IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
CASE NO. 22-7048

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

MONTELITO SANCHEZ SIMPKINS,
Defendant/Appellant.

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

OPENING BRIEF OF DEFENDANT/APPELLANT

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Attachments electronically filed in native PDF format

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PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

The Government charged Defendant/Appellant Montelito Sanchez Simpkins in a two-count superseding indictment with criminal violations of United States law, over which the district court exercised jurisdiction pursuant to 18 U.S.C. §§ 1152 & 3231. (ROA Vol. 1 at 2-3; 44-45). After a jury trial resulting in a guilty verdict on both counts, the district court entered judgment on September 23, 2022. (ROA Vol. 1 at 107-113); (Attachment 1).[1] In a criminal case, a notice of appeal may be filed no later than 14 days after docket entry of the final judgment. Fed. R. App. P. 4(b). Mr. Simpkins filed a timely notice of appeal on September 26, 2022. (ROA Vol. 1 at 114). This Court has jurisdiction over this direct appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether there was sufficient evidence to convict Mr. Simpkins of Sexual Abuse of a Minor as charged under 18 U.S.C. §§ 1151, 1152, and 2246(2)(D)

[1]The Amended Record of Appeal will be referred to as ROA. The Amended Record of Appeal contains redactions of minor names which is what Appellant's Opening Brief uses for the citation record. However, counsel refers to the original Record of Appeal to distinguish between the minors because the redactions do not provide clarification with respect to individual names.

and Abusive Sexual Contact as charged under 18 U.S.C. §§ 1151, 1152, 2244(a)(3), and 2246(3) when no evidence established that Mr. Simpkins was non-Indian or that complaining witnesses were Indians on the dates alleged in the Superseding Indictments.

2. Whether the district court committed plain error by failing to instruct the jury that they must find that Mr. Simpkins is not an Indian, which was an element of the charged offense, in order to convict him of Sexual Abuse of a Minor as charged under 18 U.S.C. §§ 1151, 1152, and 2246(2)(D) and Abusive Sexual Contact as charged under 18 U.S.C. §§ 1151, 1152, 2244(a)(3), and 2246(3).

3. Whether Mr. Simpkins is entitled to a new trial because the district court violated the rules of evidence and Mr. Simpkins's Sixth Amendment right to confront witnesses by prohibiting him from cross-examining one of the complaining witnesses, A.L., to demonstrate that she was motivated to fabricate a claim of sexual abuse against him to bolster her friend's unreliable report of sexual abuse.

4. Whether the district court imposed an illegal sentence on Count 2 when it sentenced Mr. Simpkins to 96 months, when the statutory maximum was 2 years.

STATEMENT OF THE CASE

A. The Government's Superseding Indictment omitted any allegation that Mr. Simpkins was a non-Indian.

The Government charged Mr. Simpkins with two counts: Sexual Abuse of a Minor in Indian Country and Abusive Sexual Contact in Indian Country under 18 U.S.C. § 1152. (ROA Vol. 1 at 2-3; 44-45). Count One charged him with sexual abuse of a minor who was designated as A.L. Count Two charged him with abusive sexual contact with a different minor, L.D.

To convict Mr. Simpkins of Sexual Abuse of a Minor in Indian Country, the Government had to prove Mr. Simpkins "in the special maritime and territorial jurisdiction of the United States … knowingly engage[d] in a sexual act with another person who – (1) [] attained the age of 12 years but [had] not attained the age of 16 years; and (2) [was] at least four years younger than [Mr. Simpkins]." 18 U.S.C. § 2243(a). To convict Mr. Simpkins of Abusive Sexual Contact in Indian Country, the Government had to prove Mr. Simpkins "in the special maritime and territorial jurisdiction of the United States … knowingly engage[d] in or cause[d] sexual contact with or by another person" who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging." 18 U.S.C. §§ 2244(a)(3), 2243. Both offenses require that the crimes occurred within the jurisdiction of the United States.

The superseding indictment asserted the Government's authority to prosecute Mr. Simpkins under 18 U.S.C. § 1152, which is often referred to as the General Crimes Act. That statute provides that "it shall not extend to offenses committed by one Indian against the person or property of another Indian . . ." As a result, to convict Mr. Simpkins under the General Crimes Act, it had to prove that the complaining witnesses were Indian and that Mr. Simpkins was a non-Indian. The Government failed to allege in the Superseding Indictment that Mr. Simpkins was a non-Indian. (ROA Vol. 1 at 2-3; 44-45).

B. The Government presented disputed evidence concerning the alleged offense conduct, and the district court did not allow cross-examination of A.L. that would have demonstrated that she was motivated to make false allegations against Mr. Simpkins.

The case was tried to a jury from October 19, 2021, to October 20, 2021. (ROA Vol. 3 at 33-309).

The Government called Morico Lewis, who is the father of A.L., as a witness. (ROA Vol. 3 at 93). Mr. Lewis explained that he and Mr. Simpkins used to be good friends. (ROA Vol. 3 at 95-97). Mr. Lewis even considered Mr. Simpkins to be "family." (ROA Vol. 3 at 104). It was not unusual for Mr. Simpkins to spend the night at Mr. Lewis's house. (ROA Vol. 3 at 98-99). Beginning in the summer of 2020, Mr. Lewis let Mr. Simpkins stay at his house off and on for over a year. (ROA Vol. 3 at 98-99, 103, 218-19). When Mr. Simpkins slept at Mr. Lewis's house, he

would sleep on a couch in the front room. (ROA Vol. 3 at 100-101). In addition, Mr. Simpkins was given a closet in the girls' room to store some of his belongings. (ROA Vol. 3 at 118-19).

On September 26, 2020, Mr. Lewis's daughter, A.L., planned to have her 13-year-old friend, L.D., spend the night at her house. (ROA Vol. 3 at 104). Mr. Simpkins was at Mr. Lewis's house when L.D. was dropped off that evening. (ROA Vol. 3 at 104). Mr. Simpkins knew L.D. and was friends with her family. (ROA Vol. 3 at 71). He told L.D. it was good to see her and gave her a hug. (ROA Vol. 3 at 105).

Mr. Lewis and Mr. Simpkins then left the house to spend the evening together. They returned to the Lewis residence around 2:00 a.m. (ROA Vol. 3 at 105). Mr. Simpkins planned to spend the night, as usual. (ROA Vol. 3 at 105-06). Mr. Lewis recalled that when the two men arrived at the house, the television was off, the lights were off, and A.L. and L.D. were in the living room on a pallet on the floor. (ROA Vol. 3 at 106). Mr. Simpkins always slept on the couch in the living room, so that is where he went to sleep that evening too. (ROA Vol. 3 at 105).

L.D. testified that she remembered going to A.L.'s house to spend the night on September 26, 2020. (ROA Vol. 3 at 62). When she arrived at the house, she noticed Mr. Simpkins was already sitting on the porch with A.L. and Mr. Lewis. (ROA Vol. 3 at 62). She knew Mr. Simpkins as "Lito" and Mr. Lewis as "Rico."

(ROA Vol. 3 at 63). They all made small talk before L.D. went inside the house with A.L. (ROA Vol. 3 at 63).

L.D. testified that she and A.L. spent the evening at the house watching TV, listening to music, and making Tik-Toc videos. (ROA Vol. 3 65-66). When it was time for bed, L.D. and A.L. decided to sleep together on a twin mattress that was in the living room. (ROA Vol. 3 at 67). They played music on the TV in the living room before going to sleep. (ROA Vol. 3 at 67). L.D. recalled that the TV was playing a Netflix show when they fell asleep. (ROA Vol. 3 at 88).

L.D. recalled waking up to a light turning off and on and noticed Mr. Simpkins standing over her. (ROA Vol. 3 at 69). L.D. testified Mr. Simpkins began talking to her and eventually started rubbing her thigh, and he put pressure on her vagina with his hand while touching his penis. (ROA Vol. 3 at 69-70). After some time, Mr. Simpkins walked back to the couch. (ROA Vol. 3 at 74). L.D. testified that she then turned away from Mr. Simpkins and tried to wake A.L. (ROA Vol. 3 at 74). When L.D. turned back to look at Mr. Simpkins, she saw him masturbating. (ROA Vol. 3 at 74).

L.D. testified that Mr. Simpkins eventually got up and went to the restroom. (ROA Vol. 3 at 73). When Mr. Simpkins walked to the restroom, Mr. Lewis was coming out of the restroom and they stood in the hallway and talked. (ROA Vol. 3 at 75, 86). At that point, L.D. attempted to wake up A.L. by pinching her and pushing

her. (ROA Vol. 3 at 76). She eventually woke up A.L. and reported these events to A.L. (ROA Vol. 3 at 76). L.D. then went outside and called her uncle to pick her up. (ROA Vol. 3 at 76).

A.L. provided a wildly different account of these events. According to A.L., she and L.D. went with Mr. Simpkins and Mr. Lewis to a party. (ROA Vol. 3 at 164). After the party, they all returned to the house together. (ROA Vol. 3 at 165). At that time, A.L. decided to move a mattress into the living room to sleep. (ROA Vol. 3 at 165). A.L. remembered laying down on a mattress with L.D. in the living room and watching TV around 8:00 to 9:00 p.m. (ROA Vol. 3 at 148, 152). She testified that when they laid down on the mattress to go to sleep, Mr. Simpkins was already on the couch in the living room with them. (ROA Vol. 3 at 166).

A.L. remembered hearing Mr. Simpkins talking to L.D. at some point during the night. (ROA Vol. 3 at 172). During that conversation, Mr. Simpkins was expressing concern about whether A.L. was awake. (ROA Vol. 3 at 172-73). A.L. testified that when she heard Mr. Simpkins and L.D. talking, she believed that Mr. Simpkins was messing with L.D. (ROA Vol. 3 at 172). However, A.L. did not get up, look over, or saying anything. (ROA Vol. 3 at 172). Instead, she went back to sleep. (ROA Vol. 3 at 173).

A.L. testified that L.D. later woke her up and reported that Mr. Simpkins had engaged in sexual misconduct with L.D. A.L. then went to her parents' room to tell

them what L.D. had said happened to L.D. (ROA Vol. 3 at 150). When A.L. spoke with her parents about L.D.'s report to her, for the first time, she also told her parents that back in July of 2020, Mr. Simpkins had inappropriately touched her too. (ROA Vol. 3 at 147, 150).

A.L. testified about this alleged abuse. She explained that she was 12 years old when Mr. Simpkins stayed with Mr. Lewis and his family in July of 2020. (ROA Vol. 3 at 138). She alleged that, during that time, Mr. Simpkins came into her room and began discussing his relationship problems with his girlfriend. (ROA Vol. 3 at 140). She claimed that, during this conversation, Mr. Simpkins put his hands on her leg and started moving them up until they reached her vagina. (ROA Vol. 3 at 141-144). She said he then stood up, took his penis out, and said, "Let me put it in," to which she responded, "No." (ROA Vol. 3 at 145). Mr. Simpkins allegedly informed her that when she was 18, she would be his, then sat down on her bed and continued talking to her until her dad came into the room. (ROA Vol. 3 at 146).

During cross-examination of A.L., defense counsel attempted to question A.L. about the reason and timing of her disclosure of abuse by Mr. Simpkins. The defense asserted that L.D.'s allegations prompted A.L. to also tell her mother about her own sexual abuse because A.L. thought her mother believed L.D. was a liar and would not believe L.D. (ROA Vol. 3 at 147, 150, 174, 178. 182). Although A.L.'s testimony demonstrated that she did not see Mr. Simpkins abuse L.D., A.L. wanted her mother

to believe that L.D.'s report was true. (ROA Vol. 3 at 147, 150, 174, 178. 182). Defense counsel believed that this would be A.L.'s testimony because that is what A.L. had reported in her forensic interview. (ROA Vol. 3 at 174-179, 182).

However, the district court did not allow this cross-examination. The following exchange between defense counsel, A.L., and the district court is what happened instead:

> Defense Counsel Smith: Okay. And your mom knows that L.D. has lied about things before.
>
> Prosecutor: Objection.
>
> Court: Sustained. Calls for speculation.
>
> Q: When you first told your mom that Montelito had touched L.D., your mom wasn't sure?
>
> Witness: Correct.
>
> Prosecutor: Objection.
>
> Court. Go ahead.
>
> (Outside the hearing of the jury)
>
> Prosecutor: He's trying to elicit blatant hearsay, and it is impermissible.
>
> Court: Yeah, the witness can't testify about what the mom thought. Now, the mom, I think, she'll be a witness for the government.
>
> Defense Counsel Widell: So how about the reason that you told your mother?

Court: I mean, generally what the mom says, if not offered for the truth of the matter asserted, can probably come in, okay? But what the mom thinks, or what the mom views, or what the mom knew, she doesn't know that.

Defense Counsel Widell: So the next question will probably be, you told your mom that it happened to you because you believed that your mom thought L.D. was lying.

Court: Say again?

Defense Counsel Widell: I think what he's trying to do in the forensic video, the witness said, I told my mom that it happened to me too because she knows that L.D. lies. So I think the question that he's getting to is why did you – did you tell?

Court: Well, you can ask her if she knows if L.D. lies, and then if she – what is the government's position on this?

Prosecutor: Judge, no, you can't impeach on a collateral matter like that. I mean, the time to ask about L.D. is when L.D. was on the stand. They can't ask this witness if she has a reputation for truthfulness. I mean, we're going to go down a rabbit hole and what are the examples of that. But I don't know what exactly they're going to get into with regard to the forensic interview, but the question about what mom thought or said or did, would be directed to mom. With regard to this witness, it's what did you say, what did you do, not what other people said in term of – because it is offered for the truth of the matter asserted. They want the jury to believe that L.D. has a reputation for lying.

Court: Okay. You can ask –

Defense Counsel Smith: But it is directly the reason that this witness told her mom what she told her, was her mom's response.

Prosecutor: That has not been the testimony.

Defense Counsel Smith: That's what she said in the forensic interview.

Prosecutor: Which is not before the jury. There's no testimony. This is not cross-examination based on what her direct testimony was.

Defense Counsel Widell: It's not for the truth of the matter asserted. It's why this witness did what this witness did because she felt her mom didn't believe her, the story about [L.D.] because [L.D.] lies. That's why she makes the statement, "He did it to me, too."

Court: Yeah. I think that's a function of the jury.

Prosecutor: It's very strange for me to put on a defense attorney. I mean, I think you can say, it didn't really happen to you, did it? You're just making this up, but you can't build on it, you're just making this up because your friend lies.

If you have a good faith basis to ask her, isn't it true that you're just making this up, that's different than asking - - like building it or cutting down the other victim and inserting what mom may have said or not said without mom having testified yet.

Because you're right, Your Honor, credibility determinations are for the fact finder, which in this case would be the jury.

Court: So what was your next question going to be?

Defense Counsel Smith: That when you told your mom that it happened to you, too, that helped her believe that it really happened to [L.D.].

Defense Counsel Widell: You told her that - -

Defense Counsel Smith: Yeah, that's the reason that you told her that.

Prosecutor: But that then invades the province of the jury.

Defense Counsel Widell: Okay, Let's do this then, let's make the offer of proof for the record and then let's get past it.

> 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.
>
> Court: Well, it's not going to matter what she told the mother. He can ask the witness in live, in person, not off of [sic] a proof. You can ask her, did she believe the witness when she told her, the report, what she told her mom.
>
> Defense Counsel Smith: And you're talking about the mom.
>
> Court: This witness. You're saying that she told her mom that [L.D.] lies, right? Is that what you're saying?
>
> Defense Counsel Widell: She told the forensic examiner that she told it.
>
> Defense Counsel Smith: Mom wasn't sure because [L.D.] lies, she said, and that's why I told her.
>
> Defense Counsel Widell: "I told my mom it happened to me, too, because my mom wasn't sure."
>
> Court: Okay. This question is properly asked for the mom, not for her.

(ROA Vol. 3 at 174-179).

Defense counsel continued cross-examination of A.L. and made an offer of proof:

> Defense counsel 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.

(ROA Vol. 3 at 182).

Upon hearing counsel's offer of proof, the court apparently inferred that counsel wanted to ask A.L. whether A.L. believed L.D.'s statement about being abused. This was inaccurate. Trial counsel wanted to ask A.L. if she believed her *mother* believed L.D., which would have been asked not for the truth of the matter asserted, but to establish A.L.'s motivation for raising her own claims of abuse. Nonetheless, the court announced it would "not accept" defense counsel's offer of proof and allowed the Government to respond. (ROA Vol. 3 at 183-84).

C. Mr. Simpkins testified and denied the allegations of sexual misconduct with A.L. and L.D.

Mr. Simpkins testified at trial and denied all the allegations against him. (ROA Vol. 3 at 234-235). He denied abusing A.L. and L.D. (ROA Vol. 3 at 234-235, 239).

Mr. Simpkins recalled that when he and Mr. Lewis returned to the house on September 26, 2020, the living room TV was on, but all the lights were off. (ROA Vol. 3 at 236). Mr. Simpkins believed the girls were also in the room, but he could not remember for sure. (ROA Vol. 3 at 236). He testified that when he went to sleep, he did not wake up until Mr. Lewis woke him up the following morning. (ROA Vol. 3 at 237). When he woke up, Mr. Lewis told Mr. Simpkins that L.D. had accused

Mr. Simpkins of touching her. (ROA Vol. 3 at 237).

Confused, Mr. Simpkins walked with Mr. Lewis to the front porch to talk. (ROA Vol. 3 at 238). After a few minutes, L.D.'s mother arrived at the house in a vehicle, parked, and pointed a gun at Mr. Simpkins. (ROA Vol. 3 at 238). Mr. Simpkins left immediately. (ROA Vol. 3 at 114, 126).

In addition, Mr. Simpkins testified that A.L. did not hesitate to spend time with him after July 2020 and did not act differently around him. (ROA Vol. 3 at 240). Mr. Lewis corroborated this when he testified. Mr. Lewis agreed that after Mr. Simpkins's extensive stay at his house in July of 2020, A.L. continued to spend time with Mr. Simpkins and did not act any differently and continued to call him Uncle Lito. (ROA Vol. 3 at 128).

D. At trial, the Government failed to present any evidence that Mr. Simpkins was not an Indian.

During Mr. Simpkins's trial, the Government sought to prove the facts required to invoke the General Crimes Act through stipulations. Mr. Simpkins agreed to three stipulations, all of which were admitted into evidence. (ROA Vol. 1 at 70-72). The first stipulation stated, "the victim, A.L., has some degree of Indian blood and is a member of the Seminole Nation, a federally recognized Indian tribe." (ROA Vol. 1 at 70). The second stipulation stated, "the victim, 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 tribe." (ROA Vol. 1 at 71). The third and final stipulation stated that the defendant's conduct on which the Superseding Indictment is based occurred within the Eastern District of Oklahoma, specifically within Pontotoc County, Oklahoma, and that Pontotoc County, Oklahoma is within the territorial boundaries of the Chickasaw Nation. (ROA Vol. 1 at 72). The parties did not stipulate to Mr. Simpkins's Indian or non-Indian status.

During trial, the Government did not present any evidence that tended to prove whether Mr. Simpkins was an Indian or a non-Indian. The Government took the opportunity to cross-examine Mr. Simpkins about the allegations. However, the Government did not inquire about his Indian or non-Indian status. (ROA Vol. 3 at 241-252).

E. Defense counsel made a motion for judgment of acquittal at the close of the Government's case and at the close of their case.

Mr. Simpkins orally moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 after the Government rested. The district court overruled the motion. (ROA Vol. 3 at 231). Mr. Simpkins renewed his motion for judgment of acquittal after presenting his case. The court overruled his motion again. (ROA Vol. 3 at 254); (Attachment 2).

F. The court instructed the jury in a manner that misstated the parties' stipulation and effectively removed the issue of whether L.D. was an Indian from the jury's consideration.

The district court referred to the parties' stipulations when it instructed the jury. Instruction number 11 referenced the first stipulation and stated, in pertinent part:

> 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.

(ROA Vol. 1 at 93).

The fifth element of the charged offense required the jury to find that A.L. was an Indian. (ROA Vol. 1 at 92). Instruction number 12 referred to the second stipulation and stated:

> You are further instructed that 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.

(ROA Vol. 1 at 95).

The fifth element of the charged offense required the jury to find that L.D. is an Indian. (ROA Vol. 1 at 94). The district court instructed the jury that the second stipulation stated that L.D. was a member of the Chickasaw Nation, when, in fact, it did not say that. (ROA Vol. 1 at 95). Rather, the second stipulation stated that L.D.

received benefits through the Chickasaw Nation and was *eligible for membership* in the Chickasaw Nation. (ROA Vol. 1 at 71).

In addition, the jury instruction did not include any reference to Mr. Simpkins's Indian or non-Indian status. The Government did not request that the jury be instructed to find that Mr. Simpkins is not an Indian. (ROA Vol. 1 at 30). It's proposed jury instructions only referenced the victim's Indian status. (ROA Vol. 1 at 30).[2]

G. The jury found Mr. Simpkins guilty, and the district court imposed an illegal sentence.

The jury found Mr. Simpkins guilty of both counts. Count One, Sexual Abuse of a Minor in Indian Country against A.L., carried a maximum of 15 years imprisonment, a fine, or both. Count two, Abusive Sexual Contact in Indian Country against L.D., carried a maximum of two years imprisonment, a fine, or both. 18 U.S.C. §§ 2243(a), 2244(a)(3).

Mr. Simpkins's Presentence Investigation Report was filed on May 23, 2022, and his total offense level was calculated at 27 with a criminal history of 3. (ROA Vol. 2 at 21). His guideline range was 87 to 108 months. (ROA Vol. 2 at 21).

[2]The Government's proposed jury instructions only included proposed instructions relative to Count One. ROA Vol. 1 at 18-36. The Superseding Indictment charging Count two was filed after the proposed jury instructions. (ROA Vol. 1 at 44-45).

At sentencing on September 21, 2022, the district court adopted the Presentence Investigation Report without change or objection. (ROA Vol. 3 at 324). The district court sentenced Mr. Simpkins to 96 months imprisonment on Count One. The district court ignored the two-year maximum sentence for Count two, sentencing Mr. Simpkins to 96 months imprisonment on count two. (ROA Vol. 3 at 317). It ordered that the sentences run concurrently, followed by 10 years of supervised release for both counts to run concurrently. (ROA Vol. 3 at 317).

SUMMARY OF THE ARGUMENT

The evidence is insufficient to convict Mr. Simpkins of Sexual Abuse of a Minor and Abusive Sexual Contact. The Government charged Mr. Simpkins under 18 U.S.C. § 1152, which required that it prove opposite Indian statuses of the defendant and the victims of a crime. The Government alleged, and attempted to prove, that victims A.L. and L.D. were Indians; however, it's evidence was insufficient. In addition, the Government completely failed to present evidence that Mr. Simpkins was not an Indian. The evidence with respect to the victim's Indian status was insufficient because it did not indicate when A.L. or L.D. became Indians. In fact, the stipulation entered between the parties never proved that L.D. was a member of a federally recognized tribe. Rather, the stipulation stated, contrary to the

court's jury instruction, that L.D. was merely *eligible* for membership in the Chickasaw Nation, a federally recognized tribe.

Furthermore, the district court committed plain error when it did not require the jury to find that Mr. Simpkins was not an Indian. Mr. Simpkins's non-Indian status is an essential element of the offense that had to be proven by the Government and found beyond a reasonable doubt by the jury.

In addition, Mr. Simpkins's constitutional confrontation rights were violated when the district court would not allow defense counsel to cross-examine A.L. about her motive for telling her mother about her abuse. The defense argued that A.L. was lying about the abuse. Therefore, the reasons why A.L. was motivated to fabricate a story – to bolster her friend's story – was exceptionally relevant. Mr. Simpkins was prevented from presenting evidence that A.L. told her mother about her own abuse to convince her mother that L.D. was telling the truth about L.D.'s allegations.

Finally, Mr. Simpkins was illegally sentenced in Count 2. The maximum sentence provided by the statute for Abusive Sexual Contact is 2 years; yet the district court sentenced Mr. Simpkins to 96 months.

ARGUMENT

I. The Government presented insufficient evidence for a jury to find beyond a reasonable doubt that Mr. Simpkins was guilty of Sexual Abuse of a Minor as charged under 18 U.S.C. §§ 1151, 1152, 2246(2)(D), and 2243(a) and Abusive Sexual Contact as charged under 18 U.S.C. §§ 1151, 1152, 2244(a)(3), and 2246(3).[3]

A. The Standard of Review

This Court reviews "the sufficiency of the evidence and the district court's denial of a motion for judgment of acquittal *de novo*." *United States v. Xiang*, 12 F.4th 1176, 1184 (10th Cir. 2021). This Court considers this standard of review to determine: "(1) whether a reasonable jury *could* find guilt (2) beyond a reasonable doubt." *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013) (emphasis in original).

> The test is not whether *some* evidence could have reasonably supported a guilty verdict, but whether a rational jury could have found each element of a crime beyond a reasonable doubt.

Id. (emphasis in original) (further citations omitted). The evidence "must be substantial, raising more than a mere suspicion of guilt." *Id.* A general Rule 29 motion without any specific grounds adequately preserves a challenge to insufficient

[3]Record Reference: Mr. Simpkins orally moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 after the Government rested. The district court overruled the motion. (ROA Vol. 3 at 230-231). Mr. Simpkins renewed his motion for judgment of acquittal after presenting his case. The court overruled his motion again. (ROA Vol. 3 at 254). (Attachment 2).

evidence. See *United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007) (internal quotations omitted) ("When a defendant challenges in district court the sufficiency of the evidence on specific grounds, all grounds not specified in the motion are waived."); *United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003).

B. No reasonable jury could have found Mr. Simpkins guilty because there was no evidence that proved Mr. Simpkins was a non-Indian or that the alleged victims were Indians at the time of the offense.

Mr. Simpkins was charged with Sexual Abuse of a Minor in Indian Country and Abusive Sexual Contact in Indian Country under 18 U.S.C. § 1152. (ROA Vol. 1 at 2-3; 44-45). To convict Mr. Simpkins of Sexual Abuse of a Minor in Indian Country, the Government had to prove that Mr. Simpkins "in the special maritime and territorial jurisdiction of the United States … knowingly engage[d] in a sexual act with another person who – (1) [] attained the age of 12 years but [had] not attained the age of 16 years; and (2) [was] at least four years younger than [Mr. Simpkins]." 18 U.S.C. § 2243(a). To convict Mr. Simpkins of Abusive Sexual Contact in Indian Country, the Government had to prove that Mr. Simpkins "in the special maritime and territorial jurisdiction of the United States … knowingly engage[d] in or cause[d] sexual contact with or by another person" who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger

than the person so engaging." 18 U.S.C. §§ 2244(a)(3), 2243. Both offenses require that the crimes occurred within the jurisdiction of the United States.

The Superseding Indictment based the Government's authority to prosecute Mr. Simpkins under 18 U.S.C. § 1152, which states, in pertinent part: "This section shall not extend to offenses committed by one Indian against the person or property of another Indian . . ." Therefore, where a defendant and a victim are both Indian, Section 1152 does not apply and does not provide the Government with the authority to prosecute the offense.

i. The Government failed to offer any evidence to establish the element that Mr. Simpkins was a non-Indian.

Jurisdiction in Indian country is allocated to federal, state, or tribal courts depending on a defendant's Indian status, a victim's Indian status, and the nature of the crime. *See* 18 U.S.C. §§ 1151-1153. The United States may exercise jurisdiction under 18 U.S.C. § 1152, as charged in this case, if the crime involves a non-Indian defendant who committed a crime against an Indian victim. 18 U.S.C. § 1152 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 Indian Country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the

Indian tribes respectively.

In *Ex Parte Kan-gi-shun-ca* (otherwise known as *Crow Dog*), 109 U.S. 556 (1883), the Supreme Court held that the predecessor statute to Section 1152 prohibited the United States from prosecuting Indians for crimes committed against the person or property of another Indian.[4] *Id*. at 570-72 (concluding that Section 1152's predecessor statute applied to the facts of the case and holding that the "district court of Dakota was without jurisdiction to find or try the indictment against the prisoner"). After the *Kan-gi-shun-ca* decision, Congress passed the statute now known as the Major Crimes Act, 18 U.S.C. § 1153. Just three years later, the Supreme Court considered the constitutionality of that statute in *United States v. Kagama*, 118 U.S. 375, 383-85 (1886) (recognizing passage of Section 1153's predecessor statute as a response to *Kan-gi-shun-ca* and holding it was valid exercise of congressional power).

Consequently, Sections 1152 and 1153, taken together with their history, leave no room for doubt: Where a defendant is charged under Section 1152 and the

[4]Title 28, Section 2146 of the Revised Statutes stated, in relevant part: "The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in [] Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." *Id*. at 558 (brackets in original).

alleged victim is an Indian, the Government must allege and prove that the defendant was a non-Indian. This Court addressed this element in *United States v. Prentiss*, 206 F.3d 960, 969 (10th Cir. 2000). Mr. Prentiss was charged under 18 U.S.C. § 81 and 1152 with arson for setting fire to a residence. *Id*. at 962. He was convicted and appealed, challenging the sufficiency of the indictment for failing to allege whether he and the victim were Indian or non-Indian. The Court held that an indictment must contain the essential elements of the offense or, if there is a post-verdict challenge to the indictment, it must contain sufficient "words of similar import" to the element in question. *Id*. at 965, quoting *Clay v. United States*, 326 F.2d 196, 198 (10th Cir. 1963).

The *Prentiss* Court explained that no federal crime is committed under Section 1152 unless (1) the crime occurred in Indian country, and (2) the crime occurred between an Indian person and a non-Indian person. *Id*. at 969. It concluded that "[b]ecause the Indian status of the defendant and victim are indispensable to establishing federal jurisdiction in [the] statutory scheme, they must be alleged in the indictment and proven at trial." *Id*. at 974. The indictment in *Pretniss* was insufficient because it did not aver the Indian status of the defendant or the victim, which the Court held were essential elements under 18 U.S.C. § 1152. The defect was not subject to harmless error analysis. *Id*. at 966.

Approximately a year later, the Tenth Circuit revisited *Prentiss* in an *en banc*

hearing. *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (*en banc*), overruled on other grounds as recognized by *United States v. Sinks*, 473 F.3d 1315, 1321 (10th Cir. 2007).[5] In its *en banc* rehearing, this Court decided whether the Indian and non-Indian statuses of the victim and defendant constitute elements of the crime, and if so, whether failure of an indictment to allege these elements deprived the court of subject matter jurisdiction and whether the error was subject to harmless error review. *Id*. at 972. Ultimately, the Court affirmed the panel's decision that the Indian and non-Indian statuses of the victim and the defendants are elements of a crime charged under 18 U.S.C. § 1152 that must be proven by the Government. *Id*. at 980. The Court held that because "criminal jurisdiction in Indian country affects three sovereigns: states, Indian tribes, and the federal government," … "identifying the statuses of the defendant and the victim is often essential in determining what court may hear the case." *Id*. at 974. However, the Court disagreed with the *Prentiss* panel's holding that the omission of an essential element from the indictment was not subject to harmless error. *Id*. at 981. Therefore, the Court remanded to the panel for a harmless error analysis. *Id*. at 985.

[5]This *en banc* decision in *Prentiss* has been overruled in part on other grounds due to changes in the Federal Rules of Criminal Procedure. This has no bearing on the essential holding of the *Prentis* decisions, which commands that the Government bears the burden to prove the status of both a defendant and victim in a Section 1152 case.

When the *Prentiss* case returned to the panel for further consideration due to the *en banc* decision, the panel was tasked with determining whether the indictment's failure to allege the status of the victims or defendant as being Indian was harmless. *United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001). The Court held that the Government's error of failing to prove the Indian status of the victim or defendant would not be harmless if the evidence presented at trial would have demonstrated that no jury could have reasonably found that the victim of the crime was not an Indian and that Mr. Prentiss was not an Indian. The panel applied a two-part test to determine whether someone was an Indian: The individual must "(1) [have] some Indian blood; and (2) [be] recognized as an Indian by a tribe or by the federal government." *Id*. at 1280. Therefore, in this case, the Government had the burden to prove that Mr. Simpkins is not an Indian by showing that he failed either prong. *See United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).

Although there was evidence in *Prentiss* that the victims were members of the Tesuque Pueblo, there was no evidence that they had any Indian blood. In addition, the only evidence of the defendant's Indian status was testimony from a law enforcement agent that he was not a member of the Tesuque Pueblo tribe. *Prentiss*, 273 F.3d. at 1283. The Court determined this was insufficient evidence to prove the victims' or defendant's Indian status; and therefore, the error was not harmless. *Id*.

After *Prentiss*, this Court established a four-factor test to determine if a person

is "recognized" as an Indian by a tribe or the federal government. This test was first used in this Circuit in *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004), vacated on other grounds by *Drewry v. United States*, 543 U.S. 1103 (2005), reinstated after remand by *United States v. Drewry*, 133 Fed. Appx. 543 (2005).[6] That four-factor test is as follows:

> (1) Whether the person is enrolled in a tribe;
>
> (2) Whether the government has recognized the person, either formally or informally, as an Indian by providing assistance reserved only to Indians;
>
> (3) Whether the person has enjoyed the benefits of tribal affiliation; and
>
> (4) Whether the person has been socially recognized as an Indian by residing on a reservation and participating in Indian social life.

Id. at 961. This Court subsequently applied this four-factor rule in an unpublished decision, *United States v. Nowlin*. 555 Fed. Appx. 820, 832 (10th Cir. 2014).

A defendant has a Constitutional right that demands "every element of the crime" be submitted to jurors for them to determine guilt beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 523 (1995). The Government did nothing whatsoever to satisfy either prong of the *Prentiss* test with respect to Mr. Simpkins.

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[6]The Tenth Circuit's original *Brewry* opinion was vacated as a result of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). On remand, the Tenth Circuit reinstated the original panel opinion after determining that there was no plain error necessitating a reversal of the appellant's conviction and sentence. *Drewry*, 133 Fed. Appx. at 545-46.

There was no evidence that Mr. Simpkins did not possess any Indian blood. The Government did not attempt to establish a lack Indian blood in Mr. Simpkins's ancestry. The Government did not attempt to establish that Mr. Simpkins was not recognized as a tribal member. The Government did not call any witness who knew Mr. Simpkins and ask about those topics. A jury may not speculate that about facts not in evidence. *United States v. Jones*, 44 F.3d 860, 865 (10th Cir. 1995) ("While the jury may draw reasonable inferences from direct or circumstantial evidence, an inference must be more than speculation and conjecture to be reasonable").

In addition, this error is not harmless. If Mr. Simpkins is in fact an Indian, the United States could not meet all elements of the offense under which he was charged. Because one of the elements to support his conviction is that Mr. Simpkins is not an Indian, the Government's failure to present any evidence with respect this element violates Mr. Simpkins's right to be convicted only if the Government proves every element of the offense. 18 U.S.C. § 1152. Because there is no evidence that Mr. Simpkins is not an Indian, which is required to sustain a conviction under 18 U.S.C. § 1152, there is insufficient evidence to sustain his convictions on Counts One and Two.

ii. The evidence is insufficient to establish that A.L. and L.D. were Indians at the time of the offense.

The *Prentiss* Court also recognized that, in cases brought under the General Crimes Act, the Government also must prove beyond a reasonable doubt the Indian status of the victim.

At trial, the Government presented evidence by way of stipulation that victims A.L. and L.D. were Indians. However, the stipulations did not indicate whether the victims were Indians at the time of the offense. The first stipulation stated that "the victim, A.L., has some degree of Indian blood and is a member of the Seminole Nation, a federally recognized Indian tribe." (ROA Vol. 1 at 70). The second stipulation stated that "the victim, 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 tribe." (ROA Vol. 1 at 71). The district court then instructed the jury that it could consider the elements of the victims' Indian statuses met based on these stipulations. Instruction number 11 stated, in pertinent part:

> 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. ROA Vol. 1 at 93.

Instruction number 12 stated, in pertinent part:

> You are further instructed that 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.

(ROA Vol. 1 at 95).

The stipulations did not address whether the victims were Indians at the time of the offenses. In *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015), the Ninth Circuit considered whether a defendant and victim's Indian status must be met at the time of the offense. The court held that when a defendant is prosecuted under the Major Crimes Act, "the government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged." The court reasoned that "[i]f the relevant time for determining Indian status were earlier or later, a defendant could not 'predict with certainty' the consequences of his crime at the time he commits it." *Id*., *citing Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000). In addition, "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." *Id*. at 1113.

This Court has similarly held that the Government must prove an element of an offense occurred on the date of offense. *see United States v. Darrell*, 828 F.2d 644, 648 (10th Cir. 1987) (holding that proof of insured status as of the date of the crime is a necessary element of offense under § 1014). In *United States v.*

Plattenburg, 657 F.2d 797 (5th Cir. 1981)[7], the Fifth Circuit reversed the defendant's conviction because there was insufficient evidence to prove the insured status of the bank at the time of the offense. In that case, the defendant was charged with conspiring to make false statements to a bank insured by the Federal Deposit Insurance Corporation. The court held that the insured status of a federal bank at the time of the alleged offense is an element that must be proven by the Government beyond a reasonable doubt. *Id*. at 799-800.

This Court should apply the same reasoning in this case. Although the district court was correct that the parties stipulated A.L. is a member of the Seminole Nation, there was no stipulation about *when* A.L. became a member of the Seminole Nation. If A.L. was not a member of the Seminole Nation at the time of the offense, the element of this charge cannot be satisfied. To hold otherwise 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.

This error was made even more harmful by the jury instruction, which incorrectly told the jury that L.D. was a member of the Chickasaw Nation. (ROA

[7]This Court cited and discussed the *Plattenburg* case in *United States v. Bolt*, 776 F.2d 1463, 1471 (10th Cir. 1985) (holding that "insured status of a financial institution at the time of the offense is an essential element to be proved by the Government in all prosecutions under Sec. 1014.")

Vol. 1 at 95). Although the parties stipulated that L.D. was *eligible* for membership in the Chickasaw Nation, there was no evidence that L.D. ever *was* a member of that tribe. (ROA Vol. 1 at 71). It stands to reason that if L.D. is merely *eligible* for membership of the Chickasaw Nation tribe, she is *not* a member of the Chickasaw Nation tribe. The court should not have instructed the jury that L.D. was a member of a federally recognized tribe because that is not the parties' stipulation and there was no evidence that L.D. was a member of the Chickasaw Nation tribe. The element of L.D.'s Indian status was not met, and the court should not have instructed the jury that it was.

In short, the record did not allow any reasonable juror to find beyond a reasonable doubt that Mr. Simpkins *was not* an Indian, or that A.L. or L.D. *were* Indians at the time of the offense. The record does not establish elements of the offense to convict Mr. Simpkins. *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding that a crime between two non-Indians was not a federal crime under 18 U.S.C. § 1152); *United States v. Langford*, 641 F.3d 1195 (10th Cir. 2011) (holding that the evidence was insufficient to convict the defendant for being a spectator at a cockfight because the Government failed to allege the defendant's Indian or non-Indian status, and "there was no evidence that he victimized any Indian.") This error is not harmless. This Court should reverse and remand this case to the district court with instructions to dismiss.

II. The district court committed plain error by not instructing the jury relative to all the elements of the offense of Sexual Abuse of a Minor in Indian Country and Abusive Sexual Contact in Indian Country in violation of the Sixth Amendment.[8]

A. Standard of Review

The Tenth Circuit reviews "jury instructions as a whole and view[s] them in the context of the entire trial to determine if they 'accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States. v. Sierra-Ledesma*, 645 F.3d 1213, 1217 (10th Cir. 2011) (quoting *United States v. Bedford*, 536 F.3d 1148, 1152 (10th Cir. 2008). Mr. Simpkins did not raise this issue at trial; therefore, this Court will review for plain error. *United States v. Gonzalez-Huerta*, 403 F.3d 727, 736 (10th Cir. 2005) (en banc).

Plain error is (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*., *quoting United States v. Fabinao*, 169 F.3d 1299, 1303 (10th Cir. 1999) (quotations omitted). Plain error is applied less rigidly when this Court reviews a potential constitutional error. *United States v. James*, 257 F.3d 1173 (10th Cir. 2001). Because "an improper instruction on an element of the offense violates

[8]Record Reference: Jury instruction number 11 and Jury instruction number 12: (ROA Vol. 1 at 92-95).

the Sixth Amendment's jury trial guarantee," this Court should apply the plain error standard less rigidly. *Neder v. United States*, 527 U.S. 1, 12 (1999).

B. The district court committed plain error when it did not instruct the jury that it was required to find an essential element of the offense that Mr. Simpkins is not an Indian for both counts.

The jury instructions provided by the court relative to the elements of the offense were included in Instruction numbers 11 and 12. Instruction number 11 stated:

> 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 agreed 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.

(ROA Vol. 1 at 92-93).

Jury instruction number 12 read:

> The defendant is charged in the Indictment with Abusive Sexual Contact in Indian Country in violation of Title 18, United States Code, Sections 2244(a)(3), 2246(3), 1151, and 1152.
> This law makes it a crime for anyone to knowingly engage in sexual contact 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 sexual contact with L.D. by the intentional touching, through the clothing, of the genitalia of L.D. with an intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person;
>
> Second: At the time of the sexual contact, L.D. had reached the age of

> twelve years but had not yet reached the age of sixteen years;
>
> Third: At the time of the sexual contact, L.D. 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: L.D. is an Indian.
>
> The government need not prove that the defendant knew the age of L.D.
>
> You are instructed that the parties have stipulated and agreed 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 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.

(ROA Vol. 1 at 94-95).

These instructions omitted an essential element of the offense, specifically, Mr. Simpkins's non-Indian status. The district court should have included in the jury instructions that one of the elements for both offense is that Mr. Simpkins is not an Indian.

In *United States v. Benford*, 875 F.3d 1007, 1017 (10th Cir. 2017), the first two prongs of the plain-error analysis were met when the district court incorrectly instructed the jury with respect to the constructive possession element of the offense.

The district court did not instruct the jury that constructive possession requires intent to exercise control. This Court held that the "district court's omission of the intent element [was] error, and that error [was] 'clearly contrary to the law at the time of the appeal.'" *Id*. at 1017, *quoting Johnson v. United States*, 520 U.S. 461, 468 (1997). The Court then considered the third prong and recognized that "[w]hen a district court gives a legally incorrect jury instruction on the principal elements of the offense or a defense, [it has often] concluded that the legal error affected the outcome of the trial proceedings." *Id*. (internal quotations omitted). Finally, the Court exercised its discretion in finding that the error satisfied the fourth prong of the plain-error test and reversed and remanded for a new trial. *Id*. at 1021.

Similarly, in *United States v. Samora*, 954 F.3d 1286 (10th Cir. 2020), this Court found plain error when a court failed to instruct the jury on an essential element of the offense. In that case, the defendant was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). *Id*. at 1289. The defendant argued that the district court incorrectly instructed the jury with respect to constructive possession because it did not instruct that the defendant must intend to exercise control of the firearm to be convicted of constructive possession. *Id*. at 1292. The Government conceded that the first two prongs of the plain-error test were established, and this Court agreed. *Id*. at 1293. The Court then considered the third prong of the plain-error test and found that a reasonable probability existed that had

the jury been instructed on the intent element, it would not have convicted the defendant. It held that the Government's case was not strong enough to conclude that the defendant would have intended to exercise dominion and control over the firearm because the evidence supporting actual possession was weak. *Id*. at 1294-95. Finally, because the erroneous jury instruction could have "allowed the jury to convict without requiring the government to prove all elements of the crime beyond a reasonable doubt," the Court held that the fourth prong was also satisfied and reversed and remanded for a new trial. *Id*., *quoting United States v. Benford*, 875 F.3d at 1021.

Mr. Simpkins's non-Indian status is an essential element of the offense that was not included in the court's jury instructions. As noted in Proposition One above, the Tenth Circuit decided in *Prentiss,* 256 F.3d at 972, that the Indian and non-Indian statuses of the defendant constitute an element of the crime. The trial court's failure to instruct the jury relative to this essential element was an error that was plain. In addition, this error affected Mr. Simpkins's substantial rights. There is a reasonable probability that, but for this error, Mr. Simpkins would not have been convicted of these crimes. *Samora*, 954 F.3d at 1293 ("To demonstrate the error affected [] substantial rights, Defendant must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different."). The jury could not have found that Mr. Simpkins was not an Indian because the Government did

not present any evidence that he was not. The Government did not request this element in its proposed jury instructions, did not include the element in the Indictment or Superseding Indictment, and did not question Mr. Simpkins about his Indian or non-Indian status when he testified at trial. (ROA Vol. 1 at 30, 2-3, 44-45); (ROA Vol. 3 at 209-252).

Finally, this error affected the fairness and integrity of the trial. This Court has recognized that a "district court's failure to instruct the jury on an essential element of the crime charged won't always satisfy the fourth prong of the plain-error test," but has "noted that reversal is appropriate when evidence supporting the omitted element is 'neither overwhelming nor uncontroverted.'" *Benford*, 875 F.3d at 1021, *quoting United States v. Wolfname*, 835 F.3d 1214, 1223 (10th Cir. 2016). The evidence of Mr. Simpkins's non-Indian status is neither overwhelming nor uncontroverted. A properly instructed jury would not have found Mr. Simpkins was not an Indian because the Government did not present any evidence of this element. This error seriously affected the fairness, integrity, or public reputation of judicial proceedings. The federal courts have incarcerated Mr. Simpkins despite the Government failing to allege and prove essential elements of the offense and with no evidence in the record that these elements were met.

III. Mr. Simpkins did not receive a fair trial because the district court violated his Sixth Amendment right to confront witnesses and the Federal Rules of Evidence by preventing cross-examination of A.L. about her motive for disclosing abuse.[9]

A. Standard of Review

This Court will review Confrontation Clause challenges to restrictions on cross-examination in two parts. First, the Court reviews *de novo* whether "the defendant was afforded a reasonable opportunity to impeach adverse witnesses consistent with the Confrontation Clause." *United States v. John*, 849 F.3d 912, 918 (10th Cir. 2017). If the Court determines that the defendant was, it then determines whether "the specific limitation imposed by the trial court on the defendant's cross-examination" was an abuse of discretion. *Id*. The "denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). In *Chapman v. California,* 386 U.S. 18, 24 (1967), the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The

[9]Record Reference: During cross-examination of A.L., defense counsel attempted to question her about her reason for disclosing abuse by Mr. Simpkins. When the court refused to allow this questioning, defense counsel objected and made an offer of proof. (ROA Vol. 3 at 174-179; 182). (Attachment 3)

Government bears the burden to establish that a Constitutional error is harmless beyond a reasonable doubt. *United States v. Mullikin*, 758 F.3d 1209, 1211 (10th Cir. 2014).

Further, this Court reviews a district court's rulings on evidentiary matters and for abuse of discretion. *United States v. Weller*, 238 F.3d 1215, 1220 (10th Cir. 2001). "Evidentiary ruling generally are committed to the very broad discretion of the trial judge, and they may constitute an abuse of discretion only if based on an erroneous conclusion of law, a clearly erroneous fining of fact or a manifest error in judgment." *United States v. Keck*, 643 F.3d 789, 795 (10th Cir. 2011) (internal quotations omitted).

B. The district court abused its discretion when it did not allow defense counsel to question A.L. about her reason for disclosing abuse to her mother.

The district court committed an evidentiary ruling error when it did not allow defense counsel to cross-examine A.L. about her motive and bias for disclosing alleged abuse. Relevant evidence is generally admissible. Fed. R. Evid. 402. Relevant evidence is defined by Federal Rules of Evidence 401 as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Bias is relevant to the issue of credibility because it has "a tendency to make

the facts to which [the witness] testified less probable in the eyes of the jury than it would be without such testimony." *United States v. Abel*, 469 U.S. 45, 51 (1984).

Although the district court enjoys broad discretion in rulings on evidentiary matters, its rulings may still constitute an abuse of discretion if the court's decision was based on an erroneous conclusion of law, erroneous finding of fact, or a manifest error in judgement. *United States v. Keck*, 643 F.3d 789, 795 (10th Cir. 2011). In this case, the court did not use its discretion because it did not understand the issue. The court believed that the evidence defense counsel sought to reveal could be elicited from A.L.'s mother. (ROA Vol. 3 at 179). However, defense counsel's questions to A.L.'s mother would not have established whether *A.L. believed* her mother thought L.D. was known to lie. Just as A.L. could not testify to what A.L.'s mother believed, A.L.'s mother could not testify to what A.L. believed.

A defendant maintains the right to present a defense and his version of the facts as well as "the right to confront the prosecution's witnesses for the purpose of challenging their testimony." *Washington v. Texas*, 388 U.S. 14, 19 (1967). The Confrontation Clause of the Sixth Amendment provides "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. amend. VI. "Generally, a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a

prototypical form of bias on the part of the witness." *Matthews v. Price*, 83 F.3d 328, 332-333 (10th Cir. 1996) (internal quotations omitted), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). *See also United States v. Sarracino,* 340 F.3d 1148, 1167 (10th Cir 2003) ("The [United States Supreme Court] recognized that showing a witness's motivation or bias is an important function of cross-examination."). "[C]ross-examination pertinent to the credibility of a witness and for the development of facts which may tend to show bias or prejudice should be given the 'largest possible scope.'" *Abeyta v. United States*, 368 F.2d 544 (10th Cir. 1966), *quoting Foster v. United States*, 282 F.2d 222, 224 (10th Cir. 1960).

The reason a victim discloses sexual abuse is relevant and admissible. In *Davis v. Alaska*, 415 U.S. 308 (1974), the defense was prohibited from cross-examining a key witness, Richard Green, about potential bias and motivation for testifying against the defendant. At the time of trial, Green was on probation for a juvenile crime of burglary. *Id*. at 311. Defense counsel argued that he should be allowed to cross-examine him not to impeach his "character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary." *Id*. at 311. Specifically, the defense wanted to elicit testimony that Green was potentially pressured into testifying against the defendant because of fear of probation revocation and that that fear was relevant to bias and prejudice. In reversing his conviction, the United States

Supreme Court held that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id*. at 316-17.

In *United States v. Mann*, 145 F.3d 1347 (10th Cir. 1998) (unpublished decision), the defendant was accused of sexually abusing two members of his extended family, one of them being S.Y. His defense was that S.Y.'s father was the actual abuser and that S.Y. was lying about the defendant abusing her. Accordingly, defense counsel attempted to cross-examine her about her motive to lie. Specifically, defense counsel wanted to demonstrate that S.Y. accused the defendant instead of her father of abuse because she did not want to be removed from her parent's custody as she had been in the past. *Id*. at *2. However, the court limited defense counsel's ability to cross-examine S.Y. about her motive. This Court held that the limitation was error, but harmless because there were other witnesses that testified about the abuse and "the defense was able to introduce its theory about S.Y.'s motivation to lie through cross-examination of five different witnesses." *Id*. at *3.

The error in this case was not mitigated by other evidence or testimony. There were no other witnesses who testified, or *could* have testified, about defense counsel's theory, and A.L.'s motive for disclosing was critical in this case. Mr. Simpkins's defense counsel pursued testimony that A.L.'s allegations were motivated by the belief that her allegations would lend credibility to L.D. with her

mother. The child's mother, at least from A. L.'s perspective, believed that L.D. was known to lie. (ROA Vol. 3 at 183). This presented a motive to lie and defense counsel should have been allowed to explore. The court, however, did not apprehend the nature of the testimony and misapplied the evidence code. When defense counsel attempted to elicit testimony from A.L. about her motive to lie, the court sustained the Government's objection and held that the question was "properly asked for the mom, not for her" and that "this witness can't testify to what mom thought." (ROA Vol. 3 at 180, 176).

The prosecutor's arguments appeared to increase the court's confusion. The prosecutor made sure the relevant evidence was excluded by objecting to its admission and then convincing the court it was not admissible because "the question about what mom thought or said or did, would be directed to mom" and "because it is offered for the truth of the matter asserted." (ROA Vol. 3 at 174-179).

The district court and the prosecutor were wrong. Defense counsel was not seeking to elicit testimony from A.L. about what A.L.'s mother believed - *it did not matter what A.L.'s mother believed*. What mattered, and what defense counsel was seeking to admit, was that *A.L. believed her mother thought* L.D. was known to lie. Counsel was not trying to offer A.L.'s perspective of her mother's belief before the jury to establish the truth of the matter asserted (i.e., that the child's mother

would consider L.D. a liar), but to simply establish why A.L. felt the need to bolster her friend's story with a story of her own.

The Government cannot meet its burden to show this error was harmless beyond a reasonable doubt. This case presented a swearing match. Mr. Simpkins's defense was that he never abused A.L.; therefore, to convict him of the offense, the jury had to believe that Mr. Simpkins was lying and A.L. was telling the truth. Every witness told a different story about the events of the night in question. The only evidence that Mr. Simpkins abused A.L. was her own testimony. The Government did not present any physical evidence, DNA, or eyewitnesses to corroborate that any abuse occurred. The jury relied on A.L.'s testimony to convict Mr. Simpkins, and it should have been allowed to hear defense counsel's theory on her motive to lie. A reasonable jury would have had a different impression of A.L.'s credibility if defense counsel was allowed to cross-examine her on her reasons for telling her mother about her sexual abuse.

The district court's refusal to allow cross-examination of A.L. was also important to Mr. Simpkins's defense of the allegation that he abused L.D. Cross-examination of A.L. would have shown that she was worried whether L.D. could be believed.

Finally, the prosecutor exacerbated this error when it asked the jury during closing arguments to consider the fact that A.L. did not have anything to gain from

making the abuse allegations. She asked, "What did [A.L.] have to gain? Was there some sort of menacing purpose behind the disclosures that happened?" (ROA Vol. 3 at 276). The truth is, A.L. *did* have something to gain – she was trying to bolster L.D.'s allegations because she wanted her mother to believe L.D. The jury never knew about A.L.'s motive because defense counsel was not allowed to elicit that testimony.

Moreover, the prosecutor in closing argument placed a spin on A.L.'s report that would have been contradicted by A.L.'s own testimony, had proper cross-examination been allowed. The prosecutor urged the jury to think that A.L. decided to disclose her true story of abuse because she was no longer "alone." Specifically, the Prosecutor speculated that "after [A.L.'s] friend disclosed, who didn't have a relationship with him, and you heard this from the expert, then she feels empowered. Now, it's time. I can tell. I'm not just by myself." (ROA Vol. 3 at 302). The Government made these arguments because defense counsel, who had made enormous efforts to give the jury the true answer to those very questions, was improperly forced into silence by the Government's objection.

Mr. Simpkins's Sixth Amendment Confrontation right was violated when he was restricted from challenging A.L.'s credibility by asking questions about her bias and motive to lie. This error was not harmless, considering the evidence against him.

IV. This Court must reverse a sentence that exceeds the statutory maximum.[10]

A. Standard of Review

Defense counsel did not object to the illegal sentence; therefore, this Court will review for plain error. This Court only vacates a sentence under plain error when (1) there is error; (2) that is plain; (3) that affects substantial rights, or in other words, affects the outcome of the proceeding; and (4) substantially affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lucero*, 747 F.3d 1242, 1246 (10th Cir. 2014).

B. The district court committed per se reversible error when it sentenced Mr. Simpkins to 96 months incarceration on Count Two, which had a statutory maximum sentence of two years.

The imposition of an illegal sentence constitutes plain error. *United States v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991). In *United States v. Johnson*, 4 F.3d 904, 918 (10th Cir. 1993), the defendant was sentenced to 156 months for violation of conspiracy when the maximum penalty under the statute was 60 months. This Court held that the imposition of the sentence in excess of the statutory

[10]The district court sentenced Mr. Simpkins to 96 months imprisonment for Count 2 to run concurrently to Count 1. (ROA Vol. 3 at 318); (Vol 1. at 107-08). In addition, the district court imposed supervised release for 10 years on each count to run concurrently with one another. (ROA Vol. 3 at 317-325). (Attachment 4)

maximum was plain error that warranted resentencing. Similarly, in *United States v. Jones*, 235 F.3d 1231, 1238 (10th Cir. 2000), this Court found error was not harmless when a court sentenced the defendant to a sentence outside of the statutory range. *United States v. Barwig*, 568 F.3d 852 (10th Cir. 2009) "A sentence that exceeds the statutory maximum is an illegal sentence, and an illegal sentence is per se reversible even under plain error review." (internal citations omitted); *United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir. 2017) (holding illegally sentences trigger per se, reversible, plain error) (internal quotations omitted).

In *United States v. Catrell*, 774 F.3d 666, 669 (10th Cir. 2014), the Court determined that the defendant was sentenced to an illegal sentence for aggregated identify theft when he was sentenced to 54 months because the statute required a term of 24 months. The Government conceded the error but argued that it was not plain error because the district court would have been required to sentence the defendant to the aggregate 132 months despite the illegal sentence. This Court disagreed, noting that even "an illegal sentence *favoring* a defendant is plain error." *Id*. at 660. Therefore, the Court remanded to the district court to consider a new sentence for all counts under the sentencing package doctrine. *Id*. at 670-71.

Mr. Simpkins's sentence in Count Two for Abusive Sexual Contact carried a maximum of 2 years imprisonment. *See* 18 U.S.C. § 2244(a)(3). This maximum sentence was accurately noted in the presentence investigation report. (ROA Vol. 2

at 21). Even though the sentence for Abusive Sexual Contact carried a maximum of 2 years, the district court sentenced Mr. Simpkins to 96 months imprisonment. (ROA Vol. 3 at 317). The court did not reference the illegal sentence and did not give any indication as to why it decided to impose a sentence greater than the statutory maximum. (ROA Vol. 3 at 314-316). For these reasons, the district court's sentence was illegal and Mr. Simpkins requests this Court vacate his sentence and remand for resentencing.

CONCLUSION

This Court should reverse Montelito Simpkins's conviction with instructions to dismiss as the evidence was insufficient to justify his conviction. In the alternative, this case must be remanded for a new trial. If not, this Court should remand to the district court for resentencing on Count Two.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. All issues in this case are complicated and would benefit from oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limitation of Fed. R. App. P. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12543 words.
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Date: February 24, 2023

s/ *Nicole Dawn Herron*

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that the digital version of this brief and attachments is an exact copy of any paper copy required to be submitted to the court. It has been scanned by the most recent version of Symantec Endpoint Protection and according to the program is free of viruses.

All required privacy redactions have been made.

s/ *Nicole Dawn Herron*

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2023, I electronically filed this brief, with attachments, in the Tenth Circuit using the ECF System, which transmitted a Notice of Docket Activity to the following ECF registrants:

Linda Epperley – Assistant United States Attorney

s/ *Nicole Dawn Herron*