CASE NO. 25-5014

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

ADAM JOSEPH KING,
Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of Oklahoma

The Honorable John D. Russell
United States District Judge
Case No. 24-CR-081-JDR

RESPONSE BRIEF OF THE UNITED STATES

Oral argument is not requested

There are no attachments to this brief

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Federal Cases

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Statement of Prior or Related Appeals

There are no prior or related appeals.

Statement of Jurisdiction

In March 2024, a federal grand jury indicted Adam Joseph King with Aggravated Sexual Assault and Abusive Sexual Contact in violation of 18 U.S.C. §§ 2241(c) and 2244(a)(5). (R. Vol. I at 16–19). The district court had jurisdiction under 18 U.S.C. § 3231. King was convicted at trial and now appeals (R. Vol. I at 1125–33). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Issues Presented for Appeal

1. Considering all the evidence and the reasonable inferences therefrom in the light most favorable to the government, could a rational jury have found that, at the time of his offense, King was a non-Indian and his victim was an Indian?
2. Did the district court act within its discretion when it allowed the jury to consider whether King might be guilty of the charged offenses, either as a non-Indian or as an Indian?

Introduction

The government prosecuted Adam King in this case on two sets of alternative charges. Counts One and Two charged King with committing sexual assault and sexual abuse as a non-Indian against an Indian victim. Counts Three and Four charged King with the same substantive crimes but alleged that he committed them as an Indian. The government brought these charges in the alternative because King had recently asserted in other courts that he was both an Indian and a non-Indian.

At trial, the district court instructed the jury that it could convict King (a) as a non-Indian or (b) as an Indian, but not as both. Ultimately, the jury convicted King as a non-Indian.

Statement of the Case

Adam King sexually abused and assaulted his girlfriend's minor daughter for almost four years.

Between November 2017 and August 2021, Adam Joseph King repeatedly sexually abused and assaulted M.V.,[1] his girlfriend's minor daughter. (R. Vol. II at 445–46). The abuse stopped in August 2021, when M.V. reported it to a

[1] To protect the minor victim's identity, she is referred to here, and in the district court filings, as "M.V."

school counselor, who alerted the authorities. (R. Vol. III at 101–08). In 2023, the state of Oklahoma charged King as a non-Indian for his abuse of M.V. (R. Vol. I at 824–25). Less than a month later, the Cherokee Nation charged King as an Indian for the same crimes. (Supp. R. Vol. I at 47). King moved to dismiss the state court prosecution, arguing that the court did not have jurisdiction because he was an Indian. (*Id.* at 41–46). King also moved to dismiss the Cherokee Nation case for lack of jurisdiction, asserting he was not an Indian at the time of the charged abuse. (*Id.* at 47–51). A federal grand jury indicted him in this case in March 2024. (R. Vol. I at 16–19).

Because King had alleged he was an Indian in state court and a non-Indian in tribal court, and because his dueling representations provided probable cause for either classification, the federal government brought two parallel sets of charges against him: Counts One and Two alleged King to be a non-Indian, and Counts Three and Four alleged him to be an Indian. (R. Vol. I at 16–19). King moved to dismiss the indictment for multiplicity, arguing that the government had to elect before trial whether to prosecute him as an Indian or a non-Indian. (*Id.* at 147–55). The district court denied that motion, ruling that the multiplicitous charges were permissible provided they did not result in

multiplicitous convictions, which could be avoided with appropriate jury instructions. (R. Vol. III at 8–9).

Ample evidence at trial—including King's own admissions in other cases—showed that he was not an Indian when he abused M.V.

At trial, multiple witnesses testified that King does not have a quantum of Indian blood, and that he was not recognized as an Indian person—by a tribe, by the federal government, or even by himself—at the time of the abuse. One of those witnesses was Kellie Guess, King's full biological sister. (R. Vol. III at 576–77). She testified that there was only one person of Indian descent in their family: their adopted father, Clarence King. (*Id.* at 578–79). Guess confirmed that she and Adam King have no blood relationship to Clarence. (*Id.* at 576–79). Clarence is, however, listed erroneously as their father on their birth certificates.[2] Based on that erroneous document, and despite having no proof of actual Indian heritage, Guess had attempted unsuccessfully to enroll as a member of the Delaware Tribe of Indians. (*Id.* 577–79). She testified that she has no documentation to suggest that any other blood relative—including their

[2] The record contains no explanation for why Clarence King—as the adopted father—is listed as the birth father on the birth certificates of Adam King and his sisters. (*e.g.*, R. Vol. III at 567).

mother—has a tribal membership or Indian heritage, or any information or proof that she herself has any quantum of Indian blood. (*Id.* at 579–80).

King's other full biological sister, Krystal Dunckel, offered similar testimony. (*Id.* at 565). Even though she and her siblings have no blood relationship with their adopted father Clarence, Dunckel had also sought to enroll as a member of the Delaware Tribe of Indians based on Clarence's tribal affiliation. (*Id.* at 566–67). Like her sister, Dunckel testified that she has no actual proof that she has an Indian blood quantum. (*Id.*). Dunckel stated that neither of her biological parents are members of a tribe, though she had been told that her mother's aunt and uncle are registered Indians. (*Id.* at 567–70). However, Dunckel could not identify which tribe they are affiliated with or what degree of Indian blood they have, and she admitted she had no documentation or other proof of their status. (*Id.* at 568–70). She further admitted that she does not even know her great-aunt's last name, and she had not spoken to either her great-aunt or her great-uncle about their heritage or tribal status. (*Id.*). Finally, she testified that she and her siblings were not "raised as in the belief" of any Indian heritage, and "never did anything in the [nature] of powwows or anything like that." (*Id.* at 573–74).

The jury also heard from Emily Haney, the enrollment director for the Delaware Tribe of Indians. (*Id.* at 581). Haney testified that King applied for membership with the Tribe in March 2023 and was enrolled in April 2023 (approximately 20 months after his abuse of M.V. came to light), based on his birth certificate that identified Clarence as his birth father. (*Id.* at 584–88). Although Haney originally approved Adam's application, she later learned Clarence was not Adam's biological father. (*Id.* at 587–90). Haney explained for the jury that adoptive relationships do not confer a blood quantum or eligibility for enrollment on a child. (*Id.* at 589–90). Accordingly, Haney testified, Adam King had not shown a degree of Indian blood and should not have been admitted to the tribal rolls. (*Id.*)

M.V.'s mother and King's girlfriend, Emily Anazagasty, testified that she was aware of King's enrollment with the Delaware Tribe and knew about his efforts to use the timing of his enrollment as a jurisdictional defense against prosecution. (*Id.* at 528–40). The jury saw text messages from King to her in 2024 saying that while he "wasn't tribal" at the time of the alleged crimes, M.V. would be considered tribal as an unenrolled but "eligible member." (Supp. R. Vol. I at 64). In those communications, King acknowledged that M.V.'s eligibility was the reason "she can use tribal medicine and how the tribe

took her." (*Id.*). King assured Anazagasty that the tribal prosecutors "know they don't have jurisdiction." (Supp. R. Vol. I at 65–68, 68).

Finally, the jury heard from FBI Special Agent Tiffany Harrison, who testified that the FBI reached out to various tribal entities and confirmed that no other members of King's mother's lineage were registered with any of those tribes. (R. Vol. III at 601). During Harrison's testimony, the government admitted a copy of King's 2023 motion to dismiss the prosecution against him in the Cherokee Nation court. (*Id.* at 605–606). In that motion, King had represented to the tribal court that he was not a member of any federally recognized tribe "until April 2023" and that he "was not an enrolled member of any tribe during the time these crimes were alleged." (Supp R. Vol. I at 47–51). The government also introduced King's 2023 motion to dismiss the state prosecution against him, where he asserted that he was "a member of the Tribe of Delaware Indians." (R. Vol. III at 603–04; Supp. R. Vol. I at 41–46).

The government presented evidence that M.V. had a quantum of Indian blood and was recognized as Indian by the Cherokee Nation at the time of the abuse.

Multiple witnesses testified that M.V. has a quantum of Indian blood and that she received recognition and benefits from the Cherokee Nation starting in her infancy. M.V. testified that she is an Indian person, that her mother is an

enrolled member of the Cherokee Nation, and that her father is an enrolled member of the Seminole Nation. (R. Vol. III at 312–13). Derrick Vann, the registrar for the Cherokee Nation, testified and confirmed that M.V.'s Cherokee blood quantum is 1/1024 and that she was enrolled as a member of the tribe in December 2022. (*Id.* at 389–90; Supp. R. Vol. I at 37–38).

Kim Trammell, M.V.'s maternal grandmother, confirmed her own blood quantum of 1/256, her daughter's blood quantum of 1/512, and M.V.'s blood quantum of 1/1024. (R. Vol. III at 407–08, 411–12). She testified that she was present when M.V. was born at an Indian hospital and that M.V. received healthcare at tribal facilities for the first 18 months of her life, and again later in her childhood. (*Id.* at 409–11). Trammell testified that they were able to get these services for M.V. because her birth certificate reflected that she was the natural child of Anazagasty, an enrolled Cherokee member. (*Id.* at 411). After King's abuse came to light in 2021, Kim Trammell and her husband Bill Trammell obtained a guardianship over M.V. in a Cherokee Nation court, due to M.V.'s Indian status. (*Id.* at 418–20). Bill Trammell likewise testified that he had been married to Kim for over fourteen years, that M.V. was born in an Indian hospital, that she received healthcare from her infancy at tribal

facilities, and that he and Kim obtained their guardianship over M.V. in tribal court. (*Id.* at 426–430).

Anazagasty likewise testified that she gave birth to M.V. at an Indian hospital and that she took M.V. to the Indian hospital for health care for the first eighteen months of her life. (R. Vol. III at 491, 521–23). For the next several years, she and M.V. lived in New York and had no access to tribal health care. (*Id.*). By early 2019 they had returned to Oklahoma, and Anazagasty enrolled M.V. and her younger brother with Cherokee Nation Health Services. (*Id.* at 522–23). To enroll them, Anazagasty provided their birth certificates to prove that she was the natural mother of M.V. and her brother. (*Id.* at 522–23, 553).[3]

Tammy Lee, a former Child Protective Services investigator for the Oklahoma Department of Human Services, testified that she investigated the abuse allegations against King in August 2021. (*Id.* at 124–26, 131–33). At the outset of her investigation, she determined that M.V. and her younger brother were of Cherokee descent through their mother and accordingly were entitled to heightened protections under the Indian Child Welfare Act. (*Id.* at 130–31,

[3] In 2017, Anazagasty had attempted to enroll M.V. in the Cherokee Nation, but the application was rejected because Anazagasty had not provided M.V.'s original birth certificate. (R. Vol. III at 522–23)

144–45, 162–64). Lee testified that she followed those heightened standards as required by federal law. (*Id.* at 145). Lee also testified that the Cherokee Nation arranged for a guardianship over M.V. and her brother during her investigation, and that in her experience it was unusual for a guardianship to occur that early in the process. (*Id.* at 147).

The trial court instructed the jury on the alternative sets of charges, and the jury convicted King on Counts One and Two.

King moved for a judgment of acquittal at the close of the government's case, then renewed his motion after the defense rested, and again after the government's rebuttal. (*Id.* at 801, 856–57, 872–73). The court overruled King's motion. (*Id.*) The court instructed the jury that they could not convict King on all four counts in the indictment. (R. Vol. III at 928; R. Vol. I at 1085). The court noted that Counts One and Two alleged King was a non-Indian, while Counts Three and Four alleged he was an Indian. (*Id.*) It emphasized that these charges were asserted in the alternative. (*Id.*). The jury received a special verdict form specifying the alternative choices. (R. Vol. I at 1100–01). The jury convicted King, as a non-Indian person, on Counts One and Two, and acquitted him on Counts Three and Four. (*Id.*). King now appeals his convictions. (*Id.* at 1133).

Summary of the Argument

The evidence at trial—from King's siblings, his girlfriend, a tribal official, law enforcement, and King himself—adequately supported the jury's finding that King was a non-Indian when he abused M.V.

Likewise, evidence from M.V., her grandparents, her mother, a tribal official, and a Child Protective Services investigator was sufficient for the jury to find that M.V. was an Indian when King abused her.

The trial court referenced King's prior assertions of both Indian and non-Indian status and applied the correct legal standard when it allowed the government to prosecute King as either an Indian or a non-Indian. The court did not abuse its discretion when it decided to use detailed jury instructions, rather than a pre-trial dismissal, to avoid the risk of multiplicitous judgments.

Argument

I. Taking all the evidence, along with the reasonable inferences from it, a reasonable jury could have found King guilty on Counts One and Two.

A. Record Reference

King moved for a judgment of acquittal at the close of the government's case, then renewed his motion after the defense rested, and again after the

government's rebuttal. (*Id.* at 801, 856–57, 872–73). The court overruled King's motion. (*Id.*).

B. Standard of Review

This Court reviews *de novo* the denial of a judgment of acquittal for insufficient evidence. *United States v. Garcia*, 74 F.4th 1073, 1117 (10th Cir. 2023). However, it "owe[s] considerable deference to the jury's verdict." *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011) (internal quotation marks omitted). It neither weighs the evidence nor judges witness credibility, nor does it "question the jury's resolution of the evidence if it is reasonable." *Garcia*, 74 F.4th at 1117. This Court "ask[s] only whether, taking the evidence—both direct and circumstantial, together with reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *Id*. "Rather than examining the evidence in bits and pieces, [this Court] evaluate[s] the sufficiency of the evidence by considering the collective inferences to be drawn from the evidence as a whole." *United States v. Tennison*, 13 F.4th 1049, 1059 (10th Cir. 2021) (internal quotation marks omitted).

The government charged King in Counts One and Two under 18 U.S.C. § 1152, which establishes federal jurisdiction over Indian country crimes in

which the defendant is an Indian and the victim is a non-Indian or vice-versa. *United States v. Prentiss*, 273 F.3d 1277, 1278 (10th Cir. 2001). This Court has held that that the Indian and non-Indian status of the victim and defendant are essential elements of a § 1152 charge that the government bears the burden to prove. *United States v. Walker*, 85 F.4th 973, 979 (10th Cir. 2023); *United States v. Herbert*, No. 24-7030, 2025 WL 3210787, --- F.4th --- (10th Cir. Nov. 18, 2025); *but see Herbert*, 2025 WL 3210787, at *11 (Hartz, J., concurring).

A person is an Indian if they (1) have "some Indian blood," and (2) are enrolled in a federally recognized tribe or otherwise recognized as an Indian by a tribe or the federal government. *Prentiss*, 273 F.3d at 1280. "A person satisfies the definition only if both parts are met; conversely the government can prove that a person is not Indian by showing that he fails either prong." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). To determine whether a tribe or the federal government recognizes someone as an Indian, courts have identified several nonexclusive factors, including (1) enrollment in a tribe, (2) provision of government assistance reserved only for Indians, (3) enjoying the benefits of tribal affiliation, and (4) social recognition as an Indian through living on a reservation and participating in Indian social life. *Herbert*, 2025 WL 3210787, at *2.

C. Based on the evidence and reasonable inferences from it, taken in the light most favorable to the government, a reasonable jury could have found that King was a non-Indian at the time of the abuse.

The government introduced sufficient evidence to support the jury's finding that King committed the charged crimes as a non-Indian. Testimony from a defendant's relatives that the family has no Indian blood or has no tribal recognition can establish non-Indian status. *See United States v. Walker*, 85 F.4th 973, 977, 983 (10th Cir. 2023); *United States v. Laskey*, Case No. 22-5515, 2024 WL 3898299, *3 (10th Cir. Aug. 22, 2024). In *Walker*, the defendant's adult niece had a sufficiently close relationship with him to testify that she was not aware of his being a member of any tribe. 85 F.4th at 983. In *Laskey*, the defendant's mother testified about the "biological facts" of the defendant's heritage. 2024 WL 3898299, at *3. Likewise, in *United States v. Diaz*, the defendant's father testified that the defendant had no Indian ancestors and no tribal membership. 679 F.3d 1183, 1188 (10th Cir. 2012) (noting the government has no duty to call countless tribal officials to testify that a defendant was not a member of each tribe).

The evidence, viewed in the light most favorable to the government, amply showed that King was a non-Indian at the time of the abuse. Both of King's biological sisters testified that they could not document that anyone in their

family had Indian blood or was affiliated with any tribe. Both of King's sisters confirmed that none of the siblings had a blood relationship with Clarence, and both testified that they could not prove that they had a quantum of Indian blood. Karen Dunckel also confirmed that King was not raised with any tribal beliefs and had not participated in powwows or other tribal social practices.

Kellie Guess testified that no one in her biological family is of Indian descent. And Karen Dunckel's testimony that she had been told her mother's aunt and uncle were members of a tribe does not change the evidentiary balance. Dunckel could not identify her great-aunt or great-uncle's tribes or blood quanta, could not provide her great-aunt's last name, had not actually spoken with either of them on the subject, and had no documentation to show they had a tribal affiliation. A vague, undocumented belief that a remote family member may have had some Indian heritage is insufficient under *Prentiss* to undermine proof of non-Indian status. *See United States v. Ortner*, Case No. 21-5075, 2023 WL 382932, *3 (10th Cir. Jan. 25, 2023) (where witness had no family records to document tribal status, "unsubstantiated opinion testimony" was insufficient evidence to show the defendant possessed some quantum of Indian blood).

The testimony from King's family members was consistent with King's

assertions in state and tribal court about his tribal status. As the district court noted, King's shifting Indian/non-Indian assertions in state and tribal court possibly indicated "an attempt to manipulate" the system. (R. Vol. III at 62). But King was consistent in stating that he was not affiliated with any tribe—and could not be considered an Indian for jurisdictional purposes—prior to his enrollment with the Delaware Tribe in April 2023. (Supp. R. Vol. I at 47–51). *See United States v. Nowlin*, 555 F. App'x. 820, 824 (10th Cir. 2014) (prior judicial admissions of tribal status admissible under *Prentiss* inquiry). Likewise, in his texts with Anazagasty, King admits he "wasn't tribal" at the time of the abuse and insists that the tribal courts had no jurisdiction over him.

A reasonable jury could consider this evidence—no blood quantum, no documentation of Indian heritage, no legitimate tribal enrollment, and no assertion of Indian status prior to 2023—and conclude under either prong of the *Prentiss* test that King was not an Indian at the time alleged in the Indictment. This case is unlike *United States v. Herbert*, where no close family members testified about the defendant's tribal status. 2025 WL 3210787, at *8 (testimony of defendant's step-daughter who had lived with him for a "brief time" and had never heard him speak of being an Indian was no more than a "bread crumb" of evidence). Here, King's biological sisters testified extensively

about their family's lack of Indian blood and lack of tribal affiliation. Also, unlike in *Herbert*, where the defendant remained silent about his tribal status, here King has repeatedly denied his Indian status as of the time of the abuse. *Cf. Herbert*, 2025 WL 3210787, at *9 (investigators' testimony that they did not ask defendant, and he did not tell them, whether he was Indian was inconclusive). Taken as a whole, the evidence was sufficient to support the jury's finding that King was a non-Indian.

D. Based on the evidence and reasonable inferences from it, taken in the light most favorable to the government, a reasonable jury could have found that M.V. was an Indian at the time of the abuse.

The evidence was also sufficient to support the jury's conclusion that M.V. was an Indian at the time of the offense. Where an unenrolled child of a tribal member (a) possesses a quantum of Indian blood, and (b) is recognized by the tribe via the provision of tribal services or benefits, Courts routinely recognize that child as an Indian person. *See*, *e.g., United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996). Here, King concedes that M.V. possesses a quantum of Indian blood from her mother. (Aplt. Br. at 28). The uncontroverted evidence also shows that M.V. received ongoing health care as a child from tribal facilities—not as an adopted or foster child of a tribal member, but as the biological daughter of a Cherokee

mother. (R. Vol. III at 411, 522–23, 553). This Court has held that provision of health care services under these very circumstances constitutes tribal recognition of the child's affiliation, notwithstanding the existence of statutory "exceptions allowing for the provision of care to non-Indians." *Drewry*, 365 F.3d at 961.

Drewry is fatal to King's argument.[4] That case involved minor victims who possessed a quantum of Indian blood but who were not enrolled with their tribe until after the defendant abused them. 365 F.3d at 961. Despite their lack of enrollment, this Court held that the children received tribal recognition "through receipt of assistance reserved only to Indians," i.e., health care from Indian Medical Services. *Id*. *Drewry* held that the existence of statutory exceptions "allowing for the provision of care to non-Indians" was irrelevant. *Id.* The question, *Drewry* clarified, was not how some other type of person might be recognized by a tribe, but whether the two specific victims in that case were recognized by the tribe. *Id*. Despite the statutory exceptions, the evidence as to the victims in *Drewry* "indicated their medical care was based on

[4] King incorrectly asserts that *Drewry* is no longer binding precedent. *Drewry* was briefly vacated in the wake of *United States v. Booker* and was subsequently reinstated and reaffirmed in *United States v. Drewry*, 233 F. App'x. 543, 546 (10th Cir. 2005). Though that final decision was itself unpublished, the original 2004 opinion was reinstated as originally published at 365 F.3d 957.

an assumption that they were Indians eligible for such treatment." *Id.* Likewise here, the evidence shows that M.V. received medical care based on her personal eligibility as the biological child of an enrolled Cherokee member.

Drewry is not alone in holding that provision of health care can indicate tribal recognition. *See Nowlin*, 555 F. App'x at 823-24 (unpublished) (holding "access to free healthcare from the Indian Health Service" was an indicator of tribal recognition). Other circuits agree that although the Indian Health Service sometimes provides care for non-Indians, the receipt of those services is nonetheless a factor in establishing tribal recognition. *Keys*, 103 F.3d at 761 (citing a child victim's receipt of medical services at an Indian hospital as a factor in establishing she was Indian); *United States v. Stymiest*, 581 F.3d 759, 765-66 (8th Cir. 2009) (even though the Indian Health Service must sometimes provide emergency care to non-Indians, the *ongoing* provision of non-emergent care shows the recipient is recognized as an Indian); *Wadkins v. State*, 504 P.3d 605, 610-11 (Okla. Crim. App. 2022) ("Courts have accepted evidence of consistent medical treatment of an eligible Native American at an Indian health facility as sufficient proof of government recognition by providing assistance reserved solely for Indians."); *United States v. LaBuff*, 658 F.3d 873, 878 (9th Cir. 2011) (holding health care can be considered both as services

"reserved only to Indians" and also one of the "benefits" of tribal affiliation).

King's hypothetical argument about the availability of medical care to adopted or foster children misses the point. In this case, the evidence showed that Anazagasty obtained ongoing tribal health care services for M.V., not by showing that she had adopted M.V., or was her foster parent, but by proving that M.V. is her biological, Indian descendant. A reasonable jury could have found that the Cherokee Nation provided M.V. with health care prior to King's abuse on the basis of her personal eligibility.[5]

II. The trial court acted within its discretion when it used a jury instruction, rather than a pre-trial dismissal, to address the risk of multiplicitous judgments.

A. Record Reference

Before trial, King filed a motion to dismiss the indictment for multiplicity or, in the alternative, to require the government to elect whether to prosecute King as an Indian or a non-Indian. (R. Vol. I at 147–55). The court overruled King's motion. (R. Vol. I at 215).

[5] This pre-abuse tribal recognition is consistent with the Cherokee Nation's involvement in M.V.'s guardianship immediately following the abuse. *See Drewery*, 365 F.3d at 916 (listing tribal involvement in post-abuse custody proceedings among the factors that supported recognition)

B. Standard of Review

A trial court's decision whether to require the prosecution to elect between multiplicitous counts before trial is reviewed for abuse of discretion. *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997).

C. The district court did not abuse its discretion in submitting all four counts to the jury and accurately explained the nature of the alternative charges.

The trial court acted within its discretion when it allowed the government to submit multiplicitous charges to the jury, together with appropriate instructions to avoid the possibility of multiplicitous convictions. For purposes of this appeal, the government concedes that the parallel charges under § 1152 (Counts One and Two) and § 1153 (Counts Three and Four) were multiplicitous. *See United States v. Frierson*, 698 F.3d 1267, 1269 (10th Cir. 2012) ("Multiplicity refers to multiple counts of an indictment which cover the same criminal behavior.").

King's argument nonetheless fails. "The government may submit multiplicitous charges to a jury" because "multiplicity is not fatal to an indictment." *Frierson*, 698 F.3d at 1269. In contrast, multiplicitous *convictions* and *sentences* are not permitted. *See United States v. Jackson*, 82 F.4th 943, 948 (10th Cir. 2023); *United States v. McCullough*, 457 F.3d 1150, 1162 (10th Cir. 2006). If a defendant is convicted on multiplicitous charges, the district court

must vacate one of the convictions prior to sentencing. *See Frierson*, 698 F.3d at 1269–70; *McCullough*, 457 F.3d at 1162. When the government submits multiplicitous charges, a district court has discretion to allow them to proceed to the jury, along with appropriate measures to avoid a duplicative conviction or sentence. *See*, *e.g.*, *United States v. Moore*, 149 F.3d 773, 779 (8th Cir. 1998) (instructions to jury not to convict the defendant on both counts "eliminated the risk of multiplicitous convictions or punishment" and were an "appropriate remedy for multiplicity").

In *United States v. Jackson*, the government charged the defendant with two counts of possessing child pornography under different jurisdictional theories. One count alleged that the crime affected interstate commerce, and the other alleged that the crime occurred in Indian country. 82 F.4th 943, 946-47 (10th Cir. 2023). A jury convicted Jackson, and the trial court sentenced him, on both counts. *Id.* On appeal, the Tenth Circuit held that the convictions were multiplicitous because the statute established two ways to commit one offense. *Id.* at 948. ("These are two separate jurisdictional hooks allowing Congress to criminalize possession of pornography, not two separate offenses."). Although either charge would have been appropriate based on the evidence, the

defendant could be punished only for one. This Court remanded with instructions for the district court to vacate one of the convictions. *Id.* at 949.

Citing *Jackson*, the district court here allowed all four charges against King to proceed to the jury. (R. Vol. III at 8–9). Under *Jackson*, the multiplicitous charges against King would have violated Double Jeopardy only if he was ultimately convicted and sentenced both as an Indian and a non-Indian. There was no chance of that happening here. As the district court noted, the government did not argue that the jury could convict King on all four counts. (*Id.* at 8). The court provided appropriate safeguards by giving (1) the jury instruction and (2) the special verdict form, each of which directed the jury to acquit King entirely, convict him as an Indian person, or convict him as a non-Indian person. (R. Vol. I at 1085, 1100–01). The district court acted well within its discretion in choosing to avoid the danger of multiplicitous convictions and sentences in this manner. *See United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997).

Nor did King suffer any prejudice from the presentation of multiplicitous charges to the jury. King was charged with offenses involving the same date range, the same victim, and the same conduct. The only difference in the two sets of charges concerned King's Indian status. The court properly instructed

the jury that they must find King's Indian status, or lack thereof, beyond a reasonable doubt. *See United States v. Bolt*, 776 F.2d 1463, 1467–68 (10th Cir. 1985) ("Another remedy [for multiplicity] may be the use of appropriate jury instructions."). Appropriately, the court's instructions left open the possibility that the jury might find the government had proved *neither* Indian nor non-Indian status beyond a reasonable doubt. (R. Vol. I at 1100–01)

King—who had already sought dismissal in two other courts, asserting both Indian and non-Indian status—had no right to try the same gambit at the district court. To the contrary, the government generally has the right to select the charges to be brought in a particular case and to submit those charges to the jury, if the evidence is sufficient to support a finding of guilt on more than one theory. *Ball v. United States*, 470 U.S. 856, 859–860, 865 (1985). If multiplicitous guilty verdicts result, the defendant is entitled to partial dismissal before the court enters judgment. *Id.*; *see United States v. Driver*, 945 F.2d 1410, 1415 (8th Cir. 1991) (no error to instruct jury on same crime under § 1152 and § 1153, so long as judgment is not entered on both charges). It was King's right at trial to argue that the government had not proven either Indian or non-Indian status beyond a reasonable doubt. And the government had demonstrated good cause for charging the case in the alternative, based on

King's historical assertion of both Indian and non-Indian status. The district court's decision to ask the jury to resolve this contested issue was not an abuse of discretion.

Conclusion

Because the evidence at trial was more than sufficient to prove King's status as a non-Indian and M.V.'s status as an Indian, and because the jury could not—and did not—return multiplicitous convictions, this Court should affirm.

Statement Regarding Oral Argument

The United States does not request oral argument.

Respectfully submitted,
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I certify that on December 5, 2025, I electronically transmitted the foregoing to the Clerk of the Court using the ECF System for filing, which will send notification of that filing to the following ECF registrant:

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