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

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| Tarryn Lilley,<br>Appellant<br><br>v.<br><br>Fort Peck Tribes,<br>Appellee | CASE NO. AP # 847<br><br>ORDER VACATING JUDGMENT OF CONVICTION AND ORDER FOR REMAND |

Appeal from the Fort Peck Tribal Court, Stacie Four Star, Presiding Judge.
Appellant Tarryn Lilley appears by and through Counsel Terry Boyd
Appellee Fort Peck Tribes appear by and through Prosecutor David Mrgudich
Before Justices Shanley, Jones, and Grijalva.

The Defendant has appealed from the Tribal Court's judgment of conviction finding him guilty of Burglary and Theft. He claims that his conviction was improperly tainted by the Court, Chief Judge Fourstar presiding, permitting hearsay statements and by allowing the introduction of a Facebook post implicating the Appellant in the commission of the offenses. For the reasons stated herein, this Court finds that the introduction of the challenged testimony and the Facebook posting violated the

Appellant's rights of confrontation under the Indian Civil Rights Act and vacate his convictions and remand for a new trial.

## STATEMENT OF JURISDICTION

¶ 1 Pursuant to CCOJ Title II, Chapter 2, §202, the jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court..

## STANDARD OF REVIEW

¶ 2 This Court reviews de novo all determinations of the lower court on matters of law but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. 2 CCOJ §202.

## ISSUES

1. **Did the Tribal Court err by permitting the introduction of a Facebook post made by a third party who did not testify at trial that served to implicate the Appellant in the commission of the crime?**

## DISCUSSION

¶ 3 Wesley Headdress returned from a vacation on September 4, 2022 to find that his home in Wolf Point on the Fort Peck reservation had been burglarized and that a computer had been taken. He called the police. Wolf Point Officer Morales went to his home and spoke to him and Montana Juneau Melbourne. Later, it was discovered and reported to the police that additional items including prescription medications, a gaming console, a pistol and a Nintendo Switch were missing. A report was taken at that time. Later, Headdress reported to Tribal Officer Morales that he had retrieved his pistol from an individual named John Fowler who advised that he had gotten it from the Appellant.

Headdress also showed Morales a Facebook Marketplace post from an individual named Curtis Whitehawk who was responding to a post from the victim about the stolen property which implicated the Appellant in the crime. Later, Mr. Headdress' significant other purchased more of the stolen property from a Mckayla Clark who also identified the Appellant as the individual who sold it to her. Ms. Clark refused to cooperate with the police.

¶ 4 At trial, the Tribes introduced the Facebook post, wherein the Appellant was allegedly attempting to sell the victim's property, over the Appellant's objection. The Appellant claimed that he was not provided the post as a separate document in discovery and additionally that it was hearsay and should not have been introduced. The Court overruled the objection on the ground that the Appellant should have obtained the document during the course of his own investigation, and additionally that the statement was not hearsay because it was being offered to show why the victim was led to the Appellant as being the person who burgled his home. The Tribes offered Officer Morales' testimony that the victim identified the Appellant as the suspect in the burglary based upon information gleaned through Facebook Marketplace. The Tribes also offered Roosevelt County Deputy Lingle's testimony on an interview he conducted with a Mckayla Clark, who identified the Appellant as someone who had sold her some of the stolen property. Ms. Clark had moved to Billings, Montana and was thus not subject to process for a subpoena to appear. The Appellant objected to all of this testimony but was overruled on the ground that the evidence was either a statement against penal interest (statements made by Clark to Lingle) or was only being offered to corroborate the victim's theory that the Appellant was the person who burgled his home and sold the stolen items.

¶ 5 The Tribes argue that the Facebook Marketplace post was provided to the Appellant because it was included in the report of Officer Morales and thus the Appellant's claim that there was a discovery violation is meritless. The Court finds that even if the statement was provided to the Appellant in discovery, its use at trial without calling the individual who made the post was hearsay and violated the Appellant's rights of confrontation under Crawford v. Washington, 541 U.S. 36 (2004). That right is enshrined in the Indian Civil Rights Act at 25 USC §1302(a)(6) where a criminal defendant is guaranteed the right "to be confronted with the witnesses against him."

¶ 6 The Fort Peck Comprehensive Code of Justice states that, "all testimony of witnesses shall be given orally under oath in open court and subject to the right of cross-examination." 8 CCOJ 201(b). The decision to permit Officer Lingle to testify as to what McKayla Clark told him in an interview was hearsay because she was an out of court declarant who is unavailable. The Appellant was not permitted to confront Ms. Clark about her statements. Ms. Clark's statements would only meet the admission against interest exception to hearsay if she had been present to testify at the trial. Bruton v. United States, 391 US 123 (1968).

¶ 7 An admission against interest is an out of court statement made by a party that is against their own pecuniary, proprietary, or penal interest. Fed. R. Evid. 804(b)(3). This exception to the general rule that hearsay is not admissible is premised upon the circumstantial guaranty of reliability based on the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. For this exception to hearsay to apply, the statement made must be against the *declarant's* interest. Had the Appellant made incriminating statements to Clark or

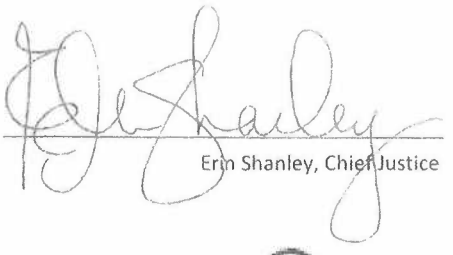
committed incriminating acts in her presence she certainly could have testified about those statements and acts as they would be statements against the Appellant's penal interest.That does not mean a third-party officer could testify as to what Clark told him about the Appellant's actions as the Appellant was being effectively denied the right to confront Clark about the accuracy of her statements, her possible biases, and indeed whether she was involved in the crime since she possessed property stolen from the scene. Even if the lower court permitted hearsay into the criminal trial of Appellant, this Court could affirm the verdicts below if the Court were to find that the decision to admit was harmless error. In this case it is not harmless error because almost all the inculpatory evidence admitted against the Appellant below was hearsay. None of the witnesses testified that Appellant made incriminating statements directly to the witness testifying and there was no testimony related to physical evidence at the scene that incriminated the Appellant. Indeed, the Tribes' prosecution below was almost entirely based upon statements and Facebook posts made by third parties implicating the Appellant. Facebook may be a good method of allowing public forum discussion, but not as the sole basis for a criminal prosecution without the individual who made the statements testifying and being subject to cross-examination by the Defendant.

## CONCLUSION

¶ 8 For the reasons stated above, the Trial Court's Judgments of Conviction are hereby reversed and this matter remanded for a new trial of the Appellant.

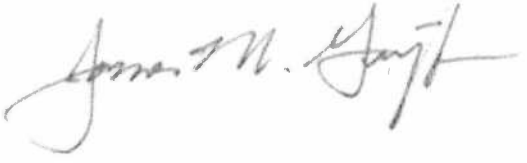
SO ORDERED this 17th day of October 2023.

FORT PECK COURT OF APPEALS



Erin Shanley, Chief Justice

B.J. Jones, Associate Justice



James Grijalva, Associate Justice