United States Court of Appeals
For the Eighth Circuit

No. 16-3397

United States of America

Plaintiff - Appellee

v.

Michael Lee Long, Jr.

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Pierre

Submitted: March 10, 2017
Filed: August 29, 2017

Before WOLLMAN, COLLOTON, and SHEPHERD, Circuit Judges.

WOLLMAN, Circuit Judge.

Michael Lee Long, Jr., was convicted by a jury of one count of assault with a dangerous weapon, in violation of 18 U.S.C. §§ 1153 and 113(a)(3); one count of simple assault, in violation of 18 U.S.C. §§ 1153 and 113(a)(5); one count of being a prohibited person in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(9), 924(a)(2), and 924(d); and one count of using a firearm during and in relation to a

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crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). The district court[1] sentenced Long to 30 months' imprisonment on the assault with a dangerous weapon count, 6 months' imprisonment on the simple assault count, and 30 months' imprisonment on the prohibited person in possession of a firearm count (prohibited-person count), to run concurrently with one another, and to a mandatory minimum 120 months' imprisonment on the use of a firearm during and in relation to a crime of violence count, to run consecutively with the other counts. Long appeals from the district court's denial of his motion to dismiss the prohibited-person count and its denial of his motions for a new trial and for a mistrial based on alleged violations of Brady v. Maryland, 373 U.S. 83 (1963). We affirm.

I. Background

On an evening in May 2015, Cynthia Jones-Bear Robe was riding in a vehicle returning from St. Francis, SD, to the town of Rosebud, SD, which is located on the Rosebud Sioux Indian Reservation. Her daughter, K.J., was driving the vehicle, while K.J.'s boyfriend Robert Kills In Water rode in the back seat. They stopped at the Paul Mart gas station and convenience store, for Jones-Bear Robe to buy cigarettes. While Jones-Bear Robe was standing in line, Long came into the store, entered the checkout line behind her, and made a derogatory remark to her about purchasing individual cigarettes. She stated that she did not want to speak to him, left the store after making her purchase, and returned to her vehicle.[2]

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[1]The Honorable Roberto A. Lange, United States District Judge for the District of South Dakota.

[2]Jones-Bear Robe testified that Long followed her out of the store and continued speaking to her, but the store's surveillance footage shows that Long did not leave the store immediately after Jones-Bear Robe. The footage captured the events inside the store and at the gas pumps, but not in the area where Jones-Bear Robe's vehicle was parked.

Jones-Bear Robe called the police from inside her vehicle to report that Long was harassing her. She exited her vehicle to record Long's license plate number and then returned to the passenger seat of her vehicle. Long, expressing anger that Jones-Bear Robe was reporting him to the police, opened the vehicle's passenger door, pulled a gun out of his pocket, pointed it at Jones-Bear Robe's head, and threatened to shoot Jones-Bear Robe and K.J. At Jones-Bear Robe's instruction, K.J. put the vehicle in reverse and accelerated; Long was hit by and rolled under the open passenger door.

Long then opened fire on the vehicle, with the witnesses at trial giving different accounts of the number of shots he fired. Jones-Bear Robe testified that he might have fired two, three, or four shots. The police dispatcher who took Jones-Bear Robe's call testified that Jones-Bear Robe had said that Long fired twice. The supervisor at Paul Mart testified that she did not hear any gunshots, saying that the cement walls in her office may have accounted for this fact. The cashier at the store testified that she heard one loud sound, like two cars colliding. Kills In Water testified that he heard four gunshots. K.J. testified that there were four shots, two of which hit the vehicle.

On the first day of Long's trial, the government received and provided to defense counsel a report prepared by Sergeant Daniel Reynolds of the Rosebud Police Department, one of the officers who responded to the incident at the Paul Mart, which included statements from two additional witnesses, Jennifer Young and James Bordeaux. Young testified that she was preparing to purchase gasoline outside the Paul Mart during the incident. She testified that she heard three gunshots, and that she had told Reynolds at the scene that she heard "a gun going off," without specifying the number of shots. Reynolds testified that Bordeaux, whom the parties were unable to locate, had told Reynolds that he saw a vehicle reversing quickly and heard a single noise, which he thought was a car backfire. Young identified an

additional witness from the surveillance video, but the parties were unable to contact her in time for her to testify at trial.

Long moved for a mistrial, or in the alternative for a continuance, on the ground that the government's failure to disclose Reynolds's report violated his Fourteenth Amendment rights under Brady, arguing that the statements by Young and Bordeaux supported his theory that he acted in self defense by firing a single shot at the vehicle to prevent it from running over him. The district court denied the motion during the trial and denied Long's post-trial motion for a new trial. D. Ct. Order of July 13, 2016, at 13-18. It concluded that information within the possession of officers of the Rosebud Sioux Tribal Law Enforcement Services was not within the government's control for purposes of Brady, relying on its previously decided case, United States v. Stoneman, No. CR 09-30101-RAL, 2010 WL 2710477, *1-2 (D.S.D. July 8, 2010). D. Ct. Opinion & Order of July 13, 2016, at 15-16. It concluded that the late disclosure of Young's statement did not prejudice Long because she testified at trial and was cross-examined by Long. Id. at 16-17. It also concluded that Bordeaux's unavailability did not prejudice Long because his statement was "at best, neutral evidence" for Long, and because any prejudice to Long was remedied by his opportunity to recall Reynolds and elicit hearsay testimony regarding Bordeaux's statement. Id. at 17-18.

Long also moved to dismiss the prohibited-person count, arguing that his underlying tribal-court conviction for domestic violence was obtained without counsel and thus could not qualify as a predicate conviction under 18 U.S.C. § 921(a)(33)(B)(i). The district court initially deferred ruling on this motion pending counsel's arguments at the pretrial conference. D. Ct. Opinion & Order of May 6, 2016, at 9-11. The government presented evidence at the pretrial conference that Long had pleaded guilty to an offense of domestic abuse under Rosebud tribal law in June 2011. Long stated that his counsel in that case, Lisa White Pipe, was not a licensed attorney or a law school graduate. Long's district

court counsel stated that he had been unable to find White Pipe's name in the State Bar of South Dakota Membership Directory. The government stated that it had not been aware that White Pipe was not law trained, but agreed that it had been unable to find her name in the Membership Directory. The government did not dispute that White Pipe had in fact been Long's representative. After Long offered to elicit White Pipe's testimony that she was not a licensed attorney, the court stated that it would consider the motion. The court denied the motion the following day, citing United States v. First, 731 F.3d 998 (9th Cir. 2013). D. Ct. Order of May 10, 2016.

II. Discussion

A. Right to Counsel for Predicate Offense

We review *de novo* the district court's denial of Long's motion to dismiss the prohibited-person count. United States v. Smith, 171 F.3d 617, 619 (8th Cir. 1999). Under 18 U.S.C. § 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm in or affecting interstate commerce, or to receive a firearm that has been shipped in interstate commerce. Section 921(a)(33)(B), however, provides:

> (B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—
>
> > (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
> >
> > (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
> >
> > (aa) the case was tried by a jury, or

> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

Adopting the reasoning set forth in United States v. First, the district court concluded that this statute did not bar the use of Long's domestic abuse conviction as a predicate for the prohibited-person count. In First, the Ninth Circuit held that, to give meaning to the phrase "knowingly and intelligently waived the right to counsel in the case," the "right to counsel" must refer to "the right as it existed in the predicate misdemeanor proceeding," rather than "a uniform federal meaning containing a Sixth Amendment floor." 731 F.3d at 1003. Because the defendant had only a right to retained counsel at his underlying tribal-court conviction, the Ninth Circuit held that his lack of appointed counsel did not bar the conviction from serving as a predicate offense under 18 U.S.C. § 922(g)(9). Id. at 1001-03, 1009.

We agree with the Ninth Circuit that the phrase "right to counsel" in § 921(a)(33)(B)(i)(I) refers to the right to counsel "as it existed in the predicate misdemeanor proceeding." Id. at 1003. We find Long's arguments to the contrary unpersuasive. Long argues that if Congress had intended the result in First, the subsection of the statute regarding the right to counsel would, like the subsection regarding the right to trial by a jury, have included such qualifying language as "in the case of a prosecution for an offense . . . for which a person was entitled to court-appointed counsel in the jurisdiction in which the case was tried." Appellant's Br. 13. We disagree, for the same reason given by the Ninth Circuit in First—namely, that the phrase "in the case" still serves to qualify the right-to-counsel provision even if the jury-trial provision is qualified more clearly. 731 F.3d at 1004. Long argues that the Ninth Circuit erred in relying on this court's decision in Smith, 171 F.3d at 621-22, but the Ninth Circuit made clear that it drew support from Smith only insofar as that case considered state law in interpreting the phrase "right to counsel" in § 921(a)(33)(B)(i)(I). First, 731 F.3d at 1005. We also reject Long's argument that

the Ninth Circuit misinterpreted the legislative history of § 921(a)(33). The court stated in First: "If anything, the words 'in the case' served to engross the right to counsel by referencing the state right to counsel provisions, which can only exceed the federal constitutional minimum." 731 F.3d at 1007. In contending that this statement supports his position rather than the government's, Long fails to address the Ninth Circuit's separate conclusion that when, in 2006, Congress added tribal offenses to the definition of "misdemeanor crime of domestic violence" under § 921(a)(33)(A), it "was aware that . . . it was allowing convictions obtained without constitutional protections to qualify as misdemeanors capable of triggering prosecution under § 922(g)(9)." Id. Finding none of Long's arguments to the contrary persuasive, we will follow the approach set forth in First and consider Long's right to counsel as it existed at his tribal court proceedings.

"The Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. But the Sixth Amendment does not apply to tribal-court proceedings." United States v. Bryant, 136 S. Ct. 1954, 1958 (2016) (citation omitted). Under the Indian Civil Rights Act of 1968, a criminal defendant in tribal-court proceedings is entitled to appointed counsel when a sentence of more than one year's imprisonment is imposed. 25 U.S.C. § 1302(c)(2). Because Long was sentenced to 365 days' imprisonment, with 305 days suspended, in the underlying tribal-court proceeding, any right that Long had to appointed counsel could have come only from Rosebud tribal law.

The Bill of Rights set forth in the Constitution of the Rosebud Sioux Tribe provides that the tribe shall not deny a criminal defendant the right "to have the assistance of counsel for his or her defense including the right to have counsel provided subject to income guidelines." Const. and Bylaws of the Rosebud Sioux Tribe of South Dakota, art. X, § 1(f). The Law and Order Code of the Rosebud Sioux Tribe allows both professional attorneys and lay counsel to practice in tribal court.

Law and Order Code of the Rosebud Sioux Tribe § 9-2-6 ("Every person appearing as a party in any judicial procedure before a Tribal court shall have the right to be represented either by lay counsel or professional attorneys and have such counsel and attorneys assist in the preparation and presentation of his case. The Rosebud Sioux Tribe shall have no obligation to provide or pay for such lay counsel or professional attorneys and only those persons who have first obtained admission to practice before the Tribal Courts shall appear therein."). It further provides that both professional attorneys and lay counsel must represent indigent defendants upon appointment by the tribal court. Id. § 9-2-7 ("Any person admitted to practice before the Tribal Court will accept and represent indigent clients without compensation or without full compensation when directed to do so by a Judge of the Tribal Court.").

Long has presented no evidence that his counsel at the tribal-court proceeding was not admitted to practice as lay counsel in the tribal court, arguing only that Ms. White Pipe is not a licensed attorney. Because lay counsel are admitted to practice before the tribal court, we conclude that Long was represented by counsel in the tribal-court proceeding within the meaning of 18 U.S.C. § 921(a)(33)(B), and that his conviction there thus constituted a valid predicate offense under 18 U.S.C. § 922(g)(9).

B. Evidence Disclosed During Trial

We review for abuse of discretion the denial of Long's Brady-based motions for a mistrial and for a new trial. United States v. Tyndall, 521 F.3d 877, 881 (8th Cir. 2008). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995). "Brady is

violated if three requirements are met: 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" Tyndall, 521 F.3d at 881 (quoting Morales v. Ault, 476 F.3d 545, 554 (8th Cir. 2007)). "The evidence is not material and no prejudice can be shown unless there is a reasonable probability that the verdict would have been different if the evidence had not been suppressed." Id. "A mid-trial disclosure violates Brady only if it comes too late for the defense to make use of it." Id. at 882.

We need not decide whether the tribal law enforcement officers in this case were acting on the government's behalf such that Reynolds's report was in the government's possession, because the information contained therein was not exculpatory, and even if it was, Long suffered no prejudice. Young appeared at trial and was cross-examined by Long, during which Young testified that she heard three gunshots, clarifying her earlier statement to Reynolds. The district court permitted Long to elicit hearsay testimony from Reynolds regarding the unavailable Bordeaux's statement. To the extent that Bordeaux's statement—that he saw a vehicle moving quickly in reverse and heard a single noise, which he thought was a car backfiring—was exculpatory, Reynolds's testimony mitigated any prejudice that resulted from the disclosure of Reynold's report at the beginning of the trial. Cf. United States v. Almendares, 397 F.3d 653, 664 (8th Cir. 2005) (holding to be adequate the trial-time disclosure of evidence that a witness identified an alternate suspect, where defense did not recall witness but cross-examined another witness regarding the identification). Long presented no evidence that the testimony of the additional witness identified by Young would have been exculpatory had she been found in time to testify at trial. Accordingly, the district court did not abuse its discretion in denying Long's motions for a mistrial and for a new trial.

The judgment is affirmed.

COLLOTON, Circuit Judge, concurring in part and dissenting in part.

A misdemeanant like Michael Long is forbidden to possess a firearm only if he was "represented by counsel in the case" in which he sustained the misdemeanor conviction, or if he "waived the right to counsel in the case." 18 U.S.C. § 921(a)(33)(B)(i)(I). It is undisputed that Long did not waive the right to counsel and that he was not represented by a lawyer in the case. The court concludes, however, that because Long was represented in the case by a nonlawyer, dubbed a "lay counsel" by the Rosebud Sioux Tribe, he was "represented by counsel in the case." I believe that this conclusion is inconsistent with the meaning of the word "counsel" in the statute, so I would reverse Long's conviction for possession of a firearm as a prohibited person.

When the Supreme Court recognized the individual right to keep and bear arms in the Second Amendment, the Court said that its opinion should not be read to cast doubt on the longstanding prohibition on "the possession of firearms by felons." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). In 18 U.S.C. § 922(g)(9), Congress extended the prohibition to persons who have been "convicted in any court of a misdemeanor crime of domestic violence." When it established that prohibition, however, Congress included certain procedural safeguards that must be satisfied before a conviction qualifies. If the misdemeanor defendant was entitled to a jury trial "in the jurisdiction in which the case was tried," then he is a prohibited person under the firearm statute only if the case was tried to a jury or if he knowingly and intelligently waived the right to have the case tried by a jury. *Id.* § 921(a)(33)(B)(i)(II). And a convicted misdemeanant loses his Second Amendment rights only if he "was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case." *Id.* § 921(a)(33)(B)(i)(I).

Long was convicted of a misdemeanor in a Rosebud Sioux tribal court. He did not waive a right to counsel in the case, so the key issue here is whether Long was "represented by counsel in the case."

The ordinary meaning of "counsel" in the legal context conveyed by the phrase "represented by counsel" is a lawyer. Webster's defines "counsel" as "a lawyer engaged in the trial or management of a cause in court." *Webster's Third New International Dictionary* 518 (1993). Black's Law Dictionary says that "counsel" means "[o]ne or more lawyers who represent a client," and in turn defines lawyer as "[o]ne who is licensed to practice law." *Black's Law Dictionary* 352, 895 (7th ed. 1999). Courts ordinarily use the term in the same way. *See Zanecki v. Health All. Plan of Detroit*, 576 F. App'x 594, 595 (6th Cir. 2014) ("The problem, then, is that Mark Zanecki was impermissibly acting as the estate's counsel, and [a] nonlawyer can't handle a case on behalf of anyone except himself.") (alteration in original) (internal quotation omitted); *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924 (7th Cir. 2003) ("Muzikowski cannot represent the NWLL because he is not a lawyer. . . . Because NWLL has not appeared by counsel, we dismiss it as a party to this appeal.") (citation omitted); *Fernicola v. Eannance*, 25 F. App'x 68, 69 (2d Cir. 2002) ("Although 28 U.S.C. § 1654 provides that '[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . .,' this does not empower a *pro se* nonlawyer litigant to represent his or her child.") (alteration in original).

The court does not really dispute that "represented by counsel" ordinarily means represented by a lawyer, but concludes that the modified phrase "represented by counsel *in the case*" implies a different meaning here. The natural meaning of the modified phrase, however, is simply that the person was represented by a lawyer *in the criminal case that resulted in the conviction*, not represented by a lawyer in some other context. Many people are represented by counsel in connection with their business affairs, estate planning, or civil litigation. The statute makes clear that a

misdemeanant is a prohibited person only if he was represented by counsel in his criminal case.

The court relies on the second clause of § 921(a)(33)(B)(i)(I), which provides that a misdemeanant has a qualifying conviction if he "knowingly and intelligently waived the right to counsel in the case." The suggestion is that "in the case" would be superfluous here unless it implied that the second clause referred to "right to counsel" as defined by the Tribe in its constitutional provision concerning "right to counsel." Waiver of a right to counsel under the second clause is not at issue in Long's case. But insofar as the two clauses should be read *in pari materia*, the phrase "in the case" does not justify interpreting "counsel" to mean a nonlawyer in both clauses.

Absent a "plain indication to the contrary," we assume that Congress intended a uniform national definition of statutory terms. *United States v. Storer*, 413 F.3d 918, 921 (8th Cir. 2005). We should therefore assume that "counsel" carries the ordinary meaning of "lawyer" in all jurisdictions where misdemeanants might be prosecuted. The phrase "in the case" in the waiver clause requires the court to determine whether the defendant waived the right to a lawyer "in the case" in which he sustained the misdemeanor conviction. If federal law or the prosecuting jurisdiction provides the right to a lawyer in the case, and the defendant waives that right, then he has been convicted of a qualifying offense. But where, as here, neither federal law nor the prosecuting jurisdiction provided the right to a lawyer, there could be no waiver that would satisfy the statute. To read more into the phrase "in the case" would dilute the procedural protections that Congress included when it added a new category of prohibited persons under § 922(g)(9).

When Long was convicted of a misdemeanor in the tribal court, he was not represented by a lawyer in the case. Therefore, he was not "represented by counsel in the case" within the meaning of § 921(a)(33)(B)(i)(I), and he "shall not be

considered to have been convicted" of a "misdemeanor crime of domestic violence" for purposes of § 922(g)(9). For these reasons, I would reverse Long's conviction for unlawful possession of a firearm as a prohibited person and remand for resentencing. I concur in Parts I and II.B of the court's opinion, and join the decision to affirm Long's other three convictions.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL LEE LONG, JR., Defendant.	3:15-CR-30118-RAL ORDER ON PRETRIAL MOTIONS

On May 9, 2016, this Court held a pretrial conference and motion hearing during which this Court entertained argument of certain pending motions. This Court made certain rulings, formalized in this order, and reserved ruling on one issue now addressed in this order. For good cause, it is hereby

ORDERED that the Government's Motions in Limine, Doc. 44, are granted to the extent that there is to be no mention during voir dire, opening statement, witness questioning, or closing argument of 1) the penalties that Defendant Michael Lee Long, Jr. (Long) may face if convicted; 2) of the fact that the crimes charged are felonies; 3) of opinions about the guilt or innocence of Long; and 4) of hearsay statements of Long sought to be admitted by Long for the truth of the matters asserted (unless somehow the door is opened to admission of some such statements). It is further

ORDERED that all fact witnesses—other than one case agent for the Government and Federal Public Defendant investigator Robert Overturf—are to be sequestered during witness testimony unless and until called and released from subpoena or from being recalled as a witness. It is further

ORDERED that the Government's Second Motions in Limine, Doc. 55, are granted to the extent that, unless the Court is first approached and rules otherwise, there is to be no mention during voir dire, opening statement, witness questioning or closing argument of the tribal court decision to dismiss charges

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arising out of the May 17, 2015 incidents and the motion and tribal court order authorizing return of a firearm to Long. It is further

ORDERED that the Government's Request for Judicial Notice, Doc. 52, is granted as to the offense of domestic abuse being a misdemeanor crime of violence under Section 5-38-2 of the Law and Order Code of the Rosebud Sioux Tribe, but is denied as to Long's date of birth or to the tribal court Judgment of Conviction marked as Exhibit 5 referring to Long. Such matters are more appropriate for Stipulation and, if contested, become fact issues for the jury. It is further

ORDERED that Long's motion to dismiss Count IV of the Superseding Indictment based on his lack of law-trained counsel in the misdemeanor tribal domestic abuse case (and absence of a knowing and intelligent waiver of right to counsel in the case), which had been under advisement with this Court, is denied based on the reasoning in United States v. First, 731 F.3d 998 (9th Cir. 2013). This Court does not read United States v. Smith, 171 F.3d 617 (8th Cir. 1999) to dictate a different outcome than reached in First. It is finally

ORDERED that each side may have 30 minutes for voir dire and 25 minutes for opening statement.

DATED this 10th day of May, 2016.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL LEE LONG, JR., Defendant.	3:15-CR-30118-RAL OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS CERTAIN COUNTS OF THE SUPERSEDING INDICTMENT

Defendant Michael Lee Long, Jr. ("Long") moves to dismiss five of the seven counts of the Superseding Indictment. Doc. 37. Specifically, Long moves to dismiss Counts II, III, VI, and VII based on multiplicity under the Fifth Amendment's Double Jeopardy Clause, and Count IV because the predicate offense is an uncounseled tribal court conviction. Doc. 37; Doc. 38 at 2-9. The Government opposes the motion. Doc. 39. For the reasons stated below, judgment is deferred on whether Counts II, III, VI, and VII are multiplicitous and whether the predicate offense to Count IV can be used under 18 U.S.C. § 921(A)(33)(B), otherwise the motion is denied.

I. FACTS

On November 14, 2015, Long was arrested on a two-count Indictment, charging him with Assault with a Dangerous Weapon in violation of 18 U.S.C. §§ 1153 and 113(a)(3) and Using a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C.

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§ 924(c)(1)(A). Doc. 1. Included in the Indictment was a forfeiture provision, requesting forfeiture of a "Glock Model 27, 40 caliber pistol." Doc. 1 at 2. The Indictment alleged that Long assaulted "Cynthia Jones" with a dangerous weapon, namely, the pistol, and that Long knowingly brandished, discharged, carried, and used the pistol during commission of that offense. Doc. 1.

The allegations[1] surrounding the Indictment are that on May 17, 2015, near Rosebud, South Dakota, Cynthia Jones-Bear Robe drove to the Paul Mart Convenience Store ("Paul Mart") and was accompanied by her daughter, K.J. and her daughter's boyfriend, Robert Kills in Water. Doc. 39 at 1. Jones Bear-Robe went inside the convenience store while K.J. and Kills in Water remained in the vehicle. Doc. 39 at 1. K.J. observed Long and his wife enter Paul Mart after Jones Bear-Robe. Doc. 39 at 1. While in the store, Long allegedly made intimidating remarks to Jones Bear-Robe. Doc. 39 at 1. Jones Bear-Rob left the store, got into the vehicle, and called law enforcement. Doc. 39 at 1. Long also left the store, returning to his own vehicle. Doc. 39 at 1. Jones Bear-Robe then got out of her vehicle and walked toward Long's vehicle reportedly to retrieve Long's license plate number. Doc. 39 at 1. Long then got out of his vehicle and followed Jones Bear-Robe as she walked to her vehicle and got into the passenger seat. Doc. 39 at 1. According to the Government, Long "approached the vehicle, opened the door, and pointed a handgun at [Jones Bear-Robe]. He then pointed the handgun inside the vehicle and said he was going to kill everyone. At that point [K.J.] put the vehicle in reverse and

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[1] Facts supporting the indictment were drawn from both the Government's and Long's briefs. Docs. 38, 39.

backed up, knocking over [Long]. [Long] got up on one knee and fired at the vehicle, striking the radiator." Doc. 39 at 2. According to Long, only a single shot was fired.[2] Doc. 38 at 1.

On March 15, 2016, the Government filed a Superseding Indictment which added five counts: two counts of Assault with a Dangerous Weapon in violation of 18 U.S.C. §§ 1153 and 113(a)(3), two counts of Using a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A), and a single count of Prohibited Person in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(9), 924(a)(2), and 924(d). Doc. 33. The additional assault counts named K.J. and Robert Kills in Water as alleged victims, which in turn are the bases for separate counts of the use of a firearm during a crime of violence. Doc. 33. The single count of Prohibited Person in Possession of a Firearm is based on an alleged previous misdemeanor conviction of Long for domestic violence in Rosebud Sioux Tribal Court. Doc. 33; Doc. 39 at 2. The Government submits that Long "was advised of his constitutional and statutory rights and plead guilty to Domestic Abuse" in the Rosebud Sioux Tribal Court and that "the Rosebud Sioux Tribe Constitution includes the right to be represented by counsel." Doc. 39 at 4. Long asserts, however, that he "was not represented by counsel, and [that] he did not waive his right to counsel" in the domestic abuse case.[3]

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[2] The Government's facts do not specify whether a single shot or multiple shots were fired at the vehicle, stating only that Long "fired at the vehicle, striking the radiator." Doc. 39 at 2.

[3] Long's brief does state that "[t]he paperwork underlying the alleged conviction is particularly confusing, but there is at least some indication that a Mike Long, Jr. might have been convicted in 2011 of a Tribal offense of 'Domestic Abuse.'" Doc. 38 at 5.

II. DISCUSSION

A. Multiplicity

Counts II and III of the Superseding Indictment charge Long with allegedly assaulting K.J. and Robert Kills in Water with a dangerous weapon. Doc. 33. Counts VI and VII of the Superseding Indictment charge Long with allegedly brandishing, discharging, carrying, and using a fireman during and in relation to a crime of violence, namely the assaults alleged in Counts II and III. Long moves to dismiss Counts II, III, VI, and VII of the Superseding Indictment for multiplicity. Doc. 38 at 2. Long argues that he has a constitutional right to this relief under the Double Jeopardy Clause of the Fifth Amendment and that the multiple counts for a single fired shot exposes him to "impermissible cumulative punishment for the same alleged course of conduct and will prejudice the jury by suggesting [that Long] has committed several separate crimes."[4] Doc. 38 at 2–3. Long maintains that "it is inconceivable that a single bullet shot at the bottom of the grill of a car could have been intended to directly injure all three of its occupants." Doc. 38 at 3.

"An indictment is multiplicitous if it charges the same crime in two counts." United States v. Siers, No. CR 11-30131-RAL, 2011 WL 6826805, at *1 (D.S.D. Dec. 28, 2011) (quoting United States v. Sandstrom, 594 F.3d 634, 651 (8th Cir.2010)). "A multiplicitous

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[4] Long, under the original Indictment, faced a term of imprisonment of "not less than 10 years" on the § 924(c) count, which, pursuant to § 924(c)(1)(D) must be served consecutively to "any other term of imprisonment . . . including any term . . . imposed for the crime of violence. 18 U.S.C. § 924(c)(1)(A), (D). The Superseding Indictment, which now charges Long with three separate violations of § 924(c), increases Long's possible time of incarceration, if convicted on all such counts, to a minimum of 30 years imprisonment, consecutive to any other sentence.

indictment is impermissible because the jury can convict the defendant on both counts, subjecting the defendant to two punishments for the same crime in violation of the double jeopardy clause of the fifth amendment." Id. (quoting Sandstrom, 594 F.3d at 651). "Demonstrating that an indictment violates the double jeopardy clause requires the defendant to show that the two offenses charged are in law and fact the same offense." United States v. Two Elk, 536 F.3d 890, 898 (8th Cir.2008) (internal quotation omitted). Where a defendant is charged with multiple violations of the same statute, "the question is whether Congress intended the facts underlying each count to constitute a separate unit of prosecution." United States v. Hinkeldey, 626 F.3d 1010, 1013 (8th Cir.2010) (internal quotation omitted). There is no double jeopardy violation if each offense requires proof of an element not required by the other. United States v. Carpenter, 422 F.3d 738, 747 (8th Cir. 2005); see also Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[T]he 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."). Additionally, there is no double jeopardy violation where a statute specifically authorizes cumulative punishment under two statutes. United States v. Mills, 835 F.2d 1262, 1264 (8th Cir. 1987) (per curiam).

Counts II and III of the Superseding Indictment are not multiplicitous to one another or to Count I and do not violate the Double Jeopardy Clause of the Fifth Amendment because each offense requires proof of an element not required by the others, namely that Long allegedly assaulted Cynthia Jones-Bear Robe in Count I, K.J. in Count II, and Robert Kills in Water in Count III. United States v. Hoover, 543 F.3d 448, 456 (8th Cir. 2008) (finding no double jeopardy violation where separate counts required government to prove that defendant killed two

separate victims); see also Carpenter, 422 F.3d at 747. Contrary to Long's assertions, the addition of Counts II and III in the Superseding Indictment will not prejudice the jury by suggesting that Long committed several separate offenses.

However, the additional use of firearm during a crime of violence counts, Counts VI and VII, present a different and more challenging question. Section 924(c)(1)(A) punishes "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A); see also United States v. Gregg, 376 F. Supp. 2d 949, 951–52 (D.S.D. 2005) ("The essential elements of the crime of using a firearm in a crime of violence in violation of 18 U.S.C. § 924(c) are that 'the defendant committed a felony and that he used a firearm during the commission of that felony, as well as the essential facts underlying the charge.'" (quoting Mills, 835 F.2d at 1264)). The United States Court of Appeals for the Eighth Circuit has held that § 924(c) clearly authorizes cumulative punishment, because § 924(c)(1)(A) provides that the punishment for use of a firearm during a crime of violence "*shall*" be imposed "*in addition to* the punishment provided for such crime of violence." Mills, 835 F.2d at 1264.

The question in this case is whether simultaneous and multiple violations of the same federal statute can support multiple § 924(c) charges. The Government tersely argues that the § 924(c) counts are not multiplicitous because each count references back to the assault counts which contain three different victims. Doc. 39 at 3. The Government does not cite any cases in support of that theory. Long, however, anticipating that the Government's response, cited to and distinguished the United States Court of Appeals for the Eighth Circuit case of United States v.

Sandstrom, 594 F.3d 634 (8th Cir. 2010). Sandstrom held that separate predicate offenses that occur simultaneously and with the single use of a firearm can support two § 924(c) convictions. Id. at 658–59. The facts presented in that case involved the death of one victim which gave rise to two underlying offenses: shooting a victim because of his race and killing a victim to prevent him from reporting a crime to law enforcement. Id. at 656–57.

In Sandstrom, the Eighth Circuit undertook an examination of precedent relating to multiple § 924(c)(1) charges. The Eighth Circuit noted that in United States v. Freisinger, 937 F.2d 383, 389 (8th Cir. 1991), overruled on other grounds by United States v. Bentley, 561 F.3d 803 (8th Cir. 2009), the Court had "acknowledged in dicta the potential permissibility of multiple convictions for the single use of a firearm based on multiple predicate offenses." Sandstrom, 594 F.3d at 658. Freisinger discussed a Tenth Circuit decision, United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987), which found that only one § 924(c) conviction could be maintained because the multiple underlying offenses—felony murder and burglary, where the burglary supported the felony murder charge—were but a single offense. Chalan, 937 F.2d at 389. The Eighth Circuit noted the following in a footnote in reference to Chalan:

> Since only one firearm was involved and only one crime of violence occurred, there was simply no legal basis for more than one section 924(c)(1) conviction. Obviously, under such circumstances multiple section 924(c)(1) convictions would constitute double jeopardy.

Freisinger, 937 F.2d at 390, n.7. The Eighth Circuit has explained that "[w]hat distinguishes one offense from another and gives them separate legal identities is the 'use' attributed to the firearm: each separate use of a firearm constitutes a separate offense, even where there is only

one predicate drug-trafficking crime." United States v. Canterbury, 2 F.3d 305, 306 (8th Cir. 1993) (citing United States v. Lucas, 932 F.2d 1210, 1223 (8th Cir. 1991)).[5]

After examining precedent, the Eighth Circuit in Sandstrom held that there was a legal basis for more than one § 924(c) conviction "because one firearm was used to commit two different offenses;" the defendants used the firearm during the commission of a crime of violence of shooting a victim because of his race and used the firearm during the commission of a crime of violence of killing a victim to prevent him from reporting a crime to law enforcement. 594 F.3d at 659. Those two predicate crimes were distinguishable from each other because of the manner in which the firearm was used, "even though the offenses occurred simultaneously." Id.

This case may be distinguishable from Sandstrom depending on the intent Long had when he allegedly used the firearm to shoot at the vehicle with three occupants on May 17, 2015. On the one hand, the Government avers that Long pointed the handgun inside the vehicle, said he was going to kill everyone, and then after the vehicle was driving away, he fired at the vehicle. Doc. 39 at 2. On the other hand, Long argues that "it is inconceivable that a single bullet shot . . . could have been intended to directly injure all three of its occupants." Doc. 38 at 3. This Court finds that deferring decision on whether there is only one or multiple § 924(c) violations is appropriate because the Court has not heard any evidence. This ruling seems best made at the

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[5] In Lucas, the Eighth Circuit affirmed a district court finding that multiple guns supported only two violations of § 924(c). 932 F.2d at 1223. One of the fourteen firearms in the defendant's home (a pistol) was used to protect the defendant and his family, and the other gun (a machine gun which was found in another part of the home) was used to protect a crack cocaine laboratory. Id.

close of the government's case when this Court can better gauge if there exists sufficient evidence to support submission of separate § 924(c) offenses to the jury.

B. Use of Uncounseled Prior Tribal Conviction as Predicate Offense under 18 U.S.C. § 922(g)(9)

Next, Long moves to dismiss Count IV of the Superseding Indictment, the Prohibited Person in Possession of a Firearm violation, because the predicate offense of domestic violence was uncounseled and should not be used under 18 U.S.C. § 921(a)(33)(B). Doc. 38 at 5. Additionally, Long argues that dismissal of Count IV is appropriate under the Sixth Amendment and the Due Process Clause of the Fifth Amendment. Long's statutory and constitutional arguments will be addressed separately.

1. Statutory Argument

"[T]he term 'misdemeanor crime of domestic violence'" includes a misdemeanor under tribal law.[6] 18 U.S.C. § 921(33)(A). 18 U.S.C. § 921(a)(33)(B)(i) then provides as follows:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—
>
> > **(I)** the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
> >
> > **(II)** in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
> >
> > > **(aa)** the case was tried by a jury, or
> > >
> > > **(bb)** the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

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[6] Long does not contend that the predicate offense of domestic violence does not qualify as a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A). Therefore, this Court will assume for purposes of this motion that Long's misdemeanor conviction for domestic violence in the Rosebud Sioux Tribal Court is a misdemeanor crime of domestic violence under § 921(a)(33)(A).

In the case of United States v. First, 731 F.3d 998 (9th Cir. 2013), the Ninth Circuit held that "a misdemeanor conviction obtained in tribal court may qualify as a predicate offense to a § 922(g)(9) prosecution so long as the defendant was provided whatever right to counsel existed in the underlying misdemeanor proceeding." Id. at 1009. In that case, First was convicted in Fort Peck Tribal Court in Montana for domestic assault under tribal law, a charge that carried a maximum imprisonment term of three months and a $500 fine. Id. at 1001. First pleaded guilty to the charge and was sentenced to a thirty day suspended jail sentence and 120 days probation. Id. First was indigent, unable to afford his own counsel, and was not offered the assistance of court-appointed counsel. Id. First did not argue that he was deprived of his right to retain counsel. Id. at 1003. Although First's suspended jail sentence would have triggered Sixth Amendment protection in state or federal court, Alabama v. Shelton, 353 U.S. 654, 658 (2002), the Ninth Circuit noted that First's conviction was validly obtained under tribal law because Indian tribes are quasi-sovereign nations and the right to appointed counsel is available only for defendants facing a term of imprisonment greater than one year. First, 731 F.3d at 1002–03; see also 25 U.S.C. § 1302. The Ninth Circuit found that a validly obtained misdemeanor conviction in tribal court qualifies as a predicate offense under § 922(g)(9) because in § 921(a)(33)(B)(i)(I), the words "in the case" in the phrase "right to counsel in the case" modify "right to counsel." Id. at 1004 (stating that the words "'in the case' . . . could not plausibly refer to any other proceeding"). The Ninth Circuit supported its holding by referring to the Eighth Circuit case of United States v. Smith, 171 F.3d 617 (8th Cir. 1999), in which the Eighth Circuit "implicitly read the 'right to counsel' provision in § 921(a)(33)(B) as referring to the right that existed in the underlying [state] proceeding." First, 731 F.3d at 1005.

Long urges this Court not to follow First. According to Long, First's holding is based on an "inexplicable leap of logic" because First "decided that there existed no right to counsel, so there would be no need to waive it, so therefore it must have been knowingly and intentionally waived." Doc. 38 at 6. Long also claims that in Smith, the Eighth Circuit analyzed whether Smith's waiver of counsel was valid under state and federal law before utilizing Smith's conviction as predicate offense to a § 922(g)(9) prosecution. Doc. 38 at 6. Long acknowledges that there is no right to a jury trial in the tribal court, but argues that Count IV should be dismissed because Long "was not represented by counsel, and he did not waive his right to counsel" in the tribal offense. The Government counters that because Long "was advised of his constitutional and statutory rights and plead guilty to Domestic Abuse" in the Rosebud Sioux Tribal Court and because "the Rosebud Sioux Tribe Constitution includes the right to be represented by counsel," Long's tribal conviction meets the statutory requirements under § 921(a)(33)(B)(i). Doc. 39 at 4.

This Court wants to hear from counsel at the pretrial conference and motion hearing before ruling on this issue. Thus, ruling is deferred at this time.

2. Constitutional Argument

Finally, Long argues that the uncounseled tribal conviction cannot serve as a predicate offense to Count IV of the Superseding Indictment because doing so would violate his Sixth Amendment right to counsel and the Due Process Clause of the Fifth Amendment. Doc. 38 at 7. The Government argues that even if the tribal conviction were uncounseled, Court IV is not defective under the Eighth Circuit's holding in United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2011). Doc. 39 at 5. In Cavanaugh, the Eighth Circuit held that the Constitution does not

preclude use of an uncounseled tribal court conviction in a 18 U.S.C. § 117(a)[7] prosecution "merely because [the conviction] would have been invalid had it arisen from a state or federal court."[8] 643 F.3d at 604 (emphasis omitted). Long recognizes Cavanaugh's holding, but wishes to preserve this argument in the event that Cavanaugh is overruled by the United States Supreme Court's upcoming decision in United States v. Bryant, 769 F.3d 671 (9th Cir. 2014), cert. granted, 84 U.S.L.W. 3200 (U.S. Dec. 14, 2015) (No. 15-420). The Supreme Court granted certiorari in Bryant to consider "whether reliance on valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution." Brief for the United States at *I, United States v. Bryant, — U.S. — (—) (No. 15-420).[9] Given the current state of the law, Cavanaugh directs that Long's motion to dismiss Count IV of the Superseding Indictment based on the Fifth and Sixth Amendments be denied.

III. CONCLUSION

For the foregoing reasons, it is hereby

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[7]Section 117(a) allows for prosecution of the offense of domestic assault by a habitual offender if the government can prove that the defendant received "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for certain abuse offenses.

[8] The Eighth Circuit holding was premised on the absence of allegations of irregularities or claims of actual innocence, both of which Long has not asserted in this case. See Cavanaugh, 643 F.3d at 605.

[9] Oral argument was heard in Bryant on April 19, 2016. No. 15-420, Supreme Court of the United States, available at http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-420.htm.

ORDERED that judgment is deferred on whether Counts II, III, VI, and VII are multiplicitous and whether the predicate offense to Count IV can be used under 18 U.S.C. § 921(A)(33)(B), otherwise Long's Motion to Dismiss, Doc. 37, is denied.

DATED this 6th day of May, 2016.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,	*	3:15-CR-30118-RAL
Plaintiff,	*	Pierre, South Dakota
-vs-	*	May 11, 2016
MICHAEL LEE LONG, JR.,	*	Volume II of III
Defendant.	*	(Pages 104 - 310)

TRANSCRIPT OF
JURY TRIAL

BEFORE THE HONORABLE ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

* * * * * * * * * *

APPEARANCES:

Counsel for Plaintiff: MR. KIRK W. ALBERTSON
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Pierre, South Dakota 57501

APPENDIX D

Water, and that -- well, he certainly wouldn't know for sure the Defendant's thoughts, but he did say the gun was pointed at the -- at Cynthia. The Defendant did not see him in the back. And he said that both on direct and in cross-examination and added that he was hiding when the Defendant fired.

So the Court does not see any evidence that the assault that the Defendant is alleged to have committed was against Robert Kills In Water and sees no evidence on the third element that there was a specific intent of Mr. Long to do bodily harm to Mr. Kills In Water.

Mr. Albertson, has the Court missed something here?

MR. ALBERTSON: I don't believe so, your Honor, based on the way the evidence has been presented.

THE COURT: All right. The Court grants judgment of acquittal then as to Count III of the Indictment.

Now the judgment of acquittal as to Count IV of the Indictment raises to this Court an interesting question about the use of tribal court convictions. The statute actually does refer to a conviction of a tribe. There are portions of a definition that refers to -- it seems to imply that Congress was contemplating convictions where their jury trials rights get waived and there's counsel involved.

This Court has spent some time on this issue. The lead-in case is the first case out of the Ninth Circuit, which has a textual explanation of how misdemeanor domestic abuse

convictions from a tribal court where there's not counsel involved can provide the predicate offense. And the Court in a previous order has determined that it would follow the first case.

So the Court, looking at the evidence, does find that each of the elements of the prohibited person in possession of a firearm offense have been established.

Now, on the multiplicity question, with regard to the three separate counts for using a firearm in relation to a crime of violence, starting with what's easy, the count that relies upon the assault on Robert Kills In Water, is gone. The Court grants judgment of acquittal on that count. I believe that would be Count VII. I think that's right.

MR. ALBERTSON: That's correct, your Honor.

THE COURT: And then we have Counts V and VI, which are the using a firearm during and in relation to a crime of violence that accuse him of separate uses with respect to Cynthia Jones and Kelly Jones. I wanted to hear the evidence. I have written a bit of an analysis in denying part of the motion to dismiss.

What is the Government's view as to how this basically three-minute window of time -- it appears to be a three-minute window of time would give rise to two separate uses of a firearm in relation to a crime of violence? Mr. Albertson.

MR. ALBERTSON: Your Honor, I think that the evidence

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-3397

United States of America

Appellee

v.

Michael Lee Long, Jr.

Appellant

Appeal from U.S. District Court for the District of South Dakota - Pierre
(3:15-cr-30118-RAL-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E