

ADDENDUM

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOV 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 20-30030

Plaintiff-Appellee,

D.C. No. 4:19-cr-00007-BMM-1

v.

JAMES MICHAEL GARCIA,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Submitted November 17, 2020**
Seattle, Washington

Before: GOULD and FRIEDLAND, Circuit Judges, and BOUGH,*** District Judge.

James Michael Garcia appeals from the district court's order denying his motion to dismiss a count of assault resulting in serious bodily injury in Indian

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

*** The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

Country, in violation of 18 U.S.C. §§ 113(a)(6), 1153, after he pleaded guilty to felony child abuse, in violation of 18 U.S.C. § 1153(a) and Mont. Code Ann. § 45-5-212(1). We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *see United States v. Ziskin*, 360 F.3d 934, 943 (9th Cir. 2003), and we affirm.

Garcia was charged in a two-count superseding indictment with abusing his daughter within the Fort Peck Indian Reservation after the girl's mother reported that she heard, over the telephone, Garcia strike their child. Garcia contends that because he pleaded guilty to Count 2 of the superseding indictment, felony child abuse, the government's continued prosecution against him under Count 1, assault resulting in serious bodily injury, violates the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause protects defendants against multiple trials and cumulative punishments. *See Ohio v. Johnson*, 467 U.S. 493, 499 (1984). However, the same act can constitute multiple offenses and be tried and punished accordingly if each statute requires proof of an additional element that the other does not. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Because the Major Crimes Act, 18 U.S.C. § 1153, enables prosecution of felony child abuse in Indian country, but does not point to a federal definition of the crime, the government may use the state law of where the offense occurred to define the elements and punishments. *See United States v. Other Medicine*, 596 F.3d 677, 681 (9th Cir. 2010). Garcia concedes that felony child abuse in Montana

has an age requirement and that assault resulting in serious bodily injury does not, but contends that this is the only difference between the two offenses. However, a conviction for assault resulting in serious bodily injury requires proof of “serious bodily injury,” 18 U.S.C. § 113(a)(6), while felony child abuse requires proof of only “bodily injury,” Mont. Code. Ann. § 45-5-212(1) (referring to Mont. Code. Ann. § 45-5-201). Garcia acknowledges that, in the context of felony child abuse here, bodily injury is defined as “physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.” Mont. Code Ann. § 45-2-101(5). Serious bodily injury, however, requires proof of greater harm; it refers to bodily injury that involves: “a substantial risk of death,” “extreme physical pain,” “protracted and obvious disfigurement,” or “protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” 18 U.S.C. § 1365(h)(3).

Garcia concedes that felony child abuse has an age requirement that assault resulting in serious bodily injury does not. Assault resulting in serious bodily injury requires proof of greater harm than felony child abuse. Therefore, each offense requires proof of an element that the other does not, and the district court properly determined that the Double Jeopardy Clause does not preclude Garcia’s prosecution for assault resulting in serious bodily injury after he pleaded guilty to felony child abuse.

To the extent Garcia argues that the evidence the government would use to prove serious bodily injury is the same he stipulated to in his guilty plea, the government does not need to demonstrate separate conduct to avoid violating the Double Jeopardy Clause. *See United States v. Wright*, 79 F.3d 112, 114 (9th Cir. 1996).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 31 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES MICHAEL GARCIA,

Defendant-Appellant.

No. 20-30030

D.C. No. 4:19-cr-00007-BMM-1
District of Montana,
Great Falls

ORDER

Before: GOULD and FRIEDLAND, Circuit Judges, and BOUGH,* District Judge.

The panel has voted to deny the petition for panel rehearing.

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

Garcia's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 34) are denied.

* The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES MICHAEL GARCIA,

Defendant.

Cause No. CR-19-07-GF-BMM

ORDER

Defendant James Michael Garcia filed a Motion to Dismiss Count I of the Superseding Indictment (Doc. 43). (Doc. 69.) Garcia asserts that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits the Government from trying him for Count I, assault resulting in serious bodily injury, after Garcia pleaded guilty to Count II, felony child abuse. (Doc. 69 at 1-2; Doc. 70 at 1-2.) The Government opposes Garcia's motion. (Doc. 76.) The Court held a hearing on January 15, 2020. (Doc. 79.)

BACKGROUND

The Superseding Indictment charges Garcia with two counts. (Doc. 43.) Count I alleges that Garcia committed assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 1153(a), 113(a)(6), and 3559(f)(3). (*Id.* at 1-2.) In order

for a jury to find Garcia guilty of assault resulting in serious bodily injury as charged in Count I of the Superseding Indictment, the Government would have to prove each of the following elements beyond a reasonable doubt:

First, the assault took place within the exterior boundaries of the Fort Peck Indian Reservation;

Second, the Defendant is an Indian person;

Third, the Defendant assaulted Jane Doe by intentionally striking her; and

Fourth, as a result, Jane Doe suffered serious bodily injury.

“Serious bodily injury” means bodily injury that involves (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a body part, organ, or mental faculty.

See Assault Resulting in Serious Bodily Injury, Section 8.9, Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit (2010 Ed., last updated December 2019); *see also* 18 U.S.C. § 113(a)(6).

Count I of the Superseding Indictment further alleges that Jane Doe was less than eighteen years of age at the time of the offense. (Doc. 43 at 2.) Garcia’s sentence would be subject to a sentencing enhancement if Jane Doe was under the age of eighteen years. *See* 18 U.S.C. § 3559(f)(3). The sentencing enhancement calls for a mandatory term of imprisonment of not less than ten years. *Id.* This sentencing enhancement that provides for a mandatory term of imprisonment requires the jury to decide whether Jane

Doe was under the age of eighteen years. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Count II alleges that Garcia committed felony child abuse in violation of 18 U.S.C. § 1153(a) and Mont. Code Ann. § 45-5-212(1). (Doc. 43 at 1-2.) In order for a jury to find Garcia guilty of felony child abuse as charged in Count II of the Superseding Indictment, the Government would have to prove each of the following elements beyond a reasonable doubt:

First, the offense took place within the exterior boundaries of the Fort Peck Indian Reservation;

Second, the Defendant is an Indian person;

Third, the Defendant committed an assault as defined by Mont. Code Ann. § 45-5-201;

Fourth, at the time of the offense, the victim was under fourteen years of age; and

Fifth, at the time of the offense, the defendant was eighteen years of age or older.

A person commits the offense of assault as defined by Mont. Code Ann. § 45-5-201 if the person purposely or knowingly causes bodily injury to another.

“Bodily injury” means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.

See Mont. Crim. Jury Instructions (2009), Model Instructions 5-117(a) (Assault on a Minor); 5-106 (Assault); and 5-106(b) (Definition of Bodily Injury).

Garcia voluntarily pleaded guilty to Count II, felony child abuse, without a plea agreement. (Docs. 61, 64 & 68.) Garcia now moves to dismiss Count I, assault resulting in serious bodily injury, on double jeopardy grounds. (Docs. 69 & 70.)

DISCUSSION

The Double Jeopardy Clause provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend.

V. The constitutional guarantee prohibits a second prosecution for the same offense after conviction. *United States v. Enas*, 255 F.3d 662, 665 (9th Cir. 2001).

Separate crimes do not have to be identical in order to be the same within the meaning of the constitutional prohibition. *Brown v. Ohio*, 432 U.S. 161, 164 (1977). The Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), articulated the test for determining whether two offenses are sufficiently distinguishable:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304.

The Court in this case must examine whether assault resulting in serious bodily injury and felony child abuse each require proof of a fact that the other does not. *See Blockburger*, 284 U.S. at 304. Assault resulting in serious bodily injury

requires proof that the victim suffered “serious bodily injury.” Serious bodily injury means bodily injury that involves (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a body part, organ, or mental faculty. Felony child abuse requires proof that the Defendant caused “bodily injury” to another. Bodily injury means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment. Assault resulting in serious bodily injury requires proof that the victim suffered a greater degree of injury than felony child abuse requires. Assault resulting in serious bodily injury, accordingly, requires proof of a fact that felony child abuse does not.

Further, felony child abuse requires proof that, at the time of the offense, the victim was under fourteen years of age and the Defendant was eighteen years of age or older. Assault resulting in serious bodily injury does not require proof of the victim’s age or the defendant’s age. The sentencing enhancement that would apply during sentencing if the jury were to determine beyond a reasonable doubt that the victim was under the age of eighteen years proves immaterial to the Court’s double jeopardy analysis. The Defendant would be guilty of assault resulting in serious bodily injury if the jury found the four elements of the crime satisfied. The victim’s age does not represent one of those elements. Felony child abuse, thus, requires proof of a fact that assault resulting in serious bodily injury does not.

The Superseding Indictment (Doc. 43) charges Garcia with two offenses, each of which requires proof of a fact that the other does not. Garcia voluntarily pleaded guilty to Count II, felony child abuse, without a plea agreement. (Docs. 61, 64 & 68.) The Double Jeopardy Clause of the Fifth Amendment does not now prohibit the Government from trying Garcia on Count I, assault resulting in serious bodily injury. (Docs. 69 & 70.) Therefore,

IT IS ORDERED that Garcia's Motion to Dismiss (Doc. 69) is **DENIED**.

IT IS FURTHER ORDERED that the following schedule shall apply: The final pretrial conference is scheduled for February 11, 2020 at 8:30 a.m. The parties shall report to the chambers of the undersigned. The jury trial is scheduled for February 11, 2020 at 9:00 a.m. in the Charles N. Pray Courtroom at the Missouri River Federal Courthouse, Great Falls, Montana. The plea agreement/notice of intent to proceed to trial deadline is February 5, 2020. Expert reports are due on or before February 6, 2020. The Jury Instructions and Trial Briefs are due by February 7, 2020.

DATED this 3rd of February, 2020.



Brian Morris
United States District Court Judge

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FILED

JUN 05 2019

Clerk, U.S. District Court
District Of Montana
Great Falls

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES MICHAEL GARCIA, Defendant.	CR 19-07-GF-BMM SUPERSEDING INDICTMENT ASSAULT RESULTING IN SERIOUS BODILY INJURY Title 18 U.S.C. §§ 1153(a), 113(a)(6), and 3559(f)(3) (Count I) (Penalty: Mandatory minimum ten years to life imprisonment, \$250,000 fine, and five years supervised release) FELONY CHILD ABUSE Title 18 U.S.C. § 1153(a) and Mont. Code Ann. § 45-5-212(1) (Count II) (Penalty: Five years imprisonment, \$50,000 fine, and three years supervised release)
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THE GRAND JURY CHARGES:

COUNT I

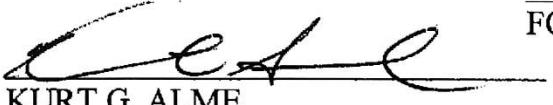
That on or about August 26, 2018, at Brockton, in Roosevelt County, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country, the defendant, JAMES MICHAEL GARCIA, an Indian person, intentionally assaulted Jane Doe, who at the time of the offense was less than eighteen years of age, with said assault being a crime of violence resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153(a), 113(a)(6), and 3559(f)(3).

COUNT II

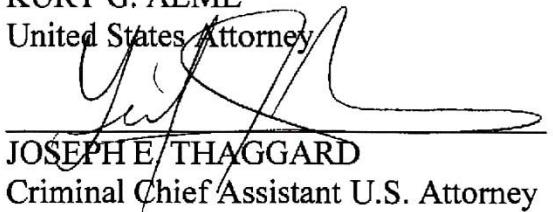
That on or about August 26, 2018, at Brockton, in Roosevelt County, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country, the defendant, JAMES MICHAEL GARCIA, an Indian person, who is over the age of 18 years, purposely and knowingly caused bodily injury to a minor, Jane Doe, an individual who had not attained the age of 14 years, in violation of 18 U.S.C. § 1153(a) and Mont. Code Ann. § 45-5-212(1).

A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.


KURT G. ALME

United States Attorney


JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

Crim. Summons _____
Warrant _____ in federal
Bail _____ custody

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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JAMES MICHAEL GARCIA, Defendant.	CR 19-7-GF-BMM UPDATED OFFER OF PROOF (As to Count II of the Superseding Indictment)
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THE CHARGES

The defendant, JAMES MICHAEL GARCIA, is charged by Indictment with one count of Assault Resulting in Serious Bodily Injury, in violation of 18 U.S.C. §§ 1153(a), 113(a)(6), and 3559 (f)(3) (Count I); and one count of Felony Child

Abuse, in violation of 18 U.S.C. § 1153(a) and Mont. Code Ann. § 45-5-212(1) (Count II).

PLEA

The defendant, JAMES MICHAEL GARCIA, has indicated that he will enter a voluntary plea of guilty to the crime of felony child abuse, as charged in Count II of the Indictment, without a plea agreement. Count I remains pending and set for trial. The government intends to proceed to trial on Count I regardless of any plea to Count II.

ELEMENTS

In order for the defendant to be found guilty of the crime of felony child abuse (assault on a minor) as charged in Count II in the superseding indictment, the United States must prove each of the following elements beyond a reasonable doubt:

1. That the defendant committed an assault, as defined by MCA § 45-5-201, by purposely or knowingly causing bodily injury to another.
2. That at the time of the offense, the victim was under 14 years of age.
3. That at the time of the offense the defendant was 18 years of age or older.
4. The defendant is an Indian person.

5. The crime occurred within the exterior boundaries of the Fort Peck Indian Reservation.

PENALTY

The charge of felony child abuse as charged in Count II of the superseding indictment carries a maximum punishment of five years of imprisonment, a \$50,000 fine, three years of supervised release, and a \$100 special assessment.

ANTICIPATED EVIDENCE

If this case were tried in United States District Court, the United States would prove the following:

On August 26, 2018, the defendant was at his residence in Brockton, Montana, which is within the exterior boundaries of the Fort Peck Indian Reservation. The defendant's daughter, Jane Doe, who was under 14 years of age, was also at home with him. That day, the defendant's (former) girlfriend and the mother of Jane Doe—Leigh Spotted Bird—was out of town.

At some point, the defendant accessed Leigh's sister's Facebook account. He viewed messages between Leigh and her sister indicating that Leigh's and the defendant's relationship was over. The defendant called Leigh to ask what was going on. Later, the defendant called Leigh back while he was drunk. The defendant asked Leigh if they could be together and Leigh said no. The defendant said that if Leigh would not be with him then he would hit Jane Doe.

Leigh told the defendant to leave Jane Doe alone. The defendant told Leigh that if she would not be with him, he was going to beat Jane Doe up. After their exchange, Leigh heard a lot of motion over the phone, as if the defendant was throwing something or something hit the floor. Leigh heard Jane Doe scream. The defendant said, "Wake the f**** up, you little b****!" Leigh heard the defendant hitting Jane Doe. Jane Doe screamed and cried, and then she stopped crying.

Jane Doe suffered a skull fracture and brain bleed as a result of this assault.

When interviewed, the defendant initially denied any memory of hurting Jane Doe, but he ultimately admitted to striking Jane Doe with his hand that had a ring on it.

The defendant is over the age of 18 years. He is an enrolled member of the Assiniboine and Sioux Tribes of Fort Peck. He is an Indian person.

The United States would have presented this evidence through the testimony of law enforcement, expert witnesses, and lay witnesses.

DATED this 7th day of December 2019.

KURT G. ALME
United States Attorney

/s/ Cassady A. Adams
CASSADY A. ADAMS
Assistant U.S. Attorney