As a member of the USMS Fugitive Task Force, he was responsible for following a lead from Oklahoma about a fugitive possibly working at a county fair. (TT 254-255). After locating the fugitive, Dennis Hebert, the arrest team picked up Defendant and transported him to Erie County prison where he was booked. (TT 257-258). Defendant did not volunteer himself as a Native American or as a member of a registered tribe. (TT258).

d. FBI Special Agent Paul Sharpe

Fourteen-year veteran FBI Special Agent Paul Sharpe works in the Durant, Oklahoma resident agency where he primarily investigates violent crimes in Indian Country. (TT 270). He testified that he contacted each of the five major tribes in the area to inquire if Defendant was a member. (TT 275). He had not received any information from any source indicating Defendant was Native American or Indian. (Id).

Special Agent Sharpe also consulted electronic databases for driver's licenses or identification cards issued to Defendant. He sponsored licenses from Alabama (*Gov. Exh. # 16*, Supp. ROA at 2) and Florida (*Gov. Exh. # 17*, Supp. ROA at 3). Both exhibits, typically based on information self-supplied by the applicant, listed Defendant's race as "W" for "White." (Id.; TT 271-273).

3. The Rule 29 Motion and the District Court's Ruling

At the conclusion of the government case-in-chief, the Court considered and overruled Defendant's motion for judgment of acquittal:

> MS. MAULDIN: I'll be brief. I would make a Rule 29 motion just to the sufficiency of the evidence, specifically the element of proving that Mr. Hebert is not a member of a recognized tribe. There has been some testimony, I understand, that they made an effort, but there still is some doubt as to that. And the rest of the issues, I believe, are based on credibility, so ...
>
> THE COURT: Okay. Thank you. When the Court considers a motion for judgment of acquittal, it is, of course, obliged to evaluate and determine the evidence in the light most favorable to the

> government. In doing so in this case, the Court finds that a reasonable jury could find each and every element of the charged crime beyond a reasonable doubt; therefore, the motion will be overruled. With regard to the Indian/non-Indian status, I think the government has put on sufficient evidence to get by a Rule 29 motion. It's a tough element, as you all know. I think it is. So we'll move on from there.

(TT 357). A renewed Rule 29 motion was again denied just before closing arguments. (TT 366).

4. Closing Arguments Relevant to Defendant's Non-Indian Status

During its first closing argument, the government addressed the basis for federal jurisdiction by asking, "why are we in federal court?" (TT 368). The prosecutor reviewed the evidence establishing Indian Country and the proof of the victim's Indian status by reminding the jury of the victim's enrollment with the Choctaw Nation. (TT 368-369). The prosecutor then turned to the status of Defendant. The following is the entirety of the prosecutor's argument regarding Defendant's Non-Indian status:

> And we're also here because the defendant is not an Indian. Now, specific to the defendant not being an Indian, now, as jurors, and as people who watch TV, you know that usually jurors have to decide what someone is or what someone -- what someone did. An example of that is you have to decide whether K.D. is under 12. You just have to decide if that's true about him.
>
> You usually don't have to come into court and decide what somebody is not, and it's a little bit different trying to prove that someone is not something. But here's the evidence that you heard that this defendant is not an Indian.
>
> You heard from Kara Byers, the defendant's former stepdaughter, that he identified as part Mexican, were the words that he used, and through her relationship with him, he never identified

himself as an Indian. And you can take into account his relationship with her, the fact that of all people, he chose to call her to ask for a place to stay. This is a person he has a relationship with, and she says that he has never told anyone, as far as she knows, that he's an Indian.

When Dakota Grantham testified, he said that the defendant identified himself to Investigator Grantham as Latino. He did not identify himself as Indian. And what's also significant about Investigator Grantham is that Dakota Grantham is a tribal police investigator. If there were ever an opportunity for the defendant to tell someone that he is an Indian, he would have told that to a tribal police investigator of all people.

Chad Sensor was a former deputy U.S. Marshal at the time the defendant was arrested in Western Pennsylvania, and when he arrested Dennis Hebert on the warrant for this case, there was no indication from the defendant that he was an Indian.

And, finally, FBI Agent Paul Sparke, he testified, and you saw Exhibit 16, which is the driver's license or ID records from Alabama, and that shows -- I think it's clear enough on the screen -- that the race identified by the defendant is White. There's no indication that he's Indian.

Same thing with Government's Exhibit 17, which is his Florida records. Same story, he identifies himself as White.

And also, Special Agent Sparke testified that he made contact with the five major tribes in Eastern Oklahoma, and he testified that he had no information that the defendant is an Indian.

(TT 396-370).

Defendant's status as an Indian or non-Indian was ignored during the defense closing and was not mentioned in government's rebuttal closing. (TT 380-389). The jury returned its guilty verdict after deliberating for just over an hour. (Vol. I, *Minutes of Proceedings – Jury Trial – May 17, 2023*, ROA at 145).

5. The Presentence Investigation Report and Sentencing Hearing

Prior to sentencing, the Probation Office prepared a revised Pre-Sentence Report ("PSR"). (Vol. II, *Revised Presentence Investigation Report*, Sealed ROA at 25-45). The PSR calculated Defendant's total offense level as a level 43. (Vol. II, *Revised Presentence Investigation Report* ¶ 32, Sealed ROA at 32). With a Category I criminal history, the PSR calculated an advisory guideline range of imprisonment of life. (Vol. II, *Revised Presentence Investigation Report* ¶ 63, Sealed ROA at 39).[3]

On March 28, 2024, the district court conducted the sentencing hearing. (Vol. I, *Minutes of Proceedings - Sentencing Hearing*, ROA at 203). The district court heard argument from the parties and victim regarding the ultimate sentence to be imposed and afforded Defendant an opportunity to allocute. (ST 3-16). The district court ultimately imposed a 360-month sentence, followed by a lifetime term of supervised release. (ST 17; Vol. I, *Judgment and Commitment*, ROA at 205-207).

This appeal followed.

SUMMARY OF THE ARGUMENT

The evidence at trial was more than sufficient to convict Defendant as a non-Indian who committed Aggravated Sexual Abuse against an Indian under the age of twelve in Indian Country. At trial, he only contested the proof of Defendant's lack

[3] The revised PSR also included the factual finding "Dennis Hebert is non-Indian" which was not objected to below. (Vol. II, *Revised Presentence Investigation Report* ¶ 10, Sealed ROA at 28).

of tribal membership. On appeal, he centers his challenge on the blood requirement of *Prentiss III* and alleges the government is imposing a race-based analysis. His new arguments should be examined for plain error only and he wholly fails to show error, prejudice or an adverse impact on judicial proceedings.

He next argues the plain language used in the district court's elements instruction did not provide sufficient detail for the jury to determine non-Indian status. This argument is also only subject to plain error review as no objection was lodged below. Even if erroneous, Defendant fails to meet the third and fourth prong to warrant reversal.

Finally, Defendant has failed to meet his burden to establish any infringement on his right to remain silent. Defendant has not demonstrated the two questions by the government violated his Fifth Amendment rights. The third question objected to was asked by defense counsel during cross-examination and cannot, therefore, constitute plainly erroneous government conduct. The prosecutors brief mention of these exchanges during closing argument was not improper and did not impact Defendant's substantial rights by affecting the jury's verdict. Given the totality of the evidence, it cannot be said that there is a reasonable probability the jury would have acquitted Defendant but for this testimony and argument and thus Defendant has failed to demonstrate plain error.

ARGUMENT AND AUTHORITIES

I. THERE WAS SUFFICIENT EVIDENCE OF DEFENDANT'S NON-INDIAN STATUS TO CONVICT HIM OF AGGRAVATED SEXUAL ABUSE IN INDIAN COUNTRY

A. Standard of Review

Generally, this Court reviews *de novo* the denial of a motion for a judgment of acquittal. *United States v. Hamilton*, 587 F.3d 1199, 1205 (10th Cir. 2009). In doing so, this Court views "the evidence in the light most favorable to the [g]overnment" and assesses whether "any rational trier of fact could have found the defendant guilty . . . beyond a reasonable doubt." *United States v. Delgado-Uribe*, 363 F.3d 1077, 1081 (10th Cir. 2001) (citing *United States v. Vallo*, 238 F.3d 1242, 1246-47 (10th Cir. 2001)). This Court will "consider all of the evidence, direct and circumstantial, along with reasonable inferences, but we do not weigh the evidence or consider the relative credibility of witnesses." *United States v. Griffith*, 928 F.3d 855, 868-69 (10th Cir. 2019) (citing *United States v. Pickel*, 863 F.3d 1240, 1251 (10th Cir. 2017)). When conducting this "highly deferential" review, this Court will reverse "only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 869. This Court must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." *Grubbs v. Hannigan*, 982 F.2d 1483, 1487 (10th Cir. 1993).

When a appellant, however, raises a new argument which was not advanced

below, such arguments are forfeited. *United States v. Garcia*, 936 F.3d 1128, 1131 (10th Cir. 2019) (citing *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011)). "On appeal, we can only consider forfeited arguments under the plain error standard of review." *Id*. In sufficiency of the evidence claims, this Court may decline to enforce such a forfeiture in limited circumstances. See *United States v. Lowe*, 117 F.4 1253, 1267-69 (10th Cir., 2024). As this Court explained in Lowe:

> In *United States v. Hernandez-Rodriguez*, we concluded that when the district court "sua sponte raises and explicitly resolves an issue of law on the merits," the appellant "may challenge that ruling on appeal on the ground addressed by the district court even if he failed to raise the issue in district court." *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003). *See also Garcia*, 936 F.3d at 1132 ("[I]f the district court was 'adequately alerted to the issue,' and perhaps even responded to the issue, then we are able to review on appeal."). In such a scenario, we review not for 'plain error' but rather the "same standard of appellate review that would be applicable if the appellant had properly raised the issue." *Hernandez-Rodriguez*, 352 F.3d at 1328.

(*Id*. at 1268).

Here, plain error review applies because Defendant relies on a ground not advanced or considered below. Relying heavily on *United States v. Antelope*, 430 U.S. 641 (1977), Defendant argues "the Government's evidence revolved around Mr. Hebert's purported racial identity, which is not an element of Indian or non-Indian status." (Def. Brf. at 8). The parties did not brief this theory below and the district court did not consider or rule on the matter. By addressing only the tribal membership prong in his Rule 29 motions at trial, Defendant is limited to plain error

review of his new challenge, assuming such arguments are not waived by failing to argue plain error in his opening brief. See *United States v. Roach*, 896 F.3d 1185, 1192 (10th Cir. 2018).

Under plain error, the defendant bears the burden to show that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [her/his] substantial rights" in that it "affected the outcome of the [trial]; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quotations and citations omitted).

For an error to be "plain," it must be "contrary to well-settled law." *United States v. Hill*, 749 F.3d 1250, 1258 (10th Cir. 2014) (internal quotation omitted). An error is "contrary to well-settled law" if it is contrary to rulings by the Supreme Court, this Court, or, in certain circumstances, "the weight of authority from other circuits." *Id.* An error affects substantial rights if the defendant demonstrates that, but for the error, the result of the proceeding would have been different. *Id.* at 1263. If the first three prongs of the plain error test are met, this Court may exercise its discretion "to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Hill,* 749 F.3d at 1266 (internal quotation omitted).

B. Discussion

The trial evidence established Defendant committed Aggravated Sexual Abuse when he raped and molested K.D. At trial, the district court instructed the jury that to find the defendant guilty, the government must prove each of the following elements beyond a reasonable doubt:

> First: between on or about July 20, 2021 and on or about July 21, 2021, the defendant knowingly engaged or attempted to engage in a sexual act with K.D.;
>
> Second: at the time the sexual act occurred, K.D. was younger than 12 years old;
>
> Third: K.D. is an Indian;
>
> Fourth: the defendant is a non- Indian; and
>
> Fifth: the sexual act took place within the Eastern District of Oklahoma in Indian Country, which is within the territorial jurisdiction of the United States.

(Vol. I, *Jury Instructions*, ROA at 170-171).

On appeal, Defendant argues there was insufficient evidence to establish he is a non-Indian. (Def. Brf. at 14-31). A brief review of the legal standards involved in this Circuit for proving a defendant's non-Indian status is instructive.

1. The two-part test of *Prentiss III*

"The term 'Indian' is 'not defined in [18 U.S.C. § 1152] or in related statutes addressing criminal jurisdiction in Indian country,' so we have adopted a two-part evidentiary test to determine whether a person is an Indian for the purposes of federal

law." *United State v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012), quoting *United States v. Prentiss,* 273 F.3d 1277, 1279 (10th Cir.2001)(*Prentiss* III). The finder of fact must determine whether the person "(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *Prentiss* III, 273 F.3d at 1280, 1282. A person satisfies the definition of "Indian" only if both factors are met. *Diaz*, 679 F. 3d at 1187. The government succeeds in proving a defendant is a non-Indian by showing that either prong is not met. *Id*.

Courts looks to the totality of the circumstances in evaluating the *Prentiss III* factors. "For example, a jury may not determine the lack of Indian heritage solely "on the basis of their names, appearance, speech, and testimony that they did not grow up on the [particular] Pueblo. . . [a]nd a jury may not find Indian heritage even if a person is a member of a particular tribe or pueblo; a showing of some "Indian blood" must also be shown." *Diaz*, 679 F. 3d at 1187. (citations omitted).

First, there was sufficient evidence Defendant was a non-Indian. Viewing the evidence on the issue in the light most favorable to the government, testimonial and documentary evidence proved Defendant fails to meet both of the *Prentiss III* requirements to qualify as an Indian.

a. Indian blood

The evidence was sufficient to prove Defendant had no Indian blood. Defendant did not argue otherwise below. (TT 357). His step-daughter, who had

known Defendant for a "very long time" and spoke to him regularly, had never heard Defendant had any Indian blood. (TT 104). She had once heard him self-identify as "part Mexican." (Id). He did not volunteer or claim he had Indian blood when speaking with law enforcement agents. (TT 231, 237; 258).[4] Rather, Defendant claimed to others he was "White," "Latino," "Hispanic," or "Mexican." (TT 104, 232, 272-273; *Gov. Exh. 16-17*, Supp. ROA at 2-3).

Defendant's attempt on appeal to invoke *United State v. Antelope*, 430 U.S. 641 (1977) as a bar to the consideration of "race or racial identity" in evaluating the proof presented at trial was rejected outright in *Prentiss III* when proposed by the government as a reason to reject the "Indian blood" portion of Indian status the test adopted by this Court. Prentiss III, 273 F.3d at 1282)(" We acknowledge that the issue of how one ought to determine Indian status under the federal statutes governing crimes in Indian country is extraordinarily complex and involves a number of competing policy considerations. Thus, the government's argument that one should follow the Supreme Court's statement in *Antelope* and dispense with the

[4] Defendant argues that allowing proof of a defendant's responses to "routine booking questions" implicates *Miranda* when the government uses such responses to prove non-Indian status. (Def. Brf. at 17-18). Criminal Investigator Dakota Grantham obtained a *Miranda* waiver before any questioning of Defendant. (TT 225). USMS Deputy Chad Sensor testified Defendant was booked, but he did not testify about personally asking the booking questions or any responses Defendant might have made. (TT 258). He only said Defendant did not at any point that day "identify himself as a Native American." (Id). Even if Defendant were accurate in flagging potential conflicts in future cases, the issue is not presented here.

"some Indian blood" component is appealing in some respects and troubling in others."). This Court agreed with "the view of scholars that some demonstrable biological identification as an Indian" is an important component of determining Indian status in this context.

Viewing the evidence here in the light most favorable to the government and in recognition that non-lawyers and non-social scientists could easily interchange terms such as "Indian blood" and "race", the government demonstrated that no evidence existed of Defendant having Indian ancestry or self-identifying as possessing Indian blood.

b. Tribal membership

The only preserved error from Defendant's Rule 29 motion references tribal membership is "specifically the element of proving that Mr. Hebert is not a member of a recognized tribe." (TT 357). On appeal, Defendant argues "even if the jury even the jury believed [FBI] SA Sparke's testimony, [that he contacted the five major tribes in the area to determine if Defendant was a "CDIB member" (TT 230-231; 239-240)], it does not proved Mr. Hebert .. had not been recognized by .. one of the other 569 federally-recognized tribes in the United States." (Def. Brf. at 27).

This Court has rejected the notion that the government must call representatives from all tribes to prove a defendant is not a registered member. *Diaz*, 679 F. 3d at 1187. ("Nor does the government have a duty—as Diaz contends—to

bring forth tribal officials to *disprove* the victim was a member of their tribes. This is hardly realistic given the many tribes in New Mexico.). The government here proved law enforcement contacted the five main tribes - Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations. The government had no duty to prove the negative by evidencing proof of contact with all the other tribes in the Eastern District of Oklahoma, the other 34 tribes in the state, or the other 569 tribes nationally.

For the first time on appeal, Defendant also appears to argue the government failed to prove Defendant had not been informally recognized as an Indian, enjoyed the benefits of tribal affiliation or been socially recognized as an Indian, as discussed in *United States v. Nowlin*, 555 Fed. Appx. 820, 823 (10th Cir. 2014)(unpublished). (Def. Brf. at 14-15, 20). In *Nowlin*, this Court affirmed the defendant's status as an Indian, despite not being a formal tribal member, in part due to evidence in the record that Mr. Nowlin had access to free healthcare, free fishing licenses and participated in pow-wows. Id. at 823-824. The government respectfully rejects any suggestion that, in order to prove the negative, the government bears the burden to contact all IHS facilities, subpoena all tribal services departments, or investigate whether a defendant has ever attended a pow-wow or other Indian social gathering.[5]

[5] The government continues to urge this Court to re-consider whether the *Prentis III* test should be, at least in part, an affirmative defense as in all other circuits considering the issue have ruled. See *United States v. Hester*, 719 F.2d 1041, 1043

This is not a case where the government failed to allege or offer any proof of Defendant's Indian status. See, *United States v. Langford*, 641 F.3d 1195 (10th Cir. 2011); *United States v. Simpkins*, 90 F.4th 1312 (10th Cir. 2023). The government presented one family member and three law enforcement officials to prove Defendant's non-Indian status. Defendant, as was his right, presented no proof on the issue. The uncontroverted evidence was sufficient to support the jury's verdict that Defendant was a non-Indian who committed Aggravated Sexual Abuse in Indian Country.

In short, there was no error, much less plain error, in overruling Defendant's motion for acquittal. The evidence presented met this Circuit's requirements under Prentiss III to disprove Defendant met either of the two factors. The testimony of Kara Byers alone would satisfy the test based on her personal knowledge as a family member. See *United States v. Walker*, 85 F.4th 973, 983 (10th Cir. 2023)(no error in admitting evidence where "close relationship sufficient for [his niece] to testify

---

(9th Cir. 1983); *Haggerty*, 997 F.3d 292, 298-302 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 759 (2022); and *United States v. Webster,* 797 F.3d 531, 536 (8th Cir. 2015). "There are cases where proving a negative is problematic or impossible, such as trying to prove that a litigant does not possess Indian blood where a defendant is adopted and has no knowledge of her birth parents' identities. Without any input from a defendant, forcing the government to investigate whether a defendant is a member of any one of the 574 federally recognized tribes or to call membership officials from all of Oklahoma's 39 such tribes to the stand imposes an unjust, unreasonable, and unnecessary burden on an already-overburdened federal court system in Oklahoma." (*United States v. Simpkins*, Case No. 22-7048, *Petition for Rehearing En Banc*, Mar. 20. 2023, at 8).

she was not aware of [Defendant's] membership in a tribe."). The district court did not plainly err and neither Defendant's substantive rights nor the interest of justice were infringed by sending the case to the jury.

II. THE DISTRICT COURT DID NOT PLAINLY ERR IN INSTRUCTING THE JURY ON THE ELEMENTS OF THE CRIME – INCLUDING THE NON-INDIAN STATUS OF DEFENDANT

A. Standard of Review

When a party fails to object to a jury instruction at trial, this Court reviews for plain error. *United States v. Bedford*, 536 F.3d 1148, 1153 (10th Cir. 2008). Under plain error, the defendant bears the burden to show that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [her/his] substantial rights" in that it "affected the outcome of the [trial]; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quotations and citations omitted).

For an error to be "plain," it must be "contrary to well-settled law." *United States v. Hill*, 749 F.3d 1250, 1258 (10th Cir. 2014) (internal quotation omitted). An error is "contrary to well-settled law" if it is contrary to rulings by the Supreme Court, this Court, or, in certain circumstances, "the weight of authority from other circuits." *Id.* An error affects substantial rights if the defendant demonstrates that, but for the error, the result of the proceeding would have been different. *Id.* at 1263.

A defendant must demonstrate a reasonable probability that a properly instructed jury would have found otherwise or the defendant has not met his burden to show plain error. *United States v. Flechs*, 98 F.4th 1235, 1255 (10th Cir. 2024), citing *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1138 (10th Cir. 2017) (en banc). If the first three prongs of the plain error test are met, this Court may exercise its discretion "to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Hill,* 749 F.3d at 1266 (internal quotation omitted).

B. Discussion

Defendant alleges plain error arising from the district court's failure to include an instruction further defining the element addressing Defendant's non-Indian status by addressing the requirements of Prentiss III. (Def. Brf. 34). Absent from Defendant's brief is any citation to a case requiring his suggested "elements within elements" instruction in an Indian Country case. He instead relies on *United States v. Kalu*, 791 F.3d 1194, 1208-10 (10th Cir. 2015), dealing with the means rea requirement in harboring alien cases. (Def. Brf. at 35). In *Kalu*, the district court instructed on a negligence standard, rather than the applicable knowledge or reckless disregard mens rea. *Kalu*, 791 F.3d at 1208. By not defining the term "should have known" the court committed obvious error. *Id*. at 1210. Even in *Kalu*, however, this Court did not find the error warranted reversal. Id. at 1210-1211 ("Mr. Kalu has

not demonstrated a reasonable probability that the plain error in Instruction 23 affected the outcome of his trial. We therefore conclude Mr. Kalu has not satisfied the third step of plain error review and affirm the district court.").

At trial, the district court instructed the jury that to find the defendant guilty, the government must prove each of the following elements beyond a reasonable doubt:

> First: between on or about July 20, 2021 and on or about July 21, 2021, the defendant knowingly engaged or attempted to engage in a sexual act with K.D.;
>
> Second: at the time the sexual act occurred, K.D. was younger than 12 years old;
>
> Third: K.D. is an Indian;
>
> Fourth: the defendant is a non- Indian; and
>
> Fifth: the sexual act took place within the Eastern District of Oklahoma in Indian Country, which is within the territorial jurisdiction of the United States.

(Vol. I, *Jury Instructions*, ROA at 170-171).

When reviewing jury instructions, "'the instructions must be read and evaluated in their entirety.'" *United States v. Heckard*, 238 F.3d 1222, 1231 (10th Cir. 2001) (quoting *United States v. Denny*, 939 F.2d 1449, 1454 (10th Cir. 1991)). Judges have "substantial discretion in formulating the instructions, so long as they are correct statements of the law and adequately cover the issues presented." *United States v. Vasquez*, 985 F.2d 491, 496 (10th Cir. 1993). Error occurs only when the

failure to give a requested instruction "serves to prevent the jury from considering the defendant's defense." *United States v. Dennison*, 937 F.2d 559, 562-63 (10th Cir. 1991), (quoting *United States v. Hunt*, 794 F.2d 1095, 1097 (5th Cir. 1986)).

Given the simple, but compelling, evidence presented by the government at trial and the lack of any competing evidence suggesting a more complicated fact-pattern or defense analysis warranting additional guidance, the instruction given was a correct statement of the law and covered the issues presented. There was no error, much less error that was obvious.

Even if it might have been preferable for the district court to additionally instruct the jury on the *Prentiss III* factors, there is no reasonable argument that the jury would have reached a difference result on the evidence presented. See *Kalu*, 791 F.3d at 1211. Nor is there any reasonable threat of a damage to the reputation, fairness or integrity of judicial proceedings. Given the seriousness of the offense and the lack of any impact on the verdict, not affirming would damage the public reputation of judicial proceedings.

III. THE DISTRICT COURT DID NOT PLAINLY ERR IN ALLOWING TESTIMONY AND CLOSING ARGUMENT REGARDING LACK OF ANY CLAIM BY DEFENDANT THAT HE WAS AN INDIAN

A. Standard of Review

Defendant failed to object to the challenged testimony or the government's opening statement or closing arguments. (Def. Brf. 43). Ordinarily, this Court

reviews "whether there has been an impermissible comment on a defendant's right to remain silent at the time of his arrest by determining 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent.'" *United States v. Toro-Pelaez,* 107 F.3d 819, 826-27 (10th Cir.1997) (citations omitted). "The contested use of the statement must be considered in the context in which the use was made. *Id.* at 827, citing *United States v. May,* 52 F.3d 885, 890 (10th Cir.1995). In the absence of a contemporaneous objection, as here, this Court is limited to plain error review. *Id*.

> "[T]he plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting *United States v. Frady,* 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982)); *United States v. Denogean,* 79 F.3d 1010, 1012 (10th Cir.), *cert. denied,* 519 U.S. 856, 117 S.Ct. 154, 136 L.Ed.2d 99 (1996). Only a "particularly egregious" and "obvious and substantial" error, *Gacnik,* 50 F.3d at 852 (quotations omitted), which seriously affects the integrity of the judicial proceedings, *United States v. Jones,* 80 F.3d 436, 438 (10th Cir.), *cert. denied,* 519 U.S. 849, 117 S.Ct. 139, 136 L.Ed.2d 87 (1996), justifies invocation of the exception. Although the rigidity of the plain-error rule is relaxed somewhat when a potential constitutional error is involved, *United States v. Saucedo,* 950 F.2d 1508, 1511 (10th Cir.1991) (quotation omitted), *cert denied,* 507 U.S. 942, 113 S.Ct. 1343, 122 L.Ed.2d 725 (1993), the defendant bears the burden of demonstrating that he was prejudiced by the error before this court can grant him relief. *United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 1777–78, 123 L.Ed.2d 508 (1993).

Id.

B. Discussion

Defendant has not demonstrated the existence of a plain error and reversal is not warranted. The challenged testimony on appeal constituted only two brief exchanges at trial. (Def. Brf. at 43). Moreover, at least one of the three challenged exchanges occurred during cross-examination, not in response to questioning by the government. (Id). The only mention at closing was during the beginning of the government's first closing argument:

> When Dakota Grantham testified, he said that the defendant identified himself to Investigator Grantham as Latino. He did not identify himself as Indian. And what's also significant about Investigator Grantham is that Dakota Grantham is a tribal police investigator. If there were ever an opportunity for the defendant to tell someone that he is an Indian, he would have told that to a tribal police investigator of all people.
>
> Chad Sensor was a former deputy U.S. Marshal at the time the defendant was arrested in Western Pennsylvania, and when he arrested Dennis Hebert on the warrant for this case, there was no indication from the defendant that he was an Indian.

(TT 370). As discussed in footnote four herein, Criminal Investigator Dakota Grantham obtained a *Miranda* waiver before he engaged in any questioning of Defendant. (TT 225).

Even if such limited comments were error, it was not obvious. Nor did such limited testimony and argument constitute plain error because Defendant can show no prejudice. *United States v. Toro-Pelaez*, 107 F.3d at 827. Even if the testimony

of the two law enforcement agents had been excluded, the testimony of Defendant's step-daughter and Government's Exhibits 16 and 17 provided sufficient evidence to support the verdict.

CONCLUSION

Based upon the foregoing arguments and authorities, the United States urges this Court to affirm Defendant's conviction.

STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully asserts that argument would not be helpful in this matter where the law and issues are clear and oral argument is therefore not requested.

Respectfully submitted,

CHRISTOPHER J. WILSON
United States Attorney

/s Linda A. Epperley
Linda A. Epperley, Oklahoma Bar No. 12057
Assistant United States Attorney
520 Denison Avenue
Muskogee, Oklahoma 74401
Telephone: (918) 684-5100
Facsimile: (918) 684-5150
linda.epperley @usdoj.gov

CERTIFICATE OF WORD COUNT COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to MS Word 2016, this brief contains 7,146 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s Linda A. Epperley

CERTIFICATE OF DIGITAL SUBMISSION

I certify that:

- all required privacy redactions have been made;

- that with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk;

-that the ECF submission was scanned for viruses using McAfee Endpoint Security 10.5.3.3178, updated continuously, and according to the program is free of viruses.

/s Linda A. Epperley

CERTIFICATE OF ECF FILING & DELIVERY

I hereby certify that on February 24, 2024 I electronically transmitted the attached documents to the Clerk of Court using the CM/ECF System for filing. A Notice of Electronic Filing will be sent via the Court's CM/ECF filing system to counsel for Defendant/Appellant:

Whitney R. Mauldin	Whitney_Mauldin@fd.org
Jared T. Guemmer	Jared_Guemmer@fd.org

/s Linda A. Epperley