APPENDIX

TABLE OF APPENDICES

United States Court of Appeals
For the Eighth Circuit

No. 17-1978

United States of America

Plaintiff - Appellee

v.

Pamela Lynn Bravebull

Defendant - Appellant

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: June 15, 2018
Filed: July 24, 2018

Before KELLY, ARNOLD, and STRAS, Circuit Judges.

ARNOLD, Circuit Judge.

Pamela Bravebull and her adult daughter, Tyann, were charged with assault with a dangerous weapon, namely, shod feet, and assault resulting in serious bodily injury, *see* 18 U.S.C. §§ 1153, 113(a)(3), (6), for their attack on Theresa Seewalker. They were charged with committing the offenses both individually and by aiding and abetting the other's commission of the offenses. *See* 18 U.S.C. § 2. Though Tyann

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pleaded guilty to assault resulting in serious bodily injury, Bravebull pleaded not guilty and took the matter to trial. The jury found Bravebull guilty of both offenses, but the verdict did not specify whether the jury found her guilty because she committed the offenses herself, because she aided and abetted Tyann, or both. The district court[1] sentenced Bravebull to 84 months in prison on both counts, to run concurrently.

On appeal, Bravebull maintains that a "panoply of errors" infected the proceedings below, though the record does not show that she raised any of her concerns to the district court. She first argues that the prosecutor improperly elicited what she characterizes as expert testimony during voir dire when he questioned a venireman about the dangers of shod feet, and then improperly referred to that questioning during his opening statement and closing argument as if the venireman's statements were evidence. Bravebull also maintains that the prosecutor intimated that Bravebull had stipulated that the shoe or shoes worn here were dangerous weapons. Because Bravebull did not raise an objection before the district court, we review her arguments for plain error. *See United States v. Paul*, 217 F.3d 989, 1003 (8th Cir. 2000).

We hold that any error the prosecutor committed here was not plain. For an error to be plain, it "must be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). Our review of the trial transcript shows that the prosecutor may have strayed close to troublesome territory by discussing with the venireman his experience as a taekwondo instructor and his views on shoes as dangerous weapons, and then (maybe) referring to this discussion during his opening statement and closing argument. But Bravebull acknowledges that this is an issue of first impression and has identified no statute, rule, or case

[1]The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

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prohibiting the prosecutor's actions, or more importantly, alerting the district court that it needed to correct any error sua sponte. Any such error, moreover, was not so "clear or obvious" as to obviate the need for some kind of pre-existing legal authority.

We have also independently reviewed the trial transcript, and we disagree that the prosecutor represented that defense counsel had stipulated that the shoes here were dangerous weapons. The prosecutor stated that defense counsel had stipulated to other elements of the crimes, such as, for instance, that Seewalker had suffered serious bodily injury and that the assaults were committed by Indians against Indians in Indian country. After discussing what he believed the evidence would show, only then did he say, "As we talked about in jury selection, a foot -- we agreed that a foot could be a weapon based upon how it was used." The subject of that sentence, "we," obviously referred to the prosecutor and the members of the jury, not the prosecutor and defense counsel.

For her next point on appeal, Bravebull argues that the evidence was insufficient to show that the shoes Bravebull and Tyann wore were dangerous weapons. The parties appear to agree that the evidence showed that both women wore shoes during the attack and that no one testified at trial about the specific shoes they wore. Bravebull argues that, though some shoes can be dangerous weapons, others, like Nike sandals, cannot. Bravebull did not raise this point to the district court, so we review her argument for plain error. *See United States v. Samuels*, 874 F.3d 1032, 1036 (8th Cir. 2017).

There is no plain error here because the jury could have properly inferred that Tyann, Bravebull, or both of them were wearing shoes that qualified as dangerous weapons during the attack. The court instructed the jury that a dangerous weapon "is any object used in a manner likely to endanger life or inflict serious bodily harm." The parties stipulated that Seewalker had suffered serious bodily injury, and all agree that Bravebull and Tyann were wearing some kind of shoes during the attack. One

witness testified that Bravebull and Tyann had unleashed an onslaught of full "wind-up" kicks to Seewalker's head—which is where she sustained her serious injuries. We can hardly say that it was plainly erroneous for the district court to allow the dangerous-weapon question to reach the jury in this case.

Bravebull also maintains that the charges of assault with a dangerous weapon and assault resulting in serious bodily injury are multiplicitous, that is, they charged the same offense, and the Double Jeopardy Clause forbids conviction on both charges. Federal Rule of Criminal Procedure 12(b)(3)(B)(ii) requires defendants to raise multiplicity challenges before trial, and when they do not, the challenge is untimely. Courts do not consider untimely multiplicity challenges unless the defendant shows good cause for the tardiness. Fed. R. Crim. P. 12(c)(3). Bravebull has not shown good cause, so we decline to address her argument. *See United States v. Fry*, 792 F.3d 884, 888–89 (8th Cir. 2015).

Bravebull takes issue with the district court's jury instruction on aiding and abetting, arguing that it omitted any requirement that she must have actually aided and abetted Tyann. Relatedly, she argues that the evidence was insufficient to show that she actually aided and abetted Tyann. Bravebull brought neither issue to the district court's attention, so we review these arguments for plain error. *See United States v. Stanley*, 891 F.3d 735, 739 (8th Cir. 2018); *Samuels*, 874 F.3d at 1036. Even if there was insufficient evidence that Bravebull aided and abetted Tyann and that the jury instruction on aiding and abetting was faulty, we do not think that the district court plainly erred because sufficient evidence shows that Bravebull committed the offenses herself, *see United States v. Dreamer*, 88 F.3d 655, 658 (8th Cir. 1996), a point that Bravebull does not challenge on appeal. "When the district court submits to the jury two or more grounds for conviction, for one of which there was insufficient evidence, and it is impossible to tell on what grounds the jury decided the defendant's guilt, we cannot reverse the jury's general verdict of guilty." *Id.*

Finally, Bravebull asserts that the district court erred by not giving her requested jury instruction on intoxication, which she proposed before trial. Since Bravebull did not preserve an objection on this point, we review her contention for plain error. *See Stanley*, 891 F.3d at 739. Bravebull bears the burden to show that there was a plain error below. *See United States v. Adejumo*, 772 F.3d 513, 538 (8th Cir. 2014). We cannot tell why the district court failed to give the instruction because the charge conference was not on the record. Once the parties went on the record, defense counsel did not raise any objection to the court's failing to give the instruction despite numerous opportunities to do so. Our reading of the record and evaluation of the attendant circumstances would support a conclusion that Bravebull had abandoned the intoxication defense and withdrew the corresponding instruction. Because we cannot tell on this record whether the district court committed an error, much less a plain one, Bravebull is not entitled to relief.

Affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1978

United States of America

Plaintiff - Appellee

v.

Pamela Lynn Bravebull

Defendant - Appellant

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:16-cr-00186-DLH-1)

JUDGMENT

Before KELLY, ARNOLD and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 24, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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Local AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of North Dakota

UNITED STATES OF AMERICA
v.
PAMELA LYNN BRAVEBULL

JUDGMENT IN A CRIMINAL CASE

Case Number: **1:16-cr-186-01**

USM Number: **16307-059**

Chad R. McCabe
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) **One (1) and Two (2) of the Indictment.**
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §§ 113(a)(3), 2 and 1153	**Assault with a Dangerous Weapon**	**6/14/2014**	**1**

The defendant is sentenced as provided in pages 2 through **8** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) **Three (3) of the Indictment.**

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 1, 2017
Date of Imposition of Judgment

Signature of Judge

Daniel L. Hovland **U.S. Chief District Judge**
Name and Title of Judge

May 1, 2017
Date

DEFENDANT: **PAMELA LYNN BRAVEBULL**
CASE NUMBER: **1:16-cr-186-01**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §§ 113 (a)(6), 2 and 1153	Assault Resulting in Serious Bodily Injury	6/14/2014	2

DEFENDANT: **PAMELA LYNN BRAVEBULL**
CASE NUMBER: **1:16-cr-186-01**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

84 MONTHS, with credit for time served, on Count 1 and 84 MONTHS, with credit for time served on Count 2, sentences to run concurrent with one another.

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the Defendant be placed at a correctional facility as close as possible to North Dakota, to remain close to family, preferably FCI Waseca in Waseca, Minnesota. In addition, the Court recommends that the Defendant be afforded the opportunity to participate in the Bureau of Prisons' 500-Hour Drug Abuse Program (RDAP).

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 1 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **PAMELA LYNN BRAVEBULL**
CASE NUMBER: **1:16-cr-186-01**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : **3 YEARS on Count 1 and 3 YEARS on Count 2, terms to run concurrent to one another.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **PAMELA LYNN BRAVEBULL**
CASE NUMBER: **1:16-cr-186-01**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: **PAMELA LYNN BRAVEBULL**
CASE NUMBER: **1:16-cr-186-01**

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a drug/alcohol dependency treatment program as approved by the supervising probation officer.

2. The defendant shall totally abstain from the use of alcohol and illegal drugs, including synthetic drugs, or the possession of a controlled substance, as defined in 21 U.S.C. Section 802 or state statute, unless prescribed by a licensed medical practitioner; and any use of inhalants.

3. The defendant shall submit to drug/alcohol screening at the direction of the U.S. Probation Officer to verify compliance. Failure or refusal to submit to testing can result in mandatory revocation. Tampering with the collection process or specimen may be considered the same as a positive test result.

4. The defendant shall not enter establishments where alcohol is the primary item for sale.

5. The defendant shall not contact the victims, A. F. and T. S. W., by any means, directly or indirectly, including in person, by mail or electronic means, or via third parties without written permission of the Court and the US Probation Office. If any contact occurs, the defendant shall immediately leave the area of contact, and immediately report the contact to the probation officer.

6. The defendant shall participate in a program or course of study aimed at improving educational level or employment skills, for example, participate in or complete a vocational training program, or participate in a literacy program.

7. The defendant shall participate in a program aimed at addressing specific interpersonal or social areas, for example, domestic violence, anger management, relationship counseling, financial counseling, cognitive skills, parenting, at the direction of her supervising probation officer.

8. The defendant shall participate in mental health treatment/counseling as directed by the supervising probation officer.

9. The defendant shall disclose her financial situation at the request of the supervising probation officer.

10. As directed by the Court, if during the period of supervised release the supervising probation officer determines the defendant is in need of placement in a Residential Re-Entry Center (RRC), the defendant shall voluntarily report to such a facility as directed by the supervising probation officer, cooperate with all rules and regulations of the facility, participate in all recommended programming, and not withdraw from the facility without prior permission of the supervising probation officer. The Court retains and exercises ultimate responsibility in this delegation of authority to the probation officer. See United States v. Kent, 209 F.3d 1073 (8th Cir. 2000).

11. The defendant shall submit her person, residence, workplace, vehicle, computer, and/or possessions to a search conducted by a United States Probation Officer based upon evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation, additional criminal charges, and arrest. The defendant shall notify any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: **PAMELA LYNN BRAVEBULL**
CASE NUMBER: **1:16-cr-186-01**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	**$ 200.00**	**$**	**$**	**$ 8,380.51**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Sanford Health **PO Box 5074** **Sioux Falls, SD 57108-2221**		**$5,002.76**	
Department of Human Services **Medical Services Division** **600 East Boulevard** **Bismarck, ND 58505**		**$2,609.75**	
Theresa See Walker **Cannon Ball, ND 58528**		**$768.00**	
TOTALS	**$ 0.00**	**$ 8,380.51**	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **PAMELA LYNN BRAVEBULL**
CASE NUMBER: **1:16-cr-186-01**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ **8,580.51** due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 1193, Bismarck, North Dakota, 58502-1193.

While on supervised release, the Defendant shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Pamela Bravebull 1:16-cr-186-01 and Tyann Bravebull 1:16-cr-186-02, $8380.51, joint and several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America,	)	
	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL**
	)	
vs.	)	
	)	Case No. 1:16-cr-186
Pamela Lynn Bravebull,	)	
	)	
Defendant.	)	

Before the Court is Defendant Pamela Bravebull's "Motion for a New Trial" filed on February 6, 2017. See Docket No. 71. The Government filed a response in opposition on February 9, 2017. See Docket No. 75. Bravebull did not reply. For the reasons explained below, the motion is denied.

I. BACKGROUND

The Government charged Bravebull in a three count indictment filed on August 3, 2016, with the offenses of Assault with a Dangerous Weapon, individually or by aiding and abetting, in violation of 18 U.S.C. §§ 2, 113(a)(3) and 1153; and Assault Resulting in Serious Bodily Injury, individually or by aiding and abetting, in violation of 18 U.S.C. §§ 2, 113(a)(6) and 1153; and Assault with a Dangerous Weapon, individually or by aiding and abetting, in violation of 18 U.S.C. §§ 2, 113(a)(3) and 1153. See Docket No. 1. Trial began on January 24, 2017, in Bismarck, North Dakota. On January 25, 2017, the jury returned its verdict finding Bravebull guilty on Counts One and Two. See Docket No. 66. Bravebull filed a "Motion for New Trial" on February 6, 2017. See Docket No. 71. Sentencing is currently scheduled for April 24, 2017.

II. LEGAL DISCUSSION

Bravebull argues she is entitled to a new trial because the Court erred by refusing to give a jury instruction on intoxication. See Docket No. 72. A criminal defendant is entitled to an instruction on a theory of defense "if he makes a timely request for such an instruction, if the request is supported by evidence and if it sets out a correct declaration of law." United States v. Manning, 618 F.2d, 45, 47-48 (8th Cir. 1980). Bravebull's proposed jury instructions included an Eighth Circuit Court of Appeals pattern jury instruction on intoxication, which reads as follows:

> One of the issues in this case is whether the defendant was [intoxicated] [taking a drug or drugs] at the time the acts charged in the Indictment were committed.
>
> Being under the influence of [alcohol] [a drug], [even one taken for medical purposes,] provides a legal excuse for the commission of a crime only if the effect of the [alcohol] [drug] makes it impossible for the defendant to have (insert mental state required by statute.) Evidence that the defendant acted while under the influence of [alcohol] [a drug] [drugs] may be considered by you, together with all the other evidence, in determining whether or not [he] [she] did in fact have (insert mental state required by statute.)

See Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 9.06.

The Eighth Circuit pattern jury instruction committee comments state, in part:

> A defendant charged with a specific intent crime is entitled to an intoxication instruction when "the evidence would support a finding that [the defendant] was in fact intoxicated and that as a result there was a reasonable doubt that he lacked specific intent." **Mere evidence that the defendant had been drinking at the time of the offense, however, is not enough to warrant an intoxication instruction.**

See Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 9.06 (internal citations omitted) (emphasis added).

The undersigned declined to give Bravebull's requested intoxication instruction to the jury, finding there was insufficient evidence to support this theory of defense. During trial, evidence of Bravebull's intoxication included generalized testimony that Bravebull and others were drinking on the night of the incident, and the result of a Portable Breath Test given to Bravebull when she was arrested.

The test result indicated Bravebull had a BAC of .12. The evidence at trial revealed that Bravebull had been drinking after the assault occurred, so it is unknown what her blood alcohol content may have been earlier in the evening. The arresting officer and the special agent on patrol on the night of the incident both testified that from their observations and experiences with Bravebull that night, they had no concerns regarding her level of intoxication. This evidence was not enough to show Bravebull was too intoxicated to form a criminal intent. See United States v. Robertson, 606 F.3d 943, 956 (8th Cir. 2010). Because mere evidence that the defendant had been drinking at the time of the offense is not enough to warrant an intoxication instruction, the Court declined to give one. Bravebull's request for a new trial on this basis must be denied.

More important, the Court declined to give an intoxication instruction because Bravebull's theory of defense at trial was that she was not directly or indirectly involved in the assault. Bravebull contended the assault was committed entirely by her daughter, and that she was merely a casual observer to the beating. Therefore, there was no factual or legal basis to give an instruction on intoxication. See U.S. v. Parker, 364 F.3d 934, 945 (8th Cir. 2004) ("Defendants are entitled to instructions on their theories of defense only insofar as those theories are supported by an adequate factual basis."); See also U.S. v. Washburn, 444 F.3d 1007, 1013 (8th Cir. 2006) ("A court is not obligated to give a jury instruction on a particular defense if that defense does not have an adequate factual basis.").

Bravebull also argues she is entitled to a new trial because the Court erred by refusing to give a jury instruction on the *scienter* element of the offense of assault resulting in serious bodily injury. See Docket No. 72. As stated above, a criminal defendant is entitled to an instruction on a theory of defense "if he makes a timely request for such an instruction, if the request is supported by evidence

and if it sets out a correct declaration of law." United States v. Manning, 618 F.2d, 45, 47-48 (8th Cir. 1980). At trial, Bravebull did make any request for such an instruction. Further, Bravebull did not object to the Court's proposed instructions regarding assault resulting in serious bodily injury. "Failure to object to jury instructions results in waiver of any assignment of error as to those instructions." U.S. v. Yellow Hawk, 276 F.3d 953, 956 (8th Cir. 2002).

"Proof of assault resulting in serious bodily injury does not require specific intent to cause serious bodily injury. Instead, it merely requires that the defendant assault the victim and that the assault happen to result in serious bodily injury." See United States v. Davis, 237 F.3d 942, 944 (8th Cir. 2001) (citing United States v. Big Crow, 728 F.2d 974 (8th Cir. 1984)). The Eighth Circuit Court of Appeals has held that a district court's jury instructions must be read as a whole. U.S. v. Rehak, 589 F.3d 965, 972, (8th Cir. 2009) ("In reviewing challenges to jury instructions, this Court recognizes that the district court has wide discretion in formulating the instructions, and we will affirm if the entire charge to the jury, when read as a whole, fairly and adequately contains the law applicable to the case."). The jury instructions in this case included instructions defining assault and intent or knowledge. See Docket No. 64. Because the undersigned instructed the jury on the necessary intent required to find Bravebull guilty of assault resulting in serious bodily injury, without objection from either party, Bravebull's request for a new trial on this basis is denied.

III. CONCLUSION

The Court has carefully considered the entire record, the parties' briefs, and relevant case law. The Defendants' motion (Docket No.75) is **DENIED**.

IT IS SO ORDERED.

Dated this 13th day of February, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

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 defense.

Fed. R. Evid. 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Fed. R. Evid. 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that

the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Fed. R. Evid. 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Fed. R. Evid. 606. Juror

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Fed. R. Evid. 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.