Tenth Circuit No. 13-8028

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. **CASEY JAMES NOWLIN,** Defendant/Appellant.	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

The Honorable Nancy D. Freudenthal
Chief United States District Court Judge

District Court No. 12-CR-00116-F

BRIEF OF APPELLEE

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October 10, 2013

ORAL ARGUMENT IS NOT REQUESTED

THERE ARE NO ATTACHMENTS

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STATEMENT OF RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF CASE

On May 16, 2012, the Defendant/Appellant Casey James Nowlin (Defendant) was charged in a six count indictment with assaulting several individuals (Vol. 1, Doc. 4). Count One charged assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 113(a)(6), 1153, and 2, and Counts Two through Six charged assault with a dangerous weapon with intent to do bodily harm, in violation of 18 U.S.C. §§ 113(a)(3), 1153 and 2 (*Id.*). On June 1, 2012, the Defendant appeared for his arraignment and pled not guilty (Vol. 1, Doc. 23). A jury trial was held, beginning on December 10, 2012 (Vol. 3). On December 18, 2012, the Defendant was found guilty of Counts One, Two, Three, Five and Six (Vol. 2, Doc. 97). The Defendant appeared for sentencing on March 4, 2013 (*see* Vol. 3, Sentencing Tr.). At that time, he was sentenced to 137 months imprisonment, a three year term of supervised release, no fine, ordered to pay $160,866.34 in restitution and pay a $500.00 special assessment fee (Vol. 1, Doc. 119 [Judgment]). He filed his timely notice of appeal on March 15, 2013 (Vol. 1, Doc. 121).

Pending the outcome of this appeal, the Defendant is currently serving a 137 month term of imprisonment.

STATEMENT OF FACTS

The Defendant raises three issues on appeal. The first two involve whether or not the government adequately and properly proved the Defendant to be an "Indian" as is required for a prosecution under 18 U.S.C. § 1153 (Deft. Br. at 10, 18). The last issue involves whether statements made by the Defendant prior to his arrest and shortly after his arrest were properly admitted by the district court (Deft. Br. at 26). Therefore, the underlying actions of the Defendant on the night in question are not disputed in this appeal. However, a thumbnail sketch of the underlying facts is appropriate for clarity.

Facts Giving Rise to the Offense:[1]

In the late evening hours of April 21, 2012, and into the early morning hours of April 22, 2012, a drinking party involving mostly underage minors was in progress at a remote location, referred to as "Narnia," on the Wind River Indian Reservation (Vol. 2, Doc. 101, PSR ¶ 4). As the party was winding down, the

[1]The relevant facts underlying the Defendant's trial and conviction are summarized in the PSR, and were not objected to by the Defendant at sentencing (*see* Vol. II, Doc. 101 at 3-7) ("PSR").

Defendant and his co-defendant, Lorenzo Roman, arrived (*Id.*). Almost immediately after arriving, Roman started arguing with the victim of Count Five, Tylis Teran (*Id.*). As Teran and Roman squared off to fight, Teran was hit in the back of the head from behind with a log (*Id.*). After Teran was struck, Michael Smith, the victim of Count Three, stepped forward to confront Roman, and he was also struck in the head from behind with a log (*Id.*). While Smith was on the ground, Roman began kicking him with shod feet. Brandon Gould, the victim of Counts One and Two, attempted to intervene and was struck several times in the head with a log (*Id.*). After Teran, Smith and Brandon Gould were injured, the other party attendees began to panic and flee the area (*Id.*). As Darlynn Seminole and Brent Gould, the victims of Counts Four and Six, were attempting to flee in a vehicle, they also were hit with the log (*Id.*). Witness testimony established that the Defendant was the person who had struck all the victims with the log (*Id.*).

After committing these assaults, the Defendant left the party at a high rate of speed in the car he arrived in, along with several others (*Id.*). The victims and witnesses who were also fleeing testified they felt the Defendant was "chasing" them down the dirt road towards the highway (*Id.*). Upon reaching the highway, the driver of the Defendant’s car sped up and attempted to run the other car off the

road (*Id.*). However, the Defendant's car crashed and rolled instead (*Id.*). Miraculously, no one was injured and the occupants of the Defendant's car scattered on foot, leaving the wrecked car behind (*Id.*). The Defendant was not arrested until later the same evening by the Riverton Police Department, after he caused a disturbance at another residence in Riverton, Wyoming (*Id.*).

Brandon Gould, the victim of Counts One and Two, was seriously injured and required a "life flight" to a hospital in Salt Lake City, Utah (*Id.*). He suffered permanent blindness in one eye (*Id.*). The other victims were treated and released from the Riverton hospital (*Id.*).

Facts Presented as to the Defendant's Indian Status:

At trial, the jury was instructed that the government was required to prove beyond a reasonable doubt that the Defendant was an "Indian" (Vol. 3, at 1404). The jury was told the government could accomplish this by proving that the Defendant had some Indian blood, and that he was recognized as an Indian by a tribe or by the federal government (*Id.*). As to the "recognition" of the Defendant as an Indian, the following factors were listed to assist the jury in making this determination:

1. Enrollment in a tribe;

2. Government recognition, formally or informally, through providing the defendant assistance reserved only for Indians;

3. Tribal recognition, formally or informally, through subjecting the defendant to tribal court jurisdiction;

4. Enjoying benefits of tribal affiliation; and,

5. Social recognition as an Indian through living on a reservation and participating in Indian social life, or holding himself out as an Indian.

(Vol. 3, at 1405).

The jury was instructed that not all of the above factors had to be present in order to find the Defendant was an "Indian," but to instead consider the evidence in its totality when making their decision (*Id.*).

As to Indian blood and recognition by a tribe as an Indian person, the government presented evidence that the Defendant's mother, aunts, grandparents and great-grandparents were enrolled members of the Eastern Shoshone Tribe (Vol. 3, at 754, 760-61). The tribal enrollment director testified that in order to qualify as an "enrollable" member, a person must have at least one quarter degree of Indian blood (Vol. 3, at 754). The Defendant's mother's blood degree was listed as 31/64's degree of Indian blood, which meant the Defendant's degree of

Indian blood was 31/128's - just a "drop" shy of the one quarter required for enrollment (Vol. 3, at 754, 763, 765, 787-88). The enrollment director further testified that if the Defendant's mother researched her own lineage further and was able to increase her own degree of Indian blood, the Defendant would most likely qualify to be enrolled (Vol. 3, at 770).

However, even though the Defendant was not "enrollable" in the Eastern Shoshone Tribe, the Defendant was considered to be a tribal "Descendent," and had been since his birth (Vol. 3, at 765-66, 773). The enrollment director testified that being classified as a "Descendent" entitled the Defendant to free medical care through the Indian Health Service, a "fishing card" allowing him fishing rights on the reservation, and some college scholarships (Vol. 3, at 766-68, 780-81).

The Administrative Officer at the Indian Health Service on the Wind River Indian Reservation testified that the Defendant was eligible for, and had in fact received, approximately $12,000 worth of free medical care from the Indian Health Service since 2008 (Vol. 3, 1118, 1127, 1143, 1146). The Administrative Officer further testified that Indian Health Services are reserved for Indian persons and official Indian descendants and that non-Indians could not receive any services from them (Vol. 3, at 1121-1123, 1125).

Evidence was also presented regarding the Defendant's social recognition as an Indian, in that witnesses testified they had seen the Defendant attending Indian Pow Wows and that the Defendant had a child with an enrolled tribal member (Vol. 3, at 596-98, 621-22, 636-37, 1212). Witnesses also testified that they knew the Defendant to hold himself out to be an Indian, that he lived on the Reservation, and that he associated with other Indians (Vol. 3, at 1071, 1140).

Lastly, the district court judicially noticed for the jury the following facts:

> The Defendant, Casey James Nowlin, has, with counsel before a court, previously admitted under oath and penalty that he is an Indian person. He stated under oath that he is not enrolled with an Indian tribe, but that he is a member of the Shoshone Tribe. The Defendant stated under oath that he has lived on the Wind River Indian Reservation all his life and attended Indian schools on the reservation. The Defendant further stated that he submitted himself to the jurisdiction of the Shoshone and Arapahoe Tribal Court. Lastly, he stated he has received treatment through the Indian Health Service in the past.

(Vol. 3, at 1328-29).

These facts were judicially noticed because the Defendant had previously pled guilty in federal court to a crime under 18 U.S.C. § 1153 and had made those admissions in court and under oath (Vol. 3, 1090, 1080, 1279). However, in order

to protect the Defendant from any unfair prejudice, the information was presented to the jury via the above judicially noticed statement (*Id.*).

Facts Related to the Defendant's Statements After the Assault:

The Defendant argues in his brief that certain actions taken by him after the assault and statements made by him were erroneously admitted at trial. The evidence involved the testimony of Billy Noon and Bureau of Indian Affairs Officer Mike Shockley.

Billy Noon testified that on April 22, 2012, at 10:14 p.m. (later the same date of the assault at Narnia), the Defendant, whom he did not know, and another person knocked on his mobile home door in Riverton, Wyoming (Vol. 3, 1030, 1032, 1042). Noon testified that he opened the door and the Defendant asked for Noon's roommate (Vol. 3, at 1032-33). Noon asked the Defendant to wait at the door, while he summoned the roommate (Vol. 3, at 1034). However, the Defendant and his friend did not wait, and instead came inside Noon's home and sat down at the kitchen table (Vol. 3, at 1034). This was not o.k. with Noon (Vol. 3, at 1034-35). Noon stated that the Defendant was at his residence approximately 15-30 minutes and while he was talking with Noon's roommate, he was "acting like he done something" and he wanted to know what it would be like to go to

prison (Vol. 3, at 1036). Noon finally asked the Defendant to leave and in turn the Defendant became aggressive and refused to leave (Vol. 3, at 1037). Eventually, another woman in the residence pushed the Defendant out the door and someone called the police (Vol. 3, at 1037).

Bureau of Indian Affairs Officer Mike Shockley testified that on April 22, 2012, he was notified by the Riverton Police Department that they had arrested the Defendant at the All Nations trailer court in Riverton (Vol. 3, at 1064-65, 1075-76). Officer Shockley responded to Riverton and observed the Defendant in the back of a Riverton Police car (Vol. 3, at 1065). Officer Shockley took custody of the Defendant (Vol. 3, at 1065). The Defendant asked Officer Shockley why he was being arrested, to which Officer Shockley responded, "You almost killed that guy last night, Casey" (Vol. 3, at 1066). The Defendant then stated "Why do you guys give a fuck about those guys? They jump people all the time and you guys don't do shit" (*Id.*). Officer Shockley said he "didn't care about them, that he was just enforcing the law" (*Id.*).

After placing the Defendant in his patrol car, Officer Shockley started driving back to the reservation (Vol. 3, at 1067). During the drive, the Defendant leaned forward and asked "So who is it that turned me in?" and Officer Shockley

stated he could not say right now (Vol. 3, at 1067). The Defendant replied, "oh, it doesn't matter, I'll find out in my papers anyway," and "was those people drunk?" (Vol. 3, at 1067). Officer Shockley stated he did not know, and the Defendant stated "I wasn't even there, I was at my sister's house" (Vol. 3, at 1068).

Officer Shockley told the Defendant that several people had identified him to the police and the Defendant leaned back in the car and said "Don't nobody know me" (Vol. 3, at 1069). Officer Shockley responded "I know you, and everybody described you to me," and the Defendant said, "you guys ain't got shit. I was at my mom's house" (Vol. 3, at 1069). Officer Shockley laughed and said, "you just said you were at your sister's," which caused the Defendant to become very upset and he accused the Officer of "making things personal" (Vol. 3, at 1069-70). Officer Shockley testified that he did not initiate any questioning of the Defendant (Vol. 3, at 1075).

SUMMARY OF ARGUMENT

The Defendant first argues that the government did not produce sufficient evidence of his status as an Indian, which was an element of the charged offense. However, taking the evidence in a light most favorable to the government, it is clear there was sufficient evidence upon which a reasonable jury could find that the

Defendant was an Indian for criminal jurisdiction purposes. The evidence showed that the Defendant had Indian blood, lived socially as an Indian, that is, attended Indian social events, had children with an enrolled tribal member, and had admitted under oath in court previously that he was an Indian. The government also produced evidence that the Defendant had received benefits that are only available to Indians by virtue of his status as a tribal descendant, including free medical care and fishing privileges on the Reservation. A *de novo* review shows there was ample evidence to support the jury's finding that the government had satisfied its burden on this element.

The Defendant also argues the court committed error when it took judicial notice of his prior admission, under oath, that he was an Indian. The Defendant admitted under oath in a prior criminal proceeding that he was a member of the Shoshone Tribe, although not enrolled, that he had lived on the Wind River Reservation all his life, that he attended schools on the Reservation, submitted himself to the jurisdiction of the Shoshone and Arapaho Tribal Court, and received treatment through the Indian Health Service. The court weighed the probative value of the Defendant's prior admissions against their prejudicial effect and found their probative value to be high, particularly in light of the fact that they had been

made in a rigorous setting, similar to the trial at hand. Additionally, to reduce any improper prejudice, the court removed all mention of the criminal context from its judicially noticed statement and instructed the jury it was free to accept the statements as true, but was not required to do so. The court therefore properly weighed the probative value versus prejudicial effect, limited any improper prejudice, and did not abuse its discretion in admitting the judicially noticed statement.

The Defendant next argues that the court erred in admitting statements made by the Defendant himself, immediately before and after his arrest in the instant case, from which the inference could be drawn that he was responsible for the assaults at Narnia. The Defendant contends that the statements in question were evidence of another crime, admission of which was subject to the requirements and limitations of Federal Rules of Evidence 404(b). The government expressly indicated, however, that the statements were being offered as admissions by a party opponent under Fed. R. Evid. 801(d)(2)(A), not as evidence of another wrong under Rule 404(b). The court found that, because the challenged statements were made by the Defendant himself, it was admissible as an admission by a party opponent and was not subject to the requirements and limitations of Rule 404(b),

and that any prejudicial effect of the statement was outweighed by its probative value. The court did not abuse its discretion in making this evidentiary ruling.

ARGUMENT

I. Sufficient Evidence was Presented as to the Defendant's Indian Status as Required Under 18 U.S.C. § 1153.

A. Standard of Review

Whether the evidence introduced by the government as to the Defendant's Indian status was sufficient to prove that element should be reviewed *de novo*. *United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir.2012). The record should be reviewed to determine whether "a reasonable jury could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along with reasonable inferences therefrom, taken in a light most favorable to the government." *Id., citing United States v. Wilson*, 107 F.3d 774, 778 (10th Cir.1997).

B. Discussion

The federal government has criminal jurisdiction over certain specified crimes if the offender is an Indian by virtue of the Major Crimes Act, 18 U.S.C. § 1153, which provides:

> **(a)** Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> **(b)** Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

The Major Crimes Act gives federal courts jurisdiction over Indians who commit one of the enumerated crimes against *any* victim, regardless of the victim's status as an Indian or non-Indian.

The term "Indian" has not been defined by statute, but instead "has become a legal term of art with varying definitions depending on the context". *St. Cloud v. United States*, 702 F.Supp. 1456, 1460 (S.Dak. 1988), *citing* Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503 (1976). The first case to set out a test for whether a person was an

Indian for criminal jurisdiction purposes was *United States v. Rogers*, 45 U.S. 567 (1846). *Rogers* has been viewed as having set out a two-part test for Indian status, inquiring both whether a person has some degree of Indian blood and whether the person is socially recognized as an Indian. In *Rogers*, a non-Indian by birth sought to avoid federal court jurisdiction by claiming he had become an Indian by virtue of having been adopted into the Cherokee Tribe. The court held that a person could not become an Indian for criminal jurisdiction purposes solely by social recognition as an Indian by a tribe. Nor is Indian blood alone enough to warrant federal criminal jurisdiction. Following the guidance of *Rogers*, the Tenth Circuit has applied a two-part test, and Indian status for criminal jurisdiction purposes is proven by meeting both prongs: 1) a person must possess some degree of Indian blood, and 2) must be recognized as an Indian either socially by a tribe or by the federal government. *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir.2001).[1] Finally, "[j]urisdiction over Indians in Indian Country does not derive

[1] The two-part test has been applied by other courts in addition to the Tenth Circuit. *See United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir.1995); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir.1996); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir.1984); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.1979); and *St. Cloud v. United States*, 702 F.Supp. 1456, 1460 (D.S.D.1988).

from a racial classification, but from the special status of a formerly sovereign people". *United States v. Antelope*, 430 U.S. 641, 646 (1977).

The government in the instant case sought to prove the Defendant's Indian status through both the fact that he has some degree of Indian blood and his social and legal recognition as an "Indian" to satisfy the two-part test set out in *Prentiss* (*supra*).

To meet the first prong, the requirement is not for any particular quantum of Indian blood, but only of "some" blood and "evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong". *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005).

With regard to the second prong, various factors have been considered by courts as probative of social or legal recognition as an Indian. In *St. Cloud v. United States*, 702 F.Supp. 1456 (S. Dak. 1988), the court formulated a list of factors to consider in determining whether a person is an Indian by virtue of meeting the second *Rogers* prong, in declining order of importance:

> "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life."

St. Cloud v. United States, 702 F.Supp. at 1461.

With these factors in mind, the government sought to prove the Defendant was an Indian at trial, although he was not enrolled in any federally recognized Indian tribe, by proving he had a degree of Indian blood as a direct descendent of a federally recognized tribe and by proving he had both social and legal recognition as an Indian.

The government produced evidence through George Shongutsie, the Eastern Shoshone Tribal Enrollment Director, that the Defendant's mother was an enrolled member of the Eastern Shoshone Tribe, as were his maternal grand-parents, and his maternal great-grand mother (Vol. 3, at 759-60).[2] Evidence was produced that the Defendant possessed 31/128ths degree of Indian blood and that one-quarter degree of Indian blood was required for enrollment in the Eastern Shoshone Tribe, [hereinafter "the Tribe"] (Vol. 3, at 754, 787).[3] The Tribal Enrollment office therefore considered the Defendant to be a "tribal descendent" (Vol. 3, at 755).

Additionally, Mr. Shongutsie testified to a procedure whereby a tribal member could research the historical tribal roles, searching for additional Indian

[2] The Defendant's father was not known at the time of trial. No determination had been made in the past or could be made at trial regarding the Defendant's paternal ancestry.

[3] Each tribe has authority to set its own blood quantum requirements.

ancestors with higher blood degrees and thereafter petition the Tribe for an increase in blood quantum (Vol. 3, at 762). Mr. Shongutsie testified that in the past, the Defendant's mother had successfully petitioned the Tribe for an increase in her blood quantum and had begun the process of petitioning the Tribe for a second blood quantum increase (Vol. 3, at 763). Mr. Shongutsie testified that when the Defendant's mother raised her blood quantum in the past, the Defendant's blood quantum was also, accordingly, increased (*Id.*). He further testified that if the Defendant's mother was successful in raising the Defendant's blood quantum by one one-hundredth, to 32/128ths, the Defendant would then most likely be eligible for enrollment in the Eastern Shoshone Tribe (Vol. 3, at 770, 787-88).

Mr. Shongutsie testified that the Defendant's folder within the Tribal Enrollment Office included a "descendency certification" for the Defendant, designating him as a tribal descendent (Vol. 3, at 765-69). Mr. Shongutsie testified that benefits a tribal descendent receives due to "decendency" status include free medical care at the Indian Health Service and a fishing card to use for identification or to fish on the Reservation (Vol. 3, at 766-67). The Defendant had applied for and received at least three fishing cards between the years of 2003 to

2011, with each card expiring after three years (Vol. 3, at 768-69). Mr. Shongutsie also considered the Defendant to be an Indian based on the history of his family being enrolled tribal members, Mr. Shongutsie's knowledge that the Defendant's mother is an Indian and the Defendant's physical appearance (Vol. 3, at 774, 776).

Evidence was also produced showing that the Defendant socialized as an Indian, having been seen at an Indian Powwow (Vol. 3, at 596). Testimony also established the Defendant had a child with an enrolled tribal member, was known to a local Bureau of Indian Affairs officer to be an Indian, lived on the Reservation, and socialized with other Indians (Vol. 3, at 1071, 1140). Evidence was also produced that the Defendant had lived the majority of his life on the Wind River Indian Reservation (Vol. 3, at 1071, 1328-29).

Regarding the second *St. Cloud* factor -- "government recognition formally and informally through providing the person assistance reserved only to Indians"-- evidence was produced that the Defendant's medical bills, in an amount totaling approximately $12,000.00, had been paid over the course of five years by the Indian Health Service (Vol. 3, at 1118, 1127, 1143, 1146). Witness Kathleen Keith, the Indian Health Service Director, testified that the Indian Health Service ("IHS") on the Reservation had several direct care facilities (clinics), and also

provided payment on behalf of Indians to providers outside of IHS, known as "contract services" for Indians who needed medical care that could not be provided by one of the direct care facilities (Vol. 3, at 1122, 1124-25). Ms. Keith described the eligibility requirements to receive IHS benefits by indicating that "direct" benefits (services rendered at the Reservation's clinics) are only provided to Native Americans who are either federally recognized tribal members or their descendants, or to the commissioned corps officers who serve as IHS physicians and their families (Vol. 3, at 1121-22, 1125).[4] Ms. Keith testified that "contract health services" (payment for those medical services that cannot be provided at the IHS clinics) are available only to members of a federally recognized tribe or their descendants (Vol. 3, at 1122, 1125). The person's status as a descendant must be proven to qualify for IHS benefits (Vol. 3, at 1124).

Lastly, the district court judicially noticed for the jury the following fact:

> The Defendant, Casey James Nowlin, has, with counsel before a court, previously admitted under oath and penalty that he is an Indian person. He stated under oath that he is not enrolled with an Indian tribe, but that he is a member of the Shoshone Tribe. The Defendant stated under oath that he has lived on the Wind River Indian Reservation all his life and attended Indian schools on the

[4] Commissioned corps officers are military officers in the same series as naval officers (Vol. 5 at 1121).

> reservation. The Defendant further stated that he submitted himself to the jurisdiction of the Shoshone and Arapahoe Tribal Court. Lastly, he stated he has received treatment through the Indian Health Service in the past.

(Vol. 3, at 1328-29).

This fact was judicially noticed because the Defendant had previously pled guilty in federal court to a crime under 18 U.S.C. § 1153 and had made those admissions in open court (Vol. 3, at 1090, 1080, 1279). However, in order to protect the Defendant from any undue prejudice, the information was presented to the jury via the above judicially noticed statement (*Id.*).

The Defendant's identification as Indian, both by himself and the society around him, accumulated over time because he was living as an Indian, his family members were enrolled tribal members on the Reservation and he participated in "Indian life." All the while his mother was attempting to increase her blood quantum, and thereby increase his as well, in order to get him enrolled as an Eastern Shoshone tribal member. His identification as an Indian was not a one-time faulty assumption on his part or misidentification on the part of others, but was a mantle of "Indian-ness" that was placed upon him by the circumstances of his birth and that he had knowingly donned on himself again as an adult. The

evidence was sufficient to support this element beyond a reasonable doubt, and the Defendant's claim to the contrary is without merit.

II. No Error was Committed by the District Court's Judicial Notice of Prior Statements Made by the Defendant as to His Indian Status.

A. Standard of Review

A district court is accorded wide discretion in determining the admissibility of evidence under the Federal Rules. *United States v. Abel,* 469 U.S. 45, 54 (1984). Whether the evidence introduced by the government to prove the Defendant's status as an Indian was properly admitted will be reviewed for an abuse of discretion. *United States v. Lugo,* 170 F.3d 996, 1005 (10th Cir.1999). Abuse of discretion is a highly deferential standard with respect to the district court's rulings. *United States v. Talamante,* 981 F.2d 1153, 1155 (10th Cir.1992). A court abuses its discretion when its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Combs,* 267 F.3d 1167, 1176 (10th Cir.2001) (quotation and citation omitted).

B. Discussion

Under Fed. R. Evid. 404(b), the evidence the government sought to introduce--the Defendant's prior admission under oath in a separate proceeding

that he is an Indian--may not be offered for the improper purpose of proving character to show action in conformity therewith.

Evidence of other bad acts is properly admitted if four requirements are met: (1) the evidence is offered for a proper purpose under F.R.E. 404(b); (2) the evidence is relevant under F.R.E. 401; (3) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice under F.R.E. 403; and (4) the district court, upon request, instructs the jury to consider the evidence only for the purpose for which it was admitted. *United States v. Tan,* 254 F.3d 1204, 1207-08 (10th Cir. 2001), *citing, Huddleston v. United States,* 485 U.S. 681, 691-92 (1988).

The court admitted the following judicially noticed statement after multiple hearings were held regarding what evidence would be allowed with regard to the government's attempt to establish the Defendant was an Indian:

> The Defendant, Casey James Nowlin, has, with counsel before a court, previously admitted under oath and penalty that he is an Indian person. He stated under oath that he is not enrolled with an Indian tribe, but that he is a member of the Shoshone Tribe. The Defendant stated under oath that he has lived on the Wind River Indian Reservation all his life and attended Indian schools on the reservation. The Defendant further stated that he submitted himself to the jurisdiction of the Shoshone and Arapaho Tribal Court. Lastly, he

> stated he has received treatment through the Indian Health Service in the past.

(Vol. 3, at 1328-29).

The government, for its part, argued the Defendant's prior admission was offered for a proper purpose under Rule 404(b), that is, the Defendant's "identity" as an Indian. *See e.g., United States v. Bell*, 624 F.3d 803, 808-11 (7th Cir.2010) (Rule 404(b)'s list is non-exclusive). The government argued the probative value of the Defendant's prior in-court admission was high.[5] The admission by the Defendant that he was an Indian had not occurred as an answer to a single question, but had been fleshed out in court through a series of admissions by the Defendant to establish the foundation for the Defendant's conviction of another crime charged under 18 U.S.C. § 1153. Although a limiting instruction would not have been proper in the strictest sense, because no further details which could be unfairly held against the Defendant remained for the jury to consider, the court

[5] The government's evidence on this element was not as strong as it wished. The government sought to introduce evidence indicating that the Defendant had been convicted in the Shoshone and Arapaho Tribal Court, which only has criminal jurisdiction over Indians; had been in the Wind River detention center, where only Indians can legally be detained; and had identified himself as a member of the "Native American religion" when detained in the county detention center. The court ruled all of this proposed evidence more prejudicial than probative (Vol. 3 at 1104-05, 1092-93, 1095).

instructed the jury it was free to accept the fact of statements made by the Defendant as true, but that it was not required to do so (Vol. 3, at 1328).

The Defendant argued his admission under oath to being an Indian was not persuasive on that point, because the Defendant was just repeating in court what he had been told all of his life, albeit mistakenly (Vol. 3, at 1111). The Defendant contended that the admission of this evidence would be more prejudicial than probative due to the fact that legal recognition of him as an Indian had come during a criminal court proceeding. *Id.*

The court, after weighing the probative nature of the proposed evidence against its potential for unfair prejudice pursuant to Rule 403, ruled the admission could be admitted as the judicially noticed statement set out above (Vol. 3, at 1112-13). The court determined that, "these adjudications, these dispositional matters and proceedings have value and weight concerning the admission by the defendant in the context of the Indian status being an element. . . . It is in the context of these proceedings where the rigor and the test is the same as the test in this proceeding". *Id.* The court properly sought to "sanitize" the Defendant's admissions, to remove any unfairly prejudicial information. As given, the

statement made no mention of the criminal nature of the proceedings in which it had been made.

Indeed, although the Defendant argued that he only admitted he was Indian because he mistakenly believed he was Indian, the court rightly evaluated the context of the admission as highly reliable based on the fact that the Defendant was not simply asked if he was Indian. The Defendant admitted he had lived on the Wind River Indian Reservation all his life, attended schools on the Reservation, and submitted himself to the jurisdiction of the Shoshone and Arapaho Tribal Court (Vol. 3, at 1328-29). All of these admissions factor into determining whether the Defendant *is* Indian for criminal jurisdiction purposes.

It is hard to imagine what improper information the trier of fact could have gleaned from the judicially noticed statement. The nature of the proceeding in which the Defendant's admissions took place was not disclosed to the jury. The Defendant suggests that the jury would necessarily infer from the fact the Defendant made a statement under oath in court that it must have been in the course of a different criminal proceeding, but there is no basis for such an inference beyond pure speculation. There was simply no prejudicial information remaining in the judicially noticed statement from which the jury could glean such

an improper character reference. The judicially noticed statement was highly probative of an essential element the government was required to prove and properly admitted for the jury's consideration. And pure speculation, without more, is not a basis for finding unfair prejudice under Rule 403. *See, e.g., United States v. Roberts*, 417 Fed. Appx. 812, 821-22 (10th Cir. 2011) (speculation alone not basis for finding unfair prejudice under Rule 403). No error occurred.

III. The Court Properly Allowed the Entry of Statements Made by the Defendant Under Fed. R. Evid. 801(d)(2)(A).

A. Standard of Review

This court "review[s] evidentiary rulings for an abuse of discretion, and pay[s] deference to the trial court's familiarity with the case and experience in evidentiary matters." *Abraham v. BP Am. Prod. Co.*, 685 F.3d 1196, 1202 (10th Cir. 2012). "A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling." *Clark v. State Farm Mut. Auto Ins. Co.*, 433 F.3d 703, 709 (10th Cir. 2005). Should the court determine the district court abused its discretion, a determination must then be made as to whether the error was harmless. *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1212 (10th

Cir. 2011). "An erroneous admission of evidence is harmless unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such an effect." *Id.* "Error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error." *United States v. Arutunoff*, 1 F.3d 1112, 1118 (10th Cir. 1993).

B. Discussion

As stated previously, the government presented evidence of the Defendant's whereabouts, actions and statements after his assault at Narnia. This evidence consisted of testimony from Billy Noon and Officer Shockley. Mr. Noon stated that the Defendant was at his residence talking with Noon's roommate and was "acting like he done something" and wanted to know what it would be like to go to prison (Vol. 3, at 1036). Officer Shockley provided testimony as to the Defendant's statements upon being arrested. The first was a conversation, prompted by the Defendant, in which he asked why he was being arrested (Vol. 3, at 1066). Officer Shockley responded, "You almost killed that guy last night, Casey" (*Id.*). The Defendant stated "Why do you guys give a fuck about those guys? They jump people all the time and you guys don't do shit" (*Id.*). And then

later, while transporting the Defendant to the reservation jail, the Defendant leaned forward and asked Officer Shockley, "So who is it that turned me in?" Officer Shockley stated he could not say right now (Vol. 3, at 1067). The Defendant replied, "oh, it doesn't matter, I'll find out in my papers anyway" and "was those people drunk?" (Vol. 3, at 1067). Officer Shockley stated he did not know, to which the Defendant stated "I wasn't even there, I was at my sister's house" (Vol. 3, at 1068). Officer Shockley told the Defendant that several people had identified him to the police and the Defendant leaned back in the car and said "Don't nobody know me" (Vol. 3, at 1069). Officer Shockley responded "I know you, and everybody described you to me" and the Defendant said, "you guys ain't got shit. I was at my mom's house" (Vol. 3, at 1069). Officer Shockley laughed and said "you just said you were at your sister's" (Vol. 3, at 1069-70). The Defendant became very upset and accused the officer of making things "personal" (*Id.*).

The Defendant argues the above testimony was evidence of "other crimes, wrongs or acts" under Fed. R. Evid. 404(b) (Deft. Br. at 28). The district court, however, in making its pretrial ruling as to these statements, determined the statements were admissible as a "statement by a party opponent," and therefore they were not hearsay, nor were they subject to the requirements of Rule 404(b)

(Vol. 3, at 34, 37-38). The district court carefully considered Rule 403 relevance standards in making its determination, finding the statements to be more probative than prejudicial (Vol. 3, at 37-38). Overall, the district court stated "[t]he discussions that we have had today don't relate to prior bad acts but relate to comments made from which the jury can conclude or infer evidence of a guilty mind" (Vol. 3, at 38).

A statement is not hearsay and is admissible as an admission when it is "the party's own statement in either an individual or a representative capacity." Fed. R. Evid. 801(d)(2)(A). Therefore, Federal Rule of Evidence 801(d)(2)(A) exempts from the definition of hearsay any statement made by a party that is offered against him. The statements in question were offered against the Defendant in court and were exempted from the definition of hearsay as an admission by a party opponent. As for Rule 404(b), it provides: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). But the Defendant's statements relate directly to the crimes at issue in this case, whereas "'other bad acts' means acts that are not part of the events giving rise to the present charges." *United States v. Gorman*, 312 F.3d 1159, 1162 (10th Cir. 2002).

The challenged statements were made by the Defendant and referred to the instant assault. The statements had nothing to do with "other wrongs" committed by the Defendant. The Defendant's admissions were therefore properly admissible under Rule 801(d)(2)(A) as an admission by party opponent for any inference the jury might draw. *Cf. United States v. Bibo-Rodriguez*, 922 F.2d 1398, 1401 (9th Cir. 1991) (defendant's admission nine weeks after the charged offense that he had been routinely transporting cocaine and marijuana for "quite a while" was not Rule 404(b) "other act" evidence, and was properly admitted under Rule 801(d)(2)(A)); *United States v. Quintana*, 70 F.3d 1167, 1170 (10th Cir. 1995) (recorded conversations of which defendant was a party were properly admitted under Rule 801(d)(2)(A)); *United States v. Porter*, 544 F.2d 936, 938-39 (8th Cir. 1976); *United States v. Malady*, 209 F.Appx 848, 850 (10th Cir. 2006); *United States v. McElhiney*, 85 F.Appx 112, 115 (10th Cir. 2003); *United States v. Tisdol*, 290 F.Appx 384, 386-87 (2d Cir. 2008). The statements presented related to the assaults at Narnia and the district court did not abuse its discretion in admitting the statements under Rule 801(d)(2)(A).

Should this court determine there was an error in the admission of this evidence, it should in any event be considered harmless. The jury was specifically

instructed to take any statement attributed to the Defendant and treat it with caution (Vol. 3, at 1407). The evidence indicating the Defendant was responsible for the assaults at Narnia was overwhelming and the small amount of testimony from Mr. Noon and Officer Shockley could not have substantially influenced the jury's verdict, and no showing has been made by the Defendant that any substantial right was affected.

For all the foregoing reasons, the Defendant's claim that the statements were admitted in violation of the Federal Rules of Evidence is without merit.

CONCLUSION

On the basis of all the foregoing, the Appellant's conviction must be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would not materially assist the court in resolving the issues presented on appeal.

DATED this 10th day of October, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing Brief of Appellee was digitally submitted to the Tenth Circuit Court of Appeals via ECF, that there were no required privacy redactions to be made, that it is an exact copy of the written document filed with the clerk, and the digital submission has been scanned for viruses with Trend Micro OfficeScan Client for Windows 2003/XP/2000/NT, Version 10.6.2108, most recently updated October 9, 2013, and, according to the program, is virus free.

/s/ Pam Petersen
UNITED STATES ATTORNEY'S OFFICE

CERTIFICATE OF COMPLIANCE

As required by Rule 32(a)(7)(C), Fed. R. App. P., I certify that this brief is proportionally spaced and contains 7,944 words. I relied on my word processor and Microsoft Word 2010 software to obtain the count.

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/ Kerry J. Jacobson
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CERTIFICATE OF SERVICE

This is to certify that on this 10th day of October, 2013, I served a true and correct copy of the foregoing Brief of Appellee upon the following by placing the same in the United States mail, duly enveloped and sufficient postage prepaid:

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