***United States v. Rainbow*, No. 15-1936 at 4 (8th Cir. Feb. 19, 2016) – Brooke Hamilton**

Christopher and Jordan Rainbow were charged with "assault to commit murder, assault with a dangerous weapon, and assault resulting in serious bodily injury," and with assaulting Sophia Bear Stops, both "individually" and "by aiding and abetting."[1] To convict the men on each count, the government had to prove the two men were "Indians" and the "offense occurred within Indian Country."[2]

During their trial, the emergency room doctor who treated Sophia testified that she suffered a head injury from "blunt trauma, [and] . . . was hit in the head or the face"[3] His medical notes stated she was "assaulted and hit with a solid object in the face." At the close of his testimony, the district court asked whether "Sophia's injuries were consistent with being struck with a solid object in the face and whether his testimony was based upon a reasonable degree of medical certainty," which the doctor answered in the affirmative.[4] The defense counsel objected to this and moved for a mistrial, but the district court overruled, determining that the doctor's testimony was consistent with the medical information provided.[5]

18 U.S.C. § 1153(a) confers federal jurisdiction to prosecute specific offenses committed by an Indian within Indian country.[6] Lacking a statutory definition for "Indian", the Eight Circuit "asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."[7] Determining whether a defendant is an Indian is a question submitted to, and decided by, the jury because it is considered an element of the crime.[8]

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[1] *United States v. Rainbow*, No. 15-1936 at 4 (8th Cir. Feb. 19, 2016).
[2] *Id*. at 5.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*. at 7
[7] *Id*. (citation omitted.)
[8] *Id*.

The government asserted that Christopher and Jordan were Indians, citing both Dwight Archambault's—deputy superintendent of trust services for the Bureau of Indian Affairs (BIA)—testimony and the certificates of degree of Indian blood as evidence during their closing statements.[9] Christopher and Jordan argued on appeal that, "in light of *Crawford v. Washington*,"[10] the admission of the certificates of their degree of Indian blood violated their rights under the Confrontation Clause of the Sixth Amendment. The Confrontation Clause of the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[11] As interpreted by the Supreme Court in Crawford, those who bear testimony are witnesses against the accused, and "testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[12] Further, *Crawford* explains that when testimonial evidence is at issue, the "Sixth Amendment demands . . . unavailability [of the witness] and a prior opportunity for cross-examination."[13] Documents which are classified as business records however, are admissible and are not testimonial because they have been created for the "administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial."[14]

The Eighth Circuit determined that although Archambault testified that he had prepared the certificates for his testimony, BIA officials consistently certify blood quantum for establishing eligibility for federal programs.[15] An individual's enrollment status and blood quantum could be looked up in the BIA's records at any time, regardless of criminal acts,

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[9] *Id*.
[10] *Id*. at 8.
[11] *Id*.
[12] *Id*. at 8-9.
[13] *Id*. at 9.
[14] *Id*. citation omitted.
[15] *Id*. at 10.

because the BIA keeps records of tribal enrollment and every member's blood quantum.[16] Because the certificates were prepared using "records maintained in the ordinary course of business," the Eight Circuit determined that the "certificates were admissible as non-testimonial business records."

The Eighth Circuit further held that both Christopher and Jordan were enrolled in the Standing Rock Sioux Tribe because the government "elicited testimony" from Archambault that they were enrolled.[17] This alone establishes that they were Indian for purposes of § 1153 because to be a member of the Standing Rock Sioux Tribe, an individual has to possess "one-fourth standing rock blood."[18] Therefore, the Eighth Circuit affirmed on appeal both Christopher and Jordan were Indian for purposes of § 1153.

The second issue argued on appeal was that the district court abused its discretion by "refusing to submit lesser-included-offense instructions to the jury." Defendants are "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find [them] guilty of the lesser offense," acquitting them of the greater. In the Eight Circuit, a lesser-included-offense instruction is allowed if defendants meet a standard of five different requirements.[19] In this case, the Eighth Circuit was examining whether defendants met the third requirement, which is "met if the jury could infer from the evidence presented that the defendant committed the lesser offense."[20]

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[16] *Id*.
[17] *Id*.
[18] *Id.* at 10-11.
[19] *Id*. at 11. *Citing United States v. Felix*, 996 F.2d 203, 207 (8th Cir. 1993), ("(1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence which would justify conviction of the lesser offense; (4) the proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense; and (5) there is mutuality, i.e. a charge may be demanded by either the prosecution or the defense.")
[20] *Id*. at 12.

Christopher and Jordan requested instructions including lesser offenses on two different counts. First, they requested an instruction on "simple assault 18 U.S.C. § 113(a)(5), as a lesser included offense of assault with a dangerous weapon."[21] The difference between the two is the use of a dangerous weapon, which is only required for conviction under § 113(a)(3).[22] Additionally, they requested a second instruction on "assault by beating, striking, or wounding, *id.* § 113(a)(4), as a lesser-included offense of assault resulting in serious bodily injury, *id.* § 113(a)(6)."[23] The difference between these two offenses is "whether serious bodily injury resulted," which is only required under § 113(a)(6).[24]

The Eighth Circuit determined that the district court did not abuse its discretion in denying the lesser-included offense instruction because a jury could not rationally find that Christopher or Jordan committed lesser offenses.[25] The Eighth Circuit additionally found that there was no error in the district court's questioning of the emergency room doctor.[26] The testimony given by the emergency room doctor was simply a clarification of the medical records and his prior testimony, and it was not viewed as "opinion testimony that went beyond the scope of the testimony elicited by the parties and of the information disclosed in the medical records."[27] Lastly, the Eighth Circuit rejected arguments made by Jordan that the evidence was insufficient to convict him of assault with a dangerous weapon or assault resulting in serious bodily injuries. Therefore, the Eighth Circuit affirmed the judgment of the district court.[28]

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[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id.*
[25] *Id.* at 12-16.
[26] *Id*. at 16.
[27] *Id.*
[28] *Id*. at 17.