IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

SUPREME COURT
FILED
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MUSCOGEE (CREEK) NATION

DEREK HUDDLESTON,	)	
Appellant,	)	
v.	)	
	)	Case No.: **SC 18-02**
MUSCOGEE (CREEK) NATION,	)	(District Court Case No. CRM-17-49)
Respondent.	)	

Appeal from District Court, Okmulgee District, Muscogee (Creek) Nation.

Stephen W. Lee; Stephen Lee, Attorney at Law; Tulsa, Oklahoma; for the Appellant.

Shelly Harrison, Assistant Attorney General, Muscogee (Creek) Nation; for the Respondent.

ORDER AND OPINION

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.[1]

Before: ADAMS, *C.J.*; THOMPSON, *V.C.J.*; LERBLANCE, HARJO-WARE, SUPERNAW, DEER, and MCNAC, *JJ.*

DEER, *J.*; delivered the opinion of the Court, in which ADAMS, *C.J.*; THOMPSON, *V.C.J.*; HARJO-WARE, SUPERNAW AND MCNAC, *JJ.*; joined.

Order and judgment of the District Court affirmed.

LERBLANCE, *J.*; filed a dissenting opinion.

[1] "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."

DEER, *J.*, delivered the opinion of the Court.

Derek Huddleston (hereinafter, the "Appellant") appeals his October 24, 2017, jury conviction in the District Court of the Muscogee (Creek) Nation, case number CRM 2017-49. The Appellant asserts (1) that he was denied due process of law, guaranteed by M(C)NCA Title 14 § 1-303 and the Indian Civil Rights Act (as amended by the Tribal Law and Order Act of 2010)[2]; (2) that certain inadmissible evidence was allegedly introduced at trial, depriving the Appellant of a fair trial; and (3) that there was insufficient evidence produced by the Muscogee (Creek) Nation (hereinafter, the "Respondent") for the trier of fact to properly find guilt beyond a reasonable doubt. On the record presented, and for the reasons set forth herein, we affirm the order and judgment of the District Court.

BACKGROUND

On February 7, 2017, the District Court for the Muscogee (Creek) Nation entered a *Protection Order* against the Appellant in case number PO 2017-01. This *Protection Order* required the Appellant to "stay away from the residence of the victim [Carmon Rudd, hereinafter the "Petitioner"] located at 14818 E. 171st St., Bixby, OK 74008[,]" and that the Appellant "not harass, annoy, telephone, contact or otherwise communicate with the victim, directly or indirectly."

On October 13, 2017, the Respondent filed its *Criminal Complaint and Information* in the District Court of the Muscogee (Creek) Nation, case number CRM 2017-49, asserting that on March 7, 2017, the Appellant violated the February 7, 2017, *Protection Order* (specifically,

[2] *See*, 25 U.S.C. § 1302 (a)(8). "(a) In general no Indian tribe in exercising powers of self-government shall – (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]"

M(C)NCA Title 6 § 3-301 (B)[3]), by allegedly obstructing the residential driveway of the Petitioner with his vehicle. A jury trial was conducted on October 23rd and 24th of 2017. Following deliberation, the jury returned a verdict of "guilty" on Count One – Violation of Protection Order, in case number CRM 2017-49,[4] and recommended a sentence of one (1) year incarceration with a twenty-five hundred dollar ($2,500.00) fine. An *Amended Judgment and Sentence* was filed with the District Court on March 12, 2018, and it is from this *Judgment* that the Appellant seeks review by this Court.

JURISDICTION, SCOPE AND STANDARD OF REVIEW

Appellate jurisdiction is proper under M(C)NCA Title 27, § 1-101 (C).[5] This Court will review issues of law *de novo* and issues of fact for clear error.[6] Each respective question will be addressed based on its applicable standard of review.

ISSUES PRESENTED

Part I. Pursuant to M(C)NCA Title 14 § 1-303 and the Indian Civil Rights Act (as amended by the Tribal Law and Order Act of 2010), were the Appellant's due process rights violated by an impermissibly vague statute?

Part II. Was inadmissible evidence introduced in the course of the Appellant's jury trial and, if so, did the inadmissible evidence infringe on the Appellant's due process rights?

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[3] M(C)NCA Title 6 § 3-301 (B), "Violation of an ex parte, temporary or final protection order by a respondent is a crime."

[4] The same jury also returned a verdict of "not guilty" in the companion case, CRF 2017-19, on Count One – Violation of Protection Order and Count Two – Attempted Burglary.

[5] M(C)NCA Title 27, § 1-101 (C), vests this Court with exclusive jurisdiction to review final orders of the Muscogee (Creek) Nation District Court.

[6] *See A.D. Ellis v. Checotah Muscogee Creek Indian Community, et al.*, SC 10-01 at 3, ____ Mvs. L.R. ____ (May 22, 2013); *In the Matter of J.S. v. MCN*, SC 93-02, 4 Mvs. L.R. 124 (October 13, 1994); *McIntosh v MCN*, SC 86-01, 4 Mvs. L.R. 28 (January 24, 1987).

Part III. Was sufficient evidence produced at trial for the trier of fact to properly find guilt beyond a reasonable doubt?

DISCUSSION

Part I. Violation of Due Process for Vagueness

All criminal defendants prosecuted within the Muscogee (Creek) Nation Courts are entitled to certain due process rights as defined by statute.[7] These rights include the right of a defendant "to be informed of the nature of the charges against him[.]"[8] A defendant is insufficiently apprised

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[7] *See*, *Muscogee (Creek) Nation v. Johnson*, SC 11-13, at 11, ____ Mvs. L.R. ____ (August 15, 2013), and M(C)NCA Title 14 § 1-303, Rights of defendant. In all criminal proceedings, the defendant shall have the following rights:

A. Representation. The defendant shall have the right to appear and represent himself; to be represented by a Indigent Defense Attorney upon application and approval by the Court if found qualified for free representation; to be represented at his or her own expense by any attorney admitted to practice before the District Court.
B. Nature of charges. The defendant shall have the right to be informed of the nature of the charges against him and to have a written copy of the complaint containing all information required by Title 14, § 1–401 herein.
C. Testimony by defendant. The defendant shall have the right to testify in his or her own behalf, or to refuse to testify regarding the charge against him or her, provided, however, that once a defendant takes the stand to testify on any matter relevant to the immediate proceeding against him or her, he or she shall be deemed to have waived all right to refuse to testify in that immediate criminal proceeding. However, such a waiver in one distinct phase of the criminal trial process, such as a motion hearing, trial or sentencing hearing, shall not be deemed to constitute a waiver of defendant's right to remain silent in other distinct phases of the criminal trial process.
D. Confront witnesses. The defendant shall have the right to confront and cross-examine all witnesses against him, subject to evidentiary requirements in the Judicial Code or other applicable law of the Muscogee (Creek) Nation.
E. Subpoena. The defendant shall have the right to compel by subpoena the attendance of witnesses on his or her own behalf.
F. Speedy trial. The defendant shall have the right to have a speedy public trial, which shall be held within one-hundred and eighty (180) days of the date of the defendant's arraignment if he or she has made bail and within ninety (90) days of the date of the defendant's arraignment if he or she is incarcerated due to his or her failure or inability to make bail, unless the defendant has waived his or her right to a speedy trial, said trial to be held before an impartial judge or jury as provided in this Title or other applicable law of the Nation. 90 Title 14, § 1–303 CRIMES & PUNISHMENTS.
G. Appeal. The defendant shall have the right to appeal in all cases.
H. Spouse's testimony. The defendant shall have the right to prevent his or her present or former spouse from testifying against him concerning any matter which occurred during such marriage, except that: 1. The defendant's present or former spouse may testify against him in any case in which the offense charged is alleged to have been committed against the spouse or the immediate family, or the children of either the spouse or the defendant, or against the marital relationship; and 2. Any testimony by the spouse in the defendant's behalf will be deemed a waiver of this privilege.
I. Double jeopardy. The defendant shall have the right to not be twice put in jeopardy by the Nation for the same offense, provided that nothing herein shall be construed as prohibiting the prosecution in the Muscogee (Creek) Nation Courts of a defendant following a state or federal jeopardy.

[8] *See*, M(C)NCA Title 14 § 1-303 (B).

of the charges against him if the underlying statute is so indefinite that an individual of ordinary common sense cannot understand or comply with the statute; in other words, if the statute is vague.

In addition to the due process protections provided by M(C)NCA Title 14 § 1-303, certain federal laws have been specifically incorporated by statute into the laws of the Muscogee (Creek) Nation, including the Indian Civil Rights Act (hereinafter, the "ICRA").[9] The ICRA provides that no person may be deprived of their liberty by any Indian tribe without *due process of law*.[10] [Emphasis Added] As a matter of federal law, the United States Supreme Court has held that vague statutes violate the Due Process clause of the Fourteenth Amendment to the United States Constitution.[11] The federal District Court for the Northern District of Oklahoma, in applying this United States Supreme Court precedent, has identified impermissibly vague statutes using the following standard:

> The Constitution prohibits statutes of "standardless sweep" that fail to establish "minimal guidelines to govern law enforcement." *Kolender v. Lawson,* 461 U.S. 352, 358 (1983). Penal statutes should "define the criminal offense with sufficient definiteness" in order both to apprise citizens of what conduct is prohibited and to prevent police from effecting a form of state-sanctioned discrimination. *Id.* at 357. "When reviewing a statute alleged to be vague, courts must indulge a presumption that it is constitutional, and the statute must be upheld unless the court is satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution." *United States v. Saffo,* 227 F.3d 1260, 1270 (10th Cir. 2000). The Court "must take into account the limitations in the English language with respect to being both specific and manageably brief and not deem void for vagueness those laws which are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States v. Michel,* 446 F.3d 1122, 1136 (10th Cir. 2006) (quoting *United States v. Solomon,* 95 F.3d 33, 35 (10th Cir. 1996) (internal citations and quotations omitted)). The fact that different courts may draw "subtle distinctions" in interpreting a law "does not necessarily render the statute vague for constitutional purposes." *Id.*[12]

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[9] *See* M(C)NCA Title 27, § 1-103 (B) ("The Muscogee (Creek) Nation shall apply the Federal Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.").

[10] *See* footnote 2.

[11] *See, Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (April 17, 2018), *Kolender v. Lawson*, 461 U.S. 352, 353 (May 2, 1983), *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (January 4, 1926).

[12] *See, U.S. v. Melcher*, 2007 WL 2254347 (August 3, 2007).

We find this standard to be consistent with the laws and traditions of the Muscogee (Creek) Nation and henceforth will apply the standard to our void-for-vagueness, due process analysis.

In the case at hand, the Appellant has not argued that a specific statute is vague, but rather that the February 7, 2017, *Protection Order* issued against the Appellant contained provisions which were vague; specifically, the Appellant argues that the provision requiring the Appellant to "stay away from the residence of the victim located at 14818 E. 171st St., South, Bixby, OK 74008" did not sufficiently apprise the Appellant of a prohibited action which might render him criminally liable. While the Appellant has not contested a specific statute, this Court notes that the *Protection Order* provision in question is derived directly from statutory authority, which authorizes the Court to issue "[a]n order requiring the respondent to stay away from the residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member[.]"[13]

The Appellant asserts that "[t]he "stay away" language in the protective order is a term so vague that men of ordinary intelligence would have to guess at both the meaning of the language and the application of such language."[14] This Court does not agree.

Interpreting the meaning of statutory terms presents an issue of law which this Court will review *de novo*. As has been our continuing precedent, "[w]hen a statutory provision is unambiguous, we presume the National Council intended the resulting impact of the unambiguous provision and apply the statute according to the plain meaning of its terms. Use of the "plain-meaning rule" is both an appropriate judicial deference to the National Council's constitutional law-making authority and an analytical hurdle which limits unnecessary judicial encroachment

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[13] *See* M(C)NCA Title 6 § 3-407 (C)(4).

[14] *See* the Brief of the Appellant, at page 7, filed April 18, 2018.

into the law-making function."[15] As such, we first look to the plain-meaning (if any) of the contested terms.

To begin, the term "stay" is commonly defined as a verb meaning (1) "to stop going forward[,]" (2) "to stop doing something[,]" or (3) "to stand firm[.]"[16] Likewise, "away" is an adverb commonly defined as, (1) "from this or that place[,]" (2) "from one's possession[,]" or (3) "by a long distance or interval[.]"[17] As a common phrase, the two terms placed together generally mean "to not go near someone or something: avoid[,]"[18] or, in a purely legal context as, "...an order forbidding the defendant to contact the victim."[19] Combining this plain-meaning understand of the contested terms with the specific address of the Petitioner which was included in the *Protection Order*, this Court determines that the *Protection Order* was sufficiently tailored to apprise the Appellant that he was to remain away from the residence located at the address provided in the February 9, 2017, *Protection Order*. Following *de novo* review of the law, this Court concludes that the *Protection Order* and the relevant provisions of M(C)NCA Title 6 § 3-407 (C)(4) do not violate the Appellant's due process rights, as found in M(C)NCA Title 14 § 1-303, and the ICRA.

Part II. Admissibility of the Evidence

The appellant's second point of contention is that the District Court improperly applied the Nation's rules of evidence during the Appellant's October 23-24, 2017, jury trial, allowing inadmissible evidence to be presented before the jury, thereby denying the Appellant due process

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[15] *See Slay v. Muscogee (Creek) Nation Travel Plaza and Hudson Insurance Company*, SC 14-01, ___ Mvs. L.R. ___ (October 23, 2014), (citing *Cox v. Kamp*, SC 91-03, 4 Mvs. L.R. 75, 79 (June 27, 1991); and *Ellis v. Checotah, et al.*, SC 10-01 at 4, ___ Mvs. L.R. ___ (May 22, 2013)).
[16] "Stay." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 4 October 2018.
[17] "Away." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 4 October 2018.
[18] "Stay Away." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 4 October 2018.
[19] *Stay-Away Order*, Black's Law Dictionary (10th ed. 2014).

of law. The laws of the Muscogee (Creek) Nation require the District Court to apply the Federal Rules of Evidence (Hereinafter, the "FRE") in the absence of any express law to the contrary.[20] As the Nation has not adopted its own rules of evidence, we apply these federal rules in the case at hand. FRE 103 (a) provides that "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a *substantial right* of the party[.]" [Emphasis Added]. Various United States Federal Courts, interpreting FRE 103, have concluded that an evidentiary error affects a substantial right only when the error is prejudicial and had a substantial effect on the verdict.[21] This Court finds the various Federal Courts' application of FRE 103 particularly persuasive and adopts this standard for its interpretation of FRE 103 within the Muscogee (Creek) Nation Courts.

Upon review of the lower court's record, including the complete transcript of the Appellant's two-day jury trial, this Court is not convinced that the claimed evidentiary errors asserted by the Appellant, even if presumed to all be true errors, were so substantial as to effect or prejudice the jury's verdict. This Court is of the opinion that sufficient evidence (admitted without objection by the Appellant) was produced by the Respondent for the jury to conclude beyond a reasonable doubt that all elements of Count One – Violation of Protection Order (Case Number CRM-2017-49) had been met.

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[20] *See* M(C)NCA Title 27 § 2-108, M(C)NCA Title 27 § 1-103 (B), and M(C)NCA Title 27, App. 2, Rule 1 (F).

[21] *See, U.S. v. Harry*, 816 F.3d 1268, 1283 (10th Cir. 2016) (citing *U.S. v. Algarate-Valencia*, 550 F.3d 1238, 1242 (10th Cir. 2008)), "An error affects substantial rights only "when it is prejudicial, meaning that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different."" and *U.S. v. Garcia*, 413 F.3d 201, 210 (2nd Cir. 2005), "An evidentiary error affects substantial rights if it had a 'substantial and injurious effect or influence' on the jury's verdict. Thus, where a court, upon review of the entire record, 'is sure that the [evidentiary] error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand..."

Part III. Sufficiency of the Evidence

As previously stated, the ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall… (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without *due process of law*[.]" [22][Emphasis Added]. In interpreting the meaning of a defendant's due process rights as they relate to U.S. federal law and the sufficiency of evidence presented at trial, the United States Supreme Court has stated that "due process guaranteed by the Fourteenth Amendment [means] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."[23] From this due process maxim, the United States Supreme Court crafted the following rule:

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby v. INS,* 385 U.S., at 282, 87 S.Ct., at 486 (emphasis added). **Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.** See *Johnson v. Louisiana,* 406 U.S., at 362, 92 S.Ct., at 1624–1625.This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[24]

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[22] *See* 25 U.S.C. 1302 (a)(8).

[23] *See Jackson v. Virginia*, 443 U.S. 307, 316 (June 28, 1979), referencing *In re Winship*, 397 U.S. 358 (March 31, 1970).

[24] *Id.*

[Emphasis Added]

This standard has been incorporated by the State of Oklahoma[25] and various federally recognized Indian tribes.[26] As an issue of first impression before the Muscogee (Creek) Nation Supreme Court, we find this standard to be consistent with the Nation's laws and traditions and adopt the standard for use in determining sufficiency of evidence produced in criminal matters before Muscogee (Creek) Nation courts.

In applying this standard to the case at hand, this Court notes that evidence (admitted without objection by the Appellant) was presented to the trier of fact that a vehicle was parked in the residential driveway of the Petitioner the evening of March 7, 2017, without authorization of the Petitioner, and that the entry gate to the driveway was closed with a chain wrapped around a t-post, preventing the Petitioner from entering her residence.[27] Additionally, the vehicle was previously purchased from the Petitioner by the Appellant and the vehicle was titled under the names of the Petitioner, the Petitioner's older daughter and the Appellant.[28] Further, the Appellant was located in the early morning hours of March 8, 2017, walking away from the residence of the Petitioner within a distance of one and a half (1 ½) to three (3) miles.[29] Evidence was presented that a valid *Protection Order* had been previously issued by the Muscogee (Creek) Nation District Court requiring the Appellant to "stay away" from the residence, and to not harass the Petitioner.[30] While no direct evidence was presented identifying the Appellant on the Petitioner's property,

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[25] *See Spuehler v. State*, 709 P.2d 202, 203, 1985 OK CR 132. (October 21, 1985); *Davis v. State*, 268 P.3d 86, 111, 2011 OK CR 29. (December 12, 2011); *Baird v. State*, 400 P.3d 875, 884, 2017 OK CR 16. (June 1, 2017).

[26] Colville Confederated Tribes (*Cora L. Pakootas v. Colville Confederated Tribes*, Case No: AP92-15148, and *Brian L. Condon v. Colville Confederated Tribes*, Case No: AP93-16290); Mashantucket Pequot Indian Tribe (*Timothy James Smith v. Mashantucket Pequot Tribal Nation*, Case No: MPTC-CV-AA-2007-181).

[27] Trial Tr. 141: 3-8 (October 23, 2017).

[28] Trial Tr. 155: 4-9 (October 23, 2017).

[29] *See* testimony of Nathan Pickering, Trial Tr. 129 to 138 (October 23, 2017).

[30] Trial Tr. 140: 15-16 (October 23, 2017).

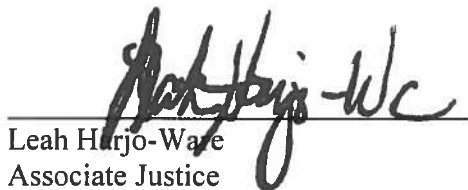
significant circumstantial evidence was presented to the jury for consideration. This Court gives equal weight to direct and circumstantial evidence and trusts that the trier of fact (in this case, six (6) qualified and competent jurors) can thoughtfully consider and weigh the evidence (direct or circumstantial) in accordance with the jury instructions provided by the Court when determining if the Nation has met its burden of proof.[31] Based on this evidence and the testimony presented at trial, we find that a rational trier of fact could have concluded that all essential elements of the crime were met beyond a reasonable doubt and we will not disturb the verdict of the jury.

IT IS HEREBY ORDERED that the *Amended Judgment and Sentence* entered by the District Court on March 12, 2018, is **AFFIRMED**.

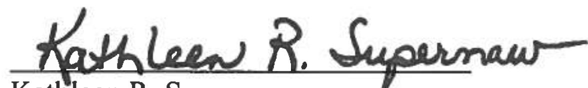
FILED AND ENTERED: October 4, 2018

Andrew Adams III
Chief Justice

George Thompson, Jr.
Vice-Chief Justice



Leah Harjo-Ware
Associate Justice



Kathleen R. Supernaw
Associate Justice

Montie R. Deer
Associate Justice

Amos McNac
Associate Justice

[31] The Court notes that the Appellant submitted no objection to the final jury instructions read into the record by the District Court prior to deliberation.

LERBLANCE, *J.*, dissenting.

A bedrock principle of the criminal justice system within the Muscogee (Creek) Nation is that no person may be found guilty of a criminal act without the Nation first proving beyond a reasonable doubt that each element of the crime has been met.[32] As the majority has emphasized, all criminal defendants prosecuted within the Muscogee (Creek) Nation Courts are entitled to certain due process protection, as defined by M(C)NCA Title 14 § 1-303.[33] Additionally, the

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[32] *See* M(C)NCA Title 14, § 2-110 (A) ("No person may be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is presumed.")

[33] *See*, *Muscogee (Creek) Nation v. Johnson*, SC 11-13, at 11, ____ Mvs. L.R. ____ (August 15, 2013), and M(C)NCA Title 14 § 1-303, Rights of defendant. In all criminal proceedings, the defendant shall have the following rights:

J. Representation. The defendant shall have the right to appear and represent himself; to be represented by a Indigent Defense Attorney upon application and approval by the Court if found qualified for free representation; to be represented at his or her own expense by any attorney admitted to practice before the District Court.

K. Nature of charges. The defendant shall have the right to be informed of the nature of the charges against him and to have a written copy of the complaint containing all information required by Title 14, § 1–401 herein.

L. Testimony by defendant. The defendant shall have the right to testify in his or her own behalf, or to refuse to testify regarding the charge against him or her, provided, however, that once a defendant takes the stand to testify on any matter relevant to the immediate proceeding against him or her, he or she shall be deemed to have waived all right to refuse to testify in that immediate criminal proceeding. However, such a waiver in one distinct phase of the criminal trial process, such as a motion hearing, trial or sentencing hearing, shall not be deemed to constitute a waiver of defendant's right to remain silent in other distinct phases of the criminal trial process.

M. Confront witnesses. The defendant shall have the right to confront and cross-examine all witnesses against him, subject to evidentiary requirements in the Judicial Code or other applicable law of the Muscogee (Creek) Nation.

N. Subpoena. The defendant shall have the right to compel by subpoena the attendance of witnesses on his or her own behalf.

O. Speedy trial. The defendant shall have the right to have a speedy public trial, which shall be held within one-hundred and eighty (180) days of the date of the defendant's arraignment if he or she has made bail and within ninety (90) days of the date of the defendant's arraignment if he or she is incarcerated due to his or her failure or inability to make bail, unless the defendant has waived his or her right to a speedy trial, said trial to be held before an impartial judge or jury as provided in this Title or other applicable law of the Nation. 90 Title 14, § 1–303 CRIMES & PUNISHMENTS

P. Appeal. The defendant shall have the right to appeal in all cases.

Q. Spouse's testimony. The defendant shall have the right to prevent his or her present or former spouse from testifying against him concerning any matter which occurred during such marriage, except that: 1. The defendant's present or former spouse may testify against him in any case in which the offense charged is alleged to have been committed against the spouse or the immediate family, or the children of either the spouse or the defendant, or against the marital relationship; and 2. Any testimony by the spouse in the defendant's behalf will be deemed a waiver of this privilege.

R. Double jeopardy. The defendant shall have the right to not be twice put in jeopardy by the Nation for the same offense, provided that nothing herein shall be construed as prohibiting the prosecution in the Muscogee (Creek) Nation Courts of a defendant following a state or federal jeopardy.

Nation has incorporated the Indian Civil Rights Act (hereinafter, the "ICRA"),[34] which expands on the due process protections guaranteed by Muscogee (Creek) Nation statute, providing that no person may be deprived of their liberty by any Indian tribe without *due process of law*.[35] As a matter of due process, the evidence presented at trial must be sufficient for a finding of proof beyond a reasonable doubt on each element of the crime.

While I agree with the majority's adoption of *Jackson v. Virginia*, 443 U.S. 307, 316 (June 28, 1979), in its Part III analysis concerning the sufficiency of the evidence produced against the Appellant, I do not agree with the majority's ultimate ruling on that point, and would conclude that no rational juror could find guilt beyond a reasonable doubt based on the limited evidence produced at trial.

Evidence is commonly produced to the trier of fact in the form of documents or other physical evidence, or by the oral testimony of witnesses or other experts in the matter being tried. Testimonial evidence generally presents the finder of fact with either direct or circumstantial testimony. Direct evidence is defined as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption. — Also termed *positive evidence*."[36] Alternatively, circumstantial evidence is defined as (1) "[e]vidence based on inference and not on personal knowledge or observation. — Also termed *indirect evidence*; *oblique evidence*[,]" or (2) "[a]ll evidence that is not given by eyewitness testimony."[37]

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[34] *See* M(C)NCA Title 27, § 1-103 (B) ("The Muscogee (Creek) Nation shall apply the Federal Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.")

[35] *See*, 25 U.S.C. § 1302 (a)(8). "(a) In general no Indian tribe in exercising powers of self-government shall – (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]"

[36] *Direct Evidence*, Black's Law Dictionary (10th ed. 2014).

[37] *Circumstantial Evidence*, Black's Law Dictionary (10th ed. 2014).

In the case at hand, the evidence presented to the jury rests almost exclusively on circumstantial evidence. No eyewitness testimony was presented identifying the Appellant on the residential property of the victim [Carmon Rudd, hereinafter the "Petitioner"] following the issuance of the February 7, 2017, *Protection Order*, nor was any direct evidence produced placing the Appellant in the vehicle in question on the days leading up to the March 7, 2017, incident. The jury was left to rely solely on the circumstantial beliefs of the Petitioner that the Appellant was the only person capable of exercising custody and control over the vehicle on the date in question and that the Appellant's relative close proximity to the residential property of the Petitioner (one and a half (1 ½) to three (3) miles from the residence) in the early morning hours of March 8, 2017, necessarily means that the Appellant was recently on the property. However, the presence of an unauthorized vehicle on the Petitioner's property and speculation that the Appellant might have abandoned the vehicle in the Petitioner's driveway, I feel, would not constitute sufficient evidence for any rational juror to find guilt beyond a reasonable doubt. It should also be noted that the same jury that found the Appellant guilty in CRM 2017-49, acquitted the Appellant in the companion case, CRF 2017-19, on the same evidence, wherein the Appellant was charged with a second misdemeanor offense for Violation of Protection Order, for allegedly harassing, visiting, stalking, contacting, or otherwise interfering with the Petitioner on March 8, 2017. I find it troubling and fatally inconsistent that the jury would conclude that there *was insufficient* evidence to find guilt beyond a reasonable doubt in CRF 2017-19 (concerning the events of March 8, 2017) while determining that there *was sufficient* evidence to find guilt beyond a reasonable doubt in CRM 2017-49 (concerning the events of March 7, 2018), when the two charges relied on nearly identical facts and evidence.

While this Court makes no distinction between direct or circumstantial evidence, it is the role of the Court to ensure that a criminal defendant has been afforded all due process protections, including that each element of the crime has been proven beyond a reasonable doubt. Jury Instruction Number 14, filed in the Appellant's case before the District Court, provides that "[n]o person may be convicted of violation of protective order unless the Nation has proved beyond a reasonable doubt each element of the crime. These elements are first, willful; second violation of a protection order; and third, served on the defendant."[38] While I feel the Court should be loath to reverse a jury conviction on the insufficiency of evidence, this Court has a greater commitment to preserving the due process protections of those prosecuted within the Muscogee (Creek) Nation, particularly when, as is the case here, the evidence presented to the jury (or lack thereof) clearly fails to meet the burden of proof placed on the Nation.

Upon review of the record I find a complete lack of direct evidence placing the Appellant on the Petitioner's property or in the vehicle in question, and only the faintest record of circumstantial evidence. The evidence was determined by the jury to be insufficient to find guilt beyond a reasonable doubt in the companion case (CRF 2017-19), yet sufficient in this matter. I am convinced that no rational juror would be capable of concluding beyond a reasonable doubt that element one (1), requiring "willful" conduct, and element two (2), requiring a "violation of [the] protection order" were met, based on the evidence presented and would respectfully reverse the judgment of the District Court.

Richard C. Lerblance
Associate Justice

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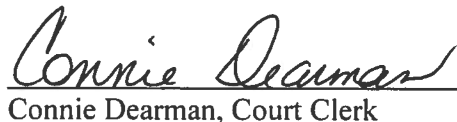
[38] Trial Tr. 225: 12-16 (October 24, 2017).

CERTIFICATE OF MAILING

I hereby certify that on October 4, 2018, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Derek Huddleston, Okmulgee County Jail, 315 West 8th Street, Okmulgee, Oklahoma 74447; Stephen W. Lee, 115 West 3rd Street, Suite 406, Tulsa, Oklahoma 74103; Muscogee (Creek) Nation, Office of the Attorney General, P.O. Box 580, Okmulgee, Oklahoma 74447. A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.



Connie Dearman, Court Clerk