

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 23-CR-00339-GKF-3
)	
ROYAL DALE JUAN BROWN, <i>et al.</i> ,)	
)	
Defendants.)	

ROYAL BROWN’S MOTION TO DISMISS COUNTS ONE, TWO, AND FIVE

Royal Brown, by and through undersigned counsel, requests this Court dismiss counts 1 and 5 of the Indictment, as to him, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). Specifically, counts 1 and 5 of the Indictment fail to adequately allege an offense as to Mr. Brown, because there is no jurisdictional element under 18 U.S.C § 1153. An allegation of accomplice liability under 18 U.S.C. § 2(b) does not cure the failure to allege an essential element. Additionally, as count 2 is predicated on the commission of count 1, it should also be dismissed as to Mr. Brown. In support of this Motion, Mr. Brown submits the following:

PROCEDURAL FACTS

On October 19, 2023, the Grand Jury returned an Indictment charging Royal Brown and his co-defendants jointly with a total of five (5) counts. The counts relevant to this motion are:

Count One

[18 U.S.C. §§ 1151, 1153, and 2111]

On or about September 14, 2023, within Indian Country in the Northern District of Oklahoma, the defendants KEENAN DUKE LAMONT BROWN II, a/k/a “Trigga”, an Indian, and ISAAC EMILIANO LITTLEMAN-ORTEGA, an Indian, aiding and abetting each other, took property of approximately \$200 in value, specifically, a cellular telephone, a wallet, and a purse, from the person and

presences of B.H., a person known to the Grand Jury, by force and violence, and by intimidation, *and the defendant, ROYAL DALE JUAN BROWN, a/k/a “Buck,” willfully caused the act described above to be done, pursuant to Title 18, United States Code, Section 2(b).*

All in violation of Title 18, United States Code, Sections 1151, 1153, and 2111.

Count Five
[18 U.S.C. §§ 1151, 1153, 1201(a)(2), and 1201(d)]

On or about September 14, 2023, within Indian Country in the Northern District of Oklahoma, the defendants, the defendants KEENAN DUKE LAMONT BROWN II, a/k/a “Trigga”, an Indian, and ISAAC EMILIANO LITTLEMAN-ORTEGA, an Indian, aiding and abetting each other, knowingly and unlawfully seized, confined, inveigled, and held for ransom, reward, and otherwise, I.V., a person known to the Grand Jury, *and the defendant, ROYAL DALE JUAN BROWN, a/k/a “Buck,” willfully caused the act described above to be done, pursuant to Title 18, United States Code, Section 2(b).*

All in violation of Title 18, United States Code, Sections 1151, 1153, and 1201(a)(2), and 1201(d)
(emphasis added).

Under 18 U.S.C. § 1153, the Indian status of the defendant is an essential element and failure to allege the status of the defendant is not harmless. To charge Mr. Brown under § 1153, his Indian status must be alleged regardless of the whether he is charged as an accomplice or a principal. As both counts 1 and 5 fail to allege the Indian status of Royal Brown, these counts do not state an offense and therefore should be dismissed. Upon dismissal of count 1, the related count 2 should also be dismissed.

ARGUMENT AND AUTHORITY

Federal Rule of Criminal Procedure 12(b) permits the filing of pretrial motions objecting to the sufficiency of an indictment for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). A sufficient indictment “sets forth the elements of the offense charged, puts the defendant on fair notices of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense.” *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir. 1997). Counts 1 and 5 of the indictment point to 18 U.S.C. § 1153 as providing the federal government jurisdiction to prosecute the offenses. This provision, otherwise known as the Major Crimes Act, extends federal criminal law to “[a]ny Indian who commits against the person or property of another Indian or other person” one of several enumerated crimes.

A. Indian status of the defendant is an essential element of an offense under 18 U.S.C. § 1153.

The Tenth Circuit has recognized that the Indian status of both the victim and the defendant are essential elements under 18 U.S.C. §§ 1152 and 1153 and that an indictment is insufficient if it fails to allege these elements. *United States v. Prentiss*, 206 F.3d 960, 966 (10th Cir. 2000), *rev’d on other grounds*, 256 F.3d 971, 985 (10th Cir. 2001) (en banc). “[I]n order to prosecute under 18 U.S.C. § 1153, the Government must prove, as a jurisdictional requisite, that an Indian committed one of fourteen enumerated crimes against another Indian, or any person, within Indian country.” *United States v. Torres*, 733 F.2d 449, 453–54 (7th Cir. 1984).

While the indictment clearly indicates that both of Mr. Brown’s co-defendants are Indians, the Government omitted any reference to Mr. Brown’s Indian status. Because the Indictment alleges the offense under the Major Crimes Act pursuant to 18 U.S.C. § 1153, and there is no reference to Mr. Brown’s Indian status—indeed, defense counsel has received no evidence that

Mr. Brown is Indian—the Indictment fails to sufficiently state an offense as to Mr. Brown. This Court should dismiss counts 1 and 5 as to Mr. Brown for failure to state an offense.

B. Accomplice liability under 18 U.S.C. § 2 does not cure the defects in Counts 1 and 5 as to Mr. Brown.

Generally, “18 U.S.C.A. § 2 abolishes the subtle distinctions, recognized with respect to felonies at common law, between principals and accessories before and at the fact, and makes them all principals, whether the offense is a felony or misdemeanor.” *Colosacco v. United States*, 196 F.2d 165, 167 (10th Cir. 1952). This Court cannot find counts 1 and 5 of the Indictment to Mr. Brown without first accepting the premise that accomplice liability under 18 U.S.C. § 2 extends the reach of 18 U.S.C. § 1153, regardless of the defendant’s Indian status. The Tenth Circuit has not yet addressed the intersection between this statute and the jurisdictional element of §1153. However, in affirming the dismissal of a similar indictment, the Eighth Circuit rejected the proposition that accomplice liability applied in this manner in the context of Indian law. *Graham v. United States*, 572 F.3d 954, 957 (8th Cir. 2009).

The *Graham* indictment charged two defendants with first degree murder under § 1153, but only alleged the Indian status of one defendant. The district court dismissed the indictment for failure to state an offense. On appeal, the government argued that the indictment was sufficient because one codefendant’s Indian status was properly alleged therefore the other defendant could be charged as an aider-and-abettor without alleging his Indian status. Relying on the plain language of § 1153, the Tenth Circuit’s holding in *Prentiss*, and its own circuit’s precedent, the *Graham* panel held that accomplice liability under § 2 does not extend federal jurisdiction under §1153 to include non-Indians therefore the indictment failed to state an offense as to the defendant whose Indian status was omitted. *Id.*

The *Graham* decision does not differentiate between the two subsections of § 2. The current Indictment, notably, has specifically referenced § 2(b) which states: “(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.” Courts have held that § 2(b) provides that an individual that is incapable of committing a substantive offense directly due to some lack in capacity can nonetheless be criminally liable where they cause the prohibited act to be done by another who has the capacity, but not the intent to commit the crime. *United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984). This provision has been used to prosecute defendants who lacked the “capacity” to directly commit the underlying offense because they did not hold a specific position, such as a government or bank employee, and they caused such an official or employee to commit the prohibited acts. *See United States v. Ruffin*, 613 F.2d 408 (2nd Cir. 1979). This provision has also been used in the context of defendants who used an innocent intermediary to execute the prohibited acts. *United States v. Montoya*, 716 F.2d 1340, 1343 (10th Cir. 1983). *See also United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). Undersigned counsel has not found any instance of §2(b) being applied to extend criminal liability where prosecution is predicated upon § 1153.

The government cannot extend the reach of the Major Crimes Act through use of accomplice liability under 18 U.S.C. § 2. Moreover, a jurisdictional void does not exist in this instance because Mr. Brown is currently facing charges in Tulsa County District Court case number CF-2023-3340 for his role in the alleged robbery. Whether or not Mr. Brown acted together with or directed the actions of his codefendants in the commission of the alleged crimes, his Indian status is a necessary element which must be alleged to sufficiently state an offense under § 1153.

CONCLUSION

Counts 1 and 5 of the Indictment must be dismissed as to Mr. Royal Brown for failure to state a federal offense pursuant to Fed. R. Crim. P. 12(b)(3)(B)(v). Count 2 is predicated on the commission of Count 1 and therefore should be dismissed as to Mr. Brown as well.

Respectfully submitted,

OFFICE OF THE FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November 2023, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of Notice of Electronic Filing to the following ECF registrants:

Joshua Michael Carmel
United States Attorney Office

Nathan Edward Michel
United States Attorney Office

Regan Vincent Reininger
United States Attorney Office

s/Stephanie A. Baker
Stephanie A. Baker,
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