IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **AMANDA IRENE SMITH,** **Defendant.**	**Case No. 21-CR-553-MWM**

Response to Defendant's Motion for Dismissal, Judgement of Acquittal, and for a New Trial [Dkt # 194]

This Court should deny Smith's motion because the court had jurisdiction over all of her offenses, the testimony and evidence presented to the trial jury sufficiently established Smith's guilt of child abuse beyond a reasonable doubt, and because she is unable to establish any of the three elements of a *Brady* violation.

Background

From 2014 to April 2019, Smith and Joel Smith physically abused and neglected H.M., who was between four to nine years old during that time. A federal grand jury returned a superseding indictment, charging Smith with Child Abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1152, 13, and 2; 21 O.S. § 843.5(A) (count three); and Child Neglect in Indian Country, in violation of 18 U.S.C. §§ 1151, 1152, 13, and 2; 21 O.S. § 843.5(C) (count four). After a four-day trial, the jury convicted Smith of both child abuse and child neglect. Smith now moves to dismiss her case for a lack of jurisdiction, moves for a judgment of acquittal of count three, Child Abuse, and for a new trial based on alleged *Brady* violations. (Dkt. # 194). For the reasons set forth below, this Court should deny Smith's motion.

Argument & Authorities

Oklahoma v. Castro-Huerta did not divest the federal government under the General Crimes Act.

Castro-Huerta held that, under the General Crimes Act (18 U.S.C § 1152), the Federal Government and the State have *concurrent* jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). It does not purport to make any ruling regarding the Assimilative Crimes Act (18 U.S.C. § 13), in fact, the Act is never mentioned in the decision. Nor does it even insinuate that it was striping the Federal Government of jurisdiction.

The ACA applies to Indian Country. *United States v. Pinto*, 755 F.2d 150, 153-54 (10th Cir. 1985) (*citing Williams v. United States*, 327 U.S. 711, 713 (1946). In *Iowa Tribe of Indians v. Kansas*, the Tenth Circuit articulated how the ACA applies to Indian Country. 787 F.2d 1434, n. 2 (10th Cir. 1986). Essentially, it is a "double derivative jurisdiction." *Id*. (*citing* Clinton, *Clinton Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 534 (1976). The ACA incorporates local state law into federal law and applies that law to federal enclaves located within the state. *Id*. The ACA is applied to Indian Country by the GCA, as a part of "the general laws of the United States." *Id*.

Smith comes to her conclusion that these two cases divest the federal government of jurisdiction through a flawed reading of the relevant statutes. (Dkt. 194 at 5). In relevant part, the general crimes act states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

18 U.S.C. § 1152. Smith's claim that this act, by its wording, applies only to locations "within the sole and exclusive jurisdiction of the United States," misunderstands the plain

meaning of the statute. (*Id.*). As far back as 1891, the Supreme Court has made it clear that the phrase, "sole and exclusive jurisdiction" is "only used in the description of the laws which are extended" to Indian country. *Castro-Huerta*, 142 S. Ct. at 2495-96 (*citing In re Wilson*, 140 U.S. 575, 578 (1891). Stated more simply, the General Crimes Act provides that the federal criminal laws that apply to federal enclaves apply to Indian Country. *Id*. at 2496. It does not create a threshold requirement that *only* federal jurisdiction apply in order to have Indian Country jurisdiction.

Such a requirement would be inconsistent with the fact that, even prior to *Castro-Huerta*, the federal government did not have sole and exclusive jurisdiction in Indian Country. Non-Indians who committed crimes against non-Indians in Indian Country could be prosecuted by the states. *United States v. McBratney*, 104 U.S. 621 (1881). Indians who committed crimes against non-Indians in Indian Country were subject to prosecution by tribal authorities, and six states already had the authority to prosecute offenses committed by Indians in Indian Country. 18 U.S.C. § 1162.

Smith's argument about Assimilative Crimes Act fares no better. In relevant part, the ACA states:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States *not within the jurisdiction of any State, Commonwealth, territory*, *possession, or district* is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 3. (emphasis added). Smith claims that the italicized text above shows that you can only use the ACA if the location is not within the jurisdiction of any State, Commonwealth, territory, possession or district. (Dkt. # 194 at 7).

However, a plain reading of the statute shows that is not the case. The first section of this statute lays out the two situations when the ACA can be used. First, "Within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title." 18 U.S.C. § 3. This is the section that makes the ACA applicable in Indian Country because of the GCA's command to apply the laws of federal enclaves to Indian Country. *Iowa Tribe of Indians*, 787 F.2d at n. 2.

The second section states: "on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, …" 18 U.S.C. § 3. This language is separated from the first clause by a comma, which is a clear sign that it is an additional means of identifying an area in which state laws can be assimilated, not conditions that modify the previous section. If the language cited by Smith was meant to modify the entire statute, it would have been separated from the statements regarding the territorial sea by some punctuation, which it is not.

Prentiss does not change this analysis. *Prentiss* held that, in a prosecution under § 1152, the Indian and Non-Indian status of the individuals involved was an essential element that needed to be alleged in the indictment and proved by the government. *United States v. Prentiss*, 206 F.3d 960, 962 (10th Cir. 2000). It does not purport to make any ruling regarding the ACA, nor is it even mentioned. As the Supreme Court had previously ruled that the ACA applies to Indian Country in *Williams*, *Prentiss*

could not limit that ruling, and certainly would not attempt to do so without doing it explicitly. Additionally, *Prentiss* was issued after *Pinto* and *Iowa Tribe of Indians*, and if the Tenth Circuit intended to overrule them, it would have stated that.

Considering the clear case law regarding the applicability of the ACA to Indian Country, and the fact that Smith's arguments are premised on a misreading of the ACA and the GCA, her first basis for dismissal for lack of subject matter jurisdiction lacks merit and should be denied.

Smith's argument that she cannot aid and abet an Indian defendant was already rejected by this Court.

Smith previously argued in Dkt. # 176, filed on June 22, 2023, that she could not be found guilty of aiding and abetting an Indian under 18 U.S.C. § 1153. This argument was rejected by the Court. (Trial Tr. at 716–17).[1]

Smith now resubmits that same argument without referencing the fact that this Court has already decided the issue. To the extent that Smith intends this as a motion to reconsider, she does not allege "1) an intervening change in the controlling law, 2) new evidence previously unavailable, [or] 3) the need to correct clear error or prevent manifest injustice." *Servants of Paracelete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Therefore, this is not a proper motion to reconsider, and is simply an attempt revisit issues already addressed by this Court, which is not an appropriate motion. *United States v. Christy*, 739 F.3d 534 539 (10th Cir. 2014). "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues

[1] Because the trial transcript is 1,022 pages, the Government will be providing a digital copy of the transcript in its entirety, which will be filed under seal.

in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.* 486 U.S. 800, 816 (1988).

As this Court has already decided this issue, and Smith raises no appropriate grounds for reconsideration, Smith's second basis for dismissal for lack of subject matter jurisdiction lacks merit and should be denied.

Smith's argument regarding the jury instructions is not appropriately before this Court.

As Smith correctly notes in her motion to dismiss, an objection to the jury instructions must be entered before the jury retires to deliberate. Fed. R. Crim. P. 30. Smith concedes that she did not object before the jury retired to deliberate. (Dkt. # 194 at 9-10). None of the cases cited by Smith establish a right to have that failure reviewed for plain error *in the district court*. The cases all consider the appropriate standard of review that an appellate court should use when reviewing the determinations *of* the district court. *See United States v. Teague*, 442 F.3d 1310, 1314 (10th Cir. 2006).

In fact, the plain language of the rule Smith cites, Rule 52, makes it clear that it does not apply in the district court. Fed. R. Crim. P. 52. The rule states: "A plain error that affects substantial rights may be considered *even though it was not brought to the court's attention*." *Id*. (emphasis added). In order for an order to be reviewed for plain error, it must not have been raised to the district court. This reading is supported by Rule 30, which states that failing to object to a jury instruction prior to when the jury begins its deliberation, "precludes appellate review, *except as permitted under Rule 52(b).*" Fed. Rule. Crim. P. 30(d) (emphasis added). This clarifies that the

standards discussed in Rule 52 are appellate review standards, not standards for the district court.

Any objection to the jury instructions needed to be made before the jury began its deliberation. No such objection was made. Under the rule, she is precluded from now making that argument. To the extent that Smith seeks review of the jury instructions, she will need to file an appeal and litigate the issue at that time. Therefore, her third stated basis for dismissal lacks merit and should be denied.

The Government presented sufficient evidence in order for a jury to find Smith guilty of child abuse.

The Court denied Smith's Rule 29 motion at trial (Trial Tr. at 661) and should do so again now because the testimony and evidence presented to the trial jury sufficiently established Smith's guilt of child abuse beyond a reasonable doubt.

A defendant challenging the sufficiency of the evidence faces a heavy burden. Federal Rule of Criminal Procedure 29(c) allows a judgment of acquittal after a guilty verdict only if a reasonable jury could not find the defendant guilty beyond a reasonable doubt based on the evidence, both direct and circumstantial, together with the reasonable inferences to be drawn from that evidence. *United States v. Montgomery*, 468 F.3d 715, 719 (10th Cir. 2006). The Court must view the evidence in the light most favorable to the government and may not weigh conflicting evidence or consider the credibility of witnesses. *United States v. Frazier*, 53 F.3d 1105, 1115 (10th Cir. 1995). A court's role is to determine whether the evidence presented, if believed, would establish the charged elements. *United States v. Vallo,* 238 F.3 1242, 1247 (10th Cir. 2001). If the standard is met, the court must defer to the jury's verdict. *United States v. Evans*, 42 F.3d 586, 589 (10th Cir. 1994).

Here, Count Three of the Superseding Indictment charged Smith with Child Abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1152, 13, and 2; 21 O.S. § 843.5(A). In order to be convicted of child abuse, the government must prove: (1) Smith willfully or maliciously; (2) injured or tortured H.M.; and (3) H.M. was under the age of eighteen at the time of the abuse. Smith argues that the government produced insufficient evidence to satisfy the elements of child abuse because "the only evidence regarding any physical contact came only from H.M., who testified that [Smith] had spanked her a single time." (Dkt. # 194, at 15). Smith is mistaken. Ample evidence at trial—including photographs and expert and lay testimony—established that a rational jury could have found that Smith willfully or maliciously injured H.M.

The government presented overwhelming evidence to support the jury's conclusion that Smith committed child abuse. H.M. remembered and testified to numerous episodes of physical abuse at the hands of Smith. H.M. testified that Smith frequently beat her with a variety of items, including a horse sorting whip, belt, paddle, and her hands. (Trial Tr. at 617-620). H.M. also testified to specific incidents of abuse. H.M. recalled a time when Smith repeatedly struck her on the head with a wooden broom handle, causing her head to bleed, and only stopped hitting her because the broom handle broke. (*Id.* at 610). H.M. also recalled a time when she was outside doing yardwork, and Smith walked outside of the house and pointed a BB gun at H.M. H.M. testified that Smith shot her in the leg and then yelled, "Get back to work." At trial, H.M. testified that she still has a scar on her leg from the bullet. (*Id.* at 618-620). Lastly, H.M. recalled that on April 5, 2019, the day she ran away, Smith had struck her numerous times with a belt earlier that afternoon. (*Id.* at 625-626).

H.M.'s testimony was further corroborated through multiple items of direct and circumstantial evidence. Allison testified to physical abuse she personally endured as well as to the physical abuse she witnessed Smith inflict upon both H.M. and Robert. Allison testified that she and H.M. were beat daily. (Trial Tr. at 301). Allison testified that she witnessed Smith strike H.M. with numerous objects, such as "shoes, fly swatter, and a livestock sorting flag." (*Id.* at 293). Allison explained that Smith used the livestock sorting flag because of its length, it allowed her to hit them with it without having to get off the couch. (*Id.).* Allison's testimony was corroborated by Deputy Brittney Burnett, who testified to locating a livestock sorting whip behind the couch in the living room, exactly where Allison had claimed it was stored. (*Id.* at 114).

H.M.'s allegations were further corroborated through Dr. Lauren Conway, a pediatric specialist that examined H.M. Dr. Conway testified that the injuries she observed to H.M. "were consistent with child physical abuse." (Trial Tr. at 521). Dr. Conway testified she observed "significant bruising on her buttocks that extended toward her genitalia" (*Id.* at 494) that was consistent with being struck with a belt. Moreover, Dr. Conway testified that of the hundreds of children she has diagnosed with physical abuse, the injuries she observed to H.M. were some of the most sever she had seen during her entire career. (*Id.* at 509-510). Lastly, in addition to her testimony alone, Dr. Conway took photos of every injury she observed on H.M.'s body, and these photos were admitted into evidence.

Considering the evidence cumulatively and in the light most favorable to the government, there is more than sufficient evidence to support Smith's conviction for Child Abuse in Indian Country.

Smith fails to establish a *Brady* violation sufficient to warrant a new trial.

Smith's motion for new trial is premised on three alleged *Brady* violations, two of which are factually inaccurate, and the third is not material. (Dkt. # 194). "A defendant who seeks a new trial ... based on an alleged *Brady* violation must show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material." *United States v. Velarde*, 485 F.3d 553, 558 (10th Cir. 2007). When evidence is made available at trial, there is no basis to assert that the government has suppressed it. *United States v. Brooks,* 727 F.3d 1291 (10th Cir. 2013).

"Evidence is 'material' under *Brady* only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 559. "In evaluating the materiality of withheld evidence, ... we review the cumulative impact of the withheld evidence, its utility to the defense as well as its potentially damaging impact on the prosecution's case." *Simpson v. Carpenter*, 912 F.3d 542, 572 (10th Cir. 2018).

Where evidence "insignificantly impact[s] the degree of impeachment," it generally will "not be sufficient to meet the ... materiality standard." *Douglas v. Workman,* 560 F.3d 1156, 1174 (10th Cir.2009). For example, where the credibility of a witness "has already been substantially called into question in the same respects by other evidence, additional impeachment evidence will generally be immaterial and will not provide the basis for a *Brady* claim." *Nuckols v. Gibson,* 233 F.3d 1261, 1267 n. 8 (10th Cir.2000). Accordingly, we have "discarded as immaterial ... undisclosed impeachment evidence where it was cumulative of evidence of bias or partiality already presented 'and thus would have provided

only marginal additional support for [the] defense.'" *United States v. Cooper*, 654 F.3d 1104, 1119–22 (10th Cir. 2011).

There was no *Brady* violation regarding Robert's memory loss because the information was presented and used by the defense during trial.

Smith cannot make any of the showings required to establish a *Brady* violation, as notice of Robert's traumatic brain injury and subsequent memory issues was not suppressed. Although the government concedes it was delayed in disclosing information related to Robert's memory loss to defense counsel, such information was still presented during Smith's trial. Specifically, the information was disclosed during Robert's direct examination. Moreover, Smith's counsel asked Robert numerous questions regarding his TBI and memory loss during cross-examination. In fact, defense went memory by memory in order to confirm precisely which memories he could no longer recall. Under *Brady 's* framework, when evidence is made available at trial, there is no basis to assert that the government has suppressed it. *United States v. Brooks*, 727 F.3d 1291 (10th Cir. 2013).

Nevertheless, even if the information is considered to have been "suppressed," Smith has not shown materiality. In the context of evidence "produced during trial, we focus on 'whether there is a reasonable probability that the outcome of [the trial] would have been different had the [government] disclosed th[e] information earlier.'" *United States v. Ahrensfield*, 698 F.3d 1310, 1318 (10th Cir. 2012). Smith appears to argue that the delay in disclosure prevented her from strategically using this information in preparation for trial. "The relevant standard of materiality, however, does not focus on trial preparation but instead on whether presentation of the evidence would have created a reasonable doubt of guilt that did not otherwise exist." *United States v. Behrens*, 689 F.2d 154, 158 (10th Cir. 1982). Under this standard, materiality requires more than vague complaints about an effect

on trial strategy. *United States v. Young*, 45 F.3d 1405, 1409 (10th Cir. 1995).

Smith has provided few specifics, stating only in broad terms that she would have been better prepared if she'd had known of the memory loss earlier. However, even if Smith would have been better prepared, she hasn't shown how earlier disclosure of Robert's memory loss would have created reasonable doubt as to Smith's guilt or innocence. Therefore, because the government didn't suppress the information and it was immaterial as to Smith's guilt, the delayed disclosure didn't violate her right to due process.

Because the government did not make any promises to Allison, nor did she testify as such, no due process violation occurred.

The government never made Allison any promises regarding potential future prosecution. This fact was confirmed during defense counsel's cross-examination of Allison. Specifically, Allison was asked:

> Q. The last thing I want to ask you about, ma'am, you testified that you knew beginning a couple of days ago that you weren't going to be charged with this crime again federally. How did you learn that information.
>
> A. I asked.
>
> Q. You asked the government?
>
> A. Yes, ma'am.
>
> Q. And the government told you that you weren't going to be charged with this?
>
> A. They told me that they hadn't taken charges at that time.
>
> Q. So they didn't specifically tell you that you weren't going to be charged?
>
> A. That is correct
>
> Q. Okay. So as you sit here today, you don't know whether you're going to be charged with that -- with this crime or not?
>
> A. Yes, ma'am.

(Trial Tr. at 368-369). As such, the government did not commit a *Brady* or prosecutorial misconduct violation, and Smith's motion asserting the contrary is not supported by the record.

Smith was provided all records that Dr. Conway reviewed in preparation for her testimony.

Smith also incorrectly asserts that the government asked Dr. Conway to testify to reports that had not previously been provided to defense counsel. Every report Dr. Conway reviewed and based her testimony on had previously been produced to in discovery. Smith failed to establish anything to the contrary, either during trial, or in her motion.

Likewise, Smith's motion fails to reference any specific record or statement made by Dr. Conway on which they are basing this assertion. However, if they were to do so, the government is confident it would be able to provide a bates stamped copy of the report in question in order to remove any doubt that all records Dr. Conway reviewed in preparation for her testimony had already been provided to defense in discovery. Therefore, without more, Smith is unable to establish the existence of any *Brady* or due process violation.

The Court did not deprive Smith of her right to mount a full defense by requiring her to comply with the Rules of Evidence.

Finally, Smith argues that her defense was hampered by the Court's evidentiary rulings with respect to their attempted impeachment of Allison. (Dkt. #194, at 22). However, the Court's rulings did not hamper the defense and were in accord with the rules of evidence. "The Fifth and Sixth Amendments grant a defendant the right to testify, present witnesses in his own defense, and cross-examine witnesses against him - often collectively referred to as the right to present a defense." *United States v. Tapaha*, 891 F.3d 900, 905 (10th Cir. 2018). However, as "this right is not absolute; a defendant must still abide by the rules of evidence

and procedure." *Id*. "Evidentiary rule that generally excludes extrinsic evidence of a witness' credibility allows cross-examination of witness about specific conduct if those incidents reflect on witness' character for truthfulness; however, if witness denies making a statement on matter classified as collateral, his examiner must take his answer, that is, examiner may not prove the making of the statement by extrinsic evidence." *United States v. Martinez*, 76 F.3d 1145 (10th Cir. 1996).

Smith argues that by preventing the admission of Allison's journals, the Court did not allow her to thoroughly impeach Allison. However, since this Court already ruled on these objections during trial, Smith should not receive a new trial unless the Court is inclined to reverse itself and allow the introduction of the inadmissible hearsay at a subsequent trial. The Court, however, should not reconsider its rulings because they were proper and still allowed the defendant to thoroughly impeach Allison.[2]

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[2] During the trial, Smith's counsel attempted to admit multiple journals that Allison had previously had, claiming that multiple entries potentially implied she was responsible for the abuse towards H.M. (Trial Tr. at 763-769). However, when fully pressed on what sort of incriminating statements were found in the multiple journals, Smith's counsel was only able to point to two entries, neither of which ultimately incriminating against Allison. The first included an entry where Allison wrote the sentence "Today I will not lose my temper with my sister." (*Id.* at 764). The second, included an entry where Mr. Gifford alleged Allison appeared to be jealous of H.M., claiming she was "spoiled" because Allison thought H.M. would receive more Christmas presents than her. (*Id.).* Based on this proffer by Mr. Gifford, the Court held neither entry was admissible. Specifically, the Court stated, "Every good older sister in America writes in her journal that she has to be more patient with her younger sister. Every decent older sibling in the world is jealous of younger siblings. All siblings wish they got more Christmas presents, so most of that won't help you." (Trial Tr. at 769).

Conclusion

This Court had jurisdiction to try this case, more than sufficient evidence was presented at trial to establish Smith's guilt of child abuse beyond a reasonable doubt, and Smith cannot establish any of the three elements of a *Brady* violation, let alone all three, therefore this Court should deny Smith's Motion.

Respectfully submitted,

CLINTON J. JOHNSON
United States Attorney
Northern District of Oklahoma

/s/ Stephanie N. Ihler
Stephanie N. Ihler, OK Bar No. 31850
Assistant United States Attorney
110 W. 7th Street, Suite 300
Tulsa, OK 74119-1029
918-382-2700
stephanie.ihler@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2023, I submitted the foregoing document to the Clerk of the Court using the CM/ECF filing system, which will provide service to the following counsel of record:

Robert Gifford
Counsel for Smith Irene Smith

/s/ Stephanie N. Ihler
Stephanie N. Ihler
Assistant United States Attorney