
APPENDIX A

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FILED

JUN 22 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAN H. JONES, Sr.,

Defendant-Appellant.

No. 16-30237

D.C. No.

2:15-cr-00199-RAJ-1

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, PresidingArgued and Submitted June 4, 2018
Seattle, WashingtonBefore: BYBEE and N.R. SMITH, Circuit Judges, and ANTOON,** District
Judge.

1. Sufficiency of the Evidence. There was sufficient evidence to convict
Jones of Count 7, possessing a firearm in furtherance of a crime of violence.

Because Jones did not move for a judgment of acquittal, "we review under a more

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable John Antoon II, United States District Judge for the
Middle District of Florida, sitting by designation.

rigorous standard of review for plain error to prevent a ‘miscarriage of justice.’” *United States v. Roston*, 986 F.2d 1287, 1289 (9th Cir. 1993) (quoting *United States v. Curtis*, 568 F.2d 643, 647 (9th Cir. 1978)). First, the statute does not require the Government prove Jones possessed a specific firearm, but, rather, any firearm. See 18 U.S.C. § 924(c)(1)(A) (requiring that “any person who, during and in relation to any crime of violence . . . shall, in addition to the punishment provided for such crime of violence . . . (ii) if *the firearm* is brandished, be sentenced to a term of imprisonment of not less than 7 years” (emphasis added)). Therefore, any claim there was insufficient evidence, because there was varying evidence about the specific model and type of the pistol, is unavailing. Second, Williams affirmatively testified that Jones brandished a firearm during the December 25, 2015 assaults. Therefore, under the plain error standard of review, there is no question “*any* rational trier of fact could have found” that Jones possessed a firearm when he committed the assaults charged in Counts 5 and 6. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

2. Severing. Jones's argument that the district court abused its discretion by denying his motion to sever Counts 1, 2, and 3 from Counts 5, 6, and 7 is waived.¹ "It is well settled that the motion to sever 'must be renewed at the close of evidence or it is waived.'" *United States v. Alvarez*, 358 F.3d 1194, 1206 (9th Cir. 2004) (quoting *United States v. Restrepo*, 930 F.2d 705, 711 (9th Cir. 1991)). Jones moved before trial to sever but did not renew his motion at the close of evidence. Further, there is no evidence that Jones "diligently pursued severance or that renewing the motion would have been an unnecessary formality." *United States v. Sullivan*, 522 F.3d 967, 1008 (9th Cir. 2008) (quoting *United States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006)).

3. Grand Jury Testimony. The district court did not abuse its discretion by admitting Medina's grand jury testimony. "We have expressly recognized that the foundational prerequisites of [Federal Rule of Evidence] 613(b) require only that the witness be permitted-*at some point*-to explain or deny the prior inconsistent statement." *United States v. Young*, 86 F.3d 944, 949 (9th Cir. 1996) (emphasis added); *see also* Fed. R. Evid. 613(b), Advisory Committee Note (noting "no

¹ The Government argues that the counts were properly joined. However, Jones has raised no such argument on appeal. Therefore, any argument that the counts were improperly joined is also waived. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

from the rule against hearsay statements “relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” Here, Medina testified that Jones and her fought from 2:00 a.m. to 6:00 a.m., Jones forced her to accompany him to try and buy a gun (approximately 7:30 a.m. to 8:30 or 9:00 a.m.), she left at her first opportunity (after Jones passed out), and she went straight to the tribal police (arriving about 9:00 a.m.).

6. Impeachment with Prior Police Report. Jones waived his argument that the district court improperly allowed the prosecution to impeach Medina with her prior report to tribal police by failing to argue the statements were improperly admitted under Rule 613(b). *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[A]rguments not raised by a party in its opening brief are deemed waived.”). Jones instead argues that the district court abused its discretion by allowing the statements under Rule 801(d)(1)(A). However, the statements were not offered under Rule 801, rather, the record indicates the Government proffered the statements as impeachment evidence, which would be admitted under Rule 613(b).

7. Cross Examination of Ramos. Jones abandoned his argument that the district court improperly limited Jones’s cross examination of Ramos by not arguing that the district court abused its discretion under Rule 403. *Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 978 (9th Cir. 2017) (“Issues raised in a brief

which are not supported by argument are deemed abandoned” (quoting *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988))). Rule 609 provides that when “attacking a witness’s character for truthfulness by evidence of a criminal conviction: (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence (A) must be admitted, subject to Rule 403.” Jones notes that the convictions are subject to a Rule 403 determination, but only argues that the district court abused its discretion by not following the mandatory “must” language in Rule 609.

8. Cross Examination of Williams. The district court did not abuse its discretion by limiting Williams’s cross examination and, in the process, did not infringe on Jones’s “fundamental right to present a defense.” *United States v. McCourt*, 925 F.2d 1229, 1236 n.12 (9th Cir. 1991). Jones does not specifically argue under what rule Williams’s tribal court misdemeanor domestic violence convictions should have been admitted, and affirmatively states that they were “not offered under [Rule] 609.” Therefore, we construe Jones’s argument to be that the convictions should have been admissible under Rule 404(b) as substantive evidence. Jones proffered the evidence to “corroborate[] Medina’s testimony that she was fearful of [Williams], and that he was both threatening and controlling of her.” In other words, it was offered to prove that Williams had indeed acted a

certain way. Such evidence is improper under Rule 404(b). *McCourt*, 925 F.2d at 1235-36 (holding “[e]vidence of ‘other crimes, wrongs, or acts,’ no matter by whom offered, is not admissible for the purpose of proving propensity or conforming conduct” (quoting Fed. R. Evid. 404(b))). Regardless, Jones was able to introduce the fact that Williams had been “physical” with Medina in the past, and Williams testified he had admitted to the conduct “because [he] wanted to stay out of jail.” This was sufficient for Jones to argue that Medina had initially provided false reports because she was afraid of Williams.

9. Vouching. First, it was not plain error for the prosecutor to state that she “th[ought] all the facts show you here that if you agree with what [Medina] has testified to, what [Williams] has testified to, about what happened on Christmas Day, you will find that the defendant possessed a firearm in furtherance of a crime of violence on Christmas Day 2014.” See *United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015). There was no indication of “extra-record” knowledge; the prosecutor argued for the jury to convict Jones for Count 7 by referencing the evidence supporting that count. *Id.* at 1040 (quoting *United States v. Ruiz*, 710 F.3d 1077, 1085 (9th Cir. 2013)). Second, it was not improper for the prosecutor to use the phrase “[Medina]’s truth” to argue one version of Medina’s testimony was true and the other was not. *United States v. Necoechea*, 986 F.2d 1273, 1279 (9th Cir.

1993) (holding it was proper for a prosecutor to state “I submit to you that she’s telling the truth”); *United States v. Preston*, 873 F.3d 829, 844 (9th Cir. 2017) (holding it was improper for the prosecutor to refer to a witness’s testimony as “the truth”). Finally, even if the prosecutor improperly stated that she “d[idn’t] think [Williams’s] a man who could orchestrate a scheme as to what he’s going to do next week, much less orchestrate a scheme were he directs [Medina],” the district court cured the statement. Thus, any error was harmless. *Flores*, 802 F.3d at 1034.

10. Double Jeopardy. The district court did not err by denying Jones’s motion to dismiss the indictment on double jeopardy grounds. “[U]nder what is known as the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns.” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). Indian tribes have retained sovereignty to prosecute their own members. *United States v. Wheeler*, 435 U.S. 313, 329-30 (1978). Therefore,

because Jones was initially prosecuted by the tribal government under its sovereign power, Jones's right against double jeopardy was not violated.²

AFFIRMED.

² While Jones alleges that his tribe and the federal government colluded in his two prosecutions, he has merely highlighted the fact that the tribal prosecutor entered an appearance in his federal prosecution. This falls far short of the type of prosecutorial "commandeer[ing]" necessary to overcome the dual-sovereignty doctrine. See *United States v. Zone*, 403 F.3d 1101, 1104-05 (9th Cir. 2005).

APPENDIX B

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TULALIP TRIBAL COURT

IN THE TULALIP TRIBAL COURT
FOR THE TULALIP INDIAN RESERVATION
TULALIP, WASHINGTON

THE TULALIP TRIBES
A Federally-Recognized Indian Tribe,
Plaintiff,

vs.

JONES, BRIAN HARRISON, SR
D.O.B. 10/02/1969

Defendant.

No. TUL-CR-DV-2015-

CRIMINAL COMPLAINT

TPD Incident No. 14-4153
Primary Officer R. Gobin

COMES NOW the Tulalip Tribes, Complainant, by and through its prosecuting authority, based upon a police investigation received from the Tulalip Police Department and not upon the personal knowledge of the undersigned, to charge the above-named defendant – an enrolled member of Tulalip (enrollment # T-2438)–with the criminal offenses of:

Charge 1: KIDNAPPING IN THE SECOND DEGREE DOMESTIC VIOLENCE (TTC 3.15.130(2) 4.25.100(11)), a Class E offense, which carries a maximum penalty of 365 days of imprisonment and/or a fine of \$5,000.00. A person commits the offense of kidnapping in the second degree by knowingly or purposely, and without lawful authority, restraining another person by secreting or holding the person in a place of isolation, or by using or threatening to use physical force against the other person. This offense occurred on or about December 25, 2014, in the vicinity of 6902 Totem Beach Rd., Tulalip, WA 98271 – within the exterior boundaries of the Tulalip Indian Reservation.

On the above date and location, defendant did commit the offense of Kidnapping 2° DV by holding his former wife, Denise Williams, at gunpoint in her residence and not allowing her to leave.

Charge 2: ASSAULT IN THE SECOND DEGREE DOMESTIC VIOLENCE (TTC 3.15.030(2) 4.25.100(11)), a Class E offense, which carries a maximum penalty of 365 days of imprisonment and/or a fine of \$5000.00. A person commits the offense of Assault 2° DV by

1 knowingly or purposely causing bodily harm to a family or household member. This offense
2 occurred on or about December 25, 2014, in the vicinity of 6902 Totem Beach Rd., Tulalip, WA
3 98271 – within the exterior boundaries of the Tulalip Indian Reservation.

4 On the above date and location, defendant did commit the offense of Assault 2° DV by
5 striking his former wife, Denise Williams, in the head with the butt of a gun, causing injury.

6 **Charge 3:** ASSAULT IN THE SECOND DEGREE (TTC 3.15.030(2)), a class E
7 offense, which carries a maximum penalty of 365 days of imprisonment and/or a fine of \$5000.
8 A person commits the offense of Assault 2° by knowingly or purposely causing bodily harm to
9 another. This offense occurred on or about December 25, 2014, in the vicinity of 6902 Totem
10 Beach Rd., Tulalip, WA 98271 – within the exterior boundaries of the Tulalip Indian
11 Reservation.

12 On the above date and location, defendant did commit the offense of Assault 2° by striking
13 Anthony Williams, pushing him to the floor, and kicking him, causing injury.

14 **Charge 4:** UNLAWFUL RESTRAINT (TTC 3.15.120), a Class C offense, which
15 carries a maximum penalty of 90 days of imprisonment and/or a fine of \$1,000.00. A person
16 commits the offense of unlawful restraint by knowingly or purposely, and without lawful
17 authority, restraining another so as to interfere substantially with another's liberty. This offense
18 occurred on or about December 25, 2014, in the vicinity of 6902 Totem Beach Rd., Tulalip, WA
19 98271 – within the exterior boundaries of the Tulalip Indian Reservation.

20 On the above date and location, defendant did commit the offense of Unlawful Restraint by
21 holding Anthony Williams by threat of force in Mr. Williams's home and not allowing him to
22 leave.

23 **Charge 5:** CRIMINAL ENDANGERMENT (TTC 3.15.090), a class E offense,
24 which carries a maximum penalty of 365 day imprisonment and/or a fine of \$5000. A person
25 commits the offense of Criminal Endangerment by knowingly engaging in conduct that creates a
26 substantial risk of death or serious bodily injury to another person. This offense occurred on or
about December 25, 2014, in the vicinity of 6902 Totem Beach Rd., Tulalip, WA 98271 – within
the exterior boundaries of the Tulalip Indian Reservation.

On the above date and location, defendant did commit the offense of Criminal Endangerment
by pointing a loaded gun at Anthony Williams.

Charge 6: CRIMINAL ENDANGERMENT DOMESTIC VIOLENCE (TTC
3.15.090 4.25.100(11)), a class E offense, which carries a maximum penalty of 365 day
imprisonment and/or a fine of \$5000. A person commits the offense of Criminal Endangerment
by knowingly engaging in conduct that creates a substantial risk of death or serious bodily injury
to a family or household member. This offense occurred on or about December 25, 2014, in the

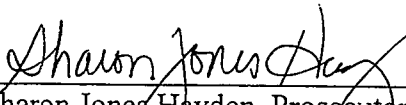
1 vicinity of 6902 Totem Beach Rd., Tulalip, WA 98271 – within the exterior boundaries of the
2 Tulalip Indian Reservation.

3 On the above date and location, defendant did commit the offense of Criminal Endangerment
4 DV by pointing a loaded gun at his former wife, Denise Williams.

5 I declare that, based upon the sworn written report and information provided to my office by
6 the Tulalip Police Department, the above allegations are true to the best of my knowledge and
7 belief, and are made under penalty of perjury.

8 DATED this 14th day of January, 2015

9 TULALIP TRIBES,
10 Office of the Reservation Attorney,

11 
12 Sharon Jones Hayden, Prosecutor WSBA# 23839
13 Brian Kilgore, Prosecutor WSBA #44275
14 Court Services Division

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UNITED STATES COURT OF APPEALS

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FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAN H. JONES, Sr.,

Defendant-Appellant.

No. 16-30237

D.C. No.

2:15-cr-00199-RAJ-1

Western District of Washington,
Seattle

ORDER

Before: BYBEE and N.R. SMITH, Circuit Judges, and ANTOON,* District Judge.

The panel has voted to withdraw the August 1, 2018 Order holding this case in abeyance. The panel has voted to deny the petition for panel rehearing. Judge Bybee has voted to deny the petition for rehearing en banc, and Judge N.R. Smith and Judge Antoon have so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.