IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 22-7048

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**UNITED STATES OF AMERICA,**
***Plaintiff/Appellee*,**

**v.**

**MONTELITO SANCHEZ SIMPKINS,**
***Defendant/Appellant.***

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE DAVID CLEVELAND JOSEPH, UNITED STATES DISTRICT JUDGE
CASE NO. CR-21-220-DCJ

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# BRIEF OF PLAINTIFF/APPELLEE

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ORAL ARGUMENT IS NOT REQUESTED

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May 26, 2023

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**

**Rules**

## PRIOR OR RELATED APPEALS

There are no prior or related appeals.

## STATEMENT OF JURISDICTION

Pursuant to 18 U.S.C. § 3231, the district court had subject matter jurisdiction over the charges because Defendant committed his offenses on Indian Country within the Eastern District of Oklahoma. (Vol. I, *Superseding Indictment*, ROA at 44-45).[1]

Pursuant to 28 U.S.C. § 1291, courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The district court sentenced Defendant on September 21, 2022, and entered its written judgment on September 23, 2022. (Vol. I, *Judgment*, ROA at 107-113). Defendant/Appellant timely filed his notice of appeal on September 26, 2022. (Vol. I, *Notice of Appeal*, ROA at 114). *See* Fed. R. App. P. 4(b)(1)(A) providing that notice of appeal must be filed within 14 days of the entry of judgment.

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[1] References to the record on appeal ("ROA") will be made as follows:

*Volume I – Pleadings*: by document title, followed by the page number(s) where the cited material appears in the consecutively paginated record, e.g. "Vol. I, *Motion*, ROA at 10";

*Volume II – Sealed Pleadings & PSR Materials Transcripts*: by paragraph number, followed by the page of the sealed record as it appears on the electronic file stamp, e.g. as "Vol. III, *PSR* ¶4, Sealed ROA at 2"; and;

*Volume III – Transcripts*: by the page number(s), where "TT" refers to the trial transcript, and "ST" refers to the sentencing transcript, e.g. "TT 7."

Defendant/Appellant's brief will be referenced as "Def. Brf."

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether There Was Sufficient Evidence to Convict Defendant of Sexual Abuse of a Minor?

II. Whether the District Court Committed Plain Error in Instructing the Jury?

III. Whether the District Court Abused Its Discretion in Limiting Defendant's Cross Examination of a Victim?

IV. Whether the District Court Imposed an Unlawful Sentence?

## COMBINED STATEMENT OF THE CASE AND FACTS

### *A. Procedural History*

On August 24, 2021, the grand jury returned a Superseding Indictment charging Defendant with two counts: Sexual Abuse of a Minor (Count One) and Abusive Sexual Contact (Count Two). (Vol. I, *Superseding Indictment*, ROA at 44-45). The Superseding Indictment alleged jurisdiction pursuant to 18 U.S.C. § 1152 because the offenses took place in Indian Country and both victims were Indian. (Vol. I, *Superseding Indictment*, ROA at 44-45). Prior to trial, Defendant failed to challenge the sufficiency of the indictment on the ground it failed to state an offense. *See, e.g.*, Fed. R. Crim. P. 12.

Prior to trial, both parties filed proposed jury instructions with the court. (Vol. I, *Gov. Proposed Jury Instructions*, ROA at 16-36; *Deft. Proposed Jury Instructions*, ROA at 37-43). Defendant submitted the following proposed instruction regarding Count One:

> The defendant is charged in Count One of the Indictment with Sexual Abuse of A Minor in Indian Country, in violation of Sections 1151, 1152, 2243(a), and 2246(2)(D) of Title 18 of the United States Code.
>
> To find the defendant guilty of this crime, you must be convinced that the United States has proved each of the following beyond a reasonable doubt:
>
> **First:** That on or about July 15, 2020, the defendant knowingly engaged in a sexual act with A.L. by intentionally touching, not through the clothing, A.L.'s genitalia with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
>
> **Second**: At the time of the sexual act, A.L. had reached the age of twelve years but had not yet reached the age of sixteen years;
>
> **Third**: At the time of the sexual act, A.L. was at least four years younger than the defendant;
>
> **Fourth**: That the sexual act occurred within the territorial jurisdiction of the United States; and
>
> **Fifth:** A.L. is an Indian.
>
> It is a defense to the charge of sexual abuse of a minor that the defendant reasonably believed that the victim had attained the age of 16 years. The defendant has the burden of proving by a preponderance of the evidence that he reasonably believed that A.L. had attained the age of 16 years.

(Vol. I, *Deft. Proposed Jury Instructions*, ROA at 42-43). The court substantially adopted Defendant's proposed instruction, specifically incorporating Defendant's five elements:

**INSTRUCTION #11**

The defendant is charged in the Indictment with Sexual Abuse of a Minor in Indian Country in violation of Title 18, United States Code, Sections 2243(a), 2246(2)(D), 1151, and 1152.

This law makes it a crime for anyone to knowingly engage in a sexual act with another person who has attained the age of twelve years, but has not attained the age of sixteen years, and is at least four years younger than the person so engaging.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

**First**: That the defendant knowingly engaged in a sexual act with A.L. by the intentional touching, not through the clothing, of the genitalia of A.L. with an intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person.

**Second**: At the time of the sexual act, A.L. had reached the age of twelve years but had not yet reached the age of sixteen years;

**Third**: At the time of the sexual act, A.L. was at least four years younger than the defendant;

**Fourth**: That the defendant's actions took place within the territorial jurisdiction of the United States; and

**Fifth**: A.L. is an Indian.

The government need not prove that the defendant knew the age of A.L.

You are instructed that the parties have stipulated and agree that the location of the charged act is in the Eastern District of Oklahoma within the boundaries of the Chickasaw Reservation within the territorial jurisdiction of the United States. This stipulation satisfies the fourth element of the charged offense.

> You are further instructed that the parties have stipulated and agreed that A.L. has some degree of Indian blood and that A.L. is a member of the Seminole Nation, a federally recognized Indian tribe. This stipulation satisfies the fifth element of the charged offense.

(Vol. I, *Jury Instructions*, ROA at 92-93).

Prior to closing arguments, the court heard argument from the parties regarding the court's proposed instructions. (TT 227-34). The government lodged one objection to Instruction 19. (TT 227-29). Defendant first asked the court to remove references to the descriptions in the instruction headings. (TT 230). Next, Defendant objected to the inclusion of "penis, groin, breast, inner thigh, or buttocks" in Instruction 12, as those areas were not alleged in the Superseding Indictment. (TT 230-233). The court sustained this objection and modified the jury instructions appropriately. (TT 230-233). Defendant's final issue was to notify the court of a typographical issue with Instruction 12, which the court corrected. (TT 233-34). Defendant never objected to the failure to include his non-Indian status as an element of the offense.

*B. Factual Summary of the October 18-19, 2022 Jury Trial*

In July 2020, A.L. lived with her mother, father (Morico Lewis), and her three siblings in Ada, Oklahoma. (TT 61-62, 104-105). Defendant often stayed at this home with A.L. and her family. (TT 62). While not related by blood, Lewis and Defendant were best friends, even more like brothers, and had known each other for

over ten years. (TT 62-63, 65, 105, 210). Lewis considered Defendant to be family. (TT 72, 212). Defendant was around for the birth of some of Lewis' children and the two would regularly hang out with each other, attend cook-outs, play video games, and listen to music. (TT 63, 210). Lewis and Defendant hung out every other day. (TT 65). When Lewis and his wife went on a weeklong cruise, it was Defendant who stayed with the children, making sure they were fed and going to school on time. (TT 86).

On July 15, 2020, Defendant and his girlfriend, Jessica, were living together when they had an argument and Jessica set Defendant's clothing on fire in their front yard. (TT 66-67, 106, 186). Lewis picked Defendant up and took him back to Lewis' residence where Defendant stayed for a period of time. (TT 67, 125, 186-187). Defendant did not have his own room at Lewis' home, but slept on a couch in the living room. (TT 68, 131, 207). Lewis' three daughters slept in a back bedroom accessible by walking through the kitchen. (TT 84-85, 128). Defendant kept some items in the closet in this bedroom. (TT 87).

The night of the fire, after returning to Lewis' house, Defendant went into A.L.'s room (the back bedroom). (TT 107, 217). Defendant was drunk, and sat on A.L.'s bed and began telling her about the fight he had with his girlfriend. (TT 108, 217). As he sat on her bed, Defendant put his hands on A.L.'s leg. (TT 109). A.L. was wearing shorts, and Defendant began touching her by placing his hand on her skin

directly underneath her knee. (TT 109). Defendant then moved his hand up A.L.'s leg, squeezing while he moved his hand, eventually reaching her vagina. (TT 110-111). Defendant positioned his hand underneath A.L.'s clothing and began touching and rubbing A.L.'s vagina. (TT 111).

During this interaction, A.L. was scared. (TT 111). She did not know what to think because Defendant was her father's best friend. (TT 111). A.L. sat there and went blank, not knowing what she should do. (TT 112). Defendant stopped touching A.L., stood up, and displayed his penis to A.L. (TT 112-113). Holding his penis, Defendant told A.L., "let me put it in." (TT 113). A.L. told him "No" and Defendant told her when she turned 18 she was his. (TT 114).

Defendant then sat back down on A.L.'s bed and returned to talking about his girlfriend. (TT 114). Lewis then came into the room, and Defendant hopped up off the bed. (TT 114, 129). After this, Defendant never spoke with A.L. about what happened in her bedroom. (TT 115).

On the night of the fire, Lewis testified he recalled seeing Defendant with A.L. in her bedroom. (TT 87). Lewis went through the kitchen and into A.L.'s room and saw Defendant on the bed with A.L. (TT 88, 100). No one else was present in the room. (TT 100). Defendant was naked from the waist up. (TT 101). Lewis asked, "What are you all doing" and Defendant popped up and told Lewis they were just hanging out. (TT 88). Lewis recalled this all took place "way after hours." (TT

87).

Less than three months later, on September 26, 2020, after having dinner with her family, L.D. went to A.L.'s home in Ada for a sleepover. (TT 29-30). L.D., who was 13, and A.L., who was 12, were looking forward to their first sleepover together. (TT 28, 30, 35, 105). L.D. and A.L were good friends and had met in fifth grade when L.D. moved to Ada. (TT 29).

When L.D. arrived at the home, A.L., Lewis (A.L.'s father), and Defendant were seated on the front porch. (TT 30, 73, 98, 209). L.D., her mother, and her step-father all got out of the car and went to talk to the trio on the porch. (TT 31, 73). Shortly after L.D. arrived at the house, Lewis and Defendant left to go hang out with friends. (TT 73, 210).

L.D. and A.L. went inside, put A.L.'s belongings down, and began talking and hanging out. (TT 32). During the evening, L.D. and A.L. talked, made Tik-Tok videos dancing and lip syncing to music, and hung out in the living room. (TT 34-35). When it was bedtime, A.L. and L.D. decided to sleep on a twin mattress in the living room. (TT 35, 120). The girls got blankets and pillows to put on the mattress. (TT 35-36). While they did not stay up late into the night, they were up later than normal, around 8:00 p.m. to 9:00 p.m. (TT 35, 116). Dressed in a Scooby-Doo t-shirt, L.D. fell asleep with A.L. on the mattress, the two girls sleeping face-to-face with each other. (TT 37, 40).

Lewis and Defendant stayed out all night partying, and arrived back home after 2:00 a.m. (TT 73, 90, 210). When they came into the house, both of the girls were asleep on the mattress in the living room.[2] (TT 74, 90). Lewis went to his bedroom and left Defendant to sleep on the couch in the living room. (TT 74, 91, 216).

Early in the morning, but while it was still dark outside, L.D. awoke to the living room lights flashing on and off and Defendant standing over her. (TT 37, 44, 90-91, 97). Once L.D. was awake, Defendant stopped flashing the lights, turning them back off. (TT 37). Defendant sat on a nearby couch and began talking to L.D. about her family. (TT 37-38). Defendant knew L.D. since she was six years' old and was familiar with many members of her family. (TT 39).

While speaking to her, Defendant got off his couch and came over to L.D.'s side of the makeshift bed. (TT 37-38). Defendant got on his knees and began rubbing L.D.'s thigh as she laid on her back. (TT 37, 40-41). When this started, L.D. stuck her hand under the blanket and tried to wake up A.L.[3] (TT 52). After touching L.D.'s thigh, Defendant moved his hand to L.D.'s vagina and began putting pressure on L.D.'s vagina. (TT 37, 40). While Defendant spent a short time touching L.D.'s vagina, it was not a brief touch. (TT 41).

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[2] A.L. testified that Defendant and Lewis were home when she and L.D. went to sleep. (TT 132-133).

[3] A.L. testified that she did not recall hearing Defendant speak to L.D. (TT 135). On cross examination, Defendant introduced evidence that A.L. stated during her forensic interview that she did hear Defendant speaking with L.D. as well as messing with her. (TT 140-141).

After a period of time, Defendant returned to his couch. (TT 37, 42). Once he left the floor, L.D. again attempted to wake up A.L. (TT 42, 52). Unable to wake A.L., L.D. looked back at Defendant now seated on the couch and observed him masturbating. (TT 37, 42). Defendant then asked L.D., "You're not going to tell anybody, right?" (TT 43).

Defendant left the living room and went to the bathroom, where L.D. heard him talking to Lewis.[4] (TT 43). L.D. continued to try to wake A.L. by pushing her and pinching her. (TT 44). Eventually, A.L. woke and L.D. took her outside and told her what happened. (TT 44, 117). L.D. looked scared, she was crying and shaking, and did not look like herself. (TT 117). L.D. called her uncle at 7:20 a.m. and asked him to pick her up at A.L.'s house. (TT 44-45). After about 35 minutes, L.D.'s uncle arrived and took L.D. from the home. (TT 45, 117-118). L.D. disclosed the details of Defendant's abuse to her aunt after which the family notified law enforcement. (TT 46-47).

After L.D. left, A.L. woke her parents up and told them about Defendant touching L.D. (TT 75, 92, 118, 142). Lewis got out of bed and spoke with Defendant. (TT 75). During this conversation, Defendant denied touching L.D. (TT 75). Defendant then went into Lewis' bedroom and confronted A.L. by looking A.L. in the eye and demanding she "better tell them I ain't doing that." (TT 93). A.L. did not respond

[4] Lewis did not recall speaking to Defendant outside the bathroom. (TT 92).

to Defendant's demands.

Lewis took Defendant from the bedroom and the two walked outside to talk further. (TT 93). While the two men stood outside, L.D.'s mother arrived at the residence with a firearm which she pointed at Defendant. (TT 76, 94). Defendant ran into the house and fled through the backdoor. (TT 76, 116).

Once Defendant was gone, A.L. told her mom and dad Defendant had also touched her, referring to the incident from July 2020. (TT 77, 118). Lewis broke down and asked A.L. why she did not tell him about this sooner. (TT 77). While crying, A.L. told him she was scared and did not know what to do. (TT 77, 83).

After Defendant fled the house, Lewis made numerous attempts to contact Defendant. (TT 76). Lewis called Defendant's telephone, sent him several text messages, and even went to Defendant's house waiting half the night for Defendant to return. (TT 76). However, these attempts failed and Lewis had not seen or heard from Defendant since that day. (TT 76). Defendant fled Ada, and police were able to locate him in Asher, Oklahoma. (TT 189-190).

When she testified, L.D. was 15 years' old and attended a school for Native American children in Oklahoma City. (TT 28). The parties also entered into two stipulations regarding the Indian status of L.D. and A.L. First, the parties stipulated, "A.L. has some degree of Indian blood and is a member of the Seminole Nation, a federally recognized Indian tribe." (Vol. I, *Stipulation No. 1*, ROA at 70). Second,

the parties stipulated, "L.D. has some degree of Indian blood, receives benefits through the Chickasaw Nation, and is eligible for membership in the Chickasaw Nation, a federally recognized Indian tribe." (Vol. I, *Stipulation No. 2*, ROA at 71).

Defendant testified at trial and confirmed much of the testimony elicited during the government's case in chief. (TT 202). For example, Defendant admitted he was at Lewis' house on September 26, 2020, and he and Lewis went to a party together that evening. (TT 203-204). Defendant and Lewis returned home, and Defendant laid on the couch in the living room where A.L. and L.D. were sleeping. (TT 204). Defendant denied touching L.D. inappropriately, but agreed Lewis went to him that morning and told him L.D. had disclosed Defendant assaulted her. (TT 205).

Defendant also admitted he spent the night at Lewis' home after his girlfriend set his clothes on fire. (TT 207-208). While Defendant denied touching A.L. inappropriately at this time, he admitted he was in A.D.'s room, alone with A.D. (TT 208, 217). Defendant disputed Lewis' testimony he was shirtless during this interaction. (TT 217).

Andrea Hamilton testified as an expert regarding child forensic interviews and the dynamics of child sexual abuse. (TT 167). Hamilton has been employed with the Oklahoma State Bureau of Investigation (OSBI) since 2007. (TT 163). Prior to her time at OSBI, she was a forensic interviewer and child welfare investigator. (TT 163). She specializes in child sexual abuse investigations and has conducted

approximately 1,890 forensic interviews of children. (TT 164, 167).

Hamilton testified a child victim can either disclose abuse immediately or delay reporting. (TT 171). An immediate disclosure is one where the child immediately tells an adult about the incident. (TT 171). Immediate disclosures are much more rare than delayed disclosures, and tend to happen when the offender is a stranger. (TT 171). In the case of a delayed disclosure, the child waits (sometimes for years) to disclose behavior, either until they are ready to disclose or when the behavior is discovered. (TT 171-172). Delayed disclosures are much more typical because children are generally abused by people they have an existing relationship with and children are not prepared to know how to act when their abuser is someone they love and trust. (TT 171-172). Specifically:

> Based on my training and experience, and research in the field what victims report later, why they didn't disclose after the first time, is that they were stunned that something happened or they were confused about what happened or they didn't know it was wrong and it may have felt good, especially if it's from someone the child trusts and loves, or if it could have been scary, if this is someone who is scary to them.
>
> It could be a lot of – a lot of kids will say that they just hoped that it would never happen again and to tell was going to be more of a problem than just dealing with it.

(TT 173-174). Moreover, if the offender has a great relationship within the family unit, this can make a child victim delay disclosing abuse. (TT 175).

*C. The Cross Examination of A.L.*

During the cross examination of A.L., the following exchange took place:

> Q. Okay. And your mom knows that XXXXX has lied about things before.
>
> MS. SINGER: Objection.
>
> THE COURT: Sustained. Calls for speculation.
>
> Q. (BY MR. SMITH:) When you first told your mom that Montelito had touched [L.D.], your mom wasn't sure?
>
> A. Correct.
>
> MS. SINGER: Objection.

(TT 142). The district court then held a bench conference with the parties regarding this line of questioning. (TT 143-148). The court told defense counsel while he could ask A.L. about what her mother said, he would not be allowed to question A.L. about what her mother thought, knew, or her mother's views on topics. (TT 143). Defense counsel then stated his intention to have A.L. testify the reason A.L. disclosed Defendant's abuse to her mother was because her mother believes that L.D. lies.[5] (TT 143-144). Specifically, counsel's next question would be, "That when you told your mom that it happened to you, too, that helped her believe that it really happened to [L.D.]." (TT 146). Counsel then made the following offer of proof:

[5] A.L. provided this information during her forensic interview. (TT 146).

> So if permitted, we would ask this witness – well, first of all we have a good faith basis to believe that this witness would say it because in the forensic video she says, I told my mom that it happened to me, too, because she did not believe [L.D.] because [L.D.] lies. That's in the forensic video, Exhibit 4, or whatever it is. [A.L.'s] forensic video.

(TT 146). The court responded:

> Well, it's not going to matter what [A.L.] told the mother. He can ask the witness in live, in person, not off of a proof. You can ask [A.L.], did she believe [L.D.] when [L.D.] told her, the report, what she told her mom.

(TT 147). However, the court would not permit counsel to ask A.L. about what A.L. thought her mother believed about L.D.'s truthfulness. (TT 147). Rather, the court instructed defense counsel those questions were properly directed at the mother herself, not A.L. (TT 147).

After concluding A.L.'s testimony and excusing the jury, the court allowed defense counsel to make a more detailed offer of proof. The following exchange took place:

> MR. WIDELL: Your Honor, if allowed, the defense would ask the following questions in this offer of proof to the witness who just left the stand, [A.L.]. You initially questioned – number one, You initially disclosed to your mother that the defendant touched [L.D.].
>
> Question number two: You only told your mother that the defendant touched you because you believed that she did not believe that the defendant touched [L.D.]. You understood your mother did not believe [L.D.'s] allegation because it is understood in the family that [L.D.] lies. The basis for –

> THE COURT: Hold on a second, Counsel. I told you that you could ask this witness what she believed about it and you chose not to do that. The question was only about what her mother thought. That was what we decided, not to go forth with questioning about. Okay, that question was not asked of this witness whether or not she believed – what she believed about the veracity of the statement of her friend to her that day. So I'm not accepting that as an offer of proof. We did not discuss that at the bench. Okay. Go ahead.
>
> MR. WIDELL: I don't know that you have –
>
> THE COURT: The record will bear it out. Go ahead; okay.
>
> MR. WIDELL: I don't know that –
>
> THE COURT: Okay. Go ahead. Please move on.
>
> MR. WIDELL: All right. And the issue is not what this young girl believed is true.
>
> THE COURT: Yes, exactly. Exactly.
>
> MR. WIDELL: It's why this young girl disclosed that "it also happened to me," because her mother apparently didn't believe, that's the question that you weren't going to allow us to ask.
>
> THE COURT: What her mother believed, correct. Go ahead.
>
> MR. WIDELL: So the transcript portion would have been 21 minutes and 50 seconds to 22 minutes and 15 seconds. Quote, "And you know my mom and them, then they believed it but they wasn't for sure because [L.D.] has lied about things." So that's what we would have liked to have been able to ask the witness, and I think we were entitled to do that.

(TT 150-152).

*D. Rule 29 Motions and the Sentencing Hearing*

At the close of the government's case, Defendant orally moved pursuant to

Rule 29 for a judgment of acquittal. (TT 198-199). Defendant's oral motion was limited to, "We make a motion under Rule 29 for judgment of acquittal at the close of the government's evidence." (TT 198-199). The court denied the motion and no additional argument was advanced by either party. (TT 199).

At the close of all the evidence, Defendant renewed his Rule 29 motion by stating, "Judge, I would like to reurge our judgment of acquittal under Rule 29." (TT 222). Again, the court denied the motion and no additional argument was advanced by either party. (TT 222). After the verdict, no additional Rule 29 motion, written or oral, was made to the court.

Prior to sentencing, the Probation Office prepared a Pre-Sentence Report ("PSR"). (Vol. II, *PSR*, Sealed ROA at 25-42). The PSR calculated Defendant's total offense level as a level 27. (Vol. II, *PSR* ¶ 39, Sealed ROA at 33). With a Category III criminal history, the PSR calculated an advisory guideline range of imprisonment of 87-108 months. (Vol. II, *PSR* ¶67, Sealed ROA at 39).

On September 21, 2022, the district court conducted the sentencing hearing. (Vol. I, *Minutes of Sentencing Hearing*, ROA at 105-106). Neither party had any objections to the information contained in the PSR. (ST 3). The court heard argument from the parties regarding the ultimate sentence to be imposed and afforded Defendant an opportunity to allocute. (ST 5-7). The court ultimately imposed a 96-month sentence on Count One and a 96-month sentence on Count Two

to be served concurrently. (Vol. I, *Judgment*, ROA at 107-113). The court also imposed a ten-year term of supervised release on Count One and Count Two, again to run concurrently. (Vol. I, *Judgment*, ROA at 107-113).

This appeal followed.

## SUMMARY OF THE ARGUMENT

The Court should apply the invited error doctrine and preclude Defendant from appealing the sufficiency of the evidence when Defendant (1) affirmatively requested a jury instruction omitting any requirement to establish his non-Indian status; and then (2) failed to object to the court giving his requested instruction. Alternatively, Defendant has not demonstrated any plain error related to the omission of evidence regarding his non-Indian status and the Court should affirm his convictions.

Given the trial stipulations and testimony, there was sufficient evidence of the victim's Indian status. It is unnecessary to determine Indian status on the date of the offense as Indian status is not something that is transmutable. Alternatively, Defendant has not demonstrated any plain error related to the omission of evidence regarding the victims' Indian-status on the specific days of the offenses.

The invited error doctrine also applies to Defendant's appeal of the jury instructions. Defendant filed a requested a jury instruction lacking any reference to his non-Indian status. When the district court at trial proposed a substantially similar

instruction on the elements, Defendant lodged no objection. Having proposed the instruction which omitted an element, he is now precluded from having the instruction set aside on appeal. Alternatively, Defendant has not demonstrated any plain error related to the jury instructions.

The district court did not abuse its discretion in limiting Defendant's cross examination of one of the victims. While the district court prohibited Defendant from soliciting speculative testimony regarding what the victim believed her mother thought, the court specifically told Defendant he may question the victim regarding her personal beliefs. Defendant chose not to question the victim in this manner, but his deliberate decision not to engage in that line of questioning does not result in any limitation on his ability to cross examine the victim.

Finally, the sentence imposed on Count Two exceeded the statutory maximum. The Court should remand for resentencing solely on Count Two.

## ARGUMENT AND AUTHORITIES

### I. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF SEXUAL ABUSE OF A MINOR

#### A. Standard of Review

Normally, this Court reviews *de novo* the denial of a motion for a judgment of acquittal. *United States v. Hamilton*, 587 F.3d 1199, 1205 (10th Cir. 2009). But this Court reviews "for plain error where a defendant appeals the sufficiency of the evidence based upon an argument that he failed to make or reaffirm before the

district court." *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011), quoting *United States v. Gallant*, 537 F.3d 1202, 1223 (10th Cir. 2008). See also *United States v. Neder*, 527 U.S. 1, 15-16 (1999) (defendant's properly preserved claim of insufficient evidence premised on an element omitted from the jury instructions is subject to harmless error review); *United States v. Langford*, 641 F.3d 1195 (10th Cir. 2011); *United States v. Samora*, 954 F.3d 1286, 1292 (10th Cir. 2020) (when defendant failed to raise the issue before the trial court, such claim is limited to plain error review).

"The invited-error doctrine prevents a party who induces an erroneous ruling from being able to have it set aside on appeal." *United States v. Jereb*, 882 F.3d 1325, 1338 (10th Cir. 2018) quoting *United States v. Morrison*, 771 F.3d 687, 694 (10th Cir. 2014) (citation omitted). "Having induced the court to rely on a particular erroneous proposition of law or fact, a party may not at a later sta[g]e use the error to set aside the immediate consequences of the error." *Id*.

**B. Discussion**

On appeal, Defendant argues there was insufficient evidence of his status as a non-Indian to satisfy the requirement of 18 U.S.C. § 1152. (Def. Brf. at 21-28). Defendant also attacks the sufficiency of the government's evidence establishing the victims were Indians. (Def. Brf. at 21-28).

Section 1152 extends federal criminal jurisdiction to crimes committed in "Indian Country" between non-Native offenders and Native-victims or Native-offenders and non-Native victims. *United States v. Prentiss*, 256 F.3d 971, 974-75 (10th Cir. 2001). Thus, in a § 1152 prosecution, the status of both the defendant and victim constitute elements of the offense. *Id*.

*1. Defendant's Indian Status*

At trial, the court failed to include Defendant's non-Indian status in its instructions to the jury. Defendant now argues his conviction must be vacated because there was insufficient evidence regarding this omitted element. (Def. Brf. at 21-28). Defendant's attack on the evidence regarding his status as a non-Indian is unreviewable on appeal as Defendant has waived his right to seek review of this issue by inviting the error which led to the omission in the jury instructions.

"The invited-error doctrine prevents a party who induces an erroneous ruling from being able to have it set aside on appeal." *Jereb*, 882 F.3d at 1338 quoting *Morrison*, 771 F.3d at 694. The doctrine of invited error "is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel. Having induced the court to rely on a particular erroneous proposition of law or fact, a party. . . may not at a later stage. . . use the error to set aside the immediate consequences of the error." *United States v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005) *quoting Fryman v. Fed. Crop Ins. Corp.*, 936 F.2d 244, 249

(6th Cir. 1991). "In other words, the invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt." *Id*.

In *Jereb*, the district court failed to correctly instruct the jury assault was an essential element necessary to support a conviction under 18 U.S.C. § 111. *Id.* at 1335. However, defendant "requested (and received) jury instructions construing a statute that contradict the construction he now prefers on appeal." *Id*. at 1340. Because defendant affirmatively requested the defective instruction, he invited the error which precluded appellate review of the issue. *Id*. at 1341. Specifically, the Court stated, "this Court will not engage in appellate review when a defendant has waived his right to challenge a jury instruction by affirmatively approving it at trial." *Id*. at 1335, quoting *United States v. Cornelius*, 696 F.3d 1307, 1319 (10th Cir. 2012). *See also United States v. Sturm*, 673 F.3d 1274, 1280-81 (10th Cir. 2012) (applying the invited error doctrine when defendant himself proffered the jury instruction he then challenged on appeal); *United States v. Visinaiz*, 428 F.3d 1300, 1310-11 (10th Cir. 2005) (same).

Such is the case here. Defendant specifically requested a marshalling instruction for Count 1. (Vol. I, *Deft. Proposed Jury Instructions*, ROA at 42-43). In his instruction, Defendant submitted only five elements were necessary to prove the offense. (Vol. I, *Deft. Proposed Jury Instructions*, ROA at 42-43). One of these

elements required the jury to determine the victim was an Indian. (Vol. I, *Deft. Proposed Jury Instructions*, ROA at 42-43). However, Defendant failed to submit as an element any determination regarding his status as a non-Indian. (Vol. I, *Deft. Proposed Jury Instructions*, ROA at 42-43). Aside from minor typographical changes, the court adopted Defendant's proposed jury instruction. (Vol. I, *Jury Instructions*, ROA at 92-93).[6] Defendant did not subsequently lodge any objection to this instruction or request his non-Indian status be added as an element of the offense.

Because Defendant specifically requested the jury only address the Indian status of the victim, he is now precluded from seeking appellate review of this issue. The contradiction between Defendant's position before the trial court (his non-Indian status is not an element of the offense) and his position on appeal (his non-Indian status is an element of the offense) is real because the underlying ideas are in conflict. *See Jereb*, 882 F.3d at 1341. While Defendant frames his argument as an attack on the sufficiency of the evidence, he represented to the court and the government that evidence regarding his non-Indian status was not an element of the

[6] Defendant did not propose a specific jury instruction for Count Two. (Vol. I, *Deft. Proposed Jury Instructions*, ROA at 37-43). It appears the Superseding Indictment, which added Count Two, was filed after Defendant submitted his proposed jury instructions to the court. (Vol. I, *Superseding Indictment*, ROA at 44). However, as there are no substantive differences in the language Defendant proposed regarding his status as a non-Indian between Counts One and Two, it can be inferred the district court also relied on Defendant's submission in crafting the marshalling instruction for Count Two.

offense. Having affirmatively acknowledged and argued to the district court his non-Indian status was not an element of the offense the jury needed to decide, he cannot now appeal of the lack of evidence regarding his non-Indian status. Because Defendant invited this error, he is precluded from seeking appellate review.

Should this Court not apply the invited error doctrine, any defect in the sufficiency of the evidence regarding Defendant's non-Indian status is reviewed for plain error. *Samora*, 954 F.3d at 1292-93. As noted above, Defendant frames his argument as an attack on the sufficiency of the evidence (possibly as an end run to avoid plain error review). However, Defendant's argument is simply an attack on the failure to properly allege the elements of the offense. For example, in *United States v. Langfor*d, 641 F.3d 1195 (10th Cir. 2011), defendant appealed his conviction for being a spectator at a cockfighting event. The Information failed to allege anything regarding defendant's Indian status and there was no evidence introduced at trial establishing defendant was an Indian. *Id*. at 1196. Because defendant raised the issue for the first time on appeal, the court applied plain error review noting:

> In this case, the distinction between plain error review and de novo review is academic because the government did not merely fail to allege Langford's Indian status as an element of the crime. Rather, it failed to produce any evidence whatsoever of Langford's Indian status. As in cases challenging the sufficiency of the evidence, a conviction in the absence of any allegation or any evidence of an essential element, "is plainly an error, clearly prejudiced the defendant, and almost always creates manifest injustice. Therefore,

> plain error review and de novo review are functionally equivalent so long as the fourth prong of plain error review – that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings – is also met."

*Id.,* quoting *United States v. Kaufman*, 546 F.3d 1242, 1247 (10th Cir. 2008). While Defendant made an oral motion pursuant to Rule 29, the Rule 29 motion did not address any error in the elements of the offense as submitted to the jury or raise any issue related to the sufficiency of the evidence regarding an element not presented to the jury. Thus, his Rule 29 motion is insufficient to evade plain error review of this issue.[7] *See, e.g.*, *United States v. Haggerty*, 997 F.3d 292, 296-97 (5th Cir. 2021)(in assessing an argument addressing the sufficiency of the evidence regarding a defendant's Indian status raised for the first time on appeal, "we are skeptical that we can apply anything but plain error review to a legal argument that is being made for the first time on appeal, especially when Haggerty passed on an available opportunity to make that same argument to the district court.").

[7] Defendant repeatedly cites to *United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001). (Def. Brf. at 24-26). Defendant also argues any error was not harmless. (Def. Brf. at 28). Any reliance by Defendant on *Prentiss* to support his harmless error argument is in error. *Prentiss* held a challenge to the sufficiency of the indictment raised for the first time on appeal was subject to harmless error analysis. *Id*. at 984. However, the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002) overruled *Prentiss* to the extent *Prentiss* held harmless error is the applicable standard of review when a defendant challenges the sufficiency of an indictment for the first time on appeal. *See United States v. Sinks*, 473 F.3d 1315, 1317 (10th Cir. 2007). Rather, the appropriate standard of review is plain error. *Id.* at 1321.

Moreover, it is well established that where "a Rule 29 motion to dismiss has been made on specific grounds, all grounds not specified in the motion are waived." *United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003) (internal quotations omitted). In this case, a defendant's claim will not be addressed on appeal "except for a review for plain error resulting in manifest injustice." *Id*. (internal quotations omitted). While Defendant made a general Rule 29 motion at the close of the government's case and at the close of all the evidence, those motions were predicated on the sufficiency of the evidence as provided by the jury instruction Defendant proposed. Defendant never argued in his Rule 29 motion there was insufficient evidence of his non-Indian status. A similar situation arose in *United States v. Ramos-Arenas*, 596 F.3d 783 (10th Cir. 2010). On appeal, defendant argued there was insufficient evidence of his intent to defraud. *Id*. at 786. The Court noted:

> The record reveals no argument or objection along these lines to the trial court. Not only did Mr. Ramos not object to the jury instruction below, which did not include an "intent to defraud" element, but the court adopted nearly verbatim Mr. Ramos's proposed jury instruction. Mr. Ramos twice moved for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, at the close of the government's case and at the close of all the evidence. But in neither motion did Mr. Ramos challenge the lack of intent evidence.

*Id*. Because defendant raised the lack of intent argument for the first time on appeal, the Court applied plain error review. *Id*. Given Defendant here represented to the district court his non-Indian status was not an element of the offense, Defendant needed to affirmatively raise the issue before the trial court in order to avoid

forfeiture. His generalized Rule 29 motion was insufficient to properly preserve the issue for appellate review and plain error review applies.

To prevail on plain error review, "Defendant must establish: (1) the district court committed error; (2) the error is plain; and (3) the error affected his substantial rights." *Johnson v. United States*, 520 U.S. 461, 467 (1997). Once a defendant demonstrates all three of these conditions, a court must then determine whether the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id*. (internal quotations omitted). See also, *United States v. Benally*, 19 F.4th 1250, 1256 (10th Cir. 2021). Under plain error review, a court may consider the entire record and is not limited to the trial record. *Greer v. United States*, 141 S.Ct. 2090, 2098 (2021). This includes information contained in the PSR. *Id.* Defendant bears "the burden of establishing entitlement to relief from plain error." *Id.* at 2097 (internal quotations omitted). "Satisfying all four prongs of the plain-error test is difficult." *Id*.

Here, defendant has failed to establish the existence of the third or fourth prong. First, to show an affect on substantial rights, Defendant must "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (internal quotations omitted). Defendant has failed to show a reasonable probability that, had the jury been properly instructed, the outcome would have been different.

*Greer*'s rationale is applicable here. In *Greer*, defendant challenged his pre-*Rehaif* conviction for being a felon in possession, arguing the jury instructions failed to properly instruct the jury regarding his knowledge he was a felon. *Id*. Applying plain error, the Supreme Court noted:

> [T]he defendant faces an uphill climb in trying to satisfy the substantial-rights prong of the plain-error test based on an argument that he did not know he was a felon. The reason is simple: If a person is a felon, he ordinarily knows he is a felon . . . In short, if a defendant was in fact a felon, it will be difficult for him to carry the burden on plain-error review of showing a "reasonable probability" that, but for the *Rehaif* error, the outcome of the district court proceedings would have been different.

*Id*. A person's classification as a felon is very similar to a person's classification as an Indian. Both constitute a status conferred onto a person. And in both cases a person ordinarily knows if he qualifies for such status. In this case Defendant has never claimed he is, in fact, an Indian. There is no evidence in the record suggesting Defendant is an Indian. Reading through the PSR, there is nothing to suggest Defendant is an Indian; there is no suggestion that he is an enrolled tribal member, receives tribal benefits, or has been recognized as an Indian by the government or any tribe. Defendant himself has not put forth any evidence he is an Indian and does not argue on appeal that he is, in fact, an Indian. Therefore, Defendant has not shown but for the error in the jury instructions there is a reasonable probability that a jury would have acquitted him. *See Greer*, 141 S.Ct. at 2098. As such, he has not met his burden to establish an affect on his substantial rights.

In a recent unpublished opinion, this Court reached this exact conclusion under a nearly identical fact pattern. *United States v. Ortner*, -- F.4d --, 2023 WL 382932 (10th Cir. 2023) (unpublished). In *Ortner*, defendant was convicted of sexual abuse of a child in Indian country (Count 2) and abusive sexual contact in Indian country (Count3). *Id*. at *1. Both of these counts were brought pursuant to 18 U.S.C. § 1152. *Id*. at *3. Defendant appealed, arguing the district court erred by failing to instruct the jury they must find he was a non-Indian. *Id*. On appeal, this Court found no plain error as defendant failed to demonstrate an affect on substantial rights. *Id*. Importantly, the defendant in *Ortner* did argue on appeal he was an Indian. *Id*. Defendant pointed to his participation in tribal powwows, evidence he had Indian blood, and his family history. *Id*. Despite this evidence, defendant did not demonstrate he was an Indian, and the Court found no plain error. *Id*. In this case, Defendant has failed to advance any argument that he is, in fact, an Indian, and there is no evidence to support such an inference. As in *Ortner*, Defendant has failed to demonstrate any error affected his substantial rights.

Additionally, the error does not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. Defendant's non-Indian status was uncontroverted at trial and remains so on appeal. *See Johnson*, 520 U.S. at 470. Moreover, regardless of Defendant's non-Indian status, Defendant's crime remains a federal criminal offense. If Defendant is a non-Indian then there is no error as the

offense is covered by 18 U.S.C. § 1152. However, if Defendant is Indian, his offense still constitutes a federal crime pursuant to 18 U.S.C. § 1153. Section 1153 creates a class of federal crimes when the crime is committed by one Indian against another Indian. 18 U.S.C. § 1153. Included in the covered crimes are felonies under chapter 109A. *Id*. The crime of sexual abuse of a minor, as codified in 18 U.S.C. § 2243 and charged in Count One, is a felony under chapter 109A. 18 U.S.C. § 2243. The crime of abusive sexual contact, as codified in 18 U.S.C. § 2244 and charged in Count Two, is also a felony under chapter 109A. Consequently, resolution of Defendant's Indian status is immaterial to the determination of whether he committed a federal crime.

This approach was adopted by the Eighth Circuit in *United States v. White Horse*, 316 F.3d 769, 772-73 (8th Cir. 2003). In *White Horse*, defendant appealed his conviction for aggravated sexual abuse under 18 U.S.C. §§ 2241(c) and 1152. *Id.* at 771. In applying plain error review to the failure of the government to prove defendant's non-Indian status at trial, the Eighth Circuit held:

> Even if a defendant's Indian status is an element of the offense under §1152, we conclude that Mr. White Horse is not entitled to plain error relief because of the complementary nature of §1152 and §1153. There is no contention that the evidence was insufficient to establish that Mr. White Horse committed the physical acts charged in the indictment, and regardless of which statute applied (one of them certainly did) Mr. White Horse was guilty of a federal crime because he, like everyone else, is either an Indian or he is not. Between them, the statutes apply to all defendants whatever their race or ethnicity. In other words, we believe that the situation here is the same as it

> would be if we were dealing not with two statutes but with a single one that provided that it applied whether or not the defendant was an Indian. Indeed, as they pertain to the crime of aggravated sexual abuse, the two relevant sections could have been codified as one to render ethnic or racial status altogether irrelevant. In the circumstances, therefore, we cannot say that Mr. White Horse's conviction seriously affected the fairness, integrity, or public reputation of judicial proceedings.

*Id.* at 772-73. Such is the case before this Court. Regardless of Defendant's Indian status, Defendant's actions constituted a federal crime, either under § 1152 or § 1153. Like in *White Horse*, Defendant is guilty of a federal crime because he, like everyone else, either is an Indian or he is not. The jury unanimously found Defendant violated federal law, it simply did not make the factual finding necessary to determine whether he violated §1152 or §1153.

Thus, the failure to address Defendant's status as an element of the offense does not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. Rather, "it would be the reversal of a conviction such as this which would have that effect. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470 (internal citations and quotations omitted). Defendant manufactured this issue by affirmatively submitting an incorrect jury instruction and then never objected to the error he invited until filing this appeal. Compounding this situation, the error he now complains of has no practical impact on whether Defendant is guilty of the federal crimes of sexual abuse and abusive sexual contact.

Regardless of whether Defendant is an Indian, he committed a federal crime. Reversal under these conditions would only encourage litigants to abuse the judicial process and invite public to distrust the judicial process. Therefore, Defendant has not established plain error.

*2. The Victims' Indian Status*

Defendant also argues there was insufficient evidence A.L. and L.D. were Indians at the time of the offense. (Def. Brf. at 29-32).

Federal law does not define the term "Indian" but this Court has applied a two-part evidentiary test to determine whether an individual is an Indian. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). "To find that a person is an Indian the court must first make factual findings that the person has 'some Indian blood' and, second, that the person is 'recognized as an Indian by a tribe or by the federal government.'" *Id*. quoting *Prentiss*, 273 F.3d at 1280.

To determine whether a person meets the second prong of this two-part test, Defendant cites to a four-factor test first articulated in *United States v. Drewry*, 365 F.3d 957, 961 (10. Cir. 2004). (Def. Brf. at 27). *Drewry* adopted an approach from the Eighth Circuit which allowed a court to consider "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation

in Indian social life" to determine if an individual is recognized by an Indian tribe or the federal government. *Id*. at 961 *citing United States v. Lawrence*, 51 F.3d 150 (8th Cir. 1995). In *United States v. Nowlin*, 555 Fed. App'x 820, 823 (10th Cir. 2014) (unpublished) the Court expanded on these factors.[8] The *Nowlin* Court noted these factors were "not exclusive and only the first factor is dispositive if the defendant is an enrolled tribe member." *Id*.

Turning to the evidence in this case, there was sufficient evidence both A.L. and L.D. were Indians. With respect to A.L., the parties' stipulation provided: "A.L. had some degree of Indian blood and is a member of the Seminole Nation, a federally recognized tribe." (Vol. I, *Stipulation No. 1*, ROA at 70). This stipulation establishes A.L. had some Indian blood, thus satisfying the first prong of the two-part test. *Diaz*, 679 F.3d at 1187. The stipulation also establishes A.L. is a member of the Seminole Nation, which *Nowlin* acknowledged is dispositive of the second prong of the two-part test (that A.L. is recognized as an Indian by a tribe or by the federal government). 555 Fed. App'x at 823.

With respect to L.D., the parties' stipulation provided: "L.D. has some degree of Indian blood, receives benefits through the Chickasaw Nation, and is eligible for membership in the Chickasaw Nation, a federally recognized Indian tribe." (Vol. I,

[8] The government was unable to locate any additional Tenth Circuit law employing this four factor test, but assumes for this purpose of this appeal it is controlling law.

*Stipulation No. 2*, ROA at 71). At trial, L.D. also testified she attended a "Native school in Oklahoma City. It's for Natives that are from different tribes." (TT 28-29). Again, this stipulation establishes L.D. had some Indian blood, thus satisfying the first prong of the two-part test. *Diaz*, 679 F.3d at 1187. With respect to the second prong of the two-part test, L.D.'s receipt of benefits and eligibility for enrollment are sufficient to establish she is recognized as an Indian.

Recognizing the insurmountable hurdle presented by the stipulations, Defendant attacks the sufficiency of the evidence by arguing there was no evidence A.L. and L.D. were Indians at the precise time of the offense. (Def. Brf. at 30-32). Defendant argues not requiring specific evidence an individual was an Indian at the time of the offense "would allow a victim, or a defendant, to manipulate the court system by enrolling in a tribe or revoking their membership in a tribe to choose which court would exercise jurisdiction over them." (Def. Brf. at 31).

First, as argued above, Defendant has waived the right to raise this argument on appeal as the jury instructions he submitted merely require the government prove each victim "is an Indian." Because Defendant invited the error that led to this issue, he is precluded from raising the issue on appeal.

Second, this argument overlooks the basic premise that an individual is either an Indian or a non-Indian. An individual cannot take steps to dissolve their status as an Indian nor can they take steps to create an Indian status when one does not exist.

You either are or are not Indian, and that is a status that is conferred at birth and attaches for the remainder of an individual's life. In fact, §1152 crimes have been referred to as "interracial crimes." *Prentiss*, 256 F.3d at 974-95. While an individual may not be able to *prove* Indian status at a specific point in time, that does not render the status void. For example, an individual born to parents of Native American decent may be raised overseas and never affiliate with a tribe as a child. However, if this individual returned to the United States and subsequently enrolled in a tribe, she would be able to legally prove her status as an Indian. But this does not mean she was not an Indian prior to tribal enrollment or she newly became Indian. She was always an Indian, there was just insufficient evidence to establish that specific legal status.

Because both A.L. and L.D. are Indians, they have always been so and will continue to be so for the remainder of their lives. Defendant's concerns about manipulating the system are misplaced, as the first requirement to establish Indian status is the person has 'some Indian blood.' The blood quantum requirement is not subject to manipulation. Relying on *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015), Defendant also argues without establishing status at the time of the offense, a defendant "could not predict with certainty the consequences of his crime at the time he commits it." (Def. Brf. at 30). But this argument fails because a defendant's *knowledge* of his, or the victim's, status is not an element of the offense.

Consequently, it is unnecessary for, and due process does not require, a defendant to be able to predict whether his chosen victim is an Indian or not.

Moreover, *Zepeda* involved a prosecution under §1153 and addressed whether there was sufficient evidence of defendant's Indian status. 792 F.3d at 1115. The Ninth Circuit rested its conclusion in part on a jurisdictional argument: "Moreover, the government could never be sure that its jurisdiction, although proper at the time of the crime, would not later vanish because an astute defendant managed to disassociate himself from his tribe." 792 F.3d at 1113. This jurisdictional argument is not applicable as this Court has expressly recognized the victim's Indian status is not a jurisdictional element, but an essential element of the offense. *United States v. Prentiss*, 256 F.3d 971, 974-75 (10th Cir. 2001). It could be argued jurisdictional facts can be more time sensitive in nature. For example, in a felon in possession case, the jurisdictional requirement that the firearm travel in interstate commerce cannot be satisfied by showing the firearm traveled across a state line subsequent to a defendant's possession. As an element of the offense, Indian status is different. For example, when a victim subsequently obtains legal recognition of her Indian status (e.g. obtaining tribal membership post crime) this simply establishes the necessary evidentiary foundation for an element of the offense. This hypothetical victim is no less an Indian the day before she became enrolled in her tribe. Rather, the only change is the evidence available to prove this victim's Indian status.

Finally, Defendant forfeited this argument, and it should be reviewed for plain error, by failing to object to the court's jury instructions which instructed the jury: "the parties have stipulated and agreed that A.L. has some degree of Indian blood and that A.L. is a member of the Seminole Nation, a federally recognized Indian tribe. This stipulation satisfies the fifth element of the charged offense." (Vol. I, *Jury Instructions*, ROA at 94). The jury instructions also provided: "the parties have stipulated and agreed that L.D. has some degree of Indian blood and that L.D. is a member of the Chickasaw Nation, a federally recognized Indian tribe. This stipulation satisfies the fifth element of the charged offense." (Vol. I, *Jury Instructions*, ROA at 95). Defendant never objected to either of these instructions and raises this issue for the first time on appeal. (TT 227-34). Because Defendant waited until appeal to raise the issue, this Court should review only for plain error as argued in Section I(b)(1) *supra*.

Defendant is unable to establish plain error. First, as articulated above, there was no error because the government is not required to prove status at the time of the offense. Second, if the Court finds it was error, such error was not plain. An error is plain "when it is clear or obvious . . . In turn to be clear or obvious, the error must be contrary to well-settled law." *United States v. Taylor*, 514 F.3d 1092, 1100 (10th Cir. 2008). Defendant cites only one out-of-circuit case, *Zepeda*, holding an individual's Indian status must be established at the time of the offense. (Def. Brf.

at 30). As argued above, *Zepeda*, addressed status in an § 1153 prosecution and the Ninth Circuit analyzed the issue under a jurisdictional framework - a method this Circuit has expressly rejected. Given this, any error here was not clear or obvious. Defendant also has failed to establish the third and fourth prongs of plain error. He has put forth no evidence suggesting either victim was not an Indian on the day of their assaults and there is nothing in the record to suggest they were not. Because Defendant has failed to establish any error, let alone plain error, this Court should deny his appeal.

## II. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN INSTRUCTING THE JURY

### A. Standard of Review

When reviewing jury instructions, "'the instructions must be read and evaluated in their entirety.'" *United States v. Heckard*, 238 F.3d 1222, 1231 (10th Cir. 2001) (quoting *United States v. Denny*, 939 F.2d 1449, 1454 (10th Cir. 1991)). Judges have "substantial discretion in formulating the instructions, so long as they are correct statements of the law and adequately cover the issues presented." *United States v. Vasquez*, 985 F.2d 491, 496 (10th Cir. 1993).

Because Defendant did not object to any of the instructions at trial, this Court reviews any error for plain error under Federal Rule of Criminal Procedure 52(b). *See Puckett v. United States*, 556 U.S. 129, 135 (2009); *United States v. Kennedy*, 64 F.3d 1465, 1478 (10th Cir. 1995). Plain error has four requirements. "First, there

must be an error or defect – some sort of deviation from a legal rule – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant." *Puckett*, 556 U.S. at 135 (internal quotation marks omitted). "Second, the legal error must be clear or obvious, rather than subject to reasonable dispute." *Id*. Third, any error must have "affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Id*. (internal quotation marks omitted). And finally, assuming the first three prongs are satisfied, "the court of appeals has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id*. (internal quotation marks omitted).

"The plain error test is inapplicable, however, in the case of invited error." *United States v. Jereb*, 882 F.3d 1325, 1335 (10th Cir. 2018). "The invited-error doctrine prevents a party who induces an erroneous ruling from being able to have it set aside on appeal." *Id.* at 1338 quoting *United States v. Morrison*, 771 F.3d 687, 694 (10th Cir. 2014) (citation omitted). "Having induced the court to rely on a particular erroneous proposition of law or fact, a party may not at a later sta[g]e use the error to set aside the immediate consequences of the error." *Id*.

**B. Discussion**

Incorporating the argument and authority from Section I(b)(1) *supra*, this Court should not reach the issue of whether the district court plainly erred in its instructions to the jury. By affirmatively submitting to the district court an instruction that lacked inclusion of Defendant's non-Indian status as an element of the offense, Defendant has waived his right to challenge the instruction on appeal. Defendant specifically requested the jury only address the Indian status of the victim when he submitted his proposed instructions to the court. He never lodged an objection to the court's jury instructions omitting his Indian status as an element of the offense. As such, Defendant invited any error, and he is precluded from seeking appellate review.

Defendant has also failed to establish the existence of any plain error. Again, incorporating the argument and authority from Section I(b)(1) *supra*, Defendant cannot establish the third or fourth prongs of plain error review. Defendant has not demonstrated a reasonable probability had the jury been properly instructed the outcome would have been different. Defendant does not allege he is an Indian, nor is there any evidence in the record which suggests he is an Indian. *See United States v. Ortner*, -- F.4d --, 2023 WL 382932 (10th Cir. 2023) (unpublished). Defendant has also failed to establish any error seriously affected the fairness, integrity, or public reputation of the judicial proceeding. Defendant's crime constituted a federal offense regardless of his Indian status. *See United States v. White Horse*, 316 F.3d

769, 772-73 (8th Cir. 2003). If he is not an Indian, Defendant is guilty pursuant to 18 U.S.C. § 1152. If he is an Indian, Defendant is guilty pursuant to 18 U.S.C. § 1153. Defendant's Indian status is immaterial to the issue of whether he committed a federal offense, therefore Defendant cannot demonstrate any error seriously affected the fairness, integrity, or public reputation of the judicial proceeding.

## III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING DEFENDANT'S CROSS EXAMINATION OF A.L.

### A. Standard of Review

> We review de novo whether a defendant's confrontation rights were violated by reason of improper cross-examination restrictions. However, the district court retains wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. The Sixth Amendment guarantees an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish. Additionally, we recognize the district court's discretion under Fed.R.Evid. 403 to exclude relevant evidence likely to cause unfair prejudice, confusion, or undue delay substantially outweighing its probative value. Our duty in reviewing the adequacy of the cross-examination is to determine whether the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias.

*United States v. Sinclair*, 109 F.3d 1527, 1537 (10th Cir. 1997) (internal citations and quotations omitted).

Even if a district court improperly denied a defendant's opportunity to impeach a witness in violation of the Sixth Amendment's Confrontation Clause, the

harmless error standard of review still applies. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). When any such error is harmless, reversal of the trial court is not required. *United States v. Torrez-Ortega*, 184 F.3d 1128, 1135 (10th Cir. 1999).

**B. Discussion**

The right to present a complete defense is anchored in the Fifth and Fourteenth Amendment right to due process and the Sixth Amendment right to compulsory process. *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005). Because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," due process guarantees are implicated whenever the exclusion of evidence acts to obstruct this right. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). But the opportunity to present evidence is not unfettered – the resolution of evidentiary questions is constrained by the twin prongs of relevancy and materiality and guided by the established rules of evidence and procedure. *Solomon*, 399 F.3d at 1239.

On appeal, Defendant argues the district court prevented him from introducing evidence of A.L.'s motive to disclose the abuse. (Def. Brf. at 41, 44-46). But this is not the evidence Defendant sought to introduce at trial. Defense counsel began his line of questioning by asking, "Okay. And your mom knows that [L.D.] has lied about things before." (TT 142). The government's objection was sustained because the question clearly asks A.L. to speculate what her mother thought. Defense counsel's second question also asked A.L. to speculate on what her mother was

thinking, "When you first told your mom that Montelito had touched [L.D.], your mom wasn't sure?" (TT 142). This question also calls for speculation as it requires A.L. to get inside her mother's head and testify regarding her mother's thoughts about L.D.'s disclosure. After the government objected, the court held a bench conference to discuss this line of questioning. (TT 143-148). During this bench conference, defense counsel represented his next question would be: "That when you told your mom that it happened to you, too, that helped her believe that it really happened to [L.D.]." (TT 146). Again, the phrasing of this question required A.L. to get inside her mother's head and speculate about what her mother may have believed which constitutes inappropriate speculation barred by Federal Rule of Evidence 602. Defense counsel then stated the testimony he wanted to elicit was "I told my mom it happened to me, too, because my mom wasn't sure." (TT 147). Which is problematic, again, because the question required A.L. to testify that her mother "wasn't sure" which required A.L. to speculate about her mother's thoughts.

During the bench conference, the court told defense counsel he would be permitted to question A.L. on whether A.L. believed L.D. (TT 147). But the court prohibited questioning A.L. on what A.L.'s mother believed, noting counsel should direct questions about the mother's beliefs to the mother herself and it would be improper to allow other witnesses to speculate as to what the mother was thinking. (TT 147). However, after the bench conference defense counsel did not explore with

A.L. what she believed, but instead began an unrelated line of questioning. (TT 148). Defendant could have easily explored this topic with A.L., asking questions like "You were concerned that no one would believe L.D.?" or "Isn't it true that you thought L.D. would not be believed so you created your own story about being abused." These questions rightfully focus on A.L.'s state of mind, and do not require her to speculate on what other people were thinking. But Defendant never asked these questions.

On appeal, Defendant argues he was attempting to expose A.L.'s motive to disclose. Counsel claims he was not seeking to introduce evidence of what A.L.'s mother thought, but instead what A.L. herself believed her mother was thinking. (Def. Brf. at 44-45). But Defendant never framed his questions during the trial this way; he represented he wanted to introduce evidence regarding what A.L.'s mother believed through A.L. In essence, Defendant wanted to introduce evidence attacking L.D.'s credibility through a backdoor – A.L.'s speculation as to what her mother thought of L.D.'s truthfulness. The Rules of Evidence prohibit such evidence, and the court did not abuse its discretion in excluding it.

After A.L. concluded her testimony, and while the jury was excused, the court allowed Defendant to make an additional offer of proof. During this offer of proof, defense counsel shifted course and told the court he wanted to ask A.L. "You only told your mother that the defendant touched you because you believed that she did

not believe that the defendant touched [L.D.]. You understood your mother did not believe [L.D.'s] allegation because it is understood in the family that [L.D.] lies." (TT 150). The court interrupted defense counsel, "Hold on a second, Counsel. I told you that you could ask this witness what she believed about it and you chose not to do that. The question was only about what her mother thought. That was what we decided, not to go forth with questioning about." (TT 150). The court's recollection was correct; the court specifically allowed questioning regarding what A.L. believed. (TT 147). The court's only limitation was that counsel could not inquire what A.L. believed her mother thought. (TT 147).

After again being told by the court he could ask A.L. about her own beliefs, Defendant failed to follow-up and ask A.L. any additional questions. Defendant could have called A.L. in his case-in-chief, as he included A.L. on his witness list. (Vol. I, *Deft. Witness List*, ROA at 77). But Defendant did not pursue the opportunity to question A.L. in this manner. This could have been a tactical decision by trial counsel because he did not want A.L. to testify about whether she believed L.D., but it cannot be argued the district court prevented Defendant from exploring A.L.'s motive to lie as the district court never excluded any evidence regarding what A.L. personally believed. Because the court did not exclude this evidence, Defendant was afforded a reasonable opportunity to impeach A.L. and there was no abuse of discretion.

Moreover, any error was harmless. Defendant argues this "case presented a swearing match." (Def. Brf. at 46). Respectfully, the government disagrees. With respect to Defendant's abuse of A.L., A.L.'s father testified on the night of the assault he observed Defendant and A.L. alone in A.L.'s bedroom. (TT 87, 100). Defendant was naked from the waist up and in the room "way after hours." (TT 87-88). A.L.'s father observed both Defendant and A.L. together on A.L.'s bed. (TT 100). These facts corroborate A.L.'s testimony regarding the timing and location of the assault. The government also presented evidence regarding why a child victim may delay their disclosure, especially when the abuser is a close family friend. (TT 171-175). A.L.'s father gave extensive testimony on how Defendant was like a brother to him, and a member of the family. This evidence explains and corroborates why A.L. waited to disclose her abuse. Given the totality of the evidence, any error in excluding this line of questioning was harmless.

## IV. THE SENTENCE IMPOSED ON COUNT TWO EXCEEDED THE STATUTORY MAXIUM

### A. Standard of Review

This Court reviews the legality of a defendant's sentence de novo. *United States v. Jones*, 235 F.3d 1231, 1235 (10th Cir. 2000).

### B. Discussion

Count Two charged Defendant with abusive sexual contact in violation of 18 U.S.C. § 2244(a)(3). That statute provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate –
> . . .
>
> subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both.

18 U.S.C. § 2244(a)(3). The PSR noted the maximum term of imprisonment for this offense was two years. (Vol. II, *PSR*, Sealed ROA at 39). At sentencing, the district court imposed a 96-month sentence on Count Two. (Vol. I, *Judgment*, ROA at 108). This sentence exceeds the statutory maximum and constitutes plain error. *United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir. 2017). This Court should reverse and remand for resentencing on Count Two only.

## CONCLUSION

Based upon the foregoing arguments and authorities, the United States urges this Court to affirm Defendant's convictions and remand for resentencing only on Count Two.

## STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully asserts that argument would not be helpful in this matter where the law and issues are clear and oral argument is therefore not requested.

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to MS Word 2016, this brief contains 12,153 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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/Lisa C. Williams*

## CERTIFICATE OF DIGITAL SUBMISSION

I certify that:

- all required privacy redactions have been made;

- that with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk;

-that the ECF submission was scanned for viruses using McAfee Endpoint Security 10.5.3.3178, updated continuously, and according to the program is free of viruses.

*/s/Lisa C. Williams*

## CERTIFICATE OF ECF FILING & DELIVERY

I hereby certify that on May 26, 2023, I electronically transmitted the attached documents to the Clerk of Court using the CM/ECF System for filing. A Notice of Electronic Filing will be sent via the Court's CM/ECF filing system to counsel for Defendant/Appellant:

| | |
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*/s/Lisa C. Williams*