

NO. 19-1213

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,**

V.

**MERLE DENEZPI,
DEFENDANT-APPELLANT.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE ROBERT E. BLACKBURN, JUDGE
D.C. NO. 18-CR-00267-REB-JMC**

ANSWER BRIEF OF THE UNITED STATES

JASON R. DUNN
United States Attorney

JEFFREY K. GRAVES
Assistant U.S. Attorney
103 Sheppard Dr., Room 215
Durango, CO 81303
Telephone: (970) 247-1514

Attorneys for
Plaintiff-Appellee

ORAL ARGUMENT IS NOT REQUESTED
January 29, 2020

RULE 26.1(B) DISCLOSURE STATEMENT

The government is not aware of any organizational victims to the criminal activity charged in this case.

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PRIOR OR RELATED APPEALS

No prior or related appeals exist.

CITATION CONVENTION

This brief cites to the record on appeal by volume and page number; *e.g.*, “I:6” refers to record volume I, page 6.

JURISDICTIONAL STATEMENT

Jurisdiction below arose under 18 U.S.C. §§ 1153 and 3231, where Denezpi was convicted at trial of aggravated sexual abuse in Indian Country, in violation of 18 U.S.C. §§ 2241(a) and 1153. I:6, 136. Final judgement entered June 5, 2019. I:205. Notice of appeal was timely filed on June 17, 2019. I:212. Denezpi appeals his conviction and this court’s jurisdiction arises under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Merle Denezpi committed a violent sexual assault against V.Y. on the Ute Mountain Ute Indian Reservation. While the federal investigation proceeded, Denezpi entered an *Alford* plea in the Code of Federal Regulations (“CFR”) Tribal Court to a violation of tribal law. Denezpi served 90 days. Later, a federal grand jury indicted Denezpi for aggravated sexual abuse. Denezpi was tried, convicted, and sentenced to 30 years. Did the district court err by denying Denezpi’s motion to dismiss the federal case on Double Jeopardy Grounds due to Denezpi’s prior conviction in a CFR Tribal Court?

II. At trial, defense counsel asked V.Y. questions about her social knowledge of Denezpi. V.Y. answered the question, recounting her interactions with Denezpi and his battered girlfriend. The district court denied defense counsel's motion to strike because the question directly called for the response. Did defense counsel invite the error, precluding appellate review? In the alternative, was any error harmless?

STATEMENT OF THE CASE AND FACTS

I. Denezpi sexually assaults V.Y.

At trial, Merle Denezpi was convicted of committing a violent sexual assault against V.Y. I:6, 136.

Both Denezpi and V.Y. are Navajo tribal members from Shiprock, New Mexico. I:156; V:41-42. On July 18, 2017, Denezpi met V.Y. in Teec Nos Pos, Arizona. V:47-49. Denezpi and V.Y. hitchhiked together to Towaoc, Colorado, on the Ute Mountain Ute Reservation. *Id.* at 46. Once there, V.Y. walked to the Ute Mountain Ute Tribal Casino. *Id.* at 52. Denezpi hitchhiked to a nearby liquor store. *Id.* at 52-53.

Later that night, V.Y. waited outside the casino for a shuttle back to Shiprock. *Id.* at 54. Denezpi approached and asked V.Y. to drink with him. *Id.* at 55. V.Y. "followed the alcohol" and accompanied Denezpi to a secluded part of the parking lot. *Id.* at 56. Meanwhile, the shuttle left, stranding V.Y. in Towaoc. *Id.* at 57.

Denezpi invited V.Y. to his girlfriend's house, nearby. *Id.* V.Y. followed Denezpi, eventually entering the house on Denezpi's invitation. V:57, 60-61. After Denezpi made V.Y. a sandwich, the pair went to the living room. *Id.* at 62-63. For a time, Denezpi and V.Y. shared a beer and talked. *Id.* at 64. Suddenly, Denezpi became angry and began pacing. *Id.* Denezpi said, in essence, "I know you followed me here for something, and I'm going to give it to you." *Id.* V.Y. protested, telling Denezpi "you know I'm not that way" – V.Y. is a lesbian. *Id.* at 65. Undeterred, Denezpi said "he was going to get it no matter what." *Id.*

Denezpi threatened to seriously hurt or kill V.Y. if she did not submit. *Id.* at 67-68. Backing up the threats, he retrieved a four-foot post, stood menacingly over V.Y., and said "if you don't do, I'll hit you with this." *Id.* at 68-69. Denezpi pulled V.Y. to the floor by her shirt and hair. *Id.* at 69-70. There, Denezpi demanded that V.Y. undress. *Id.* at 70. When V.Y. resisted, Denezpi ripped off V.Y.'s shirt and pants. *Id.* at 71. As V.Y. attempted to stand up, Denezpi forced her down by pushing on her chest, breasts, and legs. *Id.* Over her pleas, Denezpi inserted his penis into V.Y.'s vagina and had non-consensual sex. *Id.* at 71-73.

When Denezpi finished the assault, he told V.Y. that she was not "getting [her] clothes back until morning." *Id.* at 74. Denezpi told V.Y. that

she “better not go to the cops,” implying physical harm would follow if she did. *Id.* at 75. Denezpi wedged the four foot-post under the doorknob. *Id.* at 78.

As V.Y. waited in terror, Denezpi fell asleep. *Id.* at 75-76. V.Y. quietly found her clothing stuffed behind a recliner. *Id.* 76-77. She partially dressed, removed the post, opened the door to the house, and fled to the casino. *Id.* at 77-79. During her flight, V.Y. worried that Denezpi would carry out his threat and come after her with the post. *Id.* at 78.

II. Law enforcement investigates the assault.

Shortly after arriving at the casino, V.Y. reported the assault to law enforcement. V:79, 81, 198-99, 204. Later that morning, V.Y. gave a materially consistent recitation of the assault to both Officer Christopher Cable and another agent, independently. *Id.* at 82, 216-19, 276, 296. V.Y. consented to a Sexual Assault Nurse Examination (“SANE”) in Farmington, New Mexico. *Id.* at 82, 368, 372. During the SANE, V.Y. provided a materially consistent narrative of what happened to the examining nurse. *Id.* at 374-78. The nurse documented twenty-four injuries to V.Y.’s body, including bruising to the chest, breast, and legs. *Id.* at 378-86. She also documented eight injuries to V.Y.’s genitals, including tearing, bruising, redness, and lacerations. *Id.* at 389-94. At trial, the nurse opined that the

locations and severity of the genital injuries were consistent with a nonconsensual sexual assault. *Id.* at 394-95. She further testified that V.Y.'s narrative description of the assault was consistent with the bodily injuries she documented. *Id.* at 395.

Law enforcement submitted swabs taken during the sexual assault examination, along with a swab of Denezpi's DNA, to the FBI Laboratory. *Id.* at 320, 329-30, 332, 387-89. A forensic examination found semen on multiple areas of V.Y.'s genitals. *Id.* at 436-40. The examiner's analysis supported the identification of Denezpi's DNA on multiple areas of V.Y.'s genitals. *Id.*

About two hours after V.Y. left the house, Officer Cable arrived at the house to investigate V.Y.'s report. *Id.* at 205-206. Officer Cable knocked on the door, but no one answered. *Id.* at 206. Denezpi testified at trial that he heard the officer's knocking, saw the police car, and jumped out of a second-story window to "hide" from the police. *Id.* at 489, 505. He ran to nearby vegetation and hid for approximately thirteen hours. *Id.* at 245, 308, 490, 505. Through a window, Officer Cable observed a post wedged under the front door. *Id.* at 206, 208. Shortly after, the homeowner returned and granted permission for police to enter the house through the back, upstairs window. *Id.* at 209. The investigating officers found the living room,

including the wooden post and drinks, as described by V.Y. *Id.* 209-11, 302-307.

After the police found him hiding, Denezpi told them multiple, contradictory versions of his encounter with V.Y. and his movements the prior day. Trial Exhibit 37, Supp. I. His story evolved from a casual meeting at the casino (*Id.* at ¶¶79-87) to a brief stop at the house (*Id.* at ¶¶161-176) to a longer visit to the house (*Id.* at ¶¶357-82, 452-467). Denezpi denied any romantic relationship with V.Y. and specifically denied having sex with V.Y. *Id.* at ¶¶523-33. But when confronted with the possibility of his DNA on V.Y., Denezpi provided a new version of events, now claiming that he and V.Y. “fell in love” and had consensual sex. *Id.* at ¶¶555-86.

At trial, Denezpi repeatedly admitted that he lied to the agents on multiple occasions and about a number of things. V:513-18, 553, 569.

III. Denezpi is prosecuted by the Ute Mountain Ute Tribe.

Tribal authorities arrested Denezpi the next day for alleged violations of Ute Mountain Ute tribal law; specifically, a violation of Title 6, Ute Mountain Ute Code, Section 2 (Assault and Battery) and two provisions of the Code of Federal Regulations enforceable only against tribal members by a tribal court (Terrorist Threats and False Imprisonment). I:26-28. A prosecution in the Ute Mountain Ute Tribal Court, administered by the

Bureau of Indian Affairs' Court of Indian Offenses (also referred to as the "CFR Tribal Court") ensued. *Id.* Denezpi entered an apparent *Alford* plea to the violation of the Ute Mountain Ute Tribal Code and was released from custody with credit for time served. *Id.* at 33-34.¹ The remaining charges were dismissed. *Id.*

IV. Denezpi is tried and convicted in federal court for sexual assault.

Six months later, a federal grand jury returned an indictment against Denezpi, alleging a violation of 18 U.S.C. §§ 2241(a)(1) and (2), 1153, aggravated sexual abuse in Indian Country. I:6-7.

The district court denied Denezpi's motion to dismiss the indictment on Double Jeopardy grounds. I:20-25, 65-72. The court reasoned that the CFR Tribal Court's "power to punish crimes occurring on tribal land derives from their original sovereignty, not from a grant of authority by the federal government." *Id.* at 69. Thus, the separate sovereign doctrine foreclosed Double Jeopardy. *Id.* at 71-72.

During opening statement at trial, Denezpi's counsel asserted that the jury would find "many discrepancies" in V.Y.'s testimony and implored the jury to "try and understand the context." V:36. On cross-examination,

¹ An apparent reference to *North Carolina v. Alford*, 400 U.S. 25 (1970), where the Supreme Court sanctioned guilty pleas despite a defendant's protestation of innocence.

defense counsel pressed V.Y. about her knowledge of Denezpi, asking if she had any “visits and social conversation” at a local grocery store. *Id.* at 95. V.Y. responded that the only three occasions that she would see Denezpi was when she sold jewelry, when she would see him at the “laundromat with his ex-girlfriend,” or “when he got out of jail,” adding that she “didn’t know he got out of prison.” *Id.* at 95. Defense counsel neither contemporaneously, nor at a later time, objected to or moved to strike V.Y.’s statements regarding jail or prison. Instead, defense counsel continued to press V.Y. on “what [she] knew about Mr. Denezpi, not about punishment or other issues. About socially.” *Id.* at 96. V.Y. directly answered defense counsel’s question, responding “[s]ocially, when I seen him and his girlfriend, his girlfriend would be all beat up, would be all abused... [t]hat’s how I know him.” *Id.*

At that point, defense counsel asked that V.Y.’s answer “be stricken from the record.” *Id.* The government objected, arguing that defense counsel’s question “directly called for the response.” *Id.* The court noted that defense counsel had “asked about socially, and then socially the witness gave her answer. It is within the ambit or purview of the question asked,” and denied the motion to strike. *Id.*

Defense counsel continued to press V.Y. on the subject, eliciting testimony from her that she observed injuries on Denezpi’s girlfriend and

spoke to her about the abuse. *Id.* at 97. Defense counsel proceeded to vigorously cross examine V.Y. on a wide-range of subjects for several hours. *Id.* at 97-163. The government, on re-direct, asked no further questions concerning V.Y.'s observations and knowledge of Denezpi's prior assaults. *Id.* at 163-171. Neither the government nor defense counsel discussed the matter further during the trial, including in closing arguments. Defense counsel never requested a curative instruction or a mistrial.

After the jury returned a guilty verdict, the court sentenced Denezpi to 360 months in prison and 10 years of supervised release. V: 641, 677-78, I: 136, 204-11.

ARGUMENT SUMMARY

I. The district court properly denied the motion to dismiss on Double Jeopardy grounds. The ultimate source of power for prosecutions brought in this CFR Tribal Court is the unextinguished sovereignty of the Ute Mountain Ute Tribe. Under the separate sovereign doctrine, prior prosecution under that authority in the CFR Tribal Court cannot inoculate against subsequent prosecution by the United States. Denezpi's *Alford* plea under the Ute Mountain Ute Code does not implicate Double Jeopardy in his federal case.

II. Denezpi is not entitled to appellate review of his claim that V.Y.'s testimony concerning her social knowledge of Denezpi was prejudicial. Denezpi's counsel invited the error at trial by asking the witness a question that directly called for the response. In the alternative, any error was harmless.

ARGUMENT

I. **A prior tribal conviction does not bar federal prosecution for the same conduct.**

Issue Raised and Ruled On: Denezpi moved to dismiss his federal indictment due to his conviction in CFR Tribal Court on Double Jeopardy grounds. I:20-25. The court below denied the motion, finding the authority for prosecution in the Ute Mountain Ute CFR Tribal Court arose from a separate sovereign. I:65-72.

Standard of Review: This court reviews factual determinations underlying a double jeopardy claim for clear error. *United States v. Leal*, 921 F.3d 951, 958 (10th Cir. 2019) (citing *United States v. Rodriguez-Aguirre*, 73 F.3d 102, 1024-25 (10th Cir. 1996)). But the ultimate determination regarding double jeopardy is reviewed *de novo* as a question of law. *Id.* “The defendant bears the burden of proving a claim of double jeopardy.” *Rodriguez-Aguirre*, 73 F.3d at 1025.

A. Prosecutions brought by distinct sources of power do not violate double jeopardy.

The Fifth Amendment does not prohibit prosecutions arising from distinct sources of power. Double Jeopardy occurs only when there has been “more than one prosecution for the ‘same offence.’” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016) (quoting U.S. CONST. AMEND V). But “a crime under one sovereign’s laws is not ‘the same offence’ as a crime under the laws of another sovereign.” *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019). This rule respects the inherent power of each sovereign. Otherwise, “[p]rosecution by one sovereign for a relatively minor offense might bar prosecution by the other for a much graver one, thus effectively depriving the latter of the right to enforce its own laws.” *United States v. Wheeler*, 435 U.S. 313, 318 (1978). As put recently by the Supreme Court, the separate sovereign doctrine “honors the substantive differences between the interests that two sovereigns can have in punishing the same act.” *Gamble*, 139 S. Ct. at 1966.

Application of the separate sovereign doctrine “turns on whether the two entities draw their authority to punish the offender from distinct sources of power.” *Heath v. Alabama*, 474 U.S. 82, 88 (1985). In asking that “narrow, historically focused question,” the key determination is “whether the prosecutorial powers of the two jurisdictions have independent origins – or,

said conversely, whether those powers derive from the same ‘ultimate source.’” *Sanchez Valle*, 136 S.Ct. at 1867 (citing *United States v. Wheeler*, 435 U.S. 313, 320 (1978)). Importantly, distinguishing separate sovereigns “does not turn, as the term ‘sovereignty’ sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course.” *Sanchez Valle*, 136 S.Ct. at 1867 (emphasis added). “The inquiry is thus historical, not functional – looking at the deepest wellsprings, not the current exercise, of prosecutorial authority.” *Id.* at 1871.

B. The Ute Mountain Ute Tribe has a source of power distinct from the federal government.

Indian Tribes, by virtue of their retained inherent sovereignty, maintain the power to prosecute Indians. *Wheeler*, 435 U.S. 323-324; *United States v. Lara*, 541 U.S. 193, 210 (2004). “The ultimate source of a tribe’s power to punish tribal offenders thus lies in its primeval or, at any rate, pre-existing sovereignty: A tribal prosecution, like a State’s, is attributable in no way to any delegation of federal authority.” *Sanchez Valle*, 136 S. Ct. at 1872 (internal citations and quotations omitted). Where an individual has been convicted of an offense by a tribal sovereign, “the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with [a] prosecution for a discrete *federal* offense.” *Lara*, 541 U.S. at 210 (italics in original).

The Ute Mountain Ute Tribe is a sovereign Indian Tribe. For at least the last thousand years, Ute Indians have inhabited a vast area of the Southwest. See VIRGINIA SIMMONS, UTE INDIANS OF UTAH, COLORADO, AND NEW MEXICO 1-11 (2000). Through a series of conflicts, treaties, and legislation, the Ute Mountain Ute Tribe currently occupies territory in Southwest Colorado and Southeast Utah. *Id.* at 219; *Cuthair v. Montezuma-Cortez, Colorado Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1155 (D. Colo. 1998) (outlining the history of the Ute Indians). Courts have repeatedly recognized the tribe's sovereign status. See, e.g., *Jimi Dev. Corp. v. Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493, 497 (D. Colo. 1996) (applying the doctrine of sovereign immunity to the Ute Mountain Ute Tribe); *Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo. App. 2004) (examining the sovereign immunity of the Ute Mountain Ute Tribe).

Denezpi concedes that “[i]t is undisputed that the Ute Mountain Ute Tribe is sovereign” and it maintains the power to prosecute criminal offenses against tribal members. Opening Br. at 10; Def. Reply to Mot. to Dismiss, I:44 (“Uncontested Facts...The Ute Mountain Ute Tribe is a Sovereign and is a separate sovereign from them the United States.”). Thus, under the separate sovereign doctrine, prosecutions from the wellspring of Ute Mountain Ute power do not foreclose federal prosecution.

C. The CFR Tribal Court is an instrument for the tribe to exercise its power.

Prosecutions in the Ute Mountain Ute CFR Tribal Court draw authority from the wellspring of Ute Mountain Ute Power. CFR Tribal Courts operate by regulation at 25 C.F.R. § 11.100 *et. seq.* These regulations instruct that CFR Tribal Courts shall “provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians ...but where tribal courts have not been established to exercise that jurisdiction.” *Id.* at §11.102 (emphasis added). Put into relevant terms, the CFR Tribal Courts provide a forum for tribes to exercise their historically rooted prosecutorial authority.

Naturally, tribes retain the ability to dissolve and replace the CFR Tribal Court. *Id.* at §11.104; *see, e.g., Alexander v. Salazar*, 739 F.Supp.2d 1333, 1336 (E.D. Okla. 2010) (describing the Choctaw Nation’s dissolution and replacement of the CFR Court). Likewise, the tribe can institute ordinances to be enforced in the CFR Tribal Court, including ordinances that supersede any of the otherwise enforceable regulations. 25 C.F.R. § 11.108. Indeed, Denezpi entered an *Alford* plea to just such an offense under the Ute Mountain Ute Code. 6 Ute Mountain Ute Code 2; I:33-34.

The power to prosecute in a CFR Tribal Court exactly matches the authority arising from a tribe’s sovereign status, as modified by Congress and

case law. 25 C.F.R. §§ 11.114, 116, 118. In the criminal context, this means a tribe acting through a CFR Tribal Court may only prosecute Indian offenders for violations occurring on tribal land of tribal ordinances or non-superseded portions of the federal regulations. *Id.* The United States, in contrast, has no authority or jurisdiction to prosecute Indian offenders for violation of tribal ordinances, or the Code of Federal Regulations on tribal land. *See Ex Parte Crow Dog*, 109 U.S. 556 (1883). In fact, the United States acting on its authority cannot prosecute offenses committed on tribal land by an Indian with an Indian victim unless the crime falls under the ambit of the Major Crimes Act, 18 U.S.C. §1153, or is a crime of nationwide applicability, *e.g.*, violations of the Controlled Substance Act or bank robbery.²

This Court's decision in *Tillett v. Lujan* recognizes that the power to prosecute in a CFR Tribal Court flows from the tribe. 931 F.2d 636 (10th Cir. 1991). In *Tillett*, an Indian plaintiff argued that a CFR court did not have jurisdiction over her because it was not a tribal court. *Id.* at 639-641. The *Tillett* court rejected this argument, holding that "CFR courts...function as

² For this reason, if prosecutions in CFR Tribal Courts were brought by federal prosecutorial power (which they are not), all convictions from CFR Tribal Courts nationwide would be cast into significant doubt. This leads to another logical inconsistency: if the prosecutions in CFR Tribal Court arose from federal, not tribal, power, Denezpi's tribal court conviction would be a nullity for lack of authority and no bar to another prosecution.

tribal courts; they constitute the judicial forum through which the tribe can exercise its jurisdiction until such time as the tribe adopts a formal law and order code.” *Id.* at 640. Similarly, in *Dry v. CFR Court of Indian Offenses for Choctaw Nation*, this court unambiguously categorized a CFR Court as the “tribal authorities.” 168 F.3d 1207, 1208 (10th Cir. 1999); accord *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 & n. 17 (1978) (referring to Courts of Indian Offenses as “tribal courts”). Numerous district courts have reached the same conclusion. *Oklahoma v. Court of Indian Offenses for the Anadarko Agency*, 2014 WL 3880464, at *1 (W.D. Okla. Aug. 7, 2014) (rejecting an argument that the Court of Indian Offense for the Anadarko Agency is not a tribal court); *CDST-Gaming I, LLC v. Comanche Nation, Oklahoma*, 2009 WL 10668664, at *2, n.2 (W.D. Okla. July 27, 2009) (“The CFR Courts are characterized as tribal courts.”); *U.S. Bancorp v. Ike*, 171 F. Supp. 2d 1122, 1126 (D. Nev. 2001) (categorizing the Court of Indian Offenses as a tribal court); *Comanche Tribe v. Welter*, CIV-84-765-A (W.D. Okla. Sept. 4, 1986) (unpublished) (“The CFR Court does not represent a donation of jurisdiction by the United States to the Comanche Tribe; rather it was established by the United States as a channeling function simply to set up a tribunal, the existence and procedure of which would thereby be made public, so that a tribe could exert through it the powers it always had.”) (quoted in *Kiowa*

Election Bd. v. Lujan, 1987 WL 382994 at *4 & n.10 (Ct. Ind. App, Kiowa, Nov. 19, 1987)).

Congress agrees. The Indian Civil Rights Act (“ICRA”) defines a tribe’s “powers of self-government” to include the “judicial” power applied through the “courts of Indian offenses.” 25 U.S.C. §1301(2). This statute illustrates that the source of a tribe’s judicial power remains a tribe’s sovereign status and affirms this power can be applied through a CFR Tribal Court if the tribe so chooses, as the Ute Mountain Ute Tribe has chosen here.

The Courts of Indian Appeals – the appellate bodies for CFR Tribal Courts – have repeatedly rejected arguments that prosecutions in CFR Tribal Courts flow from federal power:

[T]oday [CFR] courts no longer can be categorized as [mere administrative creations of the Interior Department], and in fact have been acknowledged to operate under the residual sovereignty of the tribes as well as under the authority of the federal government.

Kiowa Election Bd., 1987 WL 382994 at *4 (footnote omitted) (quoted with brackets from the decision below, I:71). A plethora of other cases have reached the same conclusion. *See, e.g., Combrink v. Allen*, 20 Indian L. Rep. 6029, 6030 (Ct. Ind. App., Tonkawa, Mar. 5, 1993) (C.F.R. court is a “federally administered tribal court”); *Ponca Tribal Election Bd. v. Snake*, 17 Indian L. Rep. 6085, 6088 (Ct. Ind. App., Ponca, Nov. 10, 1988) (“The Courts of Indian Offenses act as tribal courts since they are exercising the sovereign authority

of the tribe for which the court sits.”); *Kiowa Bus. Comm. v. Ware*, 1980 WL 128845, at *1 (Kiowa Ct. Ind. Off. Dec. 24, 1980) (“The CFR courts are not federal district courts and function primarily as tribal courts.”); *Gallegos v. French*, 1991 WL 733411 at *10 (Ct. Ind. App., Delaware, June 4, 1991) (prior decisions “uniformly state that the court is exercising the sovereignty of the tribe for which it sits”).

Denezpi argues, without authority, that because the CFR Tribal Court “function, at least in part, as a ‘federal agency’ the dual sovereignty exception does not apply.” Opening Br. at 16. This reasoning is precisely the functional approach the Supreme Court has repeatedly rejected. *Heath*, 474 U.S. at 88; *Sanchez Valle*, 136 S.Ct. at 1867.

Further, Denezpi implies that because certain aspects of the CFR Tribal Courts must be approved by the Assistant Secretary of Indian Affairs, that prosecutions do not flow from tribal sovereignty. Opening Br. at 18. But many aspects of tribal government require approval by the federal government. For example, the Ute Mountain Ute Tribe adopted its constitution and by-laws on May 8, 1940; the Secretary of Interior approved the Constitution, as he was required to do, on June 6, 1940. CONSTITUTION AND BY-LAWS OF THE UTE MOUNTAIN UTE TRIBE, June 6, 1940, available at <http://thorpe.ou.edu/IRA/utemtcons.html> (last accessed Jan. 14, 2020). The

Ute Mountain Ute Constitution itself requires the Secretary of the Interior to approve several actions taken by the tribe. *Id.* These approvals do not reduce the tribe's sovereignty, just as the approvals and oversight required of the CFR Tribal Court do not affect the source of the tribe's power to prosecute in that venue.

Because prosecutions in the Ute Mountain Ute CFR Tribal Court draw authority from the deep wellspring of the Ute Mountain Ute Tribe's power, the court below properly denied Denezpi's motion to dismiss.

II. Denezpi is not entitled to a new trial because his counsel elicited testimony that he now regrets.

Issue Raised and Ruled On: Defense counsel asked V.Y. a series of questions about her social knowledge of Denezpi. I:95-96. V.Y. testified that she knew Denezpi and his battered girlfriend. *Id.* Defense counsel moved to strike. *Id.* The court below denied the motion because the question directly called for the response. *Id.*

Standard of Review: Denezpi has waived review of this issue under the invited error doctrine. *See United States v. Burson*, 952 F.2d 1196, 1203 (10th Cir. 1991); *United States v. Oldbear*, 568 F.3d 814, 826 (10th Cir. 2009) ("Our invited error doctrine prevents a defendant or counsel from lying in wait for potential mistakes, and then seeking to reverse the outcome of trial."). If he had not waived the issue, this court would review V.Y.'s

statements for non-constitutional harmless error by reviewing “the entire record de novo, examining the context, timing, and use of the erroneously admitted evidence at trial and how it compares to properly admitted evidence.” *United States v. Kupfer*, 797 F.3d 1233, 1243 (10th Cir. 2015).

Reversal would not be required unless the error had a “substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect.” *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (*en banc*).

A. Denezpi invited the alleged error.

Defense counsel elicited V.Y.’s testimony, inviting any error. It is “fundamental that a defendant cannot complain of error which he invited upon himself.” *United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000) (quotations omitted).

For example, in *United States v. Brown*, counsel for the defendant elicited opinion testimony from an officer about a witness’s credibility. 631 F. App’x 605, 609 (10th Cir. 2015) (unpublished). The court rejected the defendant’s request for a new trial because “[a]s a strategic decision, counsel asked a question and received an answer. [The defendant] cannot now object because the answer was different than expected or desired. Whatever counsel’s strategy, we will not consider the error on appeal.” *Id.* Similarly, in *United States v. McKenzie*, this court handily rejected an alleged

constitutional violation because the defendant “elicited through his cross-examination of [an agent] the information he complains was admitted in violation of the Confrontation Clause...” *United States v. McKenzie*, 532 F. App’x 793, 797 (10th Cir. 2013) (unpublished). *See also, e.g., United States v. Parikh*, 858 F.2d 688, 695 (11th Cir. 1988) (“We hold that the admission of out of court statements by a government witness, when responding to an inquiry by defense counsel, creates ‘invited error’”); *United States v. Sarras*, 575 F.3d 1191, 1216 (11th Cir. 2009) (“Because Sarras’s question elicited the very testimony about which he now complains, he is entitled to no relief.”).

Here, defense counsel made a strategic decision to try to undermine V.Y.’s credibility by showing a larger awareness of Denezpi than testified to on direct. V:94-99. Defense counsel was fully aware that the only social contact not yet testified to was V.Y.’s friendship with Denezpi’s previously-battered girlfriend. V:96 (“I’ve talked to Mr. Graves about this before the trial started.”). Despite this, he specifically asked V.Y. about her social knowledge of Denezpi. *Id.* This tactic had merit – if defense counsel could show V.Y. had a prior romantic relationship or had lied about her interactions with Denezpi before the assault, V.Y.’s credibility may have been undercut. The gambit backfired. This court should not grant Denezpi a new

trial “because the answer was different than expected or desired.” *Brown*, 631 F. App’x at 609

In the only cases cited by Denezpi, *the government* elicited the problematic statements. In *Sumrall v. United States*, the question that elicited the prejudicial testimony was “propounded by the U.S. Attorney.” 360 F.2d 311, 312 (10th Cir. 1966). Similarly, in *United States v. Sand*, the objectionable information was “in response to a question from the Government.” 899 F.2d 912, 915 (10th Cir. 1990). Indeed, an important factor for the *Sands* court was the conduct of the government. *Id.* (“[W]hile the Government's conduct in this case may not rise to the level of ‘misconduct,’ it certainly borders on negligence.”). Denezpi has not cited any authority for the proposition that testimony specifically elicited by defense counsel constitutes reversible error.

Denezpi invited the error. And then, doubled-down. In doing so, Denezpi waived his right to complain of the elicited testimony on appeal.

B. Any error was harmless.

Any error was harmless. Evidence of Denezpi’s guilt was substantial. V.Y. credibly testified at trial. V:41-83. Her testimony was consistent with the multiple statements given to law enforcement and medical personnel. *Compare Id.* at 41-83 to *Id.* at 82, 216-219, 276, 374-378. V.Y. had significant

injuries consistent with the reported assault. *Id.* at 394-95. Further, V.Y. had Denezpi's DNA on her genitalia. *Id.* at 436-40. The scene of the crime was as described by V.Y. *Id.* at 209-11, 302-307.

Denezpi argues that the error was not harmless because this case is a “he said, she said.” But that doesn't help him. First, the jury either believed the victim or it didn't. Because the jury believed the victim, her comments about Denezpi's girlfriend did not matter. If the jury hadn't believed her, then it wouldn't have believed her responses to defense counsel about Denezpi's girlfriend (she was the only one to testify about it.) Second, Denezpi destroyed his own credibility at trial. He fled from law enforcement and admitted he “hid.” *Id.* at 489, 505. The recorded interview with Denezpi showed a rapidly evolving, internally inconsistent narrative. Trial Exhibit 37, Supp. I. At trial, Denezpi testified that he lied multiple times to the police before asserting consent. V:513-18, 554, 569. And then he offered the jury a new and implausible version of events. V:457-77.

After defense counsel's questions of V.Y., neither party elicited further testimony about other acts by Denezpi. And neither party made use of the information in closing arguments.

CONCLUSION

Denezpi's conviction should be affirmed.

Respectfully Submitted,

Jason R. Dunn
United States Attorney

s/ Jeffrey K. Graves
Jeffrey K. Graves
Assistant U.S. Attorney
103 Sheppard Dr., Room 215
Durango, Colorado 81301
(970) 247-1514

Email: Jeffrey.Graves@usdoj.gov

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 32(a)(7)(B)(i), I certify that the **ANSWER BRIEF OF THE UNITED STATES** is proportionally spaced and contains 5,148 words, according to the Microsoft Word software used in preparing the brief.

/s/ Erin Prall
ERIN PRALL
U.S. Attorney's Office

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/s/ Erin Prall
ERIN PRALL
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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ERIN PRALL
U.S. Attorney's Office