FILED
United States Court of Appeals
Tenth Circuit

October 30, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH DALE WALKER,

Defendant - Appellant.

No. 22-5076

**Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:21-CR-00374-JFH-1)**

Keith J. Hilzendeger, Assistant Federal Public Defender (Jon M. Sands, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, District of Arizona, Phoenix, Arizona for Defendant - Appellant.

Elizabeth M. Dick, Assistant United States Attorney (Clinton J. Johnson, United States Attorney, and Leena Alam, Assistant United States Attorney, on the brief), Office of the United States Attorney, Northern District of Oklahoma, Tulsa, Oklahoma, for Plaintiff - Appellee.

Before **HARTZ**, **KELLY**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

Kenneth Dale Walker appeals his conviction and sentence for assault resulting in serious bodily injury within Indian country, in violation of 18 U.S.C. §§ 1151, 1152, and 113(a)(6). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*[1]

On July 14, 2021, Mr. Walker was at the home of his adult niece, Victoria Dirickson, in Collinsville, Oklahoma, where he lived "off and on." ROA, Vol. III at 100. Mr. Walker asked Ms. Dirickson for a set of house keys. She declined because "[i]t was [her] only day off, and [she] really didn't feel like getting out and making a copy" of the keys. *Id.* at 102. Mr. Walker became "[r]eally aggravated," and an argument ensued in the living room. *Id.*

Ms. Dirickson was sitting in a recliner when Mr. Walker "headbutted" her, causing the recliner to tip back. *Id.* at 105. Ms. Dirickson "hit [her] head on the side table that was on the side of the couch." *Id.* Then, while "on top of" Ms. Dirickson, Mr. Walker "tried gouging [her] eyes out" with his thumbs. *Id.* He also choked her and grabbed her hair. Ms. Dirickson's breath "was cut very short to where [her] vision was starting to get a little blurry." *Id.* at 108. During the fight, the necklace Ms. Dirickson was wearing broke, "le[aving] a mark on [her] neck." *Id.* at 105. The altercation ended when Ms. Dirickson's boyfriend pulled Mr. Walker off of her.

[1] This factual summary derives from the trial evidence.

Ms. Dirickson and her boyfriend then drove to a police station and filed a report. She discussed the attack with the officers, who took photos of her injuries. The photos showed marks under her eyes and on her neck from her necklace. Ms. Dirickson later checked herself into a hospital. The hospital intake documents noted she was in the "first trimester [of] pregnancy." *Id.* at 345.

B. ***Procedural History***

We provide a brief procedural overview here and later discuss additional procedural details as relevant to our analysis.

A grand jury in the Northern District of Oklahoma indicted Mr. Walker on one count of assault resulting in serious bodily injury within Indian country, in violation of 18 U.S.C. §§ 1151, 1152, and 113(a)(6). The indictment alleged that Mr. Walker was a non-Indian and Ms. Dirickson was an Indian. The trial commenced on January 18, 2022. Two days later, the jury found Mr. Walker guilty.

At sentencing, the district court applied a two-level upward variance, imposed an 84-month sentence, and included a special anger management condition for his supervised release. The court also denied Mr. Walker's request that his sentence run concurrently with an anticipated state-court sentence.

Mr. Walker timely appealed.

II. **DISCUSSION**

On appeal, Mr. Walker argues that the district court:

(A) Lacked subject matter jurisdiction because the court erred in admitting (1) Ms. Dirickson's Certificate of Degree of Indian Blood ("CDIB") and

tribal registration cards; and (2) Ms. Dirickson's and Sergeant Travis Linzy's testimony regarding Mr. Walker's status as a non-Indian.

(B) Abused its discretion in admitting the testimony of a medical expert, Dr. William Smock, because (1) the Government's expert disclosure under Federal Rule of Criminal Procedure 16 was untimely and the testimony therefore should have been excluded as a sanction, and (2) Dr. Smock's testimony improperly vouched for Ms. Dirickson's credibility.

(C) Abused its discretion in failing to give a unanimity-of-means jury instruction.

(D) Abused its discretion in failing to consider sentencing disparities arising from a possible sentence in a state case.

(E) Plainly erred in imposing an anger management condition of supervised release due to (1) insufficient notice, and (2) improper delegation of authority to the Probation Office.

We reject these arguments and affirm.

A. ***Subject Matter Jurisdiction***

Mr. Walker argues the district court erred in admitting evidence that the Government used to show that Ms. Dirickson is an Indian and Mr. Walker is a non-Indian. He further argues that without this evidence, the court would have lacked subject matter jurisdiction under 18 U.S.C. § 1152. This argument fails for two independent reasons.

First, § 1152 requires proof of Ms. Dirickson's Indian status and Mr. Walker's non-Indian status as elements of the offense. Lack of such proof may support a challenge to the conviction for insufficient evidence but, under Tenth Circuit precedent, it would not eliminate the court's subject matter jurisdiction. Second, the district court did not err in admitting the evidence in question.

1. **Section 1152—Indian and Non-Indian Statuses as Essential Elements of the Offense**

Mr. Walker was prosecuted under 18 U.S.C. § 1152,[2] which provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Section § 1152 applies when "the defendant is an Indian and the victim is a non-Indian, or vice-versa." *United States v. Prentiss*, 256 F.3d 971, 974 (10th Cir. 2001) (en banc), *overruled in part on other grounds by United States v. Cotton*, 535 U.S. 625 (2002); *see also* 1 Cohen's Handbook of Federal Indian Law § 9.02[1][d], at 744 (Nell Jessup Newton ed., 2012 ed.); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 526-27 (1976).

In *United States v. Prentiss*, our en banc court held that "the Indian/non-Indian statuses of the victim and the defendant are essential elements of [a] crime" under

[2] "For most of its history, [Section 1152] has had no descriptive title . . . ." 1 Cohen's Handbook of Federal Indian Law § 9.02[1][a], at 738 n.1 (Nell Jessup Newton ed., 2012 ed.). It is now often called the General Crimes Act or the Indian Country Crimes Act. *See id.*

Section 1152 that the government must prove beyond a reasonable doubt. 256 F.3d at 980.[3] The court said the "[e]lements of the crime of [assault resulting in serious bodily injury] under 18 U.S.C. §§ [113] & 1152, such as the Indian/non-Indian statuses of Defendant and his victim, are jurisdictional only in the sense that in the absence of those elements, no federal crime exists." *Id.* at 982. Further, "[i]f the Government alleged, but failed to prove those elements, we would not say the district court was deprived of subject matter jurisdiction to hear the case; rather we would say Defendant was entitled to acquittal." *Id.*; *see United States v. Tony*, 637 F.3d 1153, 1158-59 (10th Cir. 2011).[4]

As we discuss below, the district court did not abuse its discretion in admitting evidence regarding Ms. Dirickson's Indian status and Mr. Walker's non-Indian status. But, under *Prentiss*, even if the district court erred, excluding this evidence would not have stripped the district court of subject matter jurisdiction.

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[3] In *Prentiss*, Judges Henry and Baldock each wrote opinions for separate en banc majorities. Judge Henry's opinion held that Indian and non-Indian statuses are elements of a crime under § 1152. *See* 256 F.3d at 973 (per curiam); *id.* at 980 (Henry, J.). Judge Baldock's opinion concluded that failure to allege—and by extension prove—those elements does not "deprive the district court of subject matter jurisdiction." *Id.* at 973 (per curiam); *id.* at 981 (Baldock, J.).

[4] In his *Prentiss* majority opinion, Judge Baldock noted that "[s]ubject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231," not particular criminal statutes. 256 F.3d at 982 (quotations omitted). "Courts' recurring reference to the elements of a crime as 'jurisdictional' . . . is [thus] misplaced." *Id.* at 982.

2. **Evidence Regarding Indian/Non-Indian Status**

Mr. Walker argues the district court erred in admitting evidence and testimony concerning Ms. Dirickson's Indian status and Mr. Walker's non-Indian status.

"A district court has broad discretion to determine the admissibility of evidence, and we review the district court's ruling for abuse of discretion." *United States v. Merritt*, 961 F.3d 1105, 1111 (10th Cir. 2020) (citations omitted). "Under this standard, we will not disturb a trial court's decision unless we have a definite and firm conviction that the trial court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (alterations and quotations omitted). We discern no error in the district court's evidentiary rulings.

a. *Additional procedural background*

i. Evidence and testimony regarding Ms. Dirickson's Indian status

At trial, Ms. Dirickson testified that she was a member of the Cherokee Nation and that she carried a "CDIB card" (Certificate of Degree of Indian Blood) in her wallet. ROA, Vol. III at 95. She was then shown her CDIB card and her Cherokee Nation registration card, which she identified, and the Government moved to enter the two cards into evidence. Mr. Walker objected on authentication grounds. The district court overruled the objection.

ii. Testimony regarding Mr. Walker's non-Indian status

Ms. Dirickson also testified she was not "aware of" Mr. Walker's membership in an Indian tribe. *Id.* at 97. Sergeant Travis Linzy, a police officer with the City of Collinsville, testified he had prior contacts with Mr. Walker and that Mr. Walker

"was not" a member of a federally recognized Native American tribe. *Id.* at 195. Mr. Walker objected to Sergeant Linzy's testimony (but not Ms. Dirickson's) on foundation grounds.[5] The district court overruled the objection.

b. *Legal background*

i. Authentication of evidence

Federal Rule of Evidence 901(a) provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 902 provides an exception to this general principle for evidence that is self-authenticating:

> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> (1) Domestic Public Documents That Are Sealed and Signed. A document that bears:
>
> > (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
> >
> > (B) a signature purporting to be an execution or attestation.

[5] The parties understand this objection was based on the Federal Rule of Evidence 602 requirement that the witness have personal knowledge of the testimony's subject matter. *See* Aplt. Br. at 38-39; Aplee. Br. at 31-34.

. . . .

Fed. R. Evid. 902.

ii. Admission of testimony based on personal knowledge

Federal Rule of Evidence 602 provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Although the proponent bears the burden of establishing personal knowledge under Rule 602, "[e]vidence to prove personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602; *see also* 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6028 (2d ed. 2023) ("[P]ersonal knowledge may be established by the testimony of an in court witness without any elaborate foundation separate from the witness' description of the events in question.").

"This standard is not difficult to meet." *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014). A court should exclude testimony for lack of personal knowledge "only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to." *Id.* (quotations omitted); *see also* 1 Kenneth S. Broun et al., McCormick on Evidence § 10 n.7 (8th ed. 2022) ("[T]he trial judge plays only a limited, screening role, merely deciding whether the foundational testimony would permit a rational juror to find that the witness possesses the firsthand knowledge."). "Accordingly, if a rational juror could conclude based on a witness's testimony that

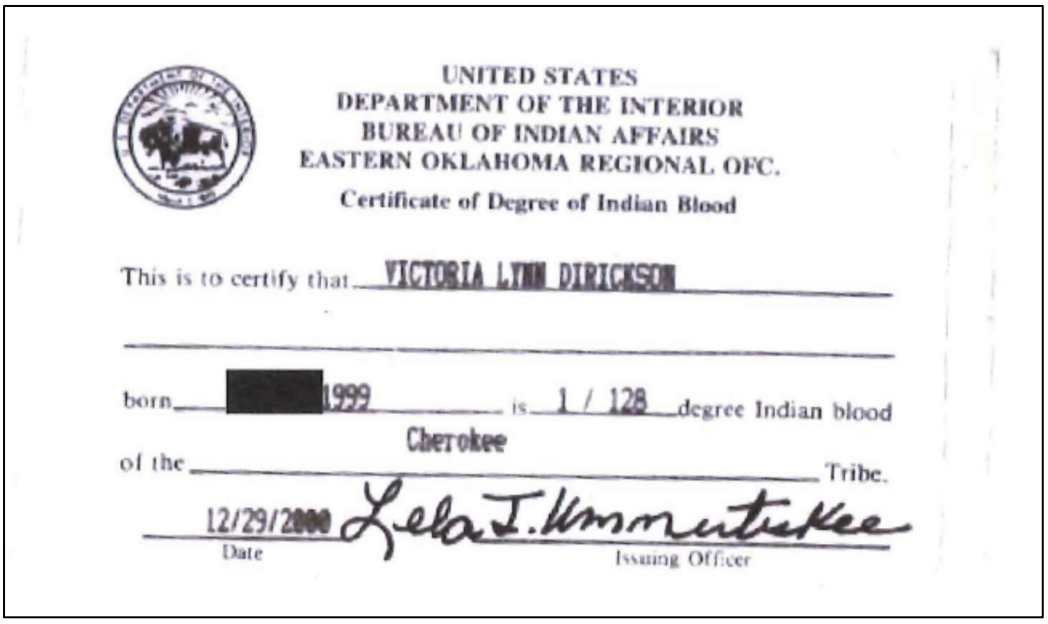
he or she has personal knowledge of a fact, the witness may testify about that fact." *Gutierrez de Lopez*, 761 F.3d at 1132.

c. *Analysis*

i. Proof of Ms. Dirickson's Indian status

The district court did not err in admitting Ms. Dirickson's CDIB card because the card was self-authenticating under Rule 902. Any error in the admission of Ms. Dirickson's Cherokee Nation Registration Card was harmless.

1) Certificate of Degree of Indian Blood Card



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
EASTERN OKLAHOMA REGIONAL OFC.
Certificate of Degree of Indian Blood

This is to certify that VICTORIA LYNN DIRICKSON

born [redacted]1999 is 1 / 128 degree Indian blood
Cherokee
of the _____ Tribe.

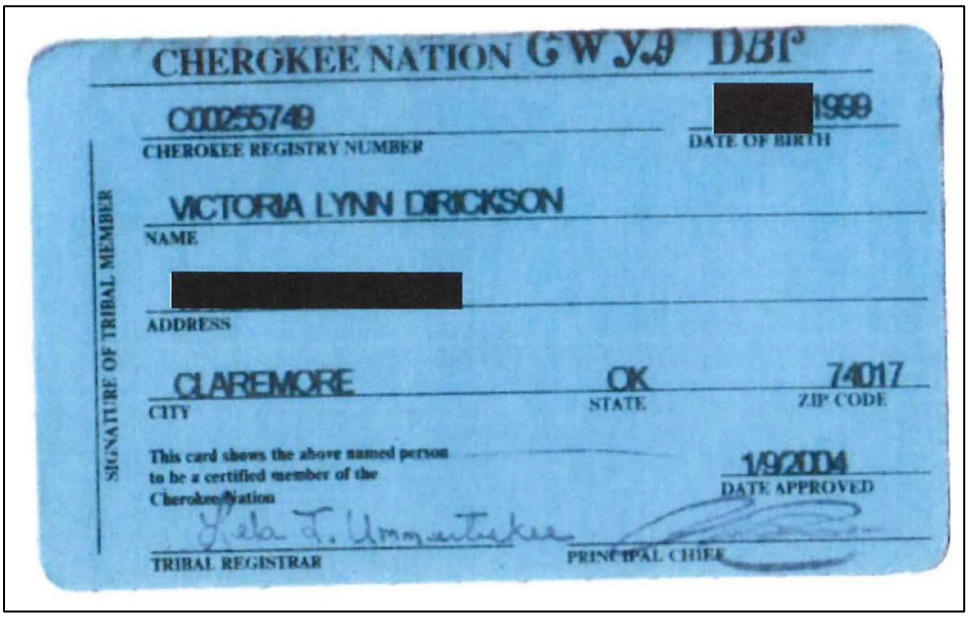
12/29/2000 Lela J. Wommentuckee
Date Issuing Officer

Suppl. ROA, Vol. I at 1.

Ms. Dirickson's CDIB card contained both "a seal purporting to be that of" a "department" of the United States—the Department of the Interior, at top left—and "a signature purporting to be an execution or attestation," at bottom right. Fed. R.

Evid. 902(1)(A), (1)(B). The card was therefore self-authenticating under Rule 902 and properly admitted.

2) Cherokee Nation Registration Card


CHEROKEE NATION

00255749
CHEROKEE REGISTRY NUMBER

[redacted]1999
DATE OF BIRTH

VICTORIA LYNN DIRICKSON
NAME

[redacted]
ADDRESS

CLAREMORE OK 74017
CITY STATE ZIP CODE

This card shows the above named person to be a certified member of the Cherokee Nation

1/9/2004
DATE APPROVED

TRIBAL REGISTRAR

PRINCIPAL CHIEF

SIGNATURE OF TRIBAL MEMBER

Suppl. ROA, Vol. I at 2.

A self-authenticating document must contain "a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; . . . a political subdivision of any of these entities; or a department, agency, or officer of any entity named above." Fed. R. Evid. 902(1)(A).

Ms. Dirickson's Cherokee Nation registration card did not contain a seal. It therefore cannot be self-authenticating under Rule 902. Even if it had contained a seal, the document would still not be self-authenticating because tribal governments are not listed among those entities whose seals satisfy Rule 902. *See id.* The Government argues that Ms. Dirickson's testimony was sufficient to authenticate the

Cherokee Nation registration card. But even if it were not, any error in admitting the card was harmless.

"[I]f a party objects to a district court's [evidentiary] ruling based solely on the Federal Rules of Evidence, we review for nonconstitutional harmless error." *United States v. Ledford*, 443 F.3d 702, 707 (10th Cir. 2005), *abrogated on other grounds by Henderson v. United States*, 575 U.S. 622 (2015). "In non-constitutional harmless error cases, the government bears the burden of demonstrating, by a preponderance of the evidence, that the substantial rights of the defendant were not affected." *United States v. Glover*, 413 F.3d 1206, 1210 (10th Cir. 2005). The admission of the Cherokee Nation card was harmless because Ms. Dirickson's CDIB card and her own testimony were sufficient to prove her enrollment in a tribe. *See* Aplee. Br. at 30.

"To find that a person is an Indian the [jury] must first make factual findings that the person has some Indian blood and, second, that the person is recognized as an Indian by a tribe or by the federal government." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) (quotations omitted). Ms. Dirickson's CDIB card was sufficient for the jury to determine that she satisfied the first element of Indian status: "some Indian blood." *Id.*

Ms. Dirickson's testimony to her enrollment in a federally recognized tribe was sufficient for the jury to determine that Ms. Dirickson satisfied the second element. *See* ROA, Vol. III at 95 ("Q: Are you a member of any federal recognized tribes? [Ms. Dirickson]: Cherokee."). The Cherokee Nation registration card was duplicative of this testimony.

Thus, any error in admission of the Cherokee Nation registration card was harmless because the Government can demonstrate by a "preponderance of the evidence[] that the substantial rights of the defendant were not affected." *Glover*, 413 F.3d at 1210.

ii. Proof of Mr. Walker's non-Indian status

Mr. Walker argues the district court erred in admitting testimony from Ms. Dirickson and Sergeant Linzy as to Mr. Walker's non-Indian status "because it was not shown that either had first-hand knowledge of his Indian status." Aplt. Br. at 38. The district court did not plainly err (as to Ms. Dirickson) or abuse its discretion (as to Sergeant Linzy) in admitting this testimony.

1) Ms. Dirickson's testimony

Ms. Dirickson testified that she was "not . . . aware of" Mr. Walker's membership in a tribe. ROA, Vol. III at 97. Because Mr. Walker did not object to this testimony, we review for plain error. Plain error review requires Mr. Walker "to establish that (1) the district court committed error; (2) the error was plain—that is, it was obvious under current well-settled law; (3) the error affected the defendant's substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Booker*, 63 F.4th 1254, 1258 (10th Cir. 2023) (alterations and quotations omitted).

There was no plain error because there was no error. Mr. Walker contends that Ms. Dirickson had no firsthand knowledge of his Indian status, but Ms. Dirickson's testimony was within the ambit of her reasonable personal knowledge. She testified

that Mr. Walker was her uncle and that he lived with her "off and on." ROA, Vol. III at 101. This close relationship was sufficient for Ms. Dirickson to testify that she was not aware of Mr. Walker's membership in a tribe. *See Gutierrez de Lopez*, 761 F.3d at 1132 (district court should exclude testimony under Rule 602 only if "it finds that the witness could not have actually perceived or observed that which he testifies to" (quotations omitted)).

2) Sergeant Linzy's testimony

At trial, Sergeant Linzy was asked if "[he was] aware if [Mr. Walker was] a member of any federally recognized Native American tribe." ROA, Vol. III at 195. He answered, "As of the night that I took the report, he was not." *Id.* Sergeant Linzy also said he was cross-deputized with the "Cherokee Marshal service," *id.* at 183, and had "legal authority to enforce tribal laws," *id.* at 184. He testified that *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), "changed how [he] approached an investigation" because he now must "inquire if anyone is a member of any federally recognized tribe." *Id.* at 184-85.[6] He also testified that he was "familiar" with Mr. Walker and that he had "prior contacts with him." *Id.* at 193–94.

[6] In *McGirt*, the Supreme Court held that Congress had not disestablished the Muscogee (Creek) Reservation. 140 S. Ct. at 2459. In light of *McGirt*, the Court affirmed our decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020), which held the same.

Although *Murphy* addressed the Creek Reservation, the Creek Nation shares its relevant history in Oklahoma with "the other Indian nations that composed the 'Five Civilized Tribes'—the Cherokees, Chickasaws, Choctaws, and Seminoles." *McGirt*, 140 S. Ct. at 2483 (Roberts, C.J., dissenting); *see Hogner v. State*, 500 P.3d 629, 635 (Okla.

The personal knowledge "standard is not difficult to meet." *Gutierrez de Lopez*, 761 F.3d at 1132. Sergeant Linzy's testimony provided sufficient basis for a rational jury to determine that he had personal knowledge of Mr. Walker's non-Indian status because he was required to undertake these inquiries as part of his job. *See id.* ("[I]f a rational juror could conclude based on a witness's testimony that he or she has personal knowledge of a fact, the witness may testify about that fact."). The district court therefore did not abuse its discretion in admitting the testimony.

* * *

Because the district court properly exercised subject-matter jurisdiction and did not abuse its discretion in admitting evidence related to Ms. Dirickson's Indian status and Mr. Walker's non-Indian status, we affirm.[7]

B. ***Expert Testimony***

Mr. Walker argues the district court erred in admitting the expert testimony of Dr. William Smock because (1) the Government's Rule 16 disclosure was untimely

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Crim. App. 2021) (under reasoning of *McGirt*, Cherokee Reservation has never been disestablished and remains Indian country).

[7] Mr. Walker moved at trial "for a directed verdict based on the lack of substantial evidence being presented by the government." ROA, Vol. III at 401–02. But he did not argue in his opening brief on appeal that there was insufficient evidence adduced at trial to support his conviction. The argument is therefore waived. *See United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011) ("It is well-settled that arguments inadequately briefed in the opening brief are waived." (alterations and quotations omitted)); *Tony*, 637 F.3d at 1159 (argument that district court lacked jurisdiction because act was not committed in Indian country waived because it was "really an insufficiency of the evidence argument" not raised on direct appeal).

and (2) Dr. Smock's testimony improperly vouched for Ms. Dirickson's credibility. "We review the district court's decision to exclude both expert and lay witness testimony as a sanction for violation of Federal Rule of Criminal Procedure 16 for abuse of discretion." *United States v. Banks*, 761 F.3d 1163, 1196 (10th Cir. 2014). We likewise review a district court's decision "whether to admit or exclude an expert's testimony . . . for abuse of discretion." *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006).

Because (1) Mr. Walker has not adequately shown prejudice from an untimely Rule 16 disclosure and (2) Dr. Smock did not improperly vouch for Ms. Dirickson's credibility, the district court did not abuse its discretion. We affirm.

1. **Legal Background**

a. *Rule 16 and exclusion as sanction*

Federal Rule of Criminal Procedure 16(a)(1)(G), as controlling at the time of trial, provided in part:

> (G) Expert Witnesses. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. . . . The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Fed. R. Crim. P. 16(a)(1)(G) (2021).[8]

[8] Rule 16(a)(1)(G) was amended by order of the Supreme Court on April 11, 2022, effective December 1, 2022. *See* S. Ct. Order Amending Fed. R. Crim. P. 16 (Apr. 11, 2022), https://perma.cc/VQ56-GRZQ.

Rule 16 also provided that a district court could sanction a party that fails to comply with the rule. The court may "order such party to permit the discovery or inspection," "grant a continuance," "prohibit the party from introducing the undisclosed evidence," or "enter any other order that is just under the circumstances." Fed. R. Crim. P. 16(d)(2) (2021).

In *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988), we set forth three factors that the district court should consider when determining whether a Rule 16 sanction is appropriate: (1) the reason for the delay, including whether the non-compliant party acted in bad faith; (2) the extent of prejudice to the party that sought the disclosure; and (3) "the feasibility of curing the prejudice with a continuance." *Id.* at 1061. "[T]hese three factors should merely guide the district court in its consideration of sanctions; they are not intended to dictate the bounds of the court's discretion." *Id.* "Frequently it will be found that the party who requested disclosure has not been prejudiced and that no sanction is needed." *United States v. Charley*, 189 F.3d 1251, 1262 (10th Cir. 1999) (quotations omitted).

b. *Improper expert vouching*

"A fundamental premise of our criminal trial system is that the *jury* is the lie detector." *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (quotations omitted). "Determining the weight and credibility of witness testimony, therefore, has long

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The revised rule requires the district court to "set a time for the government to make its disclosures. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence." *Id.* at 5.

been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" *Id.* (alteration in original) (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)).

Consistent with this principle, we have long held that expert testimony vouching for the "credibility of witnesses is generally not [] appropriate" because it (1) "usurps a critical function of the jury," (2) "is prejudicial and [can] unduly influence[] the jury," and (3) is "not helpful to the jury, which can make its own determination of credibility." *United States v. Toledo*, 985 F.2d 1462, 1470 (10th Cir. 1993); *see also* Fed. R. Evid. 702(a) (expert testimony appropriate when "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue").[9]

[9] We have often used the term "vouching" to refer to improper expert testimony expressing a belief or opinion regarding a witness's credibility. *See, e.g.*, *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999). But we have also, on rare occasion, called such expert testimony improper "bolstering." *See United States v. Torres*, 53 F.3d 1129, 1141 (10th Cir. 1995).

Our synonymous usage of the two terms when discussing experts is consistent with our usage when discussing prosecutors. We have often used the term "vouching" to refer to improper comments from a prosecutor who expresses a "personal belief in the witness'[s] credibility." *United States v. Starks*, 34 F.4th 1142, 1173 (10th Cir. 2022) (quotations omitted). But we have also called such prosecutorial commentary "bolstering." *See, e.g.*, *United States v. Rios-Morales*, 878 F.3d 978, 987 (10th Cir. 2017).

Our approach is consistent with other circuits. Some circuits use "bolstering." *See, e.g.*, *United States v. Sosa*, 897 F.3d 615, 621 (5th Cir. 2018). Others call it "vouching." *See, e.g.*, *United States v. Combs*, 379 F.3d 564, 574 (9th Cir. 2004). Others have used both terms in tandem. *See, e.g.*, *United States v. Bernal-Benitez*, 594 F.3d 1303, 1313 (11th Cir. 2010) ("bolster a witness's testimony by vouching for that witness's credibility").

2. **Additional Procedural Background**

On December 29, 2021, the Government filed a notice under Rule 16(a)(1)(G) of its intent to introduce testimony from Dr. Smock. In its notice, the Government stated that Dr. Smock was:

> [A]n expert on the life-threatening nature of strangulation, side effects of strangulation, life-threatening nature of blunt head trauma injuries like concussions, and possible obstetric complications for pregnant victims of strangulation and concussions.

ROA, Vol. I at 20. It also noted Dr. Smock was:

> [E]xpected to offer opinions regarding strangulation, concussions, their side effects, and potential obstetric complications for pregnant victims of strangulation and concussions at trial.

Id. at 21. The disclosure did not mention that Dr. Smock would testify about the impact of strangulation and concussion on Ms. Dirickson.

Dr. Smock drafted an expert report dated January 6, 2022. The Government disclosed this report to Mr. Walker on January 7. It contained extensive discussion of Dr. Smock's assessment of Ms. Dirickson. On January 11, Mr. Walker moved to exclude the expert report (1) as a sanction for late disclosure and (2) because Dr. Smock's testimony would vouch for Ms. Dirickson's credibility.[10]

Because the considerable weight of our caselaw uses the term "vouching" in the expert context, we use that term here.

[10] Mr. Walker's motion sought only to exclude Dr. Smock's "expert report," not his trial testimony. ROA, Vol. I at 132. But the district court considered Mr. Walker's motion as applying to both Dr. Smock's expert report and trial testimony.

On January 13, the district court denied Mr. Walker's motion. The court found that (1) Mr. Walker's timeliness argument was unavailing because the Government's December 29 notice complied with Rule 16's requirements; (2) the "[district court would] not allow Dr. Smock to simply vouch for the credibility of [Ms. Dirickson]," *id.* at 161; and (3) further objections to Dr. Smock's testimony could be raised at trial.

At trial, Dr. Smock testified regarding his assessment of Ms. Dirickson's injuries. He said, "When I interviewed Ms. Dirickson, I asked her, as any doctor would ask you, tell me what happened. So she went through what happened, where she had pain . . . ." ROA, Vol. III at 299. Dr. Smock also noted he had reviewed other evidence, including photos and medical documents.

Dr. Smock then testified to his professional assessment of Ms. Dirickson's injuries. He remarked that "[b]ased upon the information that [he] reviewed, [Ms. Dirickson's] injuries were consistent with a near-fatal strangulation and that she sustained serious bodily injuries with a grave risk of death." *Id.* at 304. Dr. Smock then clarified that his testimony regarding "serious bodily injury" was in "a medical sense. This is—you know, when you block blood to the brain, you block the ability to breathe, that is serious injury because you can die. And people do die from that." *Id.* at 305.

3. **Analysis**

a. *Rule 16 and exclusion as sanction*

Mr. Walker argues Dr. Smock's testimony should have been excluded because the Government's disclosure of Dr. Smock's expert report on January 7—11 days before trial—was both late and prejudicial.

Rule 16 did not establish a deadline for disclosure, and the district court did not find the disclosure was untimely. We need not resolve whether the disclosure was untimely because we hold the district court did not abuse its discretion in finding Mr. Walker failed to show prejudice.[11]

As noted above, the *Wicker* factors are: (1) the reason for the delay, including whether the non-compliant party acted in bad faith; (2) the extent of prejudice to the party that sought the disclosure; and (3) "the feasibility of curing the prejudice with a continuance." 848 F.2d at 1061.

On appeal, Mr. Walker addresses only prejudice—the second *Wicker* factor. But he has failed to show prejudice to warrant reversal. For example, he has not shown that he tried but was unable to engage an expert to counter Dr. Smock's testimony. Nor did he seek a continuance after the district court's January 11

[11] Mr. Walker argues we should consider the timeliness of the January 7 disclosure separate and apart from the December 29 notice. The Government counters they should be considered together. We need not resolve this dispute. Either way, Mr. Walker has not shown prejudice from untimeliness.

ruling.[12] Because Mr. Walker has not shown prejudice, the district court did not abuse its discretion in allowing Dr. Smock to testify.

b. *Improper expert vouching*

Mr. Walker argues that Dr. Smock's testimony improperly vouched for Ms. Dirickson's "credibility on the question of suffering serious bodily injury" and should have been excluded. Aplt. Br. at 35. He relies primarily on *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999). In *Charley*, a doctor testifying to her examination of two alleged victims of sexual abuse was "permitted to give the jury her unconditional opinion that each of the girls was in fact sexually abused." *Id.* at 1266. We noted that "if [the doctor's] opinion was largely based on crediting the girls' account, . . . [the doctor] was essentially vouching for their truthfulness." *Id.* at 1267.

Charley is distinguishable. Unlike in *Charley*, Dr. Smock's testimony was not "largely based on crediting [Ms. Dirickson's] account." *Id.* Dr. Smock based his expert medical opinion on both Ms. Dirickson's discussion of her symptoms and on other physical evidence, including photos and medical reports. When asked if he "look[s] at all—globally at all materials available to [him] on [a] case before rendering an opinion," Dr. Smock responded, "Absolutely. You have to do that." ROA, Vol. III at 387. When Dr. Smock testified that Ms. Dirickson had suffered

[12] In light of the foregoing, Mr. Walker's argument that "[t]he prejudice from the late disclosure is obvious" rings hollow. Aplt. Br. at 31.

serious bodily injury, an element of assault under Section 113, he opined in the "medical sense." *Id.* at 304. Dr. Smock provided appropriate expert medical testimony that "help[ed] the trier of fact to understand the evidence [and] to determine a fact in issue." Fed. R. Evid. 702(a). His testimony did not "usurp[] [the] critical function of the jury" in making "its own credibility determination." *Toledo*, 985 F.2d at 1470.

A review of other expert vouching cases reinforces this conclusion. Dr. Smock did not base his expert testimony on Ms. Dirickson's account alone. *See United States v. Velarde*, 214 F.3d 1204, 1211 n.6 (10th Cir. 2000) (noting doctor's testimony that she would base her diagnosis on individuals' statements "appear[ed] to be impermissible vouching"). Nor did he testify that, in his professional opinion, Ms. Dirickson was telling the truth. *See United States v. Hill*, 749 F.3d 1250, 1251 (10th Cir. 2014) (reversing where FBI agent "trained in 'special tactics and ways to identify [] deception in statements and truths in statements'" testified as an expert that, "in his opinion, many of [a party's] answers were not worthy of credence and 'did not make sense'" (first alteration in original)).

* * *

The district court did not abuse its discretion in admitting Dr. Smock's testimony.

C. ***Unanimity-of-Means Instruction***

At trial, Mr. Walker objected to the district court's proposed jury instructions because they did not include an instruction requiring the jury to agree unanimously

"as to both the acts of the assault and the serious bodily injury." ROA, Vol. III at 425. The district court overruled the objection. Mr. Walker asserts this was error.

"We review a district court's decision on whether to give a particular jury instruction for abuse of discretion and view the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law." *United States v. Sorensen*, 801 F.3d 1217, 1228-29 (10th Cir. 2015) (alterations and quotations omitted). "We will disturb a judgment only if we have substantial doubt that the jury was fairly guided." *United States v. Kahn*, 58 F.4th 1308, 1315 (10th Cir. 2023) (quotations omitted).

Because our caselaw does not require a unanimity-of-means instruction, we affirm.

1. **Legal Background**

The jury must find unanimously that "the [g]overnment has proved each element" of a crime. *Richardson v. United States*, 526 U.S. 813, 817 (1999). But the jury need not agree unanimously on the means by which the crime was committed. *Id.* Thus, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.*; *see also United States v. Kearn*, 863 F.3d 1299, 1310 (10th Cir. 2017). Put another way:

> [T]he holding of *Richardson* sets a lower bar than the rules of 'Clue.' The jury need only unanimously agree that (1) Peter murdered Paul, (2) in the room of a house,

> (3) with a blunt household instrument. If the evidence at trial persuades them of those elements, they may convict. They need not agree unanimously on which room and weapon; the different weapons and rooms are merely *means* of satisfying the statutory elements. If six jurors are persuaded it happened in the library with a candlestick, and six jurors think it happened in the observatory with a lead pipe, that would not vitiate the conviction.

Kearn, 863 F.3d at 1311.

Mr. Walker was prosecuted under 18 U.S.C. § 113, which proscribes "[a]ssault resulting in serious bodily injury." 18 U.S.C. § 113(a)(6).

2. **Analysis**

The district court did not abuse its discretion in failing to issue a unanimity-of-means jury instruction. The charged crime has two elements: "(a) the defendant committed an assault, and (b) the victim suffered serious bodily injury." *United States v. Clark*, 981 F.3d 1154, 1165 (10th Cir. 2020); *see* 18 U.S.C. § 113(a)(6). As the Supreme Court held in *Richardson*, "a jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element." 526 U.S. at 817. Here, the jury had to agree unanimously only that both elements were satisfied. They did not need to agree on which acts satisfied the elements or formed a causal act-harm sequence. The district court therefore did not abuse its discretion.

D. ***Sentencing Disparities***

Mr. Walker argues the district court erred by not considering whether imposing the federal sentence to run concurrently with a sentence in a pending state

case would avoid unwarranted sentencing disparities.[13] We review for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). We affirm.

1. **Additional Procedural Background**

At sentencing, Mr. Walker asked the district court to impose his sentence to run concurrently with his sentence in a then-pending state case. The district court ordered Mr. Walker's sentence to run consecutively to any anticipated term of imprisonment in the state case.

2. **Legal Background**

Title 18, Section 3553(a)(6) of the United States Code provides that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." We have held that Section "3553(a)(6) applies only when addressing sentencing disparities among and between federal defendants sentenced under the federal sentencing guideline regime." *United States v. Wiseman*, 749 F.3d 1191, 1196 (10th Cir. 2014). Section 3553(a)(6) does not apply to state-federal sentencing disparities. *Id.* "It cannot therefore be

[13] In his Reply, Mr. Walker posits it was error for the district court not to explain why it imposed the sentence to run consecutively to the yet-to-be-imposed state court sentence. *See* Aplt. Reply Br. at 10-14. But in his opening brief, Mr. Walker argues that the error was the failure to consider whether the consecutive sentence would have created a sentencing disparity. *See* Aplt. Br. at 41-43. "This court does not ordinarily review issues raised for the first time in a reply brief." *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000).

procedural error for the district court to fail to consider an issue irrelevant to that factor." *Id.*

3. **Analysis**

As noted, Section "3553(a)(6) applies only when addressing sentencing disparities among and between federal defendants sentenced under the federal sentencing guideline regime." *Id.* The district court therefore did not abuse its discretion when it declined to consider Mr. Walker's state-federal disparity argument. But even if the district court were required to consider Mr. Walker's argument, it stated on the record that it did so:

> Based upon these factors, this sentence outside the guideline range for justifiable reasons will serve as an adequate deterrent to this defendant as well as others, promote respect for the law, provide just punishment for the offense, and provide protection for the public and it will not undermine the statutory purposes of sentencing. *Sentencing disparities among defendants were considered in determining an appropriate sentence in this case*.

ROA, Vol. III at 494 (emphasis added).

We affirm.

E. ***Anger Management Special Condition***

Mr. Walker challenges a supervised-release condition requiring his participation in an anger-management program, asserting (1) that he had insufficient notice that the district court was considering this special condition, and (2) that this condition improperly delegates authority to the Probation Office.

Mr. Walker did not object to the special condition at sentencing. We therefore review for plain error. Because Mr. Walker has not shown error, we affirm.

1. **Additional Procedural Background**

At sentencing, the district court imposed a three-year period of supervised release. Among the conditions of release, the district court ordered that Mr. Walker:

> [P]articipate in a program for anger management during the term of supervision as deemed appropriate by the probation office.

ROA, Vol. I at 224.

2. **Legal Background**

a. *Notice of special conditions*

"[N]otice of a special condition is required only when the condition implicates a liberty interest, *and* there is a lack of any obvious nexus between the condition and the crime of conviction." *United States v. Bruce*, 458 F.3d 1157, 1167-68 (10th Cir. 2006) (emphasis added) (alterations and quotations omitted). Such instances are "highly unusual cases where pre-hearing notice [is] required." *Id.* at 1168.

b. *Delegation to Probation Office*

"It is well established that probation officers have broad authority to advise and supervise probationers." *United States v. Mike*, 632 F.3d 686, 695 (10th Cir. 2011) (alterations and quotations omitted). But "[t]here are limits to this authority." *Id.* "For instance, Article III prohibits a judge from delegating the duty of imposing the defendant's punishment to the probation officer." *Id.*

> In determining whether a particular delegation violates this restriction, courts distinguish between those delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and those that allow the officer to decide the nature or extent of the defendant's punishment. Delegations that do the former are permissible, while those that do the latter are not.

Id. (citations omitted).

"We will narrowly construe a broadly worded mental health treatment condition to ensure it does not delegate authority to a probation officer to impose conditions that implicate significant liberty interests—such as inpatient treatment." *United States v. Englehart*, 22 F.4th 1197, 1216 (10th Cir. 2022).

3. **Analysis**

The district court did not err by not giving advance notice of the anger-management condition because there is an "obvious nexus between the condition" (anger management) and "the crime[] of conviction" (assault following a dispute regarding house keys). *Bruce*, 458 F.3d at 1168.

The district court also did not err because the condition did not improperly delegate authority to the Probation Office. "We will narrowly construe a broadly worded mental health treatment condition to ensure it does not delegate authority to a probation officer to impose conditions that implicate significant liberty interests—such as inpatient treatment." *Englehart*, 22 F.4th at 1216. Applying this narrow construction here, we "read the condition as not delegating to the probation officer

the authority to impose conditions that implicate [Mr. Walker's] significant liberty interests." *Id.* (quotations omitted).

III. CONCLUSION

We affirm.