

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

ISAIAH WHITEFOX REDBIRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit incorrectly hold that Mr. Redbird's claim was not preserved, where context made the basis of his objection to exclude the prosecution's propensity evidence clear, and therefore satisfied the preservation requirement of Federal Rule of Evidence 103?

STATEMENT OF RELATED CASES

United States v. Redbird, No. 19-cr-00347-F (W.D. Okla.)

Judgment entered April 1, 2022

United States v. Redbird, No. 22-6055 (10th Cir.)

Judgment entered July 10, 2023

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PRAYER

Petitioner, Isaiah Whitefox Redbird, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on July 10, 2023.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Redbird, 73 F.4th 789 (10th Cir. 2023), is found in the Appendix at A1. The oral ruling of the United States District Court for the Western District of Oklahoma admitting propensity evidence is found in the Appendix at A5, and its oral ruling admitting additional propensity evidence is found in the Appendix at A10.

JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1).

Ninety days from July 10, 2023 is Sunday, October 8, so this petition is timely.

FEDERAL RULE INVOLVED

This petition implicates Federal Rule of Evidence 103, which deals with the preservation of claims of error. That rule provides as follows:

Rule 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 evidence 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. 103.

STATEMENT OF THE CASE

In September 2018, Byron Tongkeamah, Jr. was living in a carport with his girlfriend, Kayleigh Roughface, in Carnegie, Oklahoma. One night, Isaiah Whitefox Redbird came to the carport. He would eventually wind up killing Mr. Tongkeamah and seriously wounding Ms. Redface.

Mr. Redbird is a member of the Kiowa Nation, and the incident took place in Indian Country. He was accused of murdering Mr. Tongkeamah Jr., in violation of 18 U.S.C. § 1111(a), and of assault resulting in serious bodily injury of Ms. Roughface, in violation of 18 U.S.C. § 113(a)(6).

The jury was asked to decide between two dramatically different accounts of what happened that night. Mr. Redbird was the only one to testify to the events at the carport. Ms. Roughface had no recollection of what took place there.

Mr. Redbird insisted he acted in self-defense. He explained that he had an escalating series of encounters with Mr. Tongkeamah in the preceding weeks. Mr. Tongkeamah was a member of a violent prison gang and Mr. Redbird had been warned that he should watch out for Mr. Tongkeamah, who might stab him down. The interactions between the

two men included several incidents on a trail used to get from one side of Carnegie to another. Among these was a time in which Mr. Tongkeamah cursed Mr. Redbird out, proclaiming that Carnegis was his “F’ing town,” and that it was his “F’ing trail.” Another time, when Mr. Redbird was walking the trail at night, he heard noises coming from the bushes that sounded like Mr. Tongkeamah filing an axe he regularly carried. And the series of incidents also included Mr. Tongkeamah and Ms. Roughface following Mr. Redbird on the trail another night, with Mr. Tongkeamah announcing, “I’m going to show him what a real gangster is.”

On the night in question, Mr. Redbird was carrying a crowbar for protection. He decided to stop by the carport to ask Mr. Tongkeamah about reports that he had murdered one of Mr. Redbird’s close childhood friends, Cindy Kaudlekaule. Mr. Redbird explained why he was there and Mr. Tongkeamah responded by saying to Ms. Roughface, “Fuck, where is it, get him,” or “There he is, get him.” When Mr. Tongkeamah seemed to be reaching for his axe, Mr. Redbird hit him with the crowbar, and then hit Ms. Roughface, who appeared to be grabbing for something, and then hit Mr. Tongkeamah again. All of this took place “really fast,” in just “a few

seconds.” See generally, United States v. Redbird, 73 F.4th 789, 791 (10th Cir. 2023).

The prosecution claimed the killing was instead the avenging of what Mr. Redbird believed was Mr. Tongkeamah having killed his childhood friend. The prosecution’s version was that Mr. Redbird “went to the carport planning to kill [Mr.] Tongkeamah and [Ms.] Roughface based on the former’s rumored role in [Ms.] Kaudlekaule’s murder; that he attacked the pair while they were sleeping; and that he only later tried to justify his premeditated conduct by claiming self-defense.” Id.

The first witness at trial was Micah Ware, who investigated the case for the Bureau of Indian Affairs. On cross-examination, the defense elicited that Mr Tongkeamah had convictions for both robbery and burglary, had served years in prison and was a member of the Indian Brotherhood. The defense also brought out that the Indian Brotherhood is a violent prison gang and that the gang’s members commit acts of violence.

At a bench conference, the prosecution objected to any further questioning in this vein. The prosecution stated that only matters specific to Mr. Tongkeamah, and known to Mr. Redbird, were admissible. Defense

counsel represented that he would be making just such a connection. He declared that the questioning was relevant to self-defense because it would be linked up to Mr. Redbird's knowledge. Articulating this state-of-mind theory, counsel said he was "going to be able to show that all of this bore on Mr. Redbird's state of mind and lack of intent to commit an illegal homicide or an illegal assault and battery with a dangerous weapon."

The district court admitted the testimony on this theory. "Based on [the] representation of [defense counsel] as to linking this up during the testimony of [Mr. Redbird], the objection will be overruled."

Defense counsel proceeded to question Agent Ware about aspects of Mr. Tongkeamah's history. During this questioning, the prosecution objected to a question because it did not refer to a specific incident. In overruling the objection, the court remarked that the "the point we discussed in our bench conference is fair game."

The prosecution's redirect examination began a mere twenty-six pages of transcript after the court authorized the defense questioning on a state-of-mind theory. Nevertheless, in its first question, the prosecution asked Agent Ware whether Mr. Redbird had the "same trait for violence."

The defense objected that its claim of self-defense did not open the door to such proof. A7.

The prosecution's response rested on a theory that was inconsistent with the basis on which the district court had so recently allowed the defense questioning. The prosecution did not claim that what Mr. Redbird knew about Mr. Tongkeamah, and that was relevant to his state of mind at the time of the incident, made relevant anything about Mr. Redbird's history. Rather, the prosecution's theory was that the permitted, state-of-mind questioning went to Mr. Tongkeamah's "character trait" for violence; that is, his propensity to act violently according to that trait. It claimed that proof of the victim's character trait for violence allowed it, in response, to bring in Mr. Redbird's character trait for violence under Federal Rule of Evidence 404(a)(2)(B)(ii). See A8-9.

The district court overruled the objection. "[I]n reliance [on] the authority cited by the government," the court permitted proof of Mr. Redbird's violent propensity. A9.

The prosecution then elicited such testimony from Agent Ware. When Mr. Redbird later took the stand, defense counsel objected to inquiry

into his stabbing of an unrelated person as improper proof of other crimes. The prosecutor explained that the court's earlier propensity ruling allowed proof of that stabbing. A11. The court overruled the objection. A12.

The jury convicted Mr. Redbird of first-degree murder and of assault resulting in serious bodily injury. The district court sentenced him to life in prison on the murder conviction and to a consecutive, ten-year-prison term for the assault conviction.

On appeal, Mr. Redbird challenged the admission of the propensity proof. The Tenth Circuit declined to reach the claim. It held the claim not to have been preserved. And as Mr. Redbird had insisted the claim was in fact preserved, and had not argued he was entitled to relief if review were instead for plain error under Federal Rule of Criminal Procedure 52(b), the Tenth Circuit deemed his claim waived, and not just forfeited. It therefore affirmed his convictions without reaching the merits of his appellate claim. A5.

Mr. Redbird had argued in the Tenth Circuit that the prosecution's theory for admissibility of the propensity evidence was not viable given that his evidence of Mr. Tongkeamah's violence was introduced solely on a

state-of-mind theory. As the Tenth Circuit noted, Mr. Redbird had not articulated the argument in these precise terms when the prosecution first sought to admit proof of his violent propensity. Id. But on appeal, Mr. Redbird insisted that, when taken in context, he had sufficiently presented the claim in the district court. After all, the district court had allowed him to get into Mr. Tongkeamah's violence on a state-of-mind theory, on the promise that he would link it up with what he himself knew. And the district court had done so less than thirty transcript pages before the prosecution sought to get into his propensity for violence. So, his objection had to be taken in the context of his state-of-mind theory.

The Tenth Circuit did not agree. A4-5. It relied in significant part on the fact that the district court ruled against him, invoking it as proof it had acted without awareness of its just-issued ruling that the proof of Mr. Tongkeamah's violence was admissible only on a state-of-mind theory.

A5.

REASONS FOR GRANTING THE WRIT

This Court should grant review to correct the misguided approach of the Tenth Circuit to preservation, which has the potential wrongly to relegate many criminal defendants to plain-error review.

The adequacy of an objection must be judged in context. This is not just common sense. It is also the express terms of the relevant federal rule, Federal Rule of Evidence 103. The rule requires that a party objecting to the admission of evidence “state the specific ground, *unless it was apparent from context.*” Federal Rule of Evidence 103(a)(1)(B) (emphasis added).

The decision of the Tenth Circuit is a dangerous retreat from the basic principle that the rule commands. The Tenth Circuit acknowledged that Mr. Redbird had argued that the basis for objection should have been obvious from the context. A5. But it concluded that the context did not make the basis for the objection apparent, in large part because the district court admitted the challenged evidence as the prosecution requested. A5. This makes the sufficiency of the objection depend not on the objection itself, taken in context, but rather on the mere fact that the district court ruled against the challenge. This is contrary to Rule 103. It strays so far

from the ordinary course of proceedings that it warrants this Court's intervention. See Sup. Ct. R. 10(a).

The context here made the nature of the defense objection clear. The context begins with the basis for the admission of the evidence of Mr. Tongkeamah's violence that the defense elicited on cross-examination of Agent Ware. It was this proof that, according to the prosecution, allowed it to present proof of Mr. Redbird's propensity for violence as legitimate response under the rules of evidence.

The basis for what the defense elicited on cross-examination from Agent Ware about Mr. Tongkeamah's violence is not subject to debate. That inquiry was allowed for the limited purpose of showing Mr. Redbird's state of mind. The prosecution argued that proof of Mr. Tongkeamah's violence could only come in if Mr. Redbird knew about it. In turn, defense counsel promised that he would show through Mr. Redbird's testimony that Mr. Redbird was aware of Mr. Tongkeamah's violence, and that this therefore was relevant to his state of mind at the time of the incident. And the district court expressly allowed the cross-

examination “[b]ased on” the “representation of [defense counsel] as to linking this up during the testimony of [Mr. Redbird].”

The basis for the admission of the testimony of Mr. Tongkeamah’s violence could not have been clearer. It was offered and allowed only for the singular and limited purpose of showing Mr. Redbird’s state of mind. The basis was reiterated a short time later when the prosecution objected to further proof of that violence that did not refer to a specific incident. The court did so by noting that “the point we discussed in our bench conference is fair game.”

All of this happened a very short time before the defense objection to the prosecution’s effort to bring in proof of Mr. Redbird’s trait for violence on redirect examination of Agent Ware. Only twenty-six transcript pages separated the very clear ruling that proof of Mr. Tongkeamah’s violence was admitted solely to show Mr. Redbird’s state of mind, on the one hand, from the prosecution’s attempt to show Mr. Redbird had a character trait for violence to which the defense objected, on the other hand.

This context necessarily informed the objection the defense made to the prosecution’s effort to bring in proof of Mr. Redbird’s propensity for

violence. Against the backdrop of what just occurred, the objection made plain that the prosecution was flat-out wrong that the court had allowed the defense to introduce proof of Mr. Tongkeamah's character trait for violence. A4. The district court had done no such thing. It had only allowed proof that Mr. Redbird was aware of (or, more precisely, that Mr. Redbird would be shown to have been aware of) Mr. Tongkeamah's violence. That is, the district court did not allow character-trait evidence, but rather state-of-mind evidence.

The false proposition that the court had allowed character-trait evidence of Mr. Tongkeamah was the linchpin of the prosecution's theory for why it should be allowed to introduce proof of Mr. Redbird's character trait for violence. The rule on which the prosecution relied, Federal Rule of Evidence 404(a)(2)(B), allows, where the defense has introduced proof of the alleged victim's character trait, the prosecution to respond in kind by presenting proof of the defendant's same trait. Because the defense introduced only state-of-mind proof, the rule by its terms did not apply.

In context, the basis for the defense objection to the prosecution's propensity proof was clear. Fed. R. Evid. 103(a)(1)(B). The defense

protested that the prosecution sought to introduce “improper character evidence,” and that the defense had asked about Mr. Tongkeamah only because its theory was self-defense. With the court having allowed proof of Mr. Tongkeamah’s violence only to show Mr. Redbird’s state of mind in support of his self-defense theory, and the defense making plain that was why it was questioning Agent Ware about that violence, it was clear the defense was saying it had not introduced character-trait evidence and thus that the prosecution could not do so.

Read in context, the objection raised the same point on which Mr. Redbird relied on appeal. It was that the prosecution’s theory did not obtain because he did not present character-trait evidence, but only state-of-mind evidence that bore directly on his self-defense claim, and that the district court admitted on that basis and solely for that limited purpose.

The Tenth Circuit’s conclusion that the objection was inadequate to preserve his appellate claim was grievously mistaken, and would gut Rule 103(a)(1)(B). The Tenth Circuit adopted the prosecution’s argument that testimony about Mr. Tongkeamah’s violence (what it called testimony of his “violent character,” A4) could have also been relevant “for a propensity

purpose -- to show that the victim was the aggressor." A4. But this position wholly ignores context. Even if some of the cross-examination of Agent Ware as to Mr. Tongkeamah's violence could have been allowed on such a theory, the fact is that the defense questioning was *not* allowed on that basis.

To the contrary, the defense questioning as to Mr. Tongkeamah's violence was allowed *only* as it bore on Mr. Redbird's state-of-mind. The prosecution insisted the testimony could only be admitted for this reason; the defense insisted that was why it sought to elicit the testimony; and the district court allowed the questioning on that basis alone. It is irrelevant whether the testimony of Mr. Tongkeamah's violence could have been admitted for a different purpose. The fact is that it was not admitted for that purpose, but only to show Mr. Redbird's state of mind.

The adequacy of the objection must be judged against the reality of Mr. Redbird's trial. With the questioning made and allowed solely to show his state of mind in the carport, which was at the heart of his theory of self-defense, his objection that his questioning was done because his theory was self-defense made plain that the prosecution's stated basis for why it

could show his character trait for violence did not hold water. The theory was that Mr. Redbird's questioning had been for the purpose of showing that Mr. Tongkeamah "was the aggressor." A4. But it had not been offered or allowed for such a purpose.

The Tenth Circuit's ultimate landing point is even more problematic, as it reflects a view that transcends the particulars of this case. It is that the fact that the district court adopted the prosecution's theory itself shows that context did not make the defense objection clear. A5. The mere fact that a district court overrules an objection does not show the objection was unclear. Likewise, the fact that a district court makes an erroneous ruling does not show the inadequacy of an objection either.

The Tenth Circuit's ruling in this published decision is a significant deviation from Rule 103. If allowed to stand, it has the potential to choke off appellate review entirely in many cases -- as it did here -- or to force defendants to argue for plain-error review, and be relegated to that more demanding standard, when review should be much less deferential.

This deviation from Rule 103 has great potential for mischief and harm. The Tenth Circuit strayed far from the direction of Rule 103 and this

Court's intervention is necessary to correct what is now the law of one of the courts of appeals, and to make sure that the flawed decision here is not adopted by other circuits. See Sup. Ct. R. 10(a).

CONCLUSION

This Court should grant Mr. Redbird a writ of certiorari.

Respectfully submitted,

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