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

REPLY BRIEF OF DEFENDANT/APPELLANT

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REPLY ARGUMENT

Mr. Simpkins remains incarcerated despite no evidence in the record that the elements of his non-Indian status were met. The Government concedes it did not prove these elements. It does not even assert there is *some* evidence in the record to support these elements, which might render the error harmless. Instead, the Government urges this Court to consider any error to be invited because Mr. Simpkins submitted a proposed jury instruction for one of the counts that did not include the required element. Mr. Simpkins's proposed jury instruction for Count One does not invite error for a sufficiency of the evidence argument. His Rule 29 motions for acquittal properly preserved his arguments under a *de novo* standard of review.

In addition, it remains clear that Mr. Simpkins was denied his right to confront one of his accusers when the court restricted his ability to cross-examine her. His sentence for Count Two exceeded the statutory maximum. His convictions should be vacated.

I. The evidence was insufficient to sustain a conviction for Counts One and Two because the record is devoid of evidence that Mr. Simpkins was not an Indian.

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

Mr. Simpkins was charged with two counts 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 . . ." *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), held that a victim and defendant's Indian statuses are elements of an offense charged under 18 U.S.C. § 1152. For over 20 years, the law of this circuit has been clear that the government was required to prove that the complaining witnesses and Mr. Simpkins had opposite Indian statuses.

It is the Government's burden to present evidence to establish all elements of the offense. This burden does not shift to the defense. "The prosecution bears the burden of proving all elements of the offense charged." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *United States v. Carter*, 433 F.2d 874, 875 (10th Cir. 1970). "If there is a failure to prove an essential element of the offense, the defendant is entitled to an acquittal." *McKenize v. United States*, 266 F.2d 524 (10th Cir. 1959). The Government

alleged, and attempted to prove, that victims A.L. and L.D. were Indians. However, the Government failed to present *any* evidence that Mr. Simpkins was not an Indian.

In this appeal, the Government admits that a defendant's non-Indian status is an element of the offense. (Gov't Brief at 21). The Government's brief cited *Prentiss*, 256 F.3d at 974-75, which holds that a victim's and defendant's Indian statuses are elements of an offense charged under 18 U.S.C. § 1152. (Gov't Brief at 21). The Government does not argue that Mr. Simpkins is not an Indian, nor does the Government direct this Court to any part of the record where evidence was presented that Mr. Simpkins was not an Indian. The reason is simple: it does not exist.

Even seen in the light most favorable to the government, the record demonstrates that no reasonable jury could find Mr. Simpkins's guilty beyond a reasonable doubt had it followed the controlling law. This Court must reverse.

B. This Court should not apply a plain error standard because Mr. Simpkins adequately preserved the issue for review by making a Rule 29 motion at the close of the Government's case and renewing his Rule 29 motion at the close of his case.

A general Rule 29 motion preserves sufficiency of the evidence arguments for review on appeal. Mr. Simpkins orally moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 after the Government rested by stating, "We make a motion under Rule 29 for judgment of acquittal at the close of the

government's evidence." (ROA Vol. 3 at 230-31). The district court overruled the motion. *Id.* Mr. Simpkins renewed his motion for judgment of acquittal after presenting his case by stating, "I would like to reurge our judgment of acquittal under Rule 29." The court overruled his motion again. (*Id.* at 254). Therefore, the proper review for Mr. Simpkins's sufficiency of the evidence claim as argued in Proposition One is *de novo*. *De novo* review considers the evidence, "both direct and circumstantial, and reasonable inferences drawn from that evidence – in the light most favorable to the government and ask[s] only whether … a reasonable jury could find [the defendant] guilty beyond a reasonable doubt." *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013) (internal quotations omitted).

A general Rule 29 motion preserves all issues related to the Government's failure to prove an element of any charged offense. This Court has held where a defendant makes "a general motion for acquittal that does not identify a specific point of attack, the defendant is deemed to be challenging the sufficiency of each essential element of the government's case…" *United States v. Kelly*, 535 F.3d 1229, 1234-35 (10th Cir. 2008); *see also* 2A Sarah N. Welling and Peter J. Henning, *Federal Practice and Procedure (Wright & Miller)* § 466 (4th ed. 2023) ("Specificity is not required by a Rule 29"). Further, on many occasions, this Court has held that a denial of a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 is reviewed

de novo.[1] A Rule 29 motion is specific to a challenge to sufficiency of the evidence because it is a motion for judgment of acquittal for insufficient evidence. However, the Government asserts, without authority, that a general Rule 29 motion does not preserve a sufficiency of the evidence argument in this appeal. The cases the Government cites in attempting to make this argument are inapposite and do not support its argument.

For example, the Government cites *United States v. Haggerty*, 997 F.3d 292 (5th Cir. 2021) (Gov't Brief at 25), where the court reviewed a general Rule 29 motion for plain error. However, in *Haggerty* the court was asked to resolve a legal dispute over what the elements of the offense even were in the first instance. The defendant had not raised this legal question about the elements in the trial court. The Fifth Circuit then considered for the first time on appeal, as a case of first impression, whether a defendant's non-Indian status is an "essential element" of any offense prosecuted

[1]*See United States v. Duran*, 133 F.3d 1324, 1335 n. 9 (10th Cir. 1998) ("Normally, we would review the denial of a motion for judgment of acquittal *de novo*, applying the same standard in the district court."); *United States v. Lampley*, 127 F. 3d 1231, 1240 (10th Cir. 1997) ("We review the sufficiency of the evidence *de novo*, viewing the evidence and the inferences therefrom in a light most favorable to the government, to determine if a reasonable jury could find beyond a reasonable doubt that the defendant was guilty."); *United States v. McKissick,* 204 F.3d 1282, 1290 (10th Cir. 2000) ("When reviewing the denial of a motion for judgment of acquittal based on insufficient evidence, this court … review[s] the judgment of the district court *de novo*.").

under § 1152 or whether it is an affirmative defense that must be asserted as a defense to prosecution. *Id.* at 298. The *Haggerty* court acknowledged a circuit split on the issue, specifically recognizing this Court's holding in *Prentiss,* 256 F.3d at 980, that a defendant's Indian or non-Indian status is an essential element of an offense prosecuted under § 1152. *Id.* at 299.[2] To the extent that the Government is using *Haggerty* to argue that this Court should review Mr. Simpkins's general Rule 29 motion for plain error, it should be noted that the parties in *Haggerty* agreed that a general sufficiency of the evidence challenge should be reviewed *de novo*. *Id.* at 296. The court held that the sufficiency issue was not preserved only to the extent that the underlying legal argument – whether a defendant's Indian or non-Indian status is an essential element of the offense – was not raised in the trial court when that specific issue had never been recognized as an element in that circuit. *Id.* That is not the case here. It has been settled law in this Circuit for over 20 years that a defendant's Indian status is an essential element of an offense charged under § 1152. (Opening brief at 24-26). The district court was required to apply that settled law when it evaluated Mr. Simpkins's Rule 29 motion.

[2]The court ultimately held that when charged under the General Crimes Act, a defendant's Indian status is an affirmative defense that must be pled by the defendant.

The Government also cites *United States v. Langford*, 641 F.3d 1195 (10th Cir. 2011), to support its argument that Mr. Simpkins's general Rule 29 Motion does not adequately preserve a sufficiency of the evidence argument for appeal. (Gov't brief at 24-25). However, *Langford* involved the challenge to an *indictment* that was insufficient for failing to allege the essential element of a defendant's non-Indian status. *Id.* at 1196 ("The failure of an indictment to allege this essential element, when raised for the first time on appeal, is reviewed for plain error."). Mr. Simpkins is not challenging the sufficiency of the indictment. He agrees that such a challenge would be reviewed for plain error. Rather, Mr. Simpkins is challenging the sufficiency of the evidence to support his convictions as to Counts One and Two.

The Government cites *United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003), for the proposition that when "a Rule 29 motion to dismiss has been made on specific grounds, all grounds not specified in the motion are waived." (Gov't Brief at 26). But in *Kimler*, the defendant's Rule 29 motion was limited to a specific interstate commerce issue. *Id.* The Government is mistaken that the *Kimler* holding means that a *general* Rule 29 motion does not preserve all sufficiency of the evidence arguments. This Court recognizes that a general Rule 29 motion preserves all sufficiency of the evidence grounds for appeal. *Kelly*, 535 F.3d at 1234-35 (holding where a defendant makes "a general motion for acquittal that does not identify a specific point of attack,

the defendant is deemed to be challenging the sufficiency of each essential element of the government's case…").

Finally, the Government cites *United States v. Ramos-Arenas*, 596 F.3d 783 (10th Cir. 2010), to argue that Mr. Simpkins's general Rule 29 motion did not adequately preserve his sufficiency of the evidence argument on appeal. (Gov't Brief at 26). The *Ramos-Arenas* court generally agreed that "review in a sufficiency of the evidence challenge is *de novo*." *Id.* at 786, *citing United States v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009). The *Ramos-Arenas's* court reviewed for plain error because Ramos-Arenas supported his argument on appeal with a novel argument that sought to add a new "implied" element to the offense. He argued that the government presented insufficient evidence because his conviction for false impersonation under 18 U.S.C. § 912 required evidence of intent to defraud – an element that had not been previously recognized or required in the Tenth Circuit. *Id.* at 786. This was an open question in the Circuit. If Mr. Ramos-Arenas wanted to add a new element to the offense, he should have made that specific argument during his Rule 29 motion. However, Mr. Simpkins is not arguing for the creation of a new element for his offenses of conviction in this appeal. He merely asserts that the district court should have applied well-established law when evaluating his Rule 29 motions.

C. Even if this Court reviews Mr. Simpkins's sufficiency of the evidence argument for plain error, this Court should nonetheless find that the district court committed plain error by denying Mr. Simpkins's Rule 29 motion because there was insufficient evidence to convict Mr. Simpkins in Counts One and Two.

The Government's emphasis on plain error is also ultimately misplaced because this Court has held that "[a]n insufficient evidence claim not raised or preserved below is reviewed for plain error, but our review for plain error in this context differs little from our *de novo* review of a properly preserved sufficiency claim because a conviction in the absence of sufficient evidence will almost always satisfy all four plain-error requirements. *United States v. Otuonye,* 885 F.3d 1191, 1210 (10th Cir. 2021) (internal quotations omitted), *quoting United States v. Gallegos*, 784 F.3d 1356, 1359 (10th Cir. 2015). However, because the Government argued plain error alternative to invited error, Mr. Simpkins will address the Government's plain error argument.

1. Mr. Simpkins may raise plain error for the first time in a reply brief.

This Court has explained that an appellant may raise plain error for the first time in a reply brief. *See United States v. Zander*, 794 F.3d 1220, 1232 n.5 (10th Cir. 2015) (declining to adopt rule prohibiting raising plain error in reply to United States' assertion that error was unpreserved). When an appellant raises a plain error argument for the first time in the reply brief, this Court "will consider that argument only if it

permit[s] the appellee to be heard and the adversarial process to be served." *United States v. Isabella*, 918 F.3d 816, 845 (10th Cir. 2019) (internal quotation marks omitted). Such arguments must "run the gauntlets created by [this Court's] rigorous plain-error standard of review." *Id.*

While this court retains the discretion to decline to engage in plain error review when it is raised for the first time in a reply brief, this Court typically does so only when the plain error argument is wholly perfunctory, *see id.,.* or when the appellant made no effort to demonstrate in its opening brief that the issue was likely preserved, *see United States v. Leffler*, 942 F.3d 1192, 1198 (10th Cir. 2019) (declining to perform plain error review where appellant's opening brief did not contend issue was preserved). In *Zander*, this Court found that the adversarial process was properly served because the appellant had argued in his opening brief that the issue on appeal had been preserved. 794 F.3d at 1232, n.5.

Here, Mr. Simpkins's Opening Brief provided a thorough explanation for why his Rule 29 motion for acquittal for insufficient evidence preserved this matter for appeal. Should this Court disagree, it should perform plain error analysis here.

2. Standard of Plain Error Review

"To demonstrate plain error, a litigant must show: (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness,

integrity, or public reputation of judicial proceedings." *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1137 (10th Cir. 2017). Errors are "plain" if they are contrary well-settled law, and they are contrary to well-settled law if they are "contrary to ruling by the Supreme Court, this court, or the weight of authority from other circuits." *United States v. Hill*, 749 F.3d 1250, 1257 (10th Cir. 2014) (internal quotations omitted). To satisfy the third condition, the appellant "ordinarily must show a reasonable probability that, but for the error, the outcome of the proceedings would have been different." *Rosales-Mireles v. United States*, --- U.S. ---, 138 S. Ct. 1897, 1904-05 (2018). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Hasan*, 526 F.3d 653, 665 (10th Cir. 2008). As to the final prong, the Supreme Court has rejected a standard that limits relief to cases of actual innocence or to those that "shock the conscience of the common man," or that "serve as a powerful indictment against our justice system, or seriously call into question the competence or integrity of the district judge." *Rosales-Mireles*, 138 S. Ct. at 1906-07.

3. The district court's error in denying Mr. Simpkins's Rule 29 motion was plain.

As explained in Mr. Simpkins's Opening Brief, the district court erred in denying Mr. Simpkins's Rule 29 Motion because there was no evidence that he was

not an Indian. (Opening Brief at 21-28). This error was plain. Established law required the Government to prove Mr. Simpkins's non-Indian status as an element of the offense when charging under § 1152, as held by an *en banc* Tenth Circuit more than twenty years ago. *See Prentiss*, 256 F.3d at 980.

4. The error affected Mr. Simpkins's substantial rights because he is serving a sentence even though the Government provided no proof of an essential element of the crime.

The Government compares Mr. Simpkins's case to the defendant in *Greer v. United States*, 141 S. Ct. 2090 (2021), arguing that Mr. Simpkins cannot prove that he suffered a violation of his substantial rights when the Government did not prove that Mr. Simpkins was not an Indian. In *Greer*, the defendants were charged and convicted of being felons in possession of a firearm. *Id.* at 2093. After the convictions, the Supreme Court decided *Rahaif v. United States*, 588 U.S. ---, 139 S. Ct. 2191 (2019), which clarified a *mens rea* requirement for certain possession of a firearm offenses. "After *Rehaif*, the Government in a felon-in-possession case must prove not only that the defendant knew he possessed a firearm, but also that he knew he was a felon when he possessed the firearm." *Greer*, 141 S. Ct. at 2903. The Government did not prove that Mr. Greer knew he possessed a firearm and knew that he was a felon when he possessed the firearm. However, the Court noted "the undisputed fact that Greer was a felon is in the trial record." *Id.* Further, both Greer and Green "had been

convicted of multiple felonies prior to their respective felon-in-possession offenses." The Court concluded that "[t]hose prior convictions are substantial evidence that they knew they were felons." *Id.*

The *Greer* case has important distinctions from Mr. Simpkins's case. Here, there is no evidence in the trial record that Mr. Simpkins's is not an Indian. Given this total lack of evidence, Mr. Simpkins is not required to prove on appeal that he is not an Indian to overcome plain error review. If the trial court had correctly applied the law, which required proof of his non-Indian status, it was required to enter a judgment of acquittal. No reasonable jury could not have found that Mr. Simpkins was not an Indian based on the trial record.

Finally, the Government cites *United States v. Ortner*, --- F.4d ---, 2023 WL 382932 (10th Cir. 2023) (unpublished), in arguing that this Court has reached "this exact conclusion under a nearly identical fact pattern." (Gov't Brief at 29). *Ortner* also has critical distinctions from this case. Mr. Ortner argued on appeal that there was plain error when the court failed to instruct the jury that they must find that he was a non-Indian when charged under § 1152. The Government confessed that it was error not to require proof of Mr. Ortner's non-Indian status. *Id.* at *3. However, that error did not violate Mr. Ortner's substantial rights *because there was evidence in the record that Mr. Ortner was not an Indian*. In fact, the Government had originally charged Mr. Ortner

under § 1153, but dismissed that charge and elected to proceed under § 1152 after evidence at trial did not establish that he was an Indian. *Id.* at *2. Mr. Ortner was not a registered member of any tribe, and during an investigation, Mr. Ortner advised that he was not Native American. *Id.* at *1. In addition, there was an absence of evidence that Mr. Ortner possessed Indian blood and was a member of a tribe. *Id.* at *3. Here, unlike the *Ortner* case, there was no evidence of Mr. Simpkins's Indian status.

5. The error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Finally, this error affected the fairness and integrity of the trial. The district court should have sustained the Rule 29 motions, and Mr. Simpkins should have been found not guilty. The Government did not meet its burden to present evidence as to an element of the charged offenses. 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 this element was met.

The Government argues that this error does not affect the fairness, integrity, or public reputation of the judicial proceedings because Mr. Simpkins's crime remains a federal criminal offense even if he were Indian. The Government argues that because

Mr. Simpkins could be charged under 18 U.S.C. § 1153 if he was an Indian, "a resolution of Defendant's Indian status is immaterial to the determination of whether he committed a federal offense." (Gov't Brief at 30). The Government cites *United States v. White Horse,* 316 F.3d 769, 772-73 (8th Cir. 2003) to support this argument. However, *White Horse* is distinguishable from this case.

First, *White Horse* is yet another case where the defendant's sufficiency of the evidence argument rested on a novel legal issue that had not been preserved. The defendant argued on appeal that Indian status was an element of the offense that was not alleged in the Indictment and proven at trial. However, the Eighth Circuit had not previously held that Indian status was an element of the offense. Therefore, the court reviewed the argument for plain error on this basis.

Of more importance, *White Horse* was wrongly decided. This Court should never affirm a conviction on the theory that the defendant could be guilty of an offense that was not even charged in the district court. The Ninth Circuit correctly refused a similar invitation in *United States v. Bruce*, 394 F.3d 1215, 1229-30 (9th Cir. 2005), noting that it would be improper to "merge[] the two statutes into one." A jury can be instructed as to Section 1152 and Section 1153, yet rationally acquit, if the Government proves neither Indian nor non-Indian status beyond a reasonable doubt. *Id. Neder v. United States*, 527 U.S. 1, 19 (1999) ("A reviewing court … does not …

become in effect a second jury to determine whether the defendant is guilty.") (quotation marks omitted). And here, it is by no means clear that the jury would have convicted under either statute if properly instructed. As discussed in Mr. Simpkins's opening brief, the Government presented no evidence of Mr. Simpkins's Indian status. The government is urging this Court to act as both grand jury and jury and convict Mr. Simpkins of a new charge with no due process. In effect, the Government urges the Court to violate the Fifth and Sixth Amendments.[3]

D. Mr. Simpkins did not invite error by failing to object to the court's instructions and by submitting proposed jury instructions for Count One.

Finally, the Government urges this Court to apply the invited-error doctrine to preclude Mr. Simpkins from appealing the sufficiency of the evidence in Counts 1 and 2 because Mr. Simpkins submitted proposed jury instructions with respect to Count 1 and failed to object to the court's jury instructions. (Gov't brief at 21-22). The

[3]The Fifth Amendment due process clause provides that "No person shall be deprived of life, liberty, or property, without due process of law." U.S. const. amend. V. The Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. const. amend. VI.

Government cites no authority for its assertion that Mr. Simpkins waived appellate review for sufficiency of the evidence by submitting proposed jury instructions. Instead, the Government only cites authority that focuses on sufficiency of jury instructions and sufficiency of an indictment or information.

It was impossible for Mr. Simpkins to object to the Court's jury instructions at the time of his Rule 29 motions because the Court had not presented its jury instructions to the parties at the time. Mr. Simpkins's made two Rule 29 motions, one at the close of the Government's case and again after the defense rested. (ROA Vol. 3 at 230-231, 254). It was not until the following day that the parties discussed jury instructions. *Id.* at 227.

Mr. Simpkins also did not "invite error" when he made his Rule 29 motion by submitting proposed jury instructions because neither proposed jury instructions nor jury instructions are the law a court must apply in evaluating a Rule 29 motion. In evaluating a Rule 29 motion, courts are tasked with making an independent determination of the evidence in deciding whether the Government had met its burden of proof at the close of its case in light of the controlling law. Even the jury instructions given by the district court at the end of trial remind the jurors that "there are, in effect, two judges… I am the judge of the law. You, as jurors, are the judges of the facts." *Id.* at 80.

As would be expected, jury instructions do not supplant the law when trial courts evaluate Rule 29 motions. In *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012), the Court noted, in pertinent part, "we have said in dicta that the measure for a sufficiency challenge is … whether a properly instructed jury could convict, rather than whether the jury as actually instructed could convict." *Id.*, n. 4. In addition, the Court cited *United States v. Nacchio*, 519 F.3d 1140, 1157 (10th Cir. 2008) (vacated in part on other grounds 555 F.3d 1234, 1236 (10th Cir. 2009), where this court held, "When asking what facts the jury had to find in order to convict, we look to the elements of the crime as *defined by law*…" (internal quotations omitted) *Id.*

The Government cites *United States v. Jereb*, 882 F.3d 1325 (10th Cir. 2018), for the proposition that Mr. Simpkins invited error by submitting a proposed jury instruction. (Gov't Brief at 22). However, *Jereb* involved a challenge to the sufficiency of the jury instructions, not a sufficiency of the evidence claim as argued in Proposition One of Mr. Simpkins's Opening Brief. *Jereb*, 882 F.3d at 1335-37. The invited-error doctrine does not apply to a Rule 29 motion based on proposed jury instructions. Rather, "[t]he invited-error doctrine prevents a party who induces an erroneous ruling from being able to have it set aside on appeal." *United States v. Morrison*, 771 F.3d 687, 694 (10th Cir. 2014). The *Morrison* Court explained, "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.*

The Government also ignores direction provided by the Supreme Court. In *Musacchio v. United States*, 577 U.S. 237, 243 (2016), the Supreme Court considered how a court should assess a sufficiency of the evidence challenge when a jury instruction adds an element to the charged crime and the Government fails to object. The Court held "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instructions." *Id.* The Court cited *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979) in holding:

> The reviewing court considers only the "legal" question whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. That limited review does not intrude on the jury's role to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts. A reviewing court's limited determination on sufficiency review [] does not rest on how the jury was instructed.

Id. (internal quotations and citations omitted). Similarly, here the district court should not have considered a proposed jury instruction in deciding the sufficiency of the evidence argument.

Finally, the *Ramos-Arenas* case cited by the Government supports Mr. Simpkins's argument that he did not invite error for his Rule 29 sufficiency of the evidence claim by submitting proposed a jury instruction for Count One. The *Ramos-Arenas* Court reviewed his Rule 29 motion for plain error, even though he submitted proposed jury instructions that did not include the "intent to defraud" element he argued should be recognized in the Circuit.

Mr. Simpkins made a Rule 29 motion for acquittal based on sufficiency of the evidence after the Government presented its evidence. Unlike a jury, the court did not "rely on a particular erroneous proposition of law or fact," *i.e.*, the proposed jury instructions, in denying Mr. Simpkins's Rule 29 motion. Had Mr. Simpkins submitted proposed jury instructions that included the element of his non-Indian status, the insufficiency of the evidence would not have changed. The Government would have still presented the same evidence and the court would have relied on that same evidence in denying Mr. Simpkins's Rule 29 motion. The Government has the burden of knowing the elements of the offenses it charges and proving those elements beyond a reasonable doubt. That did not happen in this case, and the Government should not be allowed to shirk its burden by blaming a defendant.

II. There was not sufficient evidence that the victims were Indians at the time of the crime. Indian status is not a racial classification.

The Government argues that because the alleged victims' Indian statuses were proven at the time of trial, there was sufficient evidence to support their Indian statuses at the time of the offense because Indian status "is a status that is conferred at birth and attaches for the remainder of an individual's life." (Gov't Brief at 35). The Government cites *Prentiss*, 256 F.3d at 974-75, for the proposition that § 1152 crimes are "interracial crimes." *Id.* However, *Prentiss's* reference to § 1152 crimes being "interracial" simply meant that a defendant may only be punished under § 1152 for crimes when the victim and defendant have opposite Indian status. *Id.* Indian status is established by proving that the person (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government. *United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001). "A person satisfies the definition only if both parts are met; conversely the government can prove that a person is not Indian by showing that he fails either prong." *United States v. Davis*, 679 F.3d 1183, 1187 (10th Cir. 2012). The second prong can be satisfied by showing that (1) the individual is enrolled in a tribe; (2) the government has recognized the person, either formally or informally, as an Indian by providing assistance reserved only to Indians; (3) the person has enjoyed the benefits of tribal affiliation, or (4) the person has been socially

recognized as an Indian by residing on a reservation and participating in Indian social life. *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 (10th Cir. 2005). Although a person is born with or without Indian blood, a person is not born as a registered member of a tribe or as receiving tribal benefits and enjoying Indian social life.

The Supreme Court has held that legislation of Indian tribes is "governance of once-sovereign political communities," and that the federal criminal statute charging a defendant under § 1153 was "based neither in whole nor in part upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 646-47 (1977). Instead, the Court held, the "respondents were not subjected to federal criminal jurisdiction because they [were] of the Indian race but because they [were] enrolled members of the Coeur d'Alene Tribe." *Id.* Contrary to the Government's argument, no person is born Indian, and that status does not attach for the remainder of someone's life. It is entirely possible for someone to revoke Indian status by withdrawing their enrollment with a tribe or by no longer being socially recognized as an Indian by residing on a reservation or participating in Indian social life. It is also possible for an individual to be born with Indian blood, but not become an Indian until later in life, or ever.

Therefore, just because the victims were proven to be Indian at some time does not mean that they were Indian at the time of the offense.

III. 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 in Count Two.

As noted above, the Government argues in footnote 6 on page 23, without citing any authority, that even though Mr. Simpkins did not propose jury instructions for Count Two, this Court should still consider Count Two waived for invited-error because he submitted an instruction for Count One.

Mr. Simpkins only submitted proposed jury instructions for Count One. Even if this Court determines that Mr. Simpkins's complaint about the instruction for Count One was waived, it cannot find waiver on Count Two. This Court cannot decide that Mr. Simpkins's invited error by pretending or assuming that there would be error if he had submitted proposed jury instructions for Count Two along with Count One. "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. Mr. Simpkins did not propose jury instructions for Count Two at all. Although he did not object to the court's instructions, a defendant's failure to object to a district court's proposed instruction is not the same as a defendant who proffers their own instructions. *Id.*, *citing United States v. Harris*, 695 F.3d 1125, 1130 n.4 (10th Cir. 2012).

IV. The district court limited Mr. Simpkins' cross-examination of A.L., in violation of his Sixth Amendment right to confrontation.

The Government argues that the court did not prevent defense counsel from introducing evidence of A.L.'s motive to disclose the abuse. The Government selected portions from the transcript and theorized that defense counsel could have better articulated his intended questions to A.L. However, defense counsel was clear when he told the court almost immediately after the Government objected that he wanted to ask the question, "So how about the reason that you told your mother?" (ROA Vol. 3 at 175). And then, "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." *Id.* at 175. Defense counsel followed up with, "So I think the question that he's getting to is why did you - - did you tell?" *Id.* at 175. The district court told defense counsel that he could ask A.L. whether A.L. knows if L.D. lies. However, defense counsel should have been allowed to ask A.L. her motive for disclosing to her mother – not whether A.L. personally believed L.D. lies. *Id.* at 176. This record establishes that the court limited Mr. Simpkins's cross-examination of A.L. in violation of his Sixth Amendment right to confrontation.

The Government claims that any error was harmless. The 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). The Government

cites facts that it claims corroborate A.L.'s testimony regarding the timing and location of the assault. (Gov't Brief at 46). It points to evidence that A.L.'s father observed Mr. Simpkins alone in A.L.'s bedroom late at night without wearing a shirt. *Id.* However, evidence that Mr. Simpkins was in A.L.'s bedroom did not prove that he sexually assaulted her. Mr. Simpkins lived with the family off and on and even kept his clothes in a closet in A.L.'s room. (ROA Vol. 3 at 103, 132). In addition, Mr. Simpkins usually slept with his shirt off. *Id.* at 133. The Government has not met its burden to show this error was harmless.

CONCLUSION

This Court should reverse Montelito Simpkins's conviction with instructions to dismiss. The evidence was insufficient to justify his convictions. 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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Date: June 16, 2023

s/ *Nicole Dawn Herron*

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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.

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s/ *Nicole Dawn Herron*

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 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 registrant:

Lisa C. Williams – Assistant United States Attorney

s/ *Nicole Dawn Herron*