FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA
****

FORT PECK TRIBES,
Plaintiff/Appellant/Cross-Appellee,

vs. **Appeal No. 054**

WILLIAM TURCOTTE,
Defendant/Appellee/Cross-Appellant.

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana, the HONORABLE JUDGE JULIAN H. BROWN, Lawyer Judge, presided.

ARGUED: SEPTEMBER 26, 1988 DECIDED: SEPTEMBER 26, 1988.

FOR APPELLANT: Mary L. Zemyan, Attorney at Law, P.O. Box 1094, Wolf Point, Montana 59201.

FOR APPELLEE: Ron Arneson, Special Prosecutor, P.O. Box 1133, Wolf Point, Montana 59201.

CRIMINAL: SUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION; JURY DID NOT IMPROPERLY CONSIDER FACTORS; JURY INSTRUCTIONS TO BE A PART CF RECORD ON APPEAL; ATTORNEYS AND LAY COUNSELORS NOT TO HAVE POSTVERDICT CONTACT WITH JURORS WITHOUT LEAVE OF COURT; PROSECUTOR'S COMMENTS DID NOT SHIFT THE BURDEN OF PROOF; TRIBAL COURT HAS JURISDICTION OVER NONMEMBER INDIANS; AND TRIBAL COURT CANNOT COMPEL PROSECUTION TO ELECT CHARGES.

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne, Associate Justice.

HELD: AFFIRMED, APPELLANT IS TO BEGIN SERVING HIS SIX (6) MONTHS IN JAIL IMMEDIATELY UPON THE FILING OF THIS OPINION AND TO PAY A FINE OF $1,000.00 AND PERFORM THE OTHER CONDITIONS OF HIS SENTENCE AS PREVIOUSLY ORDERED.

On April 29, 1988, Appellant was charged with aggravated assault. Emmett Buckles, Tribal Prosecutor, initially authorized the issuance of this complaint signed by Linda Turcotte. The Appellant was arrested and jailed on this complaint.

On May 2, 1988 prior to any arraignment, Ron Arneson, Special Prosecutor, filed two (2) amended complaints. One complaint charged simple assault and the other attempted aggravated assault. The complaints alleged identical facts.

On June 3, 1988, Appellant moved to dismiss the charge of attempted aggravated- assault because the complaint was defectively drawn and did not properly charge the crime. At the hearing June 6, 1988, Appellant contended he was being punished twice for the same course of conduct in that the complaints were identical and did not allege any different elements.

At the hearing June 6, 1988, the Court indicated it had less concern with double jeopardy than with procedural due process and fundamental fairness. The Court ordered the Tribes to elect one of the two charges by June 13, 1988. The Court acknowledged this order was different from anything requested.

On June 13, 1988, the prosecutor elected to proceed on the charge of attempted aggravated assault. Simultaneously, he filed his application for extra-ordinary relief from the Court of Appeals, protesting the election of charges.

At the hearing held June 14, 1988, the Court:

a) accepted the prosecution's election of the charge of attempted aggravated assault;

b) dismissed the charge of simple assault with prejudice;

c) arraigned Appellant on three (3) new counts of physical abuse of a child; and

d) set trial on all four (4) charges for June 30, 1988.

A jury trial was held on all four (4) charges on June 30 and July 1, 1988. The jury found Appellant "guilty" of attempted aggravated assault and "not guilty" of the three (3) charges of physical abuse of a child. The Appellant was sentenced on July 8, 1988 to spend six (6) months in jail and to pay a fine of $1,000.00. On July 15, 1988, the Appellant filed a Notice of Cross-Appeal. The sentence has been stayed pending resolution of the Tribe's application for extra-ordinary relief and Appellant's cross-appeal.

An order granting appeal dated August 2, 1988 directed that a full transcript be prepared. Oral arguments were held September 26, 1988.

The issues presented by Appellant to this Court are as follows:

1. Whether there was sufficient evidence to sustain the Appellant's conviction for attempted aggravated assault.

2. Whether the jury improperly considered factors, other than the evidence and the applicable law, in reaching its verdict on the charge of attempted aggravated assault? Was the jury misled by the closing statement of the prosecutor which commented indirectly upon Appellant's silence and which shifted the burden of proof.

3. Whether this Court has criminal jurisdiction over Indians such as Appellant who is a nonmember Indian on the Fort Peck Indian Reservation.

4. Whether the Court erred in requiring the prosecution to elect either the simply assault or attempted aggravated assault charge and Appellant was prejudiced thereby.

Before addressing Appellant's issues, this Court will briefly address one of Appellant's posttrial motions on the issue of two (2) justices hearing oral arguments and rendering a decision.

This Court is to be composed of one (1) chief justice and two (2) associate justices. In Tribes vs. Lilley, Appeal No. 055 (September 16, l988), and Tribes vs. Onstad, Appeal No. 056 (September 16, 1988), this Court determined that two (2) justices could hear arguments and render decisions.

It is still the position of this Court and render decisions that two (2) justices may hear oral argument and render decisions since it is in the interest of justice or of expediting decision that oral arguments not be delayed in this matter. Before proceeding with oral argument, the parties were asked to stipulate to two (2) justices hearing this matter and rendering a decision. The Tribes so stipulated and the parties were ordered to proceed.

I.

The Appellant contends the evidence was insufficient to sustain Appellant's conviction for attempted aggravated assault.. Appellant's complaint specifically charged a violation of III CCOJ 112, 213.

Title III CCOJ 112 reads in part:

"(a) A person is guilty of an attempt to commit a crime who intentionally does or omits to do anything which, under the circumstances as the defendant believes them to be, is an act or omission constituting a substantial step toward the commission of a crime.

"...

"(d) The penalty for an attempted crime is the same as the penalty for the completed crime."

Title III CCOJ 213 reads in full as follows:

"Whoever

"(a) intentionally causes serious bodily injury to another; or

"(b) intentionally causes bodily injury to another with a deadly weapon; or

"(c) recklessly causes serious bodily injury to another under circumstances manifesting indifference to the value of human life is guilty of aggravated assault.

Aggravated assault is a felony.

The evidence was sufficient for the jury to find the Appellant took "substantial steps" towards the commission of the offense of aggravated assault. The prosecutor when questioning the victim elicited "substantial steps" in the following testimony:

Ron Arneson:	Would you describe briefly his tone of voice?
Linda Turcotte:	He was yelling.
Ron Arneson:	And his general demeanor? Your perception of that?
Linda Turcotte:	Very, very angry.
Ron Arneson:	What happened, in the process?
Linda Turcotte:	He hit me.
Ron Arneson:	where (sic) did he hit you?
Linda Turcotte:	I believe, the first time that he hit me was on this side of the face.
Ron Arneson:	Let the record show that the witness is showing on the left side of the face.
Linda Turcotte:	He struck me and I remember saying, "don't or I will call the cops. " I can't really remember the exact sequence of everything but then the next thing I knew, he had a hold of my hair and he had a gun at my head. And He said go ahead and call the cops, they will find a mess when they get here.
Ron Arneson:	Okay! Do you recall where you were at the time this was happening? Where were you positioned? WEre (sic) you on a chair or were you somewhere else?
Linda Turcotte:	I was sitting at the dining room table.
Ron Arneson:	Okay! When he was holding your hair, were you sitting at the dining room table?
Linda Turcotte:	Yes
Ron Arneson:	AT (sic) any time, did you end up on the floor, do you recall?
Linda Turcotte:	Yes. I really, like I say, I can't really remember the full sequence, you know. Maybe I don't want to ... I think he pushed me .... I can't remember if it was after he let go of me or after he had the gun to my head and he pushed me. I really don't recall how I ended up on the floor. But I was on the floor at one time.
Ron Arneson:	Would you describe for us, as best as you can, the circumstances as to his holding your hair and the position of the gun and that particular scene, right at that moment?
Linda Turcotte:	I was sitting at the table, He was standing on my right side. He had a hold of this side of my head, grabbed my hair and pulled it towards him with the gun right . . almost at my temple.
Ron Arneson:	Was the gun, as you recall, touching your head?
Linda Turcotte:	Yes, it was.
Ron Arneson:	Did ... do you recall some of the feelings that you were experiencing at that moment?
Linda Turcotte:	I was very, very frightened. He had in the past, told me more than once, that he would kill me ...
Ron Arneson:	What went through your head at that time, did you consider that serious, to be serious?
Linda Turcotte:	Yeah! More and more, he seem to become ... he seemed to be losing control where I was concerned. Maybe ... I don't know why.
Ron Arneson:	Would you like to describe some other indicators of why you say that? Other incidents or occurrences?

Linda Turcotte: One morning, we woke up ... I could tell he was in a very bad mood. Finally on the way to work, I asked him what was the matter, and he said I had a dream last night and you slept with so-and-so. I was catching heck because he had a dream, you know, something that was in his mind. When he put that gun to my head, I didn't know what he was going to do, I was scared. I didn't know what he really was going to do, if he would really pull the trigger. I thought that he would.

Ron Arneson: So you ... in your mind, you felt that you were really close to death?

Linda Turcotte: Yes. My children were there to see how he is. And that's another thing that I never thought would happen. He would do something like that in front of his kids.

(Transcript page 94, line 2 to page 96, line 26.)

Ron Arneson: Did you see, Did you believe the gun to be loaded?

Linda Turcotte: Yes. I didn't know, of course, I really didn't know but yes.

(Transcript page 101, lines 6-8.)

It was a "substantial step" for Appellant to intentionally strike the victim in the face and hold her hair with a gun to her head. The gun, a .22 automatic pistol, was recovered and produced as evidence at the trial. (See Transcript page 33, lines 1-30.) In addition, Appellant told the victim, "go ahead and call the cops, they will find a mess when they get here." Appellant had also told the victim on several occasions he was going to kill her and the victim believed the gun to be loaded.

As for serious bodily injury, the victim was observed with bruises and an abrasion around her face and eye. (See Transcript page 29, lines 13-30 and page 43, line 29 to page 44, lines 1-16.) Testimony was given by Dr. Yutani that the blows to the facial structure had the potential for serious bodily injury. (See Transcript page 40, lines 12-24.)

Appellant took the "substantial steps" contemplated by III CCOJ 112 and committed the crime of Attempted Aggravated Assault, a violation of III CCOJ 213. Therefore, the evidence produced at trial was sufficient to sustain the conviction on the charge of attempted aggravated assault.

II.

The second issue is a compound issue and will be addressed in two parts. The first part of the issue is whether the jury improperly considered factors other than the evidence and applicable law.

There is no evidence in the transcript that the jury improperly considered factors other than the evidence and the applicable law in reaching its verdict of guilty on the charge of attempted aggravated assault. The affidavits of the four jurors filed with this Court are identical and contained the following conclusion:

> "That after going to the jury room for deliberations, the jury reached the conclusion that the defendant was not guilty of attempted aggravated assault upon Linda Turcotte. The jury concluded that the defendant had committed a simple assault upon Linda Turcotte. Rather than render a verdict of "not guilty" on the attempted aggravated assault charge and allow the defendant to go unpunished, the jury decided to find him "guilty" in spite of the evidence

> that supported the conclusion that the defendant was "not guilty" of the charge of attempted aggravated assault."

This conclusion contains no specific statements as to what factors the jurors improperly considered other than the evidence and applicable law.

The burden of proof to proof a defendant guilty of any offense charged is placed on the Tribes by III CCOJ 103 which reads in its entirety as follows:

> "(a) The Tribes have the burden of proving each element of an offense beyond a reasonable doubt.
>
> "(b) Whenever the defendant introduces sufficient evidence of a defense to support a reasonable belief as to the existence of that defense, the Tribes have the burden of disproving such defense beyond a reasonable doubt, unless this Code or another ordinance expressly requires the defendant to prove a defense by a preponderance of evidence."

Although this Court should have been provided copies of the jury instructions on appeal, it will assume that the jurors were instructed on the Tribes' burden. Therefore, the jury must have been satisfied that the Tribes met this burden of proof when returning the verdict of guilty.

Although the first part of the second issue is addressed, there still remains the matter of postverdict communications with jurors by Appellant's attorney. It is not proper for attorneys or lay counselors to contact jurors during the trial. However, the law in the area of postverdict communications is divided, but, contact is regulated in the jurisdictions where permitted. This has never been addressed by this Court and there must be a policy set for postverdict communications.

The following discusses postverdict communications and gives guidance for establishment of a policy.

> "Courts which have upheld the power of a trial court to prohibit posttrial contact between jurors and attorneys have done so in order to (1) avoid harassment of jurors, thereby encouraging freedom of discussion in the jury room, (2) reduce the number of meritless posttrial motions, (3) eliminate a significant source of jury tampering, and (4) increase the certainty of verdicts. Several courts have approved the practice of requiring attorneys to petition the court before contacting any juror. In fact, several jurisdictions have a standing policy to the effect that all attorney-juror contact is subject to the strict regulation of the court.
>
> "In particular cases, courts have held attorneys' postverdict communications with jurors to be proper or defensible where they were engaged in for an attorney's self-education and where an attorney sought to impeach a jury's verdict by showing that the jury considered extrajudicial evidence.
>
> "On the other hand, courts have more frequently held such communications to be improper

> in particular cases when they were utilized for an attorney's self-education, for seeking to impeach a jury verdict o the ground that the jury considered extrajudicial evidence, for seeking to impeach a jury verdict on the ground of a jury's method of determining the amount of the verdict, for seeking to impeach a jury verdict on the ground of individual jurors' bias, prejudice, or other lack of qualification to serve as a juror, for seeking to impeach a jury verdict on the ground that a juror or jurors were coerced in rendering a particular verdict, and for seeking to impeach a jury verdict on miscellaneous other an unspecified grounds." Attorney's Communications With Jurors, 19 A.L.R. 4th 1209 at 1212-1213.

In the instant case, the Appellant attempts to impeach the jurors' verdict with a showing that the jury improperly considered factors not a part of the evidence. Appellant's attorney presented no evidence other than the four (4) affidavits which were prepared by the same individual with obvious legal experience. These affidavits show an inquiry by the attorney into what occurred during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as to influencing the juror to assent to or descent from the verdict or indictment. A juror may not testify to this under Rule 606(b) of the Federal Rules of Evidence. This rule reads in full as follows:

> "(b) Inquiry Into The Validity of Verdict or Indictment. Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotion's as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence or any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes." (Emphasis Added.)

The Appellant's attorney filed no motion with this Court or the tribal court to be permitted to interview the jurors in the presence of justices or a tribal judge. This Court will not condone posttrial interrogation of the jurors by attorneys and lay counselors without good cause being shown and leave being granted by this Court or the tribal court. Since the affidavits presented by Appellant's counsel are not appropriate under Rule 606(b) of the Federal Rules of Evidence, they shall not be received in this proceeding or any other to impeach the jury's verdict.

In a subsequent brief, the special prosecutor requested this Court adopt a rule which requires all juror contact by a party or a representative of a party to be strictly regulated by the Court. The special prosecutor contends and this Court agrees that such a policy will ensure the fair and just administration of justice on the Fort Peck Reservation.

Therefore, it shall be the standing policy that all postverdict juror contact is subject to the strict regulation of this Court or tribal court upon a showing of good cause therefore. No postverdict interviews shall be conducted without leave of this Court or tribal court. Furthermore, for the purposes of eliminating undue influence or harassment of jurors, interviews shall be in the presence of the justices or judge ordering the same.

This Court shall address the Appellant's attorney's unauthorized contact with the jurors since this contact has resulted in the filing of at least one meritless posttrial motion, a responsive motion and possible harassment · of jurors. The above

motions and possible juror harassment will be addressed at great length in a separate order which will deal with all posttrial motions.

The following will address the last part of the first issue. The Appellant contends the jury was misled by the prosecutor's closing statement in which he was to have commented indirectly upon Appellant's silence and thereby shifted the burden of proof.

In reviewing the transcript, there are no indirect comments made by the prosecutor which can be construed as commenting indirectly upon Appellant's silence and shifting the burden of proof. Furthermore, Appellant does not set forth the specific comments which were made. If there were no such statements by the prosecutor, the jury could not have been misled by the same. Therefore, the Appellant's contention is without merit.

III.

Appellant contends the Fort Peck Tribal Court has no jurisdiction over nonmember Indians committing criminal offenses on the reservation. The Fort Peck Tribal Court has jurisdiction over Appellant who is a nonmember Indian having committed a criminal offense on the Fort Peck Indian Reservation. Title I CCOJ 106 reads,

> "The Court shall have jurisdiction over all offenses by an Indian committed within the boundaries of the Fort Peck Indian Reservation against the law of the Tribe as established by duly enacted ordinances of the Tribal Executive Board."

On the issue of criminal jurisdiction over nonmember Indians, this Court recognizes that there is two opposing positions adopted by the United States Court of Appeals for the Eighth and Ninth Circuits. In the Eight Circuit case of Greywater et al vs. Joshua et al, No. 87-5233 (8th Cir. 1988), the Court held that Tribal Courts are without criminal jurisdiction over nonmember Indians for the same reasons as non- Indians. This Court will hereby adopt the position of the Ninth Circuit for two reasons: (1) this Court is in the Ninth Circuit; and (2) the Ninth Circuit opinion contains a better reasoned position. The Ninth Circuit's position is set out in Duro v. Reina, 851 F.2d 1136 (9th) Cir. 1987). In Duro, the question before the court was "whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member." The court stated, "We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe." Id. at 1138.

The Appellant is an enrolled member of the Turtle Mountain Reservation and is married to the victim who is an enrolled member of the Fort Peck Indian Reservation. The Appellant was charged with violations of the CCOJ. Indians who are members of recognized tribes are subject to the federal criminal statutes. In Duro, the Court stated,

> "For purposes of the federal criminal statutes the important inquiry is whether a particular defendant is a member of a tribe that has a special relationship with the federal government, not whether the defendant happens to have a relationship with the tribe governing the reservation where the offense occurred. Accordingly, in United States v. Heath, 509 F.2d 16 (9th Cir.1974) we held that a Klamath Indian whose tribe had been federally "terminated" could not be federally prosecuted for a violation of 18 U.S.C. Sections 1111 and 1153 for killing an enrolled member of the Warm Springs Indian Tribe on the Warm Springs Reservation...." Id. at 1142.

In Duro, the Court also stated,

> "The case discussing the federal criminal statutory scheme clearly indicate that if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership." Id. at 1143.

The Appellant is a member of a tribe with a special relationship with the federal government and is thereby subject to the federal criminal statutes. The federal criminal statutory scheme does not indicate Congress divested tribal courts of criminal jurisdiction over nonmember Indians and the CCOJ provides for "jurisdiction over all offenses by an Indian committed within the boundaries of the Fort Peck Indian Reservation." Therefore, the Appellant is subject to the jurisdiction of the Fort Peck Tribal Courts.

In addition to the above, Duro discusses contacts with the tribe which would subject a nonmember Indian to its criminal jurisdiction. The Court identified the contacts and agreed that Duro was an Indian subject to the tribal court's criminal jurisdiction in the following:

> "In this case, Duro was enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction." Id. at 1144.

In the instant case, Appellant is enrolled in a recognized tribe, Turtle Mountain Reservation, although not within the interior boundaries of the Fort Peck Indian Reservation. He is married to an enrolled member of the Fort Peck Indian Reservation and resides with her and his children on the reservation. His employment is with Fort Peck Housing on the reservation. Appellant's crime was against his own wife, a member of the reservation and this justifies the conclusion Appellant's contacts subject him to the jurisdiction of the Fort Peck Tribal Courts.

In Duro, the Court also considered the consequences in the event it should rule that the tribal court had no jurisdiction. The Court stated,

> "We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation - does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations...
>
> "Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction.... At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. State v. Allan, 100 Idaho 918, 921, 607 P.2d 4426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void." Id. at 1145-1146.

In conclusion, extending tribal court jurisdiction to nonmember Indians who have significant contacts with the Fort Peck Indian Reservation is not a racial classification. Rather such extension is more reasonable related to the legitimate goal of improving law enforcement on this reservation and avoiding a jurisdictional void. Therefore, this Court has criminal jurisdiction over Appellant and all other nonmember Indians committing criminal offenses on the Fort Peck Indian Reservation.

IV.

In the instant case, whether the tribal court erred in requiring the prosecution to elect either the simple assault or attempted aggravated assault charge is a moot issue. However, this Court gives the following guidance to the prosecutor. In future complaints, the prosecutor should take more care in drafting, i.e. pleading attempted aggravated assault in the alternative with simple assault.

As for prejudice to the Appellant, Appellant filed the original motion requesting that one of the complaints be dismissed because they alleged the same facts. Therefore, Appellant was not prejudiced by the tribal court requiring an election of either the simple assault or attempted aggravated assault.

THEREFORE, THIS COURT HEREBY AFFIRMS APPELLANT'S CONVICTION FOR ATTEMPTED AGGRAVATED ASSAULT. APPELLANT IS TO BEGIN SERVING HIS SIX (6) MONTHS IN JAIL IMMEDIATELY UPON THE FILING OF THIS OPINION AND PAY A FINE OF $1,000.00 AND PERFORM THE OTHER CONDITIONS OF HIS SENTENCE AS PREVIOUSLY ORDERED.

DATED this _____ day of December, 1988.

BY THE COURT OF APPEALS:

_____
ARNIE A. HOVE, Chief Justice

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GARY JAMES MELBOURNE, Associate Justice