APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

October 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN VIGIL,

Defendant - Appellant.

No. 20-2160
(D.C. No. 1:18-CR-00739-MV-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

A jury convicted Kevin Vigil of aggravated sexual abuse of a six-year-old child. On appeal, Vigil challenges two pretrial rulings: (1) that federal criminal jurisdiction exists because the offense occurred in Indian country; and (2) that the government could admit certain hearsay statements the child made to her mother. We affirm both rulings. As Vigil recognizes, our precedent forecloses his argument that the land on which his crime occurred is not considered Indian country. And because the child made the hearsay statements while under the stress caused by the alleged

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

abuse, the district court properly admitted them as excited utterances under Federal Rule of Evidence 803(2).

Background

According to trial testimony, one weekend in early February 2018, Vigil invited longtime friends Consuelo War and Tommy War over to hang out and drink at his trailer home. Vigil and Consuelo had briefly developed an intimate relationship after she and Tommy divorced in 2004, and the Wars' children—including their six-year-old daughter A.W.—called Vigil "Uncle Kevin." R. vol. 3, 401. On Saturday morning, after drinking together in the morning and early afternoon, the trio left to pick up A.W. from her sister's house.

Once they returned to Vigil's home, the three adults continued drinking until around 9:30 p.m., when Vigil went to sleep in his bedroom. Consuelo testified that half an hour later, A.W. got tired and joined Vigil. Consuelo said she twice checked on A.W. over the next hour, noticing nothing unusual either time. At 1:15 a.m., A.W. woke up and came back out to the kitchen, followed by Vigil ten minutes later. She returned to Vigil's bedroom around 2 a.m., and Vigil did the same five or ten minutes later. Then at about 2:10 a.m., Consuelo also got into Vigil's bed, on the other side of A.W., so that A.W. lay between the two adults.

Consuelo testified that three minutes later, she heard A.W. move and suddenly "gasp like something painful" had happened. *Id.* at 406. Reaching over with her hand, Consuelo felt that A.W.'s pants and underwear were off. Reaching further, Consuelo "felt [Vigil's] underwear off and his erect penis." *Id.* Consuelo turned on the lights

and "threw off the blankets" as Vigil stood up and "pull[ed] up his underwear." *Id.* After grabbing A.W., Consuelo left Vigil's home with Tommy and headed to the hospital.[1]

According to Vigil, as A.W. left, she hugged him and said, "Bye, Uncle Kevin." *Id.* at 939. Consuelo denied seeing A.W. hug Kevin and said that when A.W. got in the car, she was "scared, shocked, crying, and in pain." *Id.* at 407. Consuelo also said that during the drive to the hospital, A.W. made statements about the incident that had just occurred, saying, "Mamma, my cookie hurts and my butt hurts. Uncle Kevin put his fingers in my cookie and his pee-pee in my butt twice. And I told him to stop and he wouldn't."[2] *Id.*

Based on this incident, a grand jury indicted Vigil on two counts of aggravated sexual abuse of a child under 18 U.S.C. § 1152 and § 2241(c). Count 1 alleged that Vigil engaged and attempted to engage in contact between his penis and A.W.'s anus. *See* 18 U.S.C. § 2246(2)(A). Count 2 alleged that Vigil penetrated and attempted to penetrate A.W.'s genital opening with his fingers. *See* § 2246(2)(C).

Before trial, the government filed two motions relevant to this appeal. First, the government sought a determination that "the land on which the alleged crimes occurred is Indian [c]ountry"—a prerequisite for federal criminal jurisdiction—

[1] Vigil's version of events varied greatly. He testified that when Consuelo joined him and A.W. in his bed, she laid down in between him and A.W. He said that Consuelo then pulled down his pants and touched his penis but that he pushed her away because A.W. was sleeping next to them. Vigil said that Consuelo became upset, left the room for five minutes, and then returned to wake A.W. and leave.

[2] A.W refers to her vagina as "cookie."

because it is "within the exterior boundaries of the Ohkay Owingeh Pueblo, a federally recognized Indian [t]ribe." R. vol. 1, 72. The district court granted this motion, rejecting Vigil's argument that the land is not Indian country because it is "privately held by non-Indians." *Id.* at 344.

Second, the government moved to admit the hearsay statements A.W. made to Consuelo on the way to the hospital, arguing that they were either present sense impressions or excited utterances under Federal Rule of Evidence 803(1) and (2), respectively. The district court granted the motion over Vigil's objections that "the witness offering the statements [wa]s unreliable" and that "the statements were not made while under the stress of the event's excitement." *Id.* at 326. The government introduced A.W.'s statements at trial through Consuelo's testimony.

The jury ultimately found Vigil not guilty on Count 1 and guilty on Count 2. The district court sentenced Vigil to 360 months in prison, followed by five years of supervised release. Vigil appeals, challenging the district court's pretrial rulings on jurisdiction and hearsay.

Analysis

I. Jurisdiction

Proof that the crime occurred in Indian country is a prerequisite for federal criminal jurisdiction. *See* § 1152 (extending general federal criminal laws to "Indian country"). In his opening brief, Vigil points to his argument below "that Congress precluded the exercise of federal criminal jurisdiction over offenses occurring on the land where [he] lives when it extinguished all right, title, and interest of Ohkay

Owingeh Pueblo to that tract and relinquished all interest of the United States." Aplt. Br. 34. He again asserts lack of subject-matter jurisdiction on appeal, but he acknowledges that we recently rejected his argument. *See United States v. Antonio*, 936 F.3d 1117, 1121–24 (10th Cir. 2019) (holding that defendant's offense occurred in Indian country because land, though privately owned by non-Indians, was within exterior boundaries of Pueblo lands), *cert. denied*, 140 S. Ct. 818 (2020). And we are bound to follow that decision absent en banc reconsideration or intervening Supreme Court authority. *United States v. Berg*, 956 F.3d 1213, 1216 n.3 (10th Cir.), *cert. denied*, 141 S. Ct. 605 (2020). Vigil does not allege that either circumstance has occurred here and "raises this issue [only] to preserve it in order to seek certiorari from the . . . Supreme Court." Aplt. Br. 34. Therefore, his jurisdictional argument is foreclosed by *Antonio*.

II. Hearsay Statements

Next, Vigil argues that the district court erred in granting the government's pretrial motion to admit certain hearsay statements. We review this evidentiary ruling for abuse of discretion and will reverse only if the district court made clearly erroneous factual findings, relied on erroneous legal conclusions, or if its decision manifests a clear error in judgment.[3] *See United States v. Channon*, 881 F.3d 806,

[3] As the government points out, the more stringent plain-error standard might apply because in the district court, Vigil did not raise one of the objections he now offers to challenge the admission of A.W.'s statements—that the government failed to prove when the alleged sexual abuse occurred. *See United States v. Smalls*, 752 F.3d 1227, 1236 (10th Cir. 2014) ("If there was no objection, we review for plain

809–10 (10th Cir. 2018). And given the "fact-specific nature of a hearsay inquiry," we apply "heightened deference" to the district court's ruling. *United States v. Pursley*, 577 F.3d 1204, 1220 (10th Cir. 2009) (quoting *United States v. Trujillo*, 136 F.3d 1388, 1395 (10th Cir. 1998)); *see also Channon*, 881 F.3d at 810.

Vigil's argument centers on A.W.'s statements to Consuelo on the way to the hospital. These statements are hearsay because A.W. made them out of court and the government offered them to prove that what A.W. said was true—that is, as evidence that Vigil committed the charged acts. *See* Fed. R. Evid. 801(c). The statements are therefore inadmissible unless an exception to the rule against hearsay applies. Fed. R. Evid. 802. The district court applied two exceptions, reasoning that A.W.'s statements were admissible either as present sense impressions or as excited utterances under Rule 803(1) or (2), respectively. Vigil contends that neither exception covers A.W.'s statements.

We begin with the excited-utterance exception, which applies to "statement[s] relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). Such statements are admissible if (1) a startling event occurred, (2) the declarant made the statements while "under the stress of the event's excitement," and (3) there is "a nexus between the content of the statement and the event." *Pursley*, 577 F.3d at 1220. No one disputes that A.W.'s statements satisfy the first and third requirements: The alleged

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error."). We need not decide whether Vigil preserved this timing argument, however, because it fails even under the more lenient abuse-of-discretion standard.

sexual abuse is a startling event, and the statements are about that event. The dispute centers on the second requirement—whether A.W. made the statements while under the stress of the event's excitement.

On this requirement, our precedent sets out "a range of factors" that affect "whether a declarant made a statement while under the stress of a particular event." *Id.* Those factors include "the amount of time between the event and the statement; the nature of the event; the subject matter of the statement; the age and condition of the declarant; the presence or absence of self-interest; and whether the statement was volunteered or in response to questioning." *Id.* "[T]here is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance." *Id.* at 1221 (quoting *United States v. Ledford*, 443 F.3d 702, 711 (10th Cir. 2005)); *see also id.* (citing cases with delays ranging from 35 minutes to four hours).

The district court applied these factors to conclude that A.W. made the challenged statements under the stress caused by the incident. In particular, it found that only a "short amount of time" passed between the alleged abuse and the statements. R. vol. 1, 340. It further noted that the nature of the event—sexual abuse—was especially startling and that A.W. was only six years old. *Cf. United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993) (noting when analyzing different hearsay exception that "youth 'greatly reduce[s] the likelihood that reflection and fabrication were involved'" (alteration in original) (quoting *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988))). The district court also remarked that

A.W.'s statements lacked any apparent self-interest and found it relevant that A.W. was upset and crying at the time she made these statements. *See id.* (mother's description of child as "frightened, on the verge of tears[,] and trying to run away[ ]indicate[d] that she was still under the stress of the [sexual assault]").

On appeal, Vigil challenges the district court's conclusion that a "short amount of time" elapsed between the alleged abuse and the statements. R. vol. 1, 340. In his view, the district court "incorrect[ly] assum[ed]" that the conduct described in A.W.'s statements "occurred during the three minutes that Consuelo was lying next to [A.W.]." Aplt. Br. 29–30; *see also id.* at 30 (arguing that "the evidence does not support" conclusion that abuse could have occurred "while [Consuelo] lay awake beside [A.W.]"). But the district court's conclusion on this point is a factual finding, and we may disturb that finding only if it is clearly erroneous. *See Channon*, 881 F.3d at 809–10. A factual "finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Otuonye*, 995 F.3d 1191, 1203–04 (10th Cir. 2021) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)).

Vigil cannot meet this standard. Consuelo testified that the incident occurred at or around 2:13 a.m. (three minutes after she got into bed) and that A.W. made the statements on the ensuing drive to the hospital, where Consuelo signed a time-stamped medical form at 2:38 a.m. This evidence supports the conclusion that the abuse occurred in the time frame that Consuelo described and that A.W.'s statements

occurred shortly thereafter. And Vigil points to no other record evidence to undermine Consuelo's account. Instead, he complains generally about the amount of time and privacy required to sexually assault a child. He suggests, for instance, that "[i]t defies common sense to conclude that A[.W.] could have been anally penetrated twice during the three minutes that Consuelo was lying beside her," Aplt. Br. 27. But Vigil's complaints amount to nothing more than speculation, and we are not "left with the definite and firm conviction that a mistake has been committed." *Otuonye*, 995 F.3d at 1203 (quoting *Anderson*, 470 U.S. at 573). Accordingly, we find no clear error in the district court's factual finding that a "short amount of time" passed between the event and the statement. R. vol. 1, 340.

Vigil next argues that "the government did not demonstrate a continuous state of excitement from event to statement." Aplt. Br. 30. That is, Vigil asserts that even if A.W. "was in a state of excitement when she made her statements" in the car, "[t]he only evidence concerning A[.W.]'s condition prior to leaving [his] home was that she [was] calm." *Id.* For support, he cites his testimony that A.W. gave him a hug before leaving and said, "Bye, Uncle Kevin." R. vol. 3, 939–40.

This argument is both factually and legally flawed. In her testimony, Consuelo denied that A.W. gave Vigil a hug before leaving. Further, Consuelo's testimony about A.W.'s demeanor in the car—that A.W. was "scared, shocked, crying, and in pain"—casts doubt on Vigil's claim that A.W. appeared calm moments earlier when she left the house. *Id.* at 407. And in any event, even assuming A.W. seemed calm when she left, that fact isn't dispositive because "the declarant need not show signs

of excitement immediately upon witnessing or experiencing [the] startling event." *United States v. Lossiah*, 129 F. App'x 434, 437 (10th Cir. 2005) (unpublished);[4] *cf. United States v. Smith*, 606 F.3d 1270, 1279 (10th Cir. 2010) ("Admissibility hinges on a statement's contemporaneousness with the excitement a startling event causes, not the event itself."). To the contrary, the declarant must simply "still be under the continuing stress of excitement caused by the event or condition when making the statement." *Lossiah*, 129 F. App'x at 437; *see also id.* (rejecting argument that "statement was not an excited utterance because the younger child initially appeared calm following the startling event"). And here, the factors discussed by the district court—including its not-clearly-erroneous finding on the timing factor—suggest that A.W. remained under the stress of the event when she made her statements. For that reason, the district court did not abuse its discretion in admitting the statements as excited utterances, and we need not address whether the statements were also admissible as present sense impressions under Rule 803(1). *See Magnan*, 863 F.3d at 1287 n.1.

Conclusion

Because the district court properly determined that Vigil's offense occurred in Indian country and that A.W.'s statements were admissible hearsay under the

[4] Though *Lossiah* is unpublished and therefore lacks precedential value, we find it persuasive and cite it for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

excited-utterance exception in Rule 803(2), we affirm.

Entered for the Court

Nancy L. Moritz
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

October 20, 2021

Mr. Gordon Devon M. Fooks
Office of the Federal Public Defender
District of New Mexico
111 Lomas, NW, Suite 501
Albuquerque, NM 87102

RE: 20-2160, United States v. Vigil
Dist/Ag docket: 1:18-CR-00739-MV-1

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Kyle Nayback

CMW/jjh

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 18-739-MV

v.

KEVIN VIGIL,

Defendant.

ORDER ON MOTION IN LIMINE

THIS MATTER comes before the Court on the government's Motion in Limine for the Admission of Excited Utterances and Present Sense Impression Statements. Doc. 130. The defense timely replied. Doc. 160. The Court heard arguments on this motion on July 31, 2019. Having reviewed the briefs, relevant law, and being otherwise fully informed, the Court will **GRANT** the motion.

BACKGROUND

The government requests a pre-trial ruling to be able to admit A.W.'s statements, made to her mother on the way to Presbyterian Española Hospital, under Federal Rules of Evidence 803(1) (present sense impressions) and Rule 803(2) (excited utterances). Doc. 130 at 1. The government argues there is no violation of Mr. Vigil's right to confront the witness as the statements are not testimonial. *Id.* at 7.

The government argues that A.W.'s statements to her mother on the way to the hospital are admissible as present sense impressions because "[t]he statements describe the abuse immediately after the child was in Defendant's bed." Doc. 130 at 5.

The government also argues that A.W.'s statements to her mother on the way to the hospital

qualify as excited utterances because the statements meet all three requirements under Rule 803(2) and *Ledford*. This exception has three requirements: (1) a startling event; (2) the statement was made while the declarant was under the stress of the event's excitement; and (3) a nexus between the content of the statement and the event. *Id.* (citing *United States v. Ledford*, 443 F.3d 702, 710 (10th Cir. 2005)). The government first notes that a minor child being sexually abused by an adult would be a startling event. *Id.* at 6 (citing *United States v. Farley*, 992 F.3d 1122, 1123 (10th Cir. 1993)). Second, it argues A.W. was still under the stress of the event as evidenced by the short time lapse, her young age, the startling nature of the event, and she appeared—according to her mother—to be "crying and upset." *Id.* at 7. Third, the government states "there is a clear nexus between A.W.'s statements and the startling events." *Id.*

Mr. Vigil opposes the motion. Doc. 160. He expects that the government intends to introduce the statements through the testimony of A.W.'s mother, Consuelo War, and objects to the admission of the statements because the individual offering the statements is unreliable. *Id.* at 1. Mr. Vigil argues that "C.W. has a long history reflective of her lack of honesty," including stealing her sister's tax refund, forging her sister's signature, shoplifting from Wal-Mart, and requesting A.W. to supply urine for Ms. War's drug testing. *Id.* at 2.

Mr. Vigil additionally argues that the government has not met the second prong of the excited utterances exception: the statement was made while the declarant was under the stress of the event's excitement. *Id.* at 3. However, as noted, the government addressed this in their motion in limine: it states that the time lapse was brief between the event and the statement ("likely a matter of minutes"), she was very young at the time, and her mother reports that A.W. "was crying and upset." Doc. 130 at 7. Mr. Vigil, however, believes A.W. was not stressed because she allegedly said, "Goodbye, Uncle Kevin!" and also said goodbye to Mr. Vigil's daughter,

Tabatha, who A.W. hugged before she left "as if nothing had happened." Doc. 160 at 3. Mr. Vigil testified to this account at the hearing on July 31, 2019.

LEGAL STANDARD

The Federal Rules of Evidence define hearsay as an out of court statement that is offered to prove the truth of the matter asserted in the statement. FED. R. EVID. 801. Hearsay is generally inadmissible except as provided by federal statutes, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court. FED. R. EVID. 802. Hearsay bars a party from presenting its own statements, but a statement that is otherwise hearsay may be offered for a permissible purpose other than to prove the truth of the matter asserted, including impeaching a witness. *See United States v. Caraway*, 534 F.3d 1290, 1299 (10th Cir. 2008). Rule 803 of the Federal Rules of Evidence sets forth several exceptions to the rule against hearsay. FED. R. EVID. 803.

I. Law Regarding Rule 803(1).

Rule 803(1) provides an exception to the rule against hearsay for "[a] statement describing an event or condition, made while or immediately after the declarant perceived it." FED. R. EVID. 803(1). "By its own terms, application of Rule 803(1) has three distinct requirements: i) the statement must describe or explain the event perceived; ii) the declarant must have in fact perceived the event described; and iii) the description must be 'substantially contemporaneous' with the event in question." *United States v. DeLeon*, 287 F. Supp. 3d 1187, 1237 (D.N.M. 2018) (citing *United States v. Mejia–Valez*, 855 F. Supp. 607, 613 (E.D.N.Y. 1994)). "The present sense impression exception applies only to reports of what the declarant has actually observed through the senses, not to what the declarant merely conjectures." *Id.* (citing *Brown v. Keane*, 355 F.3d 82, 89 (2d Cir. 2004)). Such statements are allowed because they are deemed especially

trustworthy, and it is believed that the contemporaneousness of the event and statement minimizes the likelihood of deliberate or conscious misrepresentation. *Navarette v. California*, 572 U.S. 393, 399–400.

II. Law Regarding Rule 803(2).

Federal Rule of Evidence 803(2) excludes from hearsay a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that caused it." FED. R. EVID. 803(2). The exception is similarly allowed because it is believed that the circumstances "still[] the capacity for reflection and produce[] utterances free of conscious fabrication." *United States v. Magnan*, 863 F.3d 1284, 1292 (10th Cir. 2017).

The Tenth Circuit set forth a district court's required analysis for whether a statement is admissible under the excited-utterance exception:

> The so-called excited-utterance exception has three requirements: (1) a startling event; (2) the statement was made while the declarant was under the stress of the event's excitement; and (3) a nexus between the content of the statement and the event. [T]here is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance. Admissibility hinges on a statement's contemporaneousness with the excitement a startling event causes, not the event itself. There is no hard time limit that must be met under Rule 803; what is relevant is whether the declarant is still under the excitement of the startling event.

United States v. Smith, 606 F.3d 1270, 1279 (10th Cir. 2010) (internal citations and question marks omitted). In determining what constitutes being "under the stress" of a situation, the Tenth Circuit has stated that the following are "[a]mong the more relevant factors" for the court to consider: "the amount of time between the event and the statement; the nature of the event; the subject matter of the statement; the age and condition of the declarant; the presence or absence of self-interest; and whether the statement was volunteered or in response to questioning." *United States v. Pursley*, 577 F.3d 1204, 1220 (10th Cir. 2009).

ANALYSIS

This Court concludes that A.W.'s statements to her mother on the way to Presbyterian Española Hospital are admissible as hearsay exceptions under Federal Rules of Evidence 803(1) (present sense impressions) and Rule 803(2) (excited utterances). While the Court acknowledges Mr. Vigil's legitimate concern about the reliability of the witness offering the statements, such an issue can be adequately addressed on cross-examination. The reliability of the statements is based on the *declarant*'s ability to reflect and potentially fabricate the statements, not the reliability of the witness offering the statements.

A.W.'s statements meet the requirements to qualify as present sense impressions. FED. R. EVID. 803(1). First, A.W.'s statements to her mother described the actions allegedly taken by Mr. Vigil while A.W. was in the bed with him. Second, A.W. was the individual relaying what happened to her personally—she was the person who perceived the event described. Finally, these statements were made in a time period that was "'substantially contemporaneous' with the event in question." Ms. War allegedly took A.W. to the hospital immediately after her observations and, thus, A.W.'s statements on the way to the hospital were made shortly after experiencing the alleged event.

A.W.'s statements also meet the requirements under Rule 803(2) exception to hearsay for excited utterances. First, A.W.'s alleged experience as a six-year-old being sexually assaulted by an adult certainly would qualify as a startling event. *See Farley*, 992 F.3d 1122. Second, A.W. appears to have made the statement while under the stress of the event's excitement. Using the guidance set forth by *Pursley*, this Court finds that there was a short amount of time between the event and the statement, the nature of the event was startling, A.W. was only six years old at the time, and she appears to have made the statements to Ms. War without demonstrating any self-

interest. As to A.W.'s condition at the time of the statement, although Mr. Vigil testified that A.W. was calm when she left the home, A.W.'s mother observed that she was upset and crying at the time she made the statements. *Pursley*, 577 F.3d at 1220. Additionally, as this is just one factor to consider under the analysis, this Court finds that the evidence weighs in favor of finding that she was still under the stress of the situation. Finally, A.W.'s statements to Ms. War were directly related to the event she had allegedly just experienced.

IT IS THEREFORE ORDERED that the Court will **GRANT** the government's Motion in Limine for the Admission of Excited Utterances and Present Sense Impression Statements, assuming that the government establishes the foundation it has proffered as has been set forth herein. Doc. 130.

DATED this 6th day of August, 2019.

MARTHA VÁZQUEZ
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 18-739-MV

v.

KEVIN VIGIL,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the government's Motion for Pre-trial Determination of Indian Country Land Status. Doc. 60. Mr. Vigil timely responded. Doc. 71. The government then filed a timely reply. Doc. 89. The Court heard arguments on this motion on July 29, 2019, at which time the parties entered a Stipulation Regarding Land Status. The Court, having considered the Motion, relevant law, and being otherwise fully informed, finds that the motion will be **GRANTED**.

BACKGROUND

In a criminal prosecution under 18 U.S.C. §§ 1152 or 1153, the Court determines its jurisdiction based on facts established by a preponderance of the evidence. *See United States v. Bustillos*, 41 F.3d 931, 933 (10th Cir. 1994) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). The Indictment charges Kevin Vigil with two counts, both of which involve a violation of 18 U.S.C. § 1152. *See* Doc. 25 (Indictment) at 1, 2.

In the Indian County Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, Congress "conferred on the federal courts special criminal jurisdiction over offenses committed in Indian country." *Cohen's Handbook of Federal Indian Law* § 9.01, at 236–37 (Neil

Jessup Newton et al. eds., 2012). The crime must occur within "Indian country" in order for there to be federal jurisdiction. 18 U.S.C. §§ 1152, 1153. The statute provides that "[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses. . . ." 18 U.S.C. § 1153(a). According to § 1151, Indian country is defined as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

The government "moves the Court for a pre-trial determination that the land on which the charged crimes in this case occurred" is "located within the exterior boundaries of the Ohkay Owingeh Pueblo" and "therefore is Indian Country for purposes of federal criminal jurisdiction." Doc. 60 at 1. The location is:

> 1326B Camino Raphael, in Española, Rio Arriba County, New Mexico, mainly in Section 25, Township 21N, Range 8E, NMPM, within the San Juan Land Grant.

Id.

It is not disputed that the land falls within the exterior boundaries of the Ohkay Owingeh Pueblo, a federally recognized Indian Tribe. *Id.*; Doc. 71 at 1; Stipulation Regarding Land Status ¶ 1. The parties further stipulate that, on July 12, 1935, title to the tract of land on which the charged crimes are alleged was transferred to Antonio David Salazar and Ramona B. de Salazar pursuant to the Pueblo Lands Act of 1924. Doc. 71 at 1–2, 4; Stipulation ¶ 2. The Salazars

were non-Indians. *Id.* The 1935 patent transferring the land validly conveyed the land at issue to the Salazar family. *See* Doc. 71-1, Ex. A; Stipulation ¶ 3. At the time of the alleged crimes, the land was privately held by non-Indians. Stipulation ¶ 4.

The government outlines the evidence it is prepared to present to confirm the status of the land. *See id.* at 4–6 & Exs. This includes an April 11, 2018 certification by the Ohkay Owingeh's Natural Resource Director that the address "is located within the exterior boundaries of the Ohkay Owingeh" Pueblo [Ex. 2], as well as Bureau of Indian Affairs maps [Exs. 1, 3] showing the location of the address at issue in relation to the Pueblo boundaries, and the Federal Register showing the tribe is federally recognized [Ex. 4].

Mr. Vigil argues that this Court lacks subject matter jurisdiction. Doc. 71 at 1. He presents the 1935 Patent as Exhibit A, which states that it "shall have the effect only of a relinquishment by the United States of America and the Indians of said Pueblo." *Id.* at 2, Ex. A. He notes that Exhibit F, the supplemental plat containing the tract of land conveyed to the Salazars, states that it "represents the survey of certain tracts of land within the San Juan Pueblo Grant to which the Indian title has been extinguished according to the findings of the Pueblo Lands Board." *Id.* at 7, Ex. F. In addition, Mr. Vigil submitted a letter from Thomas Aragon, the Planning and Zoning Director of Rio Arriba County, stating that Antonio David Salazar and his wife "met the requirements necessary under a federal land claim. In doing so, he and his wife were awarded a U.S. Patent for the land thereby extinguishing any tribal claim to the land." *Id.* at 71-1 [Ex. E]. The defense thus requests that the case be dismissed as the Court must presume it lacks subject matter jurisdiction. *Id.* at 1.

In its reply, the government points out that the land at issue was transferred by patent issued by the United States executive branch on July 12, 1935, but under the plain language of the 2005

amendments to the Pueblo Land Act, there are no exceptions for lands held privately by non-Indians unless extinguished by Congress—that is, all land within the exterior boundaries of the Pueblo constitute "Indian Country." Doc. 89 at 2.

The language upon which the parties disagree is the clause "except as otherwise provided by Congress" found in the 2005 amendments to the 1924 Pueblo Land Act. 119 Pub. L. No. 109-133, 119 Stat. 2573. Defense believes that the 2005 amendments to the Pueblo Land Act excludes from the grant of federal jurisdiction those lands formerly belonging to the Pueblos that were transferred to private ownership as a result of the 1924 Pueblo Land Act. Doc. 71 at 7. At the hearing, defense argued that this language is not throat clearing, as the government suggests. Transcript[1] at 13:15–23. Rather, the rule against surplusage suggests that this language was intended to have the legal effect of covering the land for which "patents were issued to non-Indians through the process of the Pueblo Land Act." Tr. at 13:23–14:1.

The government, meanwhile, disagrees with this interpretation and notes that the Pueblo Land Act was "focused on the narrow issue of quieting title of lands lying within the exterior boundaries of Pueblo lands." Doc. 89 at 3. Government notes also that it was the Executive, not Congress, that issued the land patent to the Salazars and the plain language of the 2005 amendments require an act of Congress to form the basis for an exception to federal jurisdiction. *Id.* (citing *St. Charles Inv. Co. v. Comm'r*, 232 F.3d 773, 776 (10th Cir. 2000) ("It is a general rule of statutory construction that if a statute specifies exceptions to its general application, other exceptions not explicitly mentioned are excluded."). The government goes on to discuss the history of the 2005 amendments to the 1924 Pueblo Land Act and the goal to "avoid lawless enclaves within Pueblo Lands." Doc. 89 at 5–7.

[1] References to the transcript are to draft of the July 29, 2019 hearing.

DISCUSSION

I. Legal Standard

The Court may determine that the offenses proffered by the United States are within the territorial boundaries of the Ohkay Owingeh Pueblo, and then leave to the jury the question of whether the offenses occurred in those locations. *See, e.g.*, *United States v. Neha*, No. CR 04-1677 JB, 2006 WL 1305034, at *4 (D.N.M. April 19, 2006) ("While the Tenth Circuit, in *United States v. Roberts*, stated that district courts can find, as a matter of law, that a particular location is Indian Country, and then instruct the jury to determine factually whether the offense occurred there, the Tenth Circuit did not require courts to follow that procedure."). The Court may take evidence on this issue outside of the presence of the jury and instruct the jury based upon its findings. *See, e.g.*, *United States v. Tsosie*, No. CR 10–0773 JB, 2011 WL 2728346, at *1 ("While the Court usually hears the evidence at trial with the jury, there does not appear to be any problem with the Court hearing the evidence pretrial outside of the jury's presence and making the decision pretrial."). Courts have accepted a variety of evidence to prove this jurisdictional fact, including oral testimony, aerial photographs, maps, and land titled records. *See, e.g.*, *United States v. Atkinson*, 916 F. Supp. 969 (D.S.D. 1996) (aerial photography, oral testimony, and maps); Lamy, 521 F.3d at 1267–68 (oral testimony, aerial photography, maps).

As is relevant here, "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a) (emphasis added). The Tenth Circuit has recognized Pueblo land as dependent Indian communities "entitled to the aid and protection of the federal government and subject to congressional control." *United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006). The

District of New Mexico has confirmed that Indian land subject to the issuance of any patent is still Indian land if the property lies within the boundaries of the Indian reservation. *See United States v. Antonio*, No. 16-CR-1106-JB, 2017 WL 3149361 at *11 (D.N.M. June 5, 2017) (citing William C. Canby, American Indian Law § 7.B, at 140 (5th Ed. 2009)); *see also Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356–57 (1962); *United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) (holding "if the property is within boundaries of the reservation, it is Indian country irrespective of whether it is now held by a non-Indian.").

When applying the definition of "Indian country" to criminal trials under the Major Crimes Act, the Tenth Circuit has held that as "a general matter, the trial court decides the jurisdictional status of a particular property or area and then leaves to the jury the factual determination of whether the alleged crime occurred at the site." *United States v. Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999). Thus, "a trial court also acts appropriately when it makes the jurisdictional ruling a particular tract of land or geographic area is Indian Country, and then instructs the jury to determine whether the alleged offense occurred there." *Id.*

"The party seeking to invoke the jurisdiction of the federal court must demonstrate that the case is within the court's jurisdiction." *Bustillos*, 31 F.3d at 933. "The facts supporting jurisdiction must be affirmatively alleged, and if challenged, the burden is on the party claiming that the court has subject matter jurisdiction." *Id.* (citing *McNutt*, 298 U.S. at 189). Therefore, in a criminal prosecution under 18 U.S.C. §§ 1152 or 1153, the United States has the burden to prove by a preponderance of the evidence that the land on which the crime is alleged to have occurred is Indian country under 18 U.S.C. § 1151. *McNutt*, 298 U.S. at 189.

Prior to the 2005 amendments to the 1924 Pueblo Land Act, the courts struggled with a checkerboard jurisdiction that made determining Indian country difficult. In *Seymour*, for

example, the petitioner alleged that his state conviction was void due to lack of jurisdiction, arguing that "the 'purported crime' of burglary for which he had been convicted was committed in 'Indian country'" and, therefore, was within the United States' exclusive jurisdiction. 368 U.S. at 352 (quoting 18 U.S.C. § 1151). The government argued that the State retained jurisdiction over the matter, because "the particular parcel of land upon which this burglary was committed is held under a patent in fee by a non-Indian." *Id.* at 357. The Supreme Court acknowledged that, at one time, the State of Washington's contention "had the support of distinguished commentators on Indian Law," but the Supreme Court concluded that "the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151." *Id.* Accordingly, "if the property is within boundaries of the reservation, it is Indian country irrespective of whether it is now held by a non-Indian." *Webb*, 219 F.3d at 1131 (citing 18 U.S.C. § 1151(a)).

After *Seymour*, "the mere opening of a reservation for non-Indian settlement" does not remove the lands that non-Indians own in fee simple from Indian country under 18 U.S.C. § 1151(a); however, "a congressional decision to abandon the reservation status of those lands does." *United States v. Antonio*, No. CR 16-1106-JB, 2017 WL 3149361, at *12 (D.N.M. June 5, 2017), *appeal docketed*, No. 18-2118 (10th Cir. Feb. 19, 2019) (citing *American Indian Law* § 7.B, at 141). "If Congress clearly acts to disestablish or diminish reservation land, then the land is 'outside the reservation boundary, and therefore outside of Indian country under 18 U.S.C. § 1151(a).'" *Id.* (citing *United States v. Webb*, 219 F.3d at 1131).

The Supreme Court has held that Congress has: (i) the power to recognize "dependent tribes requiring the guardianship and protection of the United States;" (ii) the exclusive power "to determine for itself when the guardianship which has been maintained over [protected Indian

communities] shall cease;" and (iii) the power "to prohibit the introduction of liquor into . . . the lands of the Pueblos," without unlawfully encroaching upon New Mexico's traditional police power. *See United States v. Sandoval*, 231 U.S. 28, 48–49 (1913) ("Being a legitimate exercise of that power, the legislation in question does not encroach upon the police power of the state, or disturb the principle of equality among the states."). As Mr. Vigil notes, "Congressional intent to extinguish Indian title must be 'plain and unambiguous.'" Doc. 71 at 6 (citing *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941)). Accordingly, the Supreme Court determined that the Pueblo lands were Indian country, subject to federal jurisdiction, even where Pueblo lands were not formally designated as reservations, unless explicitly excepted by Congress. *Sandoval*, 231 U.S. at 48–49.

On December 20, 2005, Congress amended the Pueblo Lands Act, 43 Stat. 636 (1924) in order to clarify criminal jurisdiction on Pueblo lands. *See* Indian Pueblo Land Act Amendments of 2005, Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2015), *codified at* 25 U.S.C. § 331 Note. The Amendment provides:

> **SEC. 20. Criminal Jurisdiction**.
> (a) IN GENERAL. Except as otherwise provided by Congress, jurisdiction over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico, shall be as provided in this section.
> (b) JURISDICTION OF THE PUEBLO. The Pueblo has jurisdiction, as an act of the Pueblos' inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), or by any other Indian-owned entity.
> (c) JURISDICTION OF THE UNITED STATES. The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.
> (d) JURISDICTION OF THE STATE OF NEW MEXICO. The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of a Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), which offense is not subject to the jurisdiction of the United States.

25 U.S.C. § 331 Note. Congress thus provided the test by which Courts are to determine whether it has jurisdiction over alleged violations of 18 U.S.C. §§ 1152 and 1153 on Pueblo land. The test is clear: if the charging document alleges a violation of either of these statutes, and the violation occurs "anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico," then a federal court has jurisdiction over the matter. 25 U.S.C. § 331 Note; *see also Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131 (10th Cir. 2010) (en banc) (quoting 25 U.S.C. § 331 Note). The State of New Mexico has similarly held that "[t]he privately-held fee lands within the exterior boundaries of both Taos and Pojoaque Pueblos . . . remain Indian country, and the State does not have jurisdiction to prosecute the alleged crimes occurring there." *State v. Romero*, 2006-NMSC-039, ¶ 26, 142 P.3d at 896.

Where Congress *has* extinguished Indian rights to land, the Tenth Circuit has recognized that federal criminal jurisdiction will no longer exist. *See Hackford v. Utah*, 845 F.3d 1325 (10th Cir. 2017), *cert. denied*, 138 S.Ct. 206 (2017). In *Hackford*, the Tenth Circuit concluded that the criminal allegations committed by an Indian did *not* take place in tribal land as Congress had, in 1910, expressly extinguished Indian interest in the land and had set it aside for use as a reservoir. *Id.* at 1329. The land was thereby removed from the reservation and it no long maintained Indian country status. *Id.*

Using similar logic, the Tenth Circuit reached an opposite conclusion in *Magnan v. Trammell*: the land where the alleged crimes occurred *was* "Indian country" because one step required to extinguish Indian title had not been completed. 719 F.3d 1159 (10th Cir. 2013). In a 1945 law, Congress had set forth the following requirement for extinguishment of federal restrictions on what had been Indian land: approval of the Secretary of the Interior in order to

effectuate a conveyance to the Housing Authority. *Id.* at 1172. Meeting this requirement would have removed the Indian status of the land at issue, but the requirement was not satisfied. *Id.* Therefore, the Tenth Circuit concluded that, because the land was not conveyed to the Housing Authority, it remained "Indian country" at the time of the offense and the United States maintained criminal jurisdiction over the land. *Id.* at 1176, n.8.

II. Analysis

In light of the Indian Pueblo Land Act Amendments of 2005, the jurisdictional inquiry is whether the instant offense occurred "anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico." 25 U.S.C. § 331 Note. Congress' intent in enacting the Amendments of 2005 was "to clarify the uncertainty and potential law enforcement problems" on the New Mexico Pueblos' lands that had become such a problem that the territories were regularly referred to as having "checkerboard" jurisdiction. S. REP. 108-406, at 3, n.1 (2004).

Here, the parties do not dispute that the land at issue—1326 B Camino Raphael (also known as Calle Raphael)—falls within the exterior boundaries of the Ohkay Owingeh Pueblo. Although the 1935 patent passed the land to the Salazars, who are non-Indians, the definition of "Indian country," codified in 18 U.S.C. § 1151 is clear that the land remains "Indian country" notwithstanding the issuance of any patents. Though Mr. Vigil cites to *Hackford* and *Magnan*, the Court does not believe these cases support his position that the land at issue here is not Indian country. Here, the 1935 patent was not effectuated by Congress as would be necessary to except the land's status as "Indian country." *See Hackford*, 845 F.3d at 1330. Additionally, as government notes, these cases do not address the 1924 Pueblo Land Act and subsequent amendments.

Further, as was the intent of Congress in the passing of the 2005 amendments to the Pueblo Land Act to avoid checkboard jurisdiction, the "United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest." These amendments clarified that federal jurisdiction extends over all Pueblo lands, including those privately held.

CONCLUSION

The Court concludes that is has federal criminal jurisdiction in this matter. The land at issue in the instant offense is located within the exterior boundaries of the Ohkay Owingeh Pueblo, San Juan Land Grant, as the boundaries were confirmed by Congress in 1858. Though the land was privately held at the time of the instant offense, the patent was not issued by Congress and the land has remained "Indian country."

IT IS THEREFORE ORDERED that the Court will **GRANT** the government's Motion for Pre-trial Determination of Indian Country Land Status. Doc. 60.

DATED this 16th day of August, 2019.

MARTHA VÁZQUEZ
United States District Judge