

JUN 12 2013

ISSUED
CLERK OF COURT

No. CA-13-001

Pascua Yaqui Court of Appeals

Maldonado, Rene, Appellant,

vs.

Pascua Yaqui Tribe, Appellee,

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR-12-209, the Honorable Cornelia Cruz presiding.

Marisa A. Samuelson, Pascua Yaqui Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757 for the Appellant.

Alfred Urbina, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellee.

I. Opinion

1. There are two issues before this court, the first is whether the Tribal Court erred in finding that there was evidence beyond a reasonable doubt that Appellant made an unreasonable noise in a public place in violation of 4 PYTC § 1-580(A)(3). This court holds that the Tribal Court did not err in its finding. The second issue is whether the residence where the altercation between the victim and defendant occurred is a “public place” for purposes of 4 PYTC § 1-580(A)(3). On this issue, having considered the prescribed statutory provisions and principles of statutory interpretation, this court finds that it is not.

II. Background

2. On August 2, 2012, Officer Dale Pascual responded to a domestic violence call at 7621 Yoem-Bo-Oh. The victim, Kimberly Farmer (Farmer) testified that she and Appellant Maldonado [hereinafter Appellant] got into an argument in the residence at 7621 Yoem-B-Oh.

She states that Appellant was yelling at her and was in her face, so she pushed his face away because of his yelling. The argument continued and got louder so that that the police were called. The Appellant, Farmer and Office Pascual testified that the argument occurred in the residential home.

3. Appellant was arrested and charged by criminal complaint with disorderly conduct domestic violence (count one), a violation of 4 PYTC § 1-580(A)(3), and assault (count two), a violation of 4 PYTC § 1-130(A)(2). After a bench trial, appellant was found guilty as charged on count one and sentenced to pay a fine of \$200.00 and court costs of \$100.00. The amount of \$300.00 is to be paid in installments of \$25.00 per month beginning January 31, 2013, until the balance is paid in full. Appellant was also ordered not to harm or harass the victim for a period of six months. Appellant was found not guilty on count two. Appellant appealed the Tribal Court's decision arguing that the Tribal Court erred in finding that there was evidence beyond a reasonable doubt that Appellant made unreasonable noise in violation of 4 PYTC §1-580(A)(3) and that the alleged disorderly conduct failed to constitute a crime against the public pursuant 4 PYTC § 1-580(A)(3). The Tribe did not file a response in this court.

IV. Unreasonable Noise

4. The first issue on appeal is whether the Tribal Court erred in finding there was evidence beyond a reasonable doubt that Appellant made unreasonable noise while in the residence.

5. With respect to the standard of review, appellate courts “review the sufficiency of the evidence to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.” *United States v. McNeil*, 320 F.3d 1034, 1035 (9th Cir. 2003), cert. denied, 540 U.S. 842 (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). Interpretation of the elements of a criminal statute are reviewed de novo. *McNeil*, 320 F.3d at 1035.

6. Appellant argues that the record does not contain evidence that he yelled at Farmer and that Farmer testified that Appellant never threatened her. According to the transcript, Farmer

testified that when Appellant entered the room, he began questioning her, and the conversation turned into an argument. She testified that he was “yelling” at her and she moved to another area in the living room and their argument got louder (tr., p. 16). She then told him to calm down because their son was asleep and had to attend school the next morning (tr., p. 23).

7. With respect to the standard of review, it is not the function of the appellate court to reassess the testimony of the witnesses. As a rule, appellate courts give deference to the credibility findings of trial courts because of the trial court’s ability to observe the demeanor and evaluate the credibility of witnesses. See *United States v. Hood*, 493 F.2d 677, 680 (9th Cir.) cert. denied, 419 U.S. 852, 42 L. Ed. 2d 84, 95 S. Ct. 94 (1974)). Accordingly, in light of the transcript evidence this court is not swayed by Appellant’s argument that the Trial Court erred in finding the necessary elements to establish the offence of “unreasonable noise” within Section 580

V. Public Space

8. The second issue is whether the residence at 7621 S. Yoem Bo-Oh where the altercation between the victim and defendant occurred is a “public place” for purposes of 4 PYTC § 1-580(A)(3).

9. Appellant argues that the court’s determination that 7621 South Yoem Bo-Oh is a public place is unsupported by the evidence. Appellant compares the Pascua Yaqui Criminal Code statutes 4 PYTC § 1-580 and 4 PYTC § 1-300 and draws attention to Section 580 which is included in “Crimes Against the Public” and as this court notes under Section 580 (B) is defined as a place that is not private property. Section 300 is under the “Property Crimes” section along with offenses such as burglary, cutting a fence, and breaking and entry. If authorities cannot satisfy the “public” offense requirement of Section 580, they can charge an offender pursuant to Section 300, which has no such requirement. It appears that the Tribe’s inclusion of two separate classifications for disorderly conduct demonstrates the Tribal Council’s intent to punish acts that occur in a public place separately from those occurring in a private residence.

10. According to 4 PYTC § 1-580(A)(3), “Any person who commits any of the following shall be guilty of an offense: Causes any unreasonable noise in a public place.” Section B provides, “A public place shall mean any place which is regularly held open to the public for the use of the general public, *is owned by the Tribe or Community*, is a public street *or is not private property*.” (emphasis added). The plain meaning of this statute is clear: any place owned by the Tribe is considered a public place. This section, however, cannot be read in isolation so as to omit the lawful prescription that includes restrictions and covenants that the Tribe has turned its mind to in regulating the public domain.

11. In this particular situation, resolving the issue may have benefited from confirmation of the legal status of the residence - property that the Tribe unquestionably owns. There was only argument of counsel, and arguments of counsel cannot take the place of factually supported objective evidence. See *In re De Blauwe*, 736 F.2d 699, 705, (Fed. Cir. 1984).

12. As noted by counsel, 4 PYTC § 1-300 (disorderly conduct) provides that “a person commits disorderly conduct if with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person... makes unreasonable noise.” See 4 PYTC § 1-300(B). This appears to be the correct statute under which Tribal Council expects an offender who makes “unreasonable noise” within the boundaries of his own home to be charged.

13. Delineating a disorderly conduct offence separate and apart from a regularly attended public place is consistent with the Tribe’s assignment of communal property rights to individual tribal members; if a member of the Pascua Yaqui Tribe meets certain requirements pursuant the Code, a Tribal member may be eligible for a land assignment which allows the member the right to occupy and use a Parcel of land held by the Tribe. 8 PYTC § 4-1-110; 8 PYTC § 4-1-7 (B) (E) (F). When Tribal Council grants possession of a Land Assignment to a member, that member may apply for a Lease for purposes of obtaining a mortgage loan from a lender, they may construct or place improvements on a Parcel and they may transfer their rights in a Parcel to another person who meets the Code’s eligibility requirements, many of the same rights of possession enjoyed by persons who have private property rights to any piece of land. 8 PYTC §§

4-1-240, 251, 270. The provisions in the Regulatory Code are likewise consistent with the principle that Tribal members who hold a Land Assignment or a Certificate of Use and Possession have a strong privacy interest in their residence. There is no indication in the Property and Regulatory Code that a person's residence is a public place or is open to the public.

14. With respect to the standard of review, this court refers to the principle of unreasonable results in response to situations where the application of a statute's plain meaning could not be what the legislators meant to accomplish. See *United States v. Brown*, 333 U.S. 18, 27, 68 S. Ct. 376, 92 L. Ed. 442 (1948); *F.B.I. v. Abramson*, 456 U.S. 615, 640, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982); *Public Citizen v. United States Dept't. of Justice*, 491 U.S. 440, 470, 109 S. Ct. 2558; 105 L. Ed. 2d 377 (1989)(Kennedy, J., concurring, noting that unreasonable consequences allow the judiciary to avoid applying a statute's plain meaning.). In this instance, having regard to the foregoing principle and the availability of an offence for disorderly conduct under 4 PYTC § 1-300(B), it is unlikely that the Tribal Council intended a residence on the reservation be deemed a "public place".

15. In addition, counsel cites *United States v. Taylor*, 258 F.3d 1065 (9th Cir. 2001) in which the defendant's conviction for disorderly conduct was reversed for failure to establish the "public" element of the statute. This court finds the Ninth Circuit's reasoning persuasive since disorderly conduct required "a public component to the proscribed behavior." Likewise, in this case, Section 580(B) requires a public component to the proscribed behavior. The phrase "regularly held open to the public for the use of the general public" modifies whether the property is also owned by the Tribe or Community, is a public street, and not private property. The Appellant's conduct took place in his home and is therefore not public place under the statute.

16. Appellant also contends that he has a privacy interest in his residence. Although there was no search or seizure in Appellant's rented home, it should be noted that Article 1 § 1(b) of the Pascua Yaqui Constitution and the Fourth Amendment of the U.S. Constitution protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Pascua Yaqui Const. Art. 1 § 1(b); U.S. Const. amend. IV.

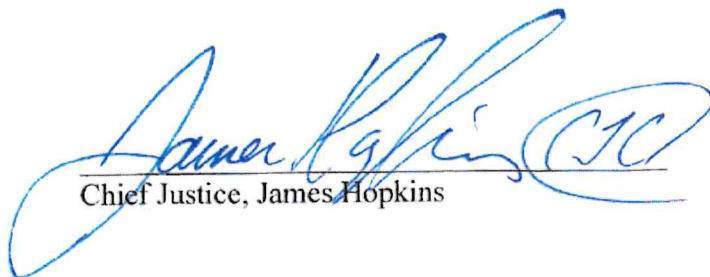
A defendant invoking the protection of the Fourth Amendment must demonstrate that he personally has a reasonable expectation of privacy in the place searched. See *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998). An individual can have a reasonable expectation of privacy in a rented room. See *McDonald et al. v. United States*, 335 U.S. 451, 454, 69 S. Ct. 191, 93 L. Ed. 153 (1948). Thus, the reasonable expectation of privacy can extend not only to a home that an individual owns, but it may also extend to rental property.

17. The altercation between Farmer and Appellant occurred in his private residence, which is not open to public use.

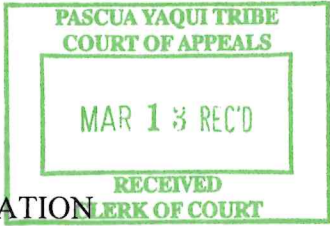
VI. Conclusion

18. For the foregoing reasons, Appellant's conviction and sentence are reversed.

So ordered on this 12th day of June 2013.



Chief Justice, James Hopkins



IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,) APPELLATE CASE NO. CA-13-001
)
Appellee,) PASCUA YAQUI TRIBAL COURT NO.:
) CR-12-209
vs.)
)
MALDONADO, RENE,)
)
Appellant.)
_____)

OPENING BRIEF

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TABLE OF CONTENTS

I. TABLE OF CONTENTS.....2

II. TABLE OF AUTHORITIES.....3-4

III. JURISDICTIONAL STATEMENT.....5

IV. STATEMENT OF THE CASE.....6

V. STATEMENT OF FACTS.....7-9

VI. ISSUES PRESENTED FOR REVIEW.....10

VII. STANDARD OF REVIEW.....11

VIII. ARGUMENT.....12-24

A. Whether the Tribal Court erred in finding that there was evidence beyond a reasonable doubt that Appellant made an unreasonable noise in a public place in violation of 4 PYTC §1-580(A)(3).....12-15

B. Whether the Tribal Court erred in finding that the alleged disorderly conduct, which occurred in Appellant’s private home, constituted a crime against the public under the criminal code.....15-24

IX. CONCLUSION.....25

X. CERTIFICATE OF SERVICE.....26

TABLE OF AUTHORITIES

Cases

<i>United States v. Chung</i> , 659 F.3d 815, 823 (9 th Cir. 2011).....	11
<i>Jackson v. Virginia</i> , 443 U.S. 307, 319 (1979).....	11, 13
<i>Martinez v. Santa Clara Pueblo</i> , 540 F.2d 1039, 1047 (1976).....	12
<i>Miles v. United States</i> , 103 U.S. 304, 312 (1881).....	12
<i>Leland v. Oregon</i> , 343 U.S. 790, 795 (1952).....	12
<i>In Re Winship</i> , 397 U.S. 358, 361 (1970).....	12, 13, 21
<i>State v. Barr</i> , 183 Ariz. 434, 438 (Ariz. Ct. App. 1995).....	17
<i>Zbaraz v. Madigan</i> , 572 F.3d 370, 386-387 (7 th Cir. 2009).....	18
<i>Treadway v. Gateway Chevrolet Oldsmobile Inc.</i> , 362 F.3d 971, 976 (7 th Cir. 2004).....	18
<i>FutureSource L.L.C v. Reuters Ltd.</i> , 312 F.3d 281, 284-85 (7 th Cir. 2002).....	18
<i>United States v. United States Dist. Court</i> , 407 U.S. 297, 313 (1972).....	19
<i>Payton v. New York</i> , 445 U.S. 573, 589-590 (1980).....	19
<i>McDonald v. United States</i> , 335 U.S. 451, 458-460 (1948).....	19
<i>State v. Gissendaner</i> , 177 Ariz. 81, 84 (Ariz. Ct. App. 1993).....	19-20
<i>Katz v. United States</i> , 389 U.S. 347, 351 (1967).....	20
<i>Stoner v. California</i> , 376 U.S. 483, 489-90 (1964).....	20
<i>Juan H. v. Walter Allen III</i> , 408 F.3d 1262, 1279 (9 th Cir. 2004).....	21
<i>United States v. Taylor</i> , 258 F.3d 1065, 1068 (9 th Cir. 2001).....	21
<i>United States v. Coutchavlis</i> , 260 F.3d 1149 (9 th Cir. 2001).....	23

Tribal Authority

Constitution of the Pascua Yaqui Tribe, Article VIII, §5.....5
Court of Appeals Procedures Act of 2000 §1.12.....5

Pascua Yaqui Codes

4 PYTC §1-580(A)(3).....7, 15, 16
4 PYTC §3-10(D).....7
4 PYTC §1-130(A)(2).....7
4 PYTC §1-300(B)15, 16
1 PYTC §2-30(B).....16
1 PYTC §2-30(H).....17
8 PYTC §4-1-20.....21
8 PYTC §4-1-220.....21
8 PYTC §4-1-230.....21
8 PYTC §4-1-270.....21
8 PYTC §4-1-290.....21

Arizona Authority

A.R.S. §13-2904.....17
Ariz. Const., art. 2.....19

Federal Authority

25 U.S.C.A. §1302(8).....12
36 C.F.R. §2.34(a)(2).....22, 23

JURISDICTIONAL STATEMENT

The jurisdiction of the Pascua Yaqui Court of Appeals extends to all appeals from final orders and judgments of the Tribal Court, in both civil and criminal matters. *See* Pascua Yaqui Const., art. VIII, §5 and the Pascua Yaqui Court of Appeals Procedures Act of 2000, §1.12 (codified under Title 10 of the Pascua Yaqui Judicial Titles and Codes). Appellant Rene Maldonado appeals an order of the Pascua Yaqui Tribal Court [December 18, 2012, Order entered in CR-12-209] in which the trial court sentenced him for a Disorderly Conduct/Domestic Violence conviction.

STATEMENT OF THE CASE

On August 2, 2012, the Tribe filed a criminal complaint against Appellant Rene Maldonado [*hereinafter* “Appellant”] charging him with one count of Disorderly Conduct/Domestic Violence and one count of Assault/Domestic Violence. [*PYT v. Rene Maldonado*, Pascua Yaqui Trial Court Record, document 30, *hereinafter* “Record at 30”]. Appellant’s initial appearance was held on August 2, 2012. [Record at 27]. The court determined that there was probable cause to support the charges against Appellant and ordered him released on a suspended (\$250) bond. [*Id.*]. Appellant was arraigned at the same hearing. He entered a plea of not guilty to both charges. [*Id.*]. Appellant’s bench trial was held on December 4, 2012. [Record at 6]. At the close of the Tribe’s case, defense counsel Melissa Acosta moved the trial court for a directed verdict; the court denied the motion. [*Id.*]. The court found Appellant not guilty of Assault/Domestic Violence [*Id.*]. The court decided, however, that the Tribe had proven that he was guilty of Disorderly Conduct/Domestic Violence. [*Id.*]. On December 18, 2012, Appellant was sentenced to pay a fine of \$200, plus a court cost of \$100. [Record at 4]. Upon Appellant’s motion, the trial court issued an order to stay his sentence on January 14, 2013. [Record at 1]. Appellant’s Notice of Appeal was filed on January 14, 2013. [Record at 3]. This Court filed its Rule 120 Notice on February 14, 2013.

STATEMENT OF FACTS

The Tribe's criminal complaint against Appellant alleged that on August 2, 2012, at approximately 5:23 a.m., "at or near 7621 S. Yoem Bo-oh," Appellant "argued with his girlfriend Kimberly Farmer," which caused an unreasonable noise in a public place, a Disorderly Conduct violation under 4 PYTC §1-580(A)(3), and a Domestic Violence offense under 4 PYTC §3-10 [Record at 30]. The complaint also alleged that Appellant committed Assault, by holding a step-stool over his girlfriend "in an aggressive manner," violations of 4 PYTC §1-130(A)(2) and 4 PYTC §3-10 respectively. [*Id.*].

At trial, Kimberly Farmer testified that Appellant argued with her inside of their home at 7621 S. Yoem Bo-oh. [Transcript at 19-20, *hereinafter* Tr. at X]. Ms. Farmer testified that she was "relaxing" in the living room when Appellant came in and asked why she was not in bed yet. [Tr. at 19, lines 1-3]. Ms. Farmer stated, "I wanted to relax by myself, because everybody was in bed." [Tr. at 20, lines 4-5]. This exchange occurred at approximately "4:00 or 5:00" in the morning. [Tr. at 20, lines 6-9]. Ms. Farmer admitted that she became irritated at Appellant because, "he kept asking me, sitting there asking me the same questions over and over." [Tr. at 21, lines 14-19]. After moving to another couch, Ms. Farmer testified, "I didn't want to keep the confrontation going so I told him to calm down, because our child was asleep, he had school the next day." [Tr. at 23, lines 13-16]. On cross-examination, Ms. Farmer conceded that Appellant had never yelled nor threatened her. [Tr. at 30, lines 12-14]. Pascua Yaqui Police Officer Dale Pascual, who investigated the incident, testified that the argument occurred inside of Appellant's home – not outside or down the street. [Tr. at 11, line 25; Tr. at 12, lines 1-5]. Officer Pascual

arrested Appellant at 5:23 a.m. [Record at 31]. The testimony from Ms. Farmer and Officer Pascual concluded the Tribe's evidence concerning the disorderly conduct charge.

At the close of the Tribe's case-in-chief, defense counsel Melissa Acosta made a motion for a directed verdict, alleging that the Tribe failed to meet its burden of proof with regard to the disorderly conduct charge. [Tr. at 31, lines 1-3]. Ms. Acosta stated that, under 4 PYTC §1-580(A)(3), the Tribe failed to establish that the alleged offense occurred in a public place. [*Id.*, lines 3-13]. "Their allegations are that this incident took place entirely in the home which is not a public place," Ms. Acosta argued. [*Id.*, lines 6-9]. Ms. Acosta pointed out that 4 PYTC §1-580(B) states that "[a] public place shall mean any place which is regularly held open to the public for the use of the general public, is owned by the Tribe or Community, is a public street, or is not private property." [Tr. at 32, lines 6-19]. The Tribe specifically charged Appellant under that code section, Ms. Acosta pointed out. [*Id.*, lines 8-9]. "Clearly a home is not a public place," Ms. Acosta added. [*Id.*, lines 17-19].

Arguing for the Tribe, Ms. Castro countered that 7621 South Yoem Bo-Oh – the home shared by Appellant and Ms. Farmer – was a public place. [Tr. at 31, lines 15-18]. Ms. Castro responded that the code allows for the place to be owned by the Tribe or community. [*Id.*, lines 23-25]. "That house is owned by the Tribe as the, the sections, the address of 7621 South Yoem Bo-Oh are [sic] rental homes which is [sic] owned by the Tribe and not, it's not private," Ms. Castro stated. [Tr. at 25-26] "It is not owned by the, by the home owner," Ms. Castro added. [Tr. at 33, lines 2-3]. Ms. Acosta countered, "[t]hat's not been submitted into evidence, Your Honor. That is not part of the Tribe's case." [Tr. at 33, lines 5-6]. The trial court did not respond

to Ms. Acosta's argument, and instead summarily denied the directed verdict motion. [*Id.*, lines 7-8]. Ms. Acosta was then directed to call her witnesses. [*Id.*].

Ms. Acosta called Appellant to testify. [Tr. at 33, lines 10-11]. When asked about the incident, Appellant stated that he had been sleeping and woke up. [*Id.*, line 19]. After noticing that Ms. Farmer was not laying next to him, Appellant went into their living room. [*Id.*, lines 23-24]. Appellant, who is blind, stated that he could hear the television and heard Ms. Farmer's voice coming from the room. [Tr. at 36, lines 3-18]. "I asked her what time it was, if she was okay, and she said that her knee was bothering her, and that she was trying to relax," Appellant testified. [*Id.*, lines 19-22]. He learned that it was 4:00 o'clock in the morning. [Tr. at 36, line 25 - Tr. at 37, lines 1-4]. Appellant testified that he never yelled at Ms. Farmer, nor threatened her. [Tr. at 43, lines 2-5]. After Appellant's testimony, the defense rested. [Tr. at 44, line 6]. The parties then gave their closing arguments. [*Id.*, lines 11-12].

In closing, Ms. Acosta asserted that the Tribe failed to prove beyond a reasonable doubt that Appellant "made unreasonable noise in a public place." [Tr. at 46, line 11]. Ms. Acosta reiterated that the alleged incident occurred "in the home." [*Id.*, line 12]. The Tribe also failed to prove that Appellant made unreasonable noise, Ms. Acosta argued. [*Id.*]. After arguing that the Tribe also failed to prove that Appellant committed assault, the court issued its ruling. It found Mr. Maldonado guilty of Disorderly Conduct/ Domestic Violence and not guilty of Assault/ Domestic Violence. [Tr. at 48, lines 7-14].

ISSUES PRESENTED FOR REVIEW

1. Whether the Tribal Court erred in finding that there was evidence beyond a reasonable doubt that Appellant made an unreasonable noise in a public place in violation of 4 PYTC §1-580(A)(3).
2. Whether the Tribal Court erred in finding that the alleged disorderly conduct, which occurred in Appellant's private home, constituted a crime against the public under the criminal code.

STANDARD OF REVIEW

The Pascua Yaqui Constitution and Pascua Yaqui Judicial Titles and Codes are silent regarding the standards of review to be applied by the Pascua Yaqui Court of Appeals. In other jurisdictions, appellate courts apply a *de novo* standard when reviewing the sufficiency of the evidence to uphold a conviction. *United States v. Chung*, 659 F.3d 815, 823 (9th Cir. 2011), citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The test is whether or not, 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. *Id.*

ARGUMENT

I. NO EVIDENCE SUPPORTED THE TRIBAL COURT'S FINDING THAT APPELLANT MADE AN UNREASONABLE NOISE IN A PUBLIC PLACE IN VIOLATION OF 4 PYTC §1-580(A)(3).

Article I, § 1 of the Pascua Yaqui Constitution provides that all Indians within the jurisdiction of the Tribal Court shall be entitled to due process of law. Likewise, the Indian Civil Rights Act (ICRA) provides that “No Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law.” 25 U.S.C.A. §1302(8). In *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1047 (1976) (*rev'd on other grounds*), the court held that, while the Fourteenth Amendment standards do not apply with full force to tribal nations, “[t]he history and decisions teach us that the Indian Bill of Rights is modeled after the Constitution of the United States and is to be interpreted in the light of constitutional law decision.” Accordingly, U.S. Supreme Court constitutional jurisprudence provides strong guidance as to the due process rights which should be accorded to defendants in Pascua Yaqui Tribal Court.

The U.S. Constitution requires that guilt of a criminal charge be established by proof beyond a reasonable doubt. *See, e.g. Miles v. United States*, 103 U.S. 304, 312 (1881), *Leland v. Oregon*, 343 U.S. 790, 795 (1952). Writing for the majority in *In Re Winship*, 397 U.S. 358, 361 (1970), Justice Brennan asserted the reasonable-doubt standard is “indispensible to command the respect and confidence of the community in applications of the criminal law.” *Id.* at 364.

Explaining further, the Court noted:

It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt **with utmost certainty**.

Id. (emphasis added).

When a reviewing court determines that the prosecution failed to prove an essential element of a criminal offense, it must vacate such a conviction. The standard of review for sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Here, in prosecuting and convicting Appellant for making an “unreasonable noise” in a “public place,” the Tribe failed to present *any* evidence – much less, evidence beyond a reasonable doubt – that Appellant made *any* such noise in *any* public place.

A. There Was No Evidence of an Unreasonable Noise.

The record is void of any evidence by which a reasonable trier of fact could conclude that Appellant made or caused a noise that could be deemed “unreasonable” pursuant to 4 PYTC §1-580(A)(3). There were just two witnesses in this case who could give competent evidence of the requisite “unreasonable noise.” Both witnesses, Appellant and Ms. Farmer, offered no such evidence. Appellant testified that he never yelled at Ms. Farmer, nor threatened her. [Tr. at 43, lines 2-5].

On cross-examination, Ms. Farmer conceded that Appellant had never yelled nor threatened her. [Tr. at 30, lines 12-14]. Ms. Farmer testified that she became irritated at Appellant because, “he kept asking me, sitting there asking me the same questions over and over.” [Tr. at 21, lines 14-19]. Moreover, based on Ms. Farmer’s testimony, any “noise” from her interaction with Appellant was evidently *not* very loud. She testified that her son was asleep in the next room. [Tr. at 23, lines 13-16]. “I didn’t want to keep the confrontation going so I told him to calm down, because our child was asleep, he had school the next day,” Ms. Farmer noted. [*Id.*].

Applying the sufficiency of evidence standard in *Jackson v. Virginia* to this case, even viewing the evidence in the light most favorable to the prosecution, there is no evidence of a noise that could be considered unreasonable. Accordingly, no rational trier of fact could conclude that the Tribe proved beyond a reasonable doubt this essential element of disorderly conduct pursuant to 4 PYTC §1-580(A)(3).

B. There Was No Evidence that Appellant’s Home Was a “Public Place”.

Similarly, it is clear from the record that the Tribal Court was presented with insufficient facts to prove beyond a reasonable doubt that the Appellant committed disorderly conduct under 4 PYTC §1-580(A)(3). The court’s conclusion that Appellant committed a crime in a public place was not supported by *any* competent evidence. Rather, it was based entirely upon the argument of counsel, which does not satisfy the requirements of due process.

The court erred when it accepted the Tribe’s unfounded argument and conjecture, rather than using supported facts, to determine that Appellant’s private home qualified as a public place under the code. The sufficiency of evidence standard set forth in *Jackson v. Virginia* requires a reviewing court to view the “evidence” in the light most favorable to the prosecution; however,

this demands a review of actual facts. This Court must reverse the Appellant's conviction, not just to honor the Appellant's due process rights, but as a matter of public policy. As noted by Justice Brennan, it is "indispensible to command the respect and confidence of the community in applications of the criminal law."

All members of the Pascua Yaqui Tribe should have confidence that their courts will not judge them guilty of a criminal offense without *facts* that prove their guilt "with utmost certainty." To allow the Tribal Court's decision – which was based on mere argument – to stand would most certainly undermine the community's confidence in its judiciary.

II. THE TRIBAL COURT ERRED IN FINDING THAT THE ALLEGED DISORDERLY CONDUCT, WHICH OCCURRED IN APPELLANT'S PRIVATE HOME, CONSTITUTED A CRIME AGAINST THE PUBLIC.

A. The Pascua Yaqui Criminal Code Differentiates Between Disorderly Conduct that Occurs in a Public Place and Disorderly Conduct that Occurs in a Private Context.

The Pascua Yaqui Criminal Code includes two separate Disorderly Conduct offenses. One of the offenses, 4 PYTC § 1-580, is listed under subsection F, Crimes Against the Public. The other section, 4 PYTC § 1-300, is listed under subsection D, Property Crimes. The offense of disorderly conduct is the only criminal offense listed in the code that has two separate classifications. Section 580, which is in the Crimes Against the Public section, is included among such offenses as Urinating and Defecating in Public, Public Indecency, and Dumping Trash on Tribal Property. By contrast, Section 300, which is under the Property Crimes section, is listed among such offenses as Burglary, Cutting a Fence, and Breaking and Entry. If authorities are unable to satisfy the "public" offense requirements of Section 580, they have the option of charging someone under Section 300, which has no such requirement.

The Code sections read as follows:

Section 300 (4 PYTC § 1-300)

A person commits disorderly conduct if, with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:

- (A) Engages in fighting, violent or seriously disruptive behavior.
- (B) Makes unreasonable noise.
- (C) Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person.
- (D) Recklessly handles, displays or discharges a deadly weapon or dangerous instrument.

Section 580 (4 PYTC § 1-580)

(A) Any person who commits any of the following shall be guilty of an offense:

- (1) Engages in fighting or provoking a fight in a public place; or
- (2) Disturbs or annoys any public or religious assembly; or
- (3) Causes any unreasonable noise in a public place; or
- (4) Uses any obscene or offensive language or gestures in a public place; or
- (5) Engages in any other act of public indecency or immorality.

(B) A public place shall mean any place which is **regularly held open to the public for the use of the general public**, is owned by the Tribe or Community, is a public street, or is **not private property**.

(Emphasis added).

Viewing sections 580 and 300 together, it is clear that Section 580 contemplates those acts which occur *only* in a public place. 1 PYTC §2-30(B) states that the Code “shall be construed as a whole to give effect to all its parts in a logical, consistent manner.” A reading of Section 580 makes clear that the Tribal Council’s main purpose in enacting this code section was

the preservation of peace and good order in public spaces. The Tribal Council's intent to proscribe behavior that provokes a reaction from a group of people is demonstrated through the kinds of acts referenced in Section 580: making obscene gestures, using offensive language, or disturbing a public religious assembly.

It should be noted that in most other jurisdictions, including Arizona, there is only one Disorderly Conduct offense. The Arizona disorderly conduct statute, A.R.S. § 13-2904, which in many ways mirrors the language of Section 300 of the Pascua Yaqui Criminal Code, does not require that the acts must occur in a public place. The fact that the Pascua Yaqui Criminal Code includes two separate classifications for disorderly conduct demonstrates the Tribal Council's intent to punish acts that occur in the public sphere separately from those that occur in a private residence. By enacting two separate disorderly conduct code sections, the Council evidenced its intention to limit cases that can be brought under Section 580 to those that occur solely in a public place.¹

1 PYTC § 2-30(H) provides that “[c]riminal offense ordinances shall be construed according to the fair import of their terms, with a view to affect their object and to promote justice.” The Tribe's claim that the Appellant's home is somehow a public place, and therefore qualifies as an essential element of Section 580, is an unreasonable and precarious interpretation of that code section. The Tribe's claim makes a mockery of the Tribal Council's intent to give clear notice to the Pascua Yaqui community as to what constitutes a public place. To give

¹ *But see State v. Barr*, 183 Ariz. 434, 438 (Ariz. Ct. App. 1995), where the Arizona Court of Appeals concluded that A.R.S. §13-1502(A), the criminal trespass statute, applied to both private and public property. “There is no indication in the statute or elsewhere that the legislature intended to limit this criminal trespass statute to private property. The legislature could have distinguished between private and public property, but did not; rather, it used the phrase ‘any real property’ in the definition of the offense.”

credence to the Tribe's argument would be an injustice not only to the Appellant, but to the community as a whole. Since the Tribal Council included a "publicness" element in Section 580 of the code, and included no such element in Section 300, the Tribe cannot rightfully argue that incidents occurring within a private residence should be chargeable under Section 580. There is no evidence in the record demonstrating that Appellant's private home was sufficiently public to support the charged crime.

B. Courts Have a Duty to Avoid Construing Statutes In a Manner That Leads to Absurd Results.

Furthermore, Courts have a duty to construe a statute in a way that accords with common sense and considers the public and legislative impact. In *Zbaraz v. Madigan*, 572 F.3d 370, 386-387 (7th Cir. 2009), the court noted, "[j]ust as we will not reach for an unconstitutional interpretation of statutory language, neither will we construe a statute in a way that leads to absurd results." See *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 (7th Cir. 2004) ("Nonsensical interpretations of contracts, as of statutes, are disfavored ... [n]ot because of a judicial aversion to nonsense as such, but because people are unlikely to make contracts, or legislatures statutes, that they believe will have absurd consequences.") (quoting *FutureSource L.L.C v. Reuters Ltd.*, 312 F.3d 281, 284-85 (7th Cir. 2002)). An interpretation that flies in the face of a code section's purpose will, undoubtedly, lead to an absurd result. The Tribe's interpretation of Section 580, which broadens the definition of public place to include an individual's home, could certainly result in an absurd consequence. If one were to indulge the Tribe's argument that Appellant's home is actually a public place because the Pascua Yaqui Tribe is the rightful property owner, then all homes on the Reservation would by extension also

be deemed public. Pascua Yaqui tribal members would be surprised to learn that their homes are actually public places, to be held open for the use of the general public! Under such a scenario, tribal members would have no reason to lock up their homes for privacy and protection because anyone would be entitled to enter their home as a public space, just as they would a church or community center. If one were to extend the Tribe's argument to all residences on the Pascua Yaqui Reservation, any modicum of privacy in one's home would be eviscerated.

C. Occupants of Homes Enjoy Special Constitutional Privacy Protection.

The United State Supreme Court has enshrined the idea of the home as a private space impervious to government interference under Fourth Amendment. Indeed, the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed ...” *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972). *See also Payton v. New York*, 445 U.S. 573, 589-590 (1980) (“the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant”). The Arizona Constitution is even more explicit in safeguarding fundamental liberty: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Ariz. Const., art. 2.

The privacy protections accorded to residents of a “home” have been extended to renters of houses and apartments too. *See McDonald v. United States*, 335 U.S. 451, 458-460 (1948). Courts have also held that overnight guests enjoy the right to protections of privacy. *Minnesota v. Olson*, 495 U.S. 91, 95-97 (1990) (“[T]he Fourth Amendment protects people, not places, and provides sanctuary for citizens wherever they have a legitimate expectation of privacy.”) (*quoting Katz v. United States*, 389 U.S. 347, 351 (1967)). *See also State v. Gissendaner*, 177

Ariz. 81, 84 (Ariz. Ct. App. 1993) (“As an overnight guest, the defendant had a legitimate expectation of privacy in Sorrels’ house which was protected by both the United States Constitution and by article 2, section 8 of the Arizona Constitution.”). Even hotel and motel guests enjoy privacy protections, notwithstanding the fact that guests do not “own” the hotel room. In *Stoner v. California*, 376 U.S. 483, 489-90 (1964), the U.S. Supreme Court also held that hotel or motel guests are protected by the Fourth Amendment against unreasonable governmental searches of their rooms.

Accordingly, based on Fourth Amendment jurisprudence, the Appellant, who has a legitimate property interest in his home at 7621 S. Yoem Bo-oh, also has a reasonable expectation of privacy in his domestic affairs, free from government intrusion.

D. The Tribe Failed to Prove that the Appellant’s Home Should be Considered a Public Place.

During the Appellant’s trial, the Tribe argued that the Appellant’s home, at 7621 S. Yoem Bo-oh, was in fact a public place because it was a rental property owned by the Tribe. [Tr. at 32, lines 23-26, Tr. at 33, lines 2-3]. “That house is owned by the Tribe, and not, it’s not private,” Ms. Castro told the court. [Tr. at 25-26] “It’s not owned by ... the homeowner,” she added. Defense counsel, Ms. Acosta, countered, “[t]hat’s not been submitted into evidence, Your Honor. That is not part of the tribe’s case.” [Tr. at 33, lines 5-6]. The Tribal Court did not respond to Ms. Acosta’s argument. Without comment, the court merely denied Appellant’s directed verdict motion based on the Tribe’s insufficient evidence.

By merely accepting the Tribe’s argument, with no further evidence, the Tribal Court committed a manifest error. The court accepted the Tribe’s position that the Appellant’s

residence at 7621 S. Yoem Bo-oh was owned by the Tribe and that the occupants of the home, Appellant and Ms. Farmer, were mere renters, somehow rendering their privacy interests inconsequential. Mere argument from counsel is not sufficient evidence. The court is charged with evaluating evidence and making a finding on whether the prosecution proved all elements of an offense beyond a reasonable doubt. The court here not only failed to make a reasoned finding, but allowed the Tribe's speculation and conjecture to serve as probative "facts" supporting Appellant's conviction. Such a lack of evidence "violates the Fourteenth Amendment guarantee that an accused must go free unless and until the prosecution presents evidence that proves guilt beyond a reasonable doubt." See *Juan H. v. Walter Allen III*, 408 F.3d 1262, 1279, (9th Cir. 2004) (citing *In re Winship*, 397 U.S. 358, 365-68).

The Tribe's argument also ignores the fact that, by statute, 8 PYTC §4-1-20, the Tribe has transferred parcels of land to members of the tribe for their private use. Members of the tribe are landholders of their parcel of property, which includes ownership rights such a making improvements on the property, and compliance with all building, housing, zoning, and environmental codes and laws of the Tribe. See 8 PYTC §§4-1-220, 4-1-230. Landholders also have conveyance rights and intestate rights under 8 PYTC §§4-1-270, 4-1-290. Therefore, the Appellant, like all members of the Pascua Yaqui Tribe, has a legitimate ownership interest in his home at 7621 S. Yoem Bo-oh.

When reviewing courts determine that the prosecution failed to prove an essential element of a criminal offense, they reverse such convictions. In *United States v. Taylor*, 258 F.3d 1065, 1068 (9th Cir. 2001), the Ninth Circuit Court of Appeals reversed a district court conviction where the government failed to prove that the defendant's conduct was "public" as

required by the federal disorderly conduct regulation, 36 C.F.R. §2.34(a)(2). In that case, the defendant, who was in his cabin in Yosemite National Park was awoken by a park ranger who poked him in the chest and chin. *Id.*, 258 at 1066. When he opened his eyes, the officer demanded to see some identification, to which the defendant responded, “”**** you, ****Yosemite, I don’t have to show you anything” and sat up. *Id.* The exchange between the two men eventually led to the defendant pointing to the park ranger and shouting another profanity at him. *Id.* The officer, who testified that he felt threatened by defendant’s conduct and language, arrested the defendant under 36 C.F.R. §2.34(a)(2), which requires that:

a person commits disorderly conduct when, **with intent to cause public alarm, nuisance, jeopardy or violence** or knowingly or recklessly creating a risk thereof, such person commits any of the following acts: Uses language, an utterance, or gesture, or engages in a display or act that is obscene, physically threatening or menacing, or done in a manner that is likely to inflict injury or incite an immediate breach of the peace.

Id. at 1067. (emphasis added).

In reversing the defendant’s conviction, the Ninth Circuit noted that the incident occurred “totally” within the defendant’s cabin. *Id.* at 1066. “The officer and Taylor were the only people in the cabin,” the court noted. *Id.* Citing its agreement with similar court decisions, the court held that the federal disorderly conduct statute required a “public component” to the proscribed behavior. *Id.* at 1068. “We, too, think it plain that the word “public” was intended to modify not only alarm, but also nuisance, jeopardy, and violence,” the court noted. Therefore, the court concluded, the defendant’s alleged disorderly conduct, which occurred solely inside of his cabin, could not be considered a “public” act as required by the statute. *Id.*

By contrast, in *United States v. Coutchavlis*, 260 F.3d 1149 (9th Cir. 2001), the Ninth Circuit Court of Appeals found that an altercation that occurred inside a car that was driving on a public road inside Yosemite National Park did constitute a public act under C.F.R. §2.34(a), the federal disorderly conduct regulation. In *Coutchavlis*, the defendant was driving his car with his “sometime girlfriend” when the two got into an argument. *Id.* at 1152. The defendant, while driving, punched the windshield, lengthening a pre-existing crack, and also grabbed his girlfriend’s arm, preventing her from getting out of the car. *Id.* The defendant was later arrested for disorderly conduct. *Id.* In considering whether the actions inside a car on a public road caused public alarm, the court considered the Model Penal Code definition of “public,” as adopted by the Ninth Circuit in *Taylor*, 258 F.3d at 1068. According to that definition, “[p]ublic’ means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.” Model Penal Code 250.2 (cited in *Coutchavilis*, 260 F.3d at 1154). The court held that the defendant’s alleged disorderly conduct fell “squarely within the Model Penal Code definition of “public” because the conduct took place on the highway. Moreover, even though there were no other cars or people on the road at the time of the incident, the court held that the defendant acted “recklessly,” thereby creating a *risk* of public harm, because the conduct took place on a **public road** and there was a risk that it could have resulted in a crash. *Id.* (emphasis added).

The issue considered by the court in *U.S. v. Taylor* is analogous to the issue under consideration by this Court and distinguishable from the facts in *Coutchavlis*. Like the defendant in *Taylor*, whose altercation with the park ranger occurred in his cabin, the Appellant’s alleged

disorderly conduct which arose out of an exchange with his girlfriend, occurred entirely within the confines of his **home**. By contrast, the altercation between the defendant and his girlfriend in *Coutchavlis*, although inside of a car, took place on a **road** which was accessible to the public. The *Coutchavlis* court noted that, while no other cars or people actually witnessed the incident, it nevertheless took place in a location that had the likelihood of affecting a substantial group of people. *Id.* at 1155. In Appellant's case, there was no risk that any members of the public could witness (let alone hear) the alleged disorderly conduct because it took place inside of his home at approximately 4 a.m., a time of day when nearly everyone is asleep. This Court should reason, as did the Ninth Circuit Court of Appeals, that an altercation between two people, within the confines of a home or cabin, is a private occurrence and one that creates zero risk of a public disturbance. Accordingly, this Court should conclude that the Tribe failed to meet the "public place" requirement under 4 PYTC §1-580(B).

CONCLUSION

The Tribal Court committed a manifest error when it convicted Appellant for making an “unreasonable noise” in a “public place,” in violation of 4 PYTC §1-580(A)(3). Clearly, the court not only failed to make a reasoned finding, but allowed the Tribe’s speculation and conjecture to serve as probative “facts” supporting Appellant’s conviction. When a reviewing court determines that the prosecution failed to prove an essential element of a criminal offense, it must vacate such a conviction. Even viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could conclude that the Tribe in this case proved the essential elements of the crime beyond a reasonable doubt. Accordingly, the Appellant asks this Court to reverse the trial court’s conviction.

DATED this 13th day of March 2013.

PASCUA YAQUI PUBLIC DEFENDER



Marisa A. Samuelson
Deputy Public Defender
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that Mr. Maldonado's Opening Brief was delivered this date to:


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Linda.Imonode@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Mr. Maldonado's Opening Brief was delivered this date to:

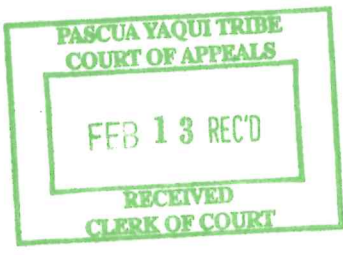
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DATED this 13th day of March, 2013.

PASCUA YAQUI PUBLIC DEFENDER



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5
6 IN THE PASCUA YAQUI COURT OF APPEALS
7 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

8 PASCUA YAQUI TRIBE,
9 Appellee,
10
11 vs.
12 MALDONADO, RENE,
13 Appellant.

) Case No. CA-13-001
)
) Tribal Court No. CR-12-209

NOTICE OF FILING OF TRANSCRIPT

14
15 Appellant Rene Maldonado, through counsel and pursuant to 3 PYTC Part II, Chapter 2-3, Section
16 110, Pascua Yaqui Tribe Rules of Appellate Procedure, respectfully files the transcript of all proceedings
17 before the lower court.

18 DATED this 13th day of February, 2013.

19 PASCUA YAQUI PUBLIC DEFENDER

20
21 *Marisa Sa*
22 _____
Marisa A. Samuelson
Deputy Public Defender

23 ORIGINAL delivered this date to
24 PYT Court of Appeals:
25 COPY of the foregoing hand-delivered this date
26 PY Prosecutor's In-Box by:
27
28

IN THE PASCUA YAQUI TRIBAL COURT
CITY OF TUCSON, STATE OF ARIZONA

STATE OF ARIZONA,) NO. CR12-209
)
Plaintiff,)
)
vs.)
)
RENE MALDONADO,)
)
Defendant.) Tucson, Arizona
December 4, 2012

BEFORE: THE HONORABLE CORNELIA CRUZ, JUDGE OF
THE PASCUA YAQUI TRIBAL COURT

APPEARANCES: PATRICIA CASTRO, ESQ.
appearing for The Tribe/Plaintiff

MELISSA ACOSTA, ESQ.
appearing for Defendant

RE: BENCH TRIAL

Christine McGarvey
Legal Transcription Services Plus, Inc.

1
2 **INDEX**

3 **WITNESS**

4 Officer Dale Pascual, Witness
5 Kimberly Farmer, Witness
6 Rene Maldonado, Witness

7 -----

8 THE COURT: The Pascua Yaqui Tribal Court is
9 now in session in the matter of the Pascua Yaqui Tribe versus Rene
10 Maldonado, Docket number CR12-209 and today's date is December
11 5th, 2012. Patricia Castro appears for the Tribe. Defendant
12 appears with legal counsel, Melissa Acosta, and this is the trial
13 hearing in this matter. And Ms. Acosta, do you waive reading of
14 your client's rights?

15 MS. ACOSTA: Yes, Your Honor.

16 THE COURT: And are the parties ready to
17 proceed to, uhm, trial?

18 MS. CASTRO: Yes, Your Honor.

19 MS. ACOSTA: Yes, Your Honor.

20 THE COURT: Go ahead.

21 MS. CASTRO: Your Honor, before the Tribe
22 begins, the Tribe would like to admit Tribe's ex --, exhibit one,
23 which is the Pascua Yaqui Tribe Enrollment Department Certificate
24 of Degree of Indian Blood. A copy has been given to defense
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1 counsel.

2 THE COURT: Any objections?

3 MS. ACOSTA: No, Your Honor.

4 THE COURT: Tribal exhibit one is moved into
5 evidence.

6
7 MS. CASTRO: And Your Honor, the Tribe would
8 like to call its first witness, Officer Dale Pascual.

9 THE COURT: So you're waiving the opening
10 statement at this time?

11 MS. CASTRO: Oh, yes, Your Honor. I'm sorry.

12 THE COURT: Okay. Officer Pascual, if you can
13 please step forward and raise your right hand. Do you solemnly
14 swear to tell the truth and nothing but the truth in this matter?
15

16 OFFICER PASCUAL: Yes, I do.

17 THE COURT: Go ahead and be seated. Go ahead.

18 MS. CASTRO: Uh, can you please state your name
19 and occupation for the Record?
20

21 OFFICER PASCUAL: Dale Pascual, police officer.

22 MS. CASTRO: And how long have you been so
23 employed?
24

25 OFFICER PASCUAL: Eight years.
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1 MS. CASTRO: In your position, have you had any
2 police training?

3 OFFICER PASCUAL: Yes.

4 MS. CASTRO: Can you please briefly tell us
5 about what type of trainings you've had?
6

7 OFFICER PASCUAL: Uhm, graduated from the academy in
8 1995. I worked for the Hualapai Police Department. I worked for
9 the (inaudible)... uhm, Sheriff's Office. Uhm, I worked for the
10 United States Marshall Service and now here.
11

12 MS. CASTRO: Okay. And were you so employed
13 here on August 2nd, 2012 at approximately 5:23 a.m.?

14 OFFICER PASCUAL: Yes.

15 MS. CASTRO: Can you briefly tell us about what
16 happened that morning?
17

18 OFFICER PASCUAL: I got a, I was dispatched to a, a
19 domestic violence call at, uhm, on Yoem-Bo-Oh. Uhm, I was advised
20 that the subject --

21 MS. ACOSTA: Objection, hearsay.

22 THE COURT: Sustained.

23 MS. CASTRO: Uhm, can you tell the court where
24 you went on this morning?
25
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1 OFFICER PASCUAL: I responded to 7621 Yoem-Bo-Oh.
2 MS. CASTRO: And what occurred when you got to
3 this address?
4 OFFICER PASCUAL: Well, prior to going to that
5 address, I was uh, advised over the radio --
6 MS. ACOSTA: Objection, hearsay.
7 THE COURT: Sustained.
8 MS. CASTRO: When you went to 7621, what
9 occurred, uhm, when you arrived at this residence?
10 OFFICER PASCUAL: I was driving a --, I was driving
11 around Yoem-Bo-Oh looking for the subject who was advised, or, I'm
12 sorry, who I was told he was walking off --
13 MS. ACOSTA: Objection, hearsay again.
14 THE COURT: Sustained.
15 MS. CASTRO: Did you come in contact with the
16 Defendant on this morning?
17 OFFICER PASCUAL: Yes. I, I did.
18 MS. CASTRO: And where did you come in contact
19 with the Defendant?
20 OFFICER PASCUAL: It was down the street on --
21 MS. CASTRO: On what street was that?
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1 OFFICER PASCUAL: Yoem-Bo-Oh.
2 MS. CASTRO: What happened when you came in
3 contact with the Defendant?
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5 OFFICER PASCUAL: I approached him and I asked him
6 who h --, what his name was, and he told me it was Rene Maldonado.
7 MS. CASTRO: The Defendant sitti--, seated to my
8 right; that's the Defendant you came in contact this morning?
9
10 OFFICER PASCUAL: Yes.
11 MS. CASTRO: Did he say anything to you?
12 OFFICER PASCUAL: He was pretty upset. He just
13 wanted to know why I was there.
14 MS. CASTRO: And then what happened?
15 OFFICER PASCUAL: I told him that I was there
16 because, uhm, a fight had occurred at that address.
17
18 MS. CASTRO: And what else happened after that?
19 OFFICER PASCUAL: I was able to, uhm, get him into my
20 vehicle and speak with him in a calm manner.
21 MS. CASTRO: And what else happened?
22
23 OFFICER PASCUAL: I was able to persuade him to go to
24 the police station with me so I can talk to him further at the
25 station.
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1 MS. CASTRO: Okay. So you, you drove the
2 Defendant to the police station?
3 OFFICER PASCUAL: Yes.
4 MS. CASTRO: And what happened at the police
5 station?
6
7 OFFICER PASCUAL: There, that's where he explained
8 what happened at, what happened at the address at 7621 Yoem-Bo-Oh.
9 MS. CASTRO: What did the Defendant say?
10 OFFICER PASCUAL: That, he stated that he was hit
11 first and that he was trying to defend himself.
12 MS. CASTRO: Did he tell you where he was hit,
13 where he seems to be hit?
14 OFFICER PASCUAL: He said he was hit at the face.
15 MS. CASTRO: Did you observe any, any signs, any
16 markings?
17 OFFICER PASCUAL: No.
18 MS. CASTRO: Did you come in contact with a
19 Kimberly Farmer on this morning?
20 OFFICER PASCUAL: Yes. I did.
21 MS. CASTRO: And did you speak to her in person?
22 OFFICER PASCUAL: Yes. I did.
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1 MS. CASTRO: Uhm, what was her demeanor?
2 OFFICER PASCUAL: She was upset over the whole thing,
3 uhm, crying and sobbing.
4 MS. CASTRO: And what else did sh --, did she
5 say anything?
6 MS. ACOSTA: Objection, hearsay.
7 MS. CASTRO: Your Honor, the de --, the, the
8 officer himself is talking to Ms. Farmer.
9 THE COURT: It's overruled. Go ahead.
10 MS. CASTRO: What did the, what did Ms. Farmer
11 tell you?
12 OFFICER PASCUAL: She told me that Rene came at her
13 with a type of foot stool.
14 MS. CASTRO: Did she say anything else?
15 OFFICER PASCUAL: And that sh --, when she was trying
16 to defend herself, she was, uh, yelling and screaming for help and
17 her roommate, David Hernandez, had come out to her rescue.
18 OFFICER PASCUAL: And this incident occurred at what
19 address?
20 OFFICER PASCUAL: 7621 Yoem-Bo-Oh.
21 MS. CASTRO: And is that in the exterior
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1 boundaries of the Pascua Yaqui Tribe?
2 OFFICER PASCUAL: Yes. It is.
3 MS. CASTRO: Nothing further, Your Honor.
4 THE COURT: Okay. Any cross Ms., uhm, Acosta?
5 MS. ACOSTA: Officer Pascual, isn't it true you
6 only spoke with Ms. Farmer over the phone?
7 OFFICER PASCUAL: Not th --, we called.
8 MS. ACOSTA: Well, I don't have that marked, but
9 let me, uh, show you, uh, read Defendant's exhibit A. Is this a
10 copy, oh, you have a copy of the report in front of you?
11 OFFICER PASCUAL: Yes.
12 MS. ACOSTA: Is this also a copy of your report?
13 OFFICER PASCUAL: Yes it is.
14 MS. ACOSTA: Does it say in that report that you
15 spoke to her over the phone, that you made contact with her over
16 the phone?
17 OFFICER PASCUAL: Oh yes, it does.
18 MS. ACOSTA: So, you didn't make contact with
19 her in person? You only made contact with her over the phone?
20 OFFICER PASCUAL: I responded back. I went back to
21 talk to her after looking for Rene and then to advise her that I
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1 placed him under arrest.

2 MS. ACOSTA: Okay. Would you agree that you
3 didn't document that in your report anywhere?

4 OFFICER PASCUAL: Yes.

5 MS. ACOSTA: Okay. And would you also agree that
6 you don't have, uhm, her demeanor documented in your report?

7 OFFICER PASCUAL: Yes.

8 MS. ACOSTA: You just say that she sounded upset
9 and disturbed?

10 OFFICER PASCUAL: Yes.

11 MS. ACOSTA: Okay. Uhm, so would you agree that
12 when you initially had contact with Ms. Farmer, you don't know
13 whether she had been drinking or not, is that correct?

14 OFFICER PASCUAL: That's correct.

15 MS. ACOSTA: Okay. You don't know her
16 personally to know what she normally would sound like?

17 OFFICER PASCUAL: Right.

18 MS. ACOSTA: Okay. Uhm, you never spoke with
19 this other person that was in the residence, is that correct?

20 OFFICER PASCUAL: What s --, wh --, wh --

21 MS. ACOSTA: You mentioned there was a, a David.

1 OFFICER PASCUAL: Oh, David Hernandez, yes.
2 MS. ACOSTA: Okay.
3 OFFICER PASCUAL: No.
4 MS. ACOSTA: So was he present when you went to
5 the residence later?
6 OFFICER PASCUAL: No. He was not.
7 MS. ACOSTA: Okay. And you don't know where he
8 went?
9 OFFICER PASCUAL: Kimberly told me he was asleep in
10 the room.
11 MS. ACOSTA: Okay. So you didn't bother to
12 question this, to what he observed occurred?
13 OFFICER PASCUAL: No.
14 MS. ACOSTA: Okay. Uhm, you c --, the contact
15 you made with Mr. Maldonado when he, is, he was walking down the
16 street, is that correct?
17 OFFICER PASCUAL: That's correct.
18 MS. ACOSTA: How far away from the residence was
19 he?
20 OFFICER PASCUAL: I'd say about half a block.
21 MS. ACOSTA: Okay. And, so, it's your
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1 understanding that an argument took place in the home?

2 OFFICER PASCUAL: Yes.

3 MS. ACOSTA: Not outside? Not down the street?

4 OFFICER PASCUAL: Yes.

5
6 MS. ACOSTA: Okay. And when you first made
7 contact with Mr. Maldonado, he told you he was the victim, is that
8 correct?

9 OFFICER PASCUAL: Correct.

10 MS. ACOSTA: Were you aware, prior to making
11 contact with Mr. Maldonado, that he was blind?

12 OFFICER PASCUAL: Yes.

13 MS. ACOSTA: Okay. And, so, when you made
14 contact with Mr. Maldonado, you had to inform him of who you were,
15 correct?
16

17 OFFICER PASCUAL: Correct.

18 MS. ACOSTA: Was he walking with his cane?

19 OFFICER PASCUAL: Yes.

20 MS. ACOSTA: Okay. So there was no doubt in
21 your mind that he is blind?
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23 OFFICER PASCUAL: Yes.

24 MS. ACOSTA: Okay. And he told you that he had
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1 | been hit in the face, is that correct?

2 | OFFICER PASCUAL: Correct, but that was after.

3 | MS. ACOSTA: When you had him at the police
4 | station?

5 | OFFICER PASCUAL: Yes.

6 | MS. ACOSTA: Because you, when you first made
7 | contact with Mr. Maldonado, you asked if you could take him to the
8 | police station to question him?
9 |

10 | MS. ACOSTA: Correct.

11 | OFFICER PASCUAL: Okay. So at the police station, he
12 | told you what happened. He told you he had been hit in the face.
13 | He picked up the foot stool to defend himself?
14 |

15 | OFFICER PASCUAL: Yes.

16 | MS. ACOSTA: Okay. You never received any
17 | information that, uh, Ms. Farmer was hit with a foot stool, is
18 | that correct?
19 |

20 | OFFICER PASCUAL: Correct.

21 | MS. ACOSTA: Okay.

22 | MS. ACOSTA: In fact, did you observe any
23 | injuries on her?
24 |

25 | OFFICER PASCUAL: No.

1 MS. ACOSTA: Okay. Were there any photos taken
2 of Mr. Maldonado?

3 OFFICER PASCUAL: No, but uh, I don't think I did.

4 MS. ACOSTA: Okay. And, in fact, when you had
5 this conversation with Mr. Maldonado at the detention facility,
6 you informed him that your report would be forwarded to the
7 prosecutor's office for review about having charges filed against
8 Ms. Farmer?
9

10 OFFICER PASCUAL: Correct.

11 MS. ACOSTA: Okay. To your knowledge, have any
12 charges against her been filed?
13

14 OFFICER PASCUAL: I don't know.

15 MS. ACOSTA: Okay. You weren't, you didn't do
16 any follow-up regarding that?
17

18 OFFICER PASCUAL: No.

19 MS. ACOSTA: Okay. I have no further questions.

20 THE COURT: Okay. Any redirect?

21 MS. CASTRO: No, Your Honor.

22 THE COURT: Thank you officer. And any other
23 witness?
24

25 MS. CASTRO: Yes, Your Honor. The Tribe at this
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1 time is calling Kimberly Farmer.

2 THE COURT: Ms. Farmer, if you can please step
3 forward and raise your right hand. Do you solemnly swear to tell
4 the truth and nothing by the truth in this matter?
5

6 KIMBERLY FARMER: Yes ma'am.

7 THE COURT: Go ahead and be seated over here.
8 Uhm, go ahead Ms. Castro.

9 MS. CASTRO: Good afternoon Mrs. Farmer.

10 KIMBERLY FARMER: Hi.

11 MS. CASTRO: Can you please tell us your first
12 and last name for the record?
13

14 KIMBERLY FARMER: Kimberly Farmer.

15 MS. CASTRO: And Ms. Farmer, can you tell us
16 what your address was on August 2nd, 2012?
17

18 KIMBERLY FARMER: 7621 South Yoem-Bo-Oh.

19 MS. CASTRO: Do you recall an incident that
20 occurred on that day?

21 KIMBERLY FARMER: Yes.

22 MS. CASTRO: Can you tell us about what happened
23 that morning?
24

25 KIMBERLY FARMER: That morning, uhm, we just had a
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1 stressful day. I was just relaxing in the living room and thought
2 everybody went to bed and then Mr. Maldonado came in and, I don't
3 know, I don't remember him, what he was asking me but it turned
4 into an argument, like I think he wanted me to go to bed, but I
5 told him I just needed to relax in the living room because we had
6 a long day and then it just turned into an argument and, uhm, for
7 him being a blind person, he knew exactly where I was sitting, and
8 his face was right here when he was yelling at me and I did not
9 hit him. I simply just pushed his face away because he was right
10 here yelling at me.
11

12
13 MS. CASTRO: Okay. And then what happened?

14 KIMBERLY FARMER: And then, then once he moved away,
15 then I stood up and I went to the other couch and then our
16 argument continued and it got louder and I told him to calm down
17 because our son was asleep and that he had to go to school and
18 then I don't know what occurred from there. The next thing I
19 remember, the foot stool being held over my head.
20

21 MS. CASTRO: Okay, uhm, let me stop you. Who
22 had the foot stool?
23

24 KIMBERLY FARMER: Rene.

25 MS. CASTRO: Okay. And what did he do with the
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1 foot stool?

2 KIMBERLY FARMER: He just held it over my head and he
3 just continued yelling at me and I kept telling him to back away
4 and then at that moment Mr. Hernandez, David Hernandez, came in
5 the room and asked what was going on and then -
6

7 MS. ACOSTA: Objection, hearsay.

8 THE COURT: Sustained.

9 MS. CASTRO: Okay, uhm, you said that he had the
10 foot stool.
11

12 KIMBERLY FARMER: Yes ma'am.

13 MS. CASTRO: What did he do with the foot stool?

14 KIMBERLY FARMER: He just held it over my head like
15 he was going to hit me with it.
16

17 MS. CASTRO: And were you afraid?

18 KIMBERLY FARMER: Yes. I was.

19 MS. CASTRO: And the Defendant, seated to my
20 right, how do you know him?
21

22 KIMBERLY FARMER: He is the father of son.

23 MS. CASTRO: And is there anything else you'd
24 like to tell the court, what happened that morning?
25

26 KIMBERLY FARMER: No. Just, that this, it scared me,
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1 because the, the whole time that me and Mr. Maldonado were
2 together, he never once yelled at me. He never once threatened to
3 hit me, so, I think that's why I was more scared and distraught.

4 MS. CASTRO: Okay. No further questions Your
5 Honor.
6

7 THE COURT: Do you have any cross Ms., uhm,
8 Acosta?

9 MS. ACOSTA: Yes, Your Honor.

10 THE COURT: Go ahead and ask.

11 MS. ACOSTA: Okay. Ms. Farmer do you currently
12 live with Mr. Maldonado?
13

14 KIMBERLY FARMER: Now I do.

15 MS. ACOSTA: Now you do? So sometime after this
16 incident, uhm, you were, were you asked to leave?
17

18 KIMBERLY FARMER: Yes. He asked me to leave.

19 THE COURT: Uhm, I'm sorry, Ms. Acosta, is, is
20 the an --, was the answer she does live with him, or no?

21 KIMBERLY FARMER: Yes. I do live with him now.

22 THE COURT: Okay.

23 MS. ACOSTA: Currently, but after this, you were
24 asked to leave his residence?
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1 KIMBERLY FARMER: Yes ma'am.
2 MS. ACOSTA: Okay. So you just recently moved
3 back in?
4 KIMBERLY FARMER: Yes ma'am.
5 MS. ACOSTA: Okay. So you admit Mr. Maldonado
6 is blind.
7 KIMBERLY FARMER: Yes ma'am.
8 MS. ACOSTA: How long has he been blind?
9 KIMBERLY FARMER: He has been blind for, for almost
10 two years now.
11 MS. ACOSTA: Maybe a little longer?
12 KIMBERLY FARMER: Maybe. Yeah.
13 MS. ACOSTA: Okay. And he's got a lot of health
14 problems?
15 KIMBERLY FARMER: Yes he does.
16 MS. ACOSTA: Okay. So you testified that, uhm,
17 it had been a stressful day. You were relaxing in the room and he
18 came in and you don't recall what he was asking you --
19 KIMBERLY FARMER: Yeah. Just -
20 MS. ACOSTA: -- for?
21 KIMBERLY FARMER: I know he was asking me what, what
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1 I was doing. I told him I was relaxing and I think he had wanted
2 me, like, to go to bed, you know, but I told him I would be in
3 there when I get ready, because I was just, I wanted to relax by
4 myself, because everybody was in bed.

5
6 MS. ACOSTA: Okay. And this was about 4:00
7 o'clock in the morning?

8 KIMBERLY FARMER: 4:00 or 5:00, or something like
9 that.

10 MS. ACOSTA: 4:00 o'clock in the morning? So you
11 had been up all night?

12 KIMBERLY FARMER: Yeah. I had been up all day and
13 all night.

14 MS. ACOSTA: Okay. And you don't recall him
15 asking you what time it was and if you were okay when he came out?

16 KIMBERLY FARMER: I know he asked me what time it
17 was.

18 MS. ACOSTA: Do you normally stay up all night?

19 KIMBERLY FARMER: Well if, yeah, sometimes I do. I
20 could, I could get like a, my second wind.

21 MS. ACOSTA: Okay. Had you been drinking that
22 night?

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KIMBERLY FARMER: I just had one drink.

MS. ACOSTA: One drink?

KIMBERLY FARMER: Just, just to calm down. Yeah.

MS. ACOSTA: Okay. So do you normally stay up and have some drinks?

KIMBERLY FARMER: Not all the time.

MS. ACOSTA: Okay. So if you had been up all day, stressful day, would you agree that you were probably pretty irritated at that point?

KIMBERLY FARMER: That's why I was trying to relax, yes ma'am.

MS. ACOSTA: Okay. So you maybe got upset when he was asking you if you were okay?

KIMBERLY FARMER: No. When he, yeah, when he kept asking me, sitting there asking me the same questions over and over. Yes, I did get irritated.

MS. ACOSTA: Okay, in fact, you admitted you pushed his face away.

KIMBERLY FARMER: Because it was right in front of my face.

MS. ACOSTA: Okay. So you physically made

1 contact with him first?

2 KIMBERLY FARMER: It wasn't a hit though. He w -

3 MS. ACOSTA: Okay. But you put your hand on his
4 face and pushed it.

5 KIMBERLY FARMER: Yeah, when it's right in front of
6 my face --

7 MS. ACOSTA: Okay.

8 KIMBERLY FARMER: -- when I tell him to leave me
9 alone and he doesn't.

10 MS. ACOSTA: Okay. But he, he, again, you
11 physically made contact with him first. Did he fall over when you
12 pushed his face?

13 KIMBERLY FARMER: No. He did not.

14 MS. ACOSTA: Where was he at when you did that?

15 KIMBERLY FARMER: He was right in front of my face,
16 got in right in front of my face, standing up.

17 MS. ACOSTA: But you were sitting down?

18 KIMBERLY FARMER: Yes. I was sitting on the couch.
19 He was somewhat leaned over. He was still standing up.

20 MS. ACOSTA: Okay.

21 KIMBERLY FARMER: But he does have a problem with

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1 balance so he did fall, 'cause I know I stood up. I didn't see
2 what he, happened to him. I stood up and I moved to the other
3 couch.

4 MS. ACOSTA: Okay. Are you about the same height as
5 Mr. Maldonado, or are you taller?
6

7 KIMBERLY FARMER: We used to be. I think we're about
8 the same height now.

9 MS. ACOSTA: Same height? Okay. So you stood up
10 when you pushed his face away?
11

12 KIMBERLY FARMER: Yeah. Because I told him to move
13 and that's when I di --, I didn't want to keep the confrontation
14 going so I told him to calm down, because our child was asleep, he
15 had school the next day --
16

17 MS. ACOSTA: Uh-huh.

18 KIMBERLY FARMER: -- so that's when I told him to
19 move so I could get up and move to the next couch.

20 MS. ACOSTA: And after you pushed his face away
21 is when he picked up the foot stool?
22

23 KIMBERLY FARMER: Yeah. And then he knew exactly
24 where I was on the other couch for someone being blind.

25 MS. ACOSTA: And you don't recall him, well
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1 | you're s --, are you yelling at him at h --, this point so he can
2 | hear you?

3 | KIMBERLY FARMER: No. I'm not.

4 | MS. ACOSTA: You're not saying anything then?

5 | KIMBERLY FARMER: I'm, I'm just telling him, leave me
6 | alone. Leave me alone. Just go to the room. Leave me alone.
7 | I'm, I'll, you know, I just wanted him to calm down because our
8 | child was asleep.

9 | MS. ACOSTA: You don't recall him telling you
10 | not to hit him anymore when he picked up the stool?

11 | KIMBERLY FARMER: He never said that.

12 | MS. ACOSTA: And you're saying that he picked up
13 | the stool over your head?

14 | KIMBERLY FARMER: Yeah, because I was sitting down.
15 | He was still standing up and he had the foot stool like this, over
16 | his head.

17 | MS. ACOSTA: Like over his head --

18 | KIMBERLY FARMER: Like th--, over his head, like
19 | this, and he was coming --

20 | MS. ACOSTA: Okay.

21 | KIMBERLY FARMER: -- you know? He was like that.

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1 MS. ACOSTA: Had Mr. Maldonado had dialysis that
2 day?

3 KIMBERLY FARMER: Uhm, no, it was a Thursday, so no,
4 he shouldn't have. His dialyses then were Monday, Wednesday, and
5 Fridays.
6

7 MS. ACOSTA: Okay. Because you know he gets
8 very weak after he's had dialysis.

9 KIMBERLY FARMER: He's, he's always weak.

10 MS. ACOSTA: He's always weak?

11 KIMBERLY FARMER: Yeah.

12 MS. ACOSTA: Okay. Okay.

13 KIMBERLY FARMER: He has a problem with his standing,
14 walking.
15

16 MS. ACOSTA: So your argument with Mr. Maldonado
17 only occurred in the home, is that correct?
18

19 KIMBERLY FARMER: Yes. It did.

20 MS. ACOSTA: Okay. You didn't leave the
21 residence after he did?
22

23 KIMBERLY FARMER: No. I didn't.

24 MS. ACOSTA: Okay. Did the officer talk to you
25 on the phone or at your house?
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1 KIMBERLY FARMER: There were several officers I
2 talked to. It wasn't just him. That's --

3 MS. ACOSTA: Okay. So there were several that,
4 uh, came?
5

6 KIMBERLY FARMER: Yeah.

7 MS. ACOSTA: Or did you talk to them over the
8 phone?

9 KIMBERLY FARMER: I talked to him in person and then
10 he did talk to me on the phone to let me know that Rene, that he
11 did not find Rene, or he was still looking for him. But there
12 were several officers that I did talk to that came. There was
13 like about three cars there.
14

15 MS. ACOSTA: So you don't remember telling an
16 officer what happened over the phone?
17

18 KIMBERLY FARMER: No. I don't. I know some of them
19 came into the home and wanted to know what's going on.

20 MS. ACOSTA: Okay. And where was David during
21 all this?
22

23 KIMBERLY FARMER: David went back to his room because
24 --

25 MS. ACOSTA: So he never came out and talked to
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1 the police?

2 KIMBERLY FARMER: He talked to some other officers,
3 not directly to him.

4 MS. ACOSTA: And you don't recall who they were?
5

6 KIMBERLY FARMER: No. I don't.

7 MS. ACOSTA: Does David s --, still live in the
8 home?

9 KIMBERLY FARMER: No. He does not.
10

11 MS. ACOSTA: Okay. Now you don't recall telling
12 the officer that, uhm, Rene grabbed the foot stool but d --, but
13 you didn't know why?

14 KIMBERLY FARMER: Yeah.

15 MS. ACOSTA: Okay. So you don't know, you
16 didn't, you didn't tell the officer that you had pushed him in the
17 face, is that correct?
18

19 KIMBERLY FARMER: Yes. I did tell the officer I pu -
20 -, I moved his face. I didn't push. I didn't, I didn't hit him,
21 I didn't him, it just, I just touched him and moved his face so I
22 could get up and move.
23

24 MS. ACOSTA: Okay. So yo --, it's your
25 testimony that you did tell the officer that?
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1 KIMBERLY FARMER: I told one of the officers.
2 MS. ACOSTA: Okay. How many, how many were at
3 your house?
4 KIMBERLY FARMER: Alls (sic) I remember was looking
5 out and there was three, three of the Suburbans, or whatever they
6 have.
7 MS. ACOSTA: Three of them?
8 KIMBERLY FARMER: Yeah.
9 MS. ACOSTA: Okay. And so there was (sic) at
10 least three police officers?
11 KIMBERLY FARMER: There was three or four. I don't
12 know.
13 MS. ACOSTA: And you specifically recall talking
14 to this officer in person?
15 KIMBERLY FARMER: Yes. I did.
16 MS. ACOSTA: And telling him everything you just
17 testified today?
18 KIMBERLY FARMER: Not everything because there was
19 (sic) other officers there asking what, there was an officer there
20 with glasses on. I don't know how many of them wear glasses. I
21 know I told him what happened.
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1 MS. ACOSTA: Did anybody ever come back and, and
2 ask you any other questions?

3 KIMBERLY FARMER: Somebody came back and told me that
4 they picked up Mr. Maldonado.

5 MS. ACOSTA: Okay. Have you ever been, have you
6 been charged out of this incident?

7 KIMBERLY FARMER: No ma'am.

8 MS. ACOSTA: I have no further questions.

9 THE COURT: Any redirect?

10 MS. CASTRO: Uhm, yes, Your Honor, just one.
11 Uhm, Ms. Farmer, you said you touched his face, correct?

12 KIMBERLY FARMER: Yes.

13 MS. CASTRO: Why did you that?

14 KIMBERLY FARMER: To move him away from my face
15 because he was about right here. Even though he was standing up,
16 he was leaning over towards me. His face was right here and I
17 asked him, I said, can you please move. He didn't wa --, didn't
18 want to move. He kept wanting to argue so I just pushed his face
19 so I could get up to move to the other couch.

20 MS. CASTRO: So what was he doing?

21 KIMBERLY FARMER: He was like this close arguing with
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1 me.

2 MS. CASTRO: Okay. No further questions Your
3 Honor.

4 THE COURT: Okay.

5 MS. ACOSTA: I, can I have just one, based on
6 that question? I just have one.

7 THE COURT: Uh, just based on that question.

8 MS. ACOSTA: Yes.

9 THE COURT: Okay. Go ahead.

10 MS. ACOSTA: You, you said that he has never
11 yelled or threatened you, not once?

12 KIMBERLY FARMER: No ma'am.

13 MS. ACOSTA: No further questions.

14 KIMBERLY FARMER: Before that, no.

15 THE COURT: Okay. And that's it. Thank you
16 Ms., uh, Farmer.

17 KIMBERLY FARMER: Thank you.

18 THE COURT: Any other witness?

19 MS. CASTRO: No, Your Honor.

20 THE COURT: And Ms., uh, Acosta, do you have
21 any witnesses?

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1 MS. ACOSTA: I do. But first, I'd like to make
2 a motion for a directed verdict Your Honor, uh, starting with
3 count one, that this vio --, this code violation clearly requires
4 a person to cause unreasonable noise in a public place. Uhm,
5 clearly, that has not been established by the Tribe. Uhm, their
6 allegations are that this incident took place entirely in the home
7 which is not a public place. Uhm, there has been no evidence to
8 suggest that Mr. Maldonado made any unreasonable noise in a public
9 place. So, uh, I would ask this court to direct a verdict on
10 count one based on a lack of a factual basis because the code
11 specifically requires those elements.

14 THE COURT: Can we hear from the Tribe?

15 MS. CASTRO: (Inaudible)... the, the, uhm, the
16 Tribe does have in its, in its complaint the address of 7621 South
17 Yoem-Bo-Oh, a public place. The Defendant was yelling and arguing
18 in the home where not only Ms. Farmer was residing but another
19 occupant, Mr. Hernandez. The Defendant was clearly making
20 unreasonable noise by arguing and yelling at, at the victim.

22 THE COURT: At this time, the motion for
23 directed verdict is denied. Uhm, a, as Tribe pointed out, the
24 address is 7621 South Yoem-Bo-Oh. Uhm, directed verdict is
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1 denied.

2 MS. ACOSTA: Your Honor, can I just, can I just,
3 uhm, make a, a further record?
4

5 THE COURT: Sure.

6 MS. ACOSTA: Uhm, under section 580 which Mr.
7 Maldonado has been charged, it, it defines what a public place is
8 and it, he has specifically been charged with this code, this
9 specific code; it says "any person who commits any of the
10 following shall be guilty (inaudible)... causes any unreasonable
11 noise in a public place" which is section A3 which the Tribe has
12 specifically charged Mr. Maldonado with. Under B, "a public place
13 shall mean any place which is regularly held open to the public
14 for the use of the general public, is owned by the Tribe, or
15 community, is a public street, or is not private property." Uhm,
16 clearly a home is not a public place and so again, we would, uhm,
17 for the record, request a directed verdict.
18
19

20 THE COURT: Okay. Do you want to argue on
21 that?
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23 MS. CASTRO: Your Honor, uhm, it does state in
24 that section that it is owned by the Tribe, or community. That
25 house is owned by the Tribe as the, the sections, the address of
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1 7621 South Yoem-Bo-Oh are rental homes which is owned by the Tribe
2 and not, it's not private. It is not owned by the, by the home
3 owner.

4 MS. ACOSTA: That's not been submitted into
5 evidence, Your Honor. That is not part of the Tribe's case.
6

7 THE COURT: Directed verdict is denied and did
8 you have any witnesses?

9 MS. ACOSTA: Yes, Your Honor. Defense ca --,
10 uh, Defense calls Mr. Maldonado.
11

12 THE COURT: Okay. And Mr. Maldonado, please
13 step forward and raise your right hand. (Inaudible - people
14 moving and giving directions)... and can you raise your right hand
15 please? Do you solemnly swear to tell the truth and nothing but
16 the truth in this matter?
17

18 RENE MALDONADO: Yes. I do.

19 THE COURT: Go ahead. Go ahead Ms., uhm,
20 Acosta.

21 MS. ACOSTA: Okay. Can you please state your
22 name?
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24 RENE MALDONADO: Rene Maldonado.

25 MS. ACOSTA: Okay. Mr. Maldonado, what do you
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1 do for a living?

2 RENE MALDONADO: I'm disabled.

3 MS. ACOSTA: Okay. Could you please describe
4 your disabilities?

5 RENE MALDONADO: Blindness, heart failure, kidney
6 failure, diabetes, multiple illnesses due to diabetes.

7 MS. ACOSTA: And how long have you been blind?

8 RENE MALDONADO: Four years.

9 MS. ACOSTA: Okay. Are you able to see
10 anything?

11 RENE MALDONADO: No.

12 MS. ACOSTA: Okay. And do you recall being
13 contacted, uhm, by the police outside your home on August 2nd, the
14 w --, everybody has been talking about today?

15 RENE MALDONADO: Yes. I recall being contacted but
16 not the date.

17 MS. ACOSTA: Okay. Was it early morning?

18 RENE MALDONADO: Yes.

19 MS. M. ACOSTA Okay. How did the police contact
20 you?

21 RENE MALDONADO: Verbally, pulling up next to me --
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1 MS. ACOSTA: Okay.
2 RENE MALDONADO: -- in the street.
3 MS. ACOSTA: Did they say anything to you?
4 RENE MALDONADO: They, uhm, identified themselves.
5 MS. ACOSTA: Okay.
6 RENE MALDONADO: And asked me what I was doing.
7 MS. ACOSTA: Okay. And what did you say?
8 RENE MALDONADO: I told him I had an argument with
9 my girlfriend and I was walking to cool off and give her a chance
10 to cool off.
11 MS. ACOSTA: Okay. And where had you been
12 before police contacted you?
13 RENE MALDONADO: I was in the home.
14 MS. ACOSTA: Okay. And what had you been doing
15 in your home?
16 RENE MALDONADO: I had been sleeping and woke up.
17 MS. ACOSTA: Okay. And when you woke up, what
18 happened?
19 RENE MALDONADO: I noticed that Kimberly wasn't
20 laying next to me and went into the living room.
21 MS. ACOSTA: Okay. Does she normally sleep next
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1 to you?

2 RENE MALDONADO: Yes.

3 MS. ACOSTA: Okay. So when you went into the li

4 --, did you go, you went into the living room, then what happened?

5

6 RENE MALDONADO: I ha --, I heard the t.v.

7 MS. ACOSTA: Okay.

8 RENE MALDONADO: I asked if anyone was in there.

9 Heard --

10 MS. ACOSTA: Was it?

11 RENE MALDONADO: I heard Kimberly's voice.

12 MS. ACOSTA: Okay. Are you able to see Kimberly

13 at all?

14

15 RENE MALDONADO: No.

16 MS. ACOSTA: Okay. And, uhm, when you heard

17 Kimberly's voice, did you say anything?

18

19 RENE MALDONADO: Yes. I asked her what time it was,

20 if she was okay, and she said that her knee was bothering her, and

21 that she was trying to relax.

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23 MS. ACOSTA: Okay. And did you say anything

24 after she told you that her knee was bothering her?

25 RENE MALDONADO: I asked her what time it was and --

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1 MS. ACOSTA: Did she tell you?
2 RENE MALDONADO: Yes. It was approximately 4:00
3 o'clock in the morning.
4 MS. ACOSTA: Okay. Do you believe, or did you
5 believe that she had been up all night when you went out to the
6 living room?
7 RENE MALDONADO: Yes.
8 MS. ACOSTA: Okay. Did you know whether Kim had
9 been drinking that evening?
10 RENE MALDONADO: No. I do not.
11 MS. ACOSTA: Okay. You don't know, or --
12 RENE MALDONADO: No.
13 MS. ACOSTA: -- do you know she hadn't? You
14 don't know?
15 RENE MALDONADO: No.
16 MS. ACOSTA: Okay. Does she drink?
17 RENE MALDONADO: On occasion.
18 MS. ACOSTA: Are you able to see her drinking?
19 RENE MALDONADO: No.
20 MS. ACOSTA: Okay. If she is drinking, how do
21 you know, if at all?
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1 RENE MALDONADO: If th --, if I was sitting next to
2 her.
3 MS. ACOSTA: Only if you were sitting next to
4 her?
5
6 RENE MALDONADO: Yes.
7 MS. ACOSTA: Okay.
8 RENE MALDONADO: I would smell the alcohol.
9 MS. ACOSTA: Do you drink?
10
11 RENE MALDONADO: No.
12 MS. ACOSTA: So, uhm, after you asked her what
13 time it was and she told you, did some more conversation occur?
14 RENE MALDONADO: Yes.
15 MS. ACOSTA: Okay. Uhm, do you recall what you
16 guys were discussing?
17
18 RENE MALDONADO: No.
19 MS. ACOSTA: Okay. Did anybody's voice rise?
20 Did you start yelling, or did she start yelling?
21 RENE MALDONADO: She started yelling.
22 MS. ACOSTA: Okay. Now you heard her, did you hear
23 her testify in court?
24
25 RENE MALDONADO: Yes.
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1 MS. ACOSTA: Did, you heard her say that she
2 just pushed your face away, that you were in her face. Is that
3 what happened?

4 RENE MALDONADO: No.

5 MS. ACOSTA: Okay. What happened?

6 RENE MALDONADO: She hit, struck me with a, either a
7 pillow or a towel.

8 MS. ACOSTA: Okay. Did she say anything before
9 she struck you with a pillow or the towel?

10 RENE MALDONADO: Not to --, what I re --, I can't
11 recall.

12 MS. ACOSTA: Okay. You weren't, were you able
13 to see what hit you?

14 RENE MALDONADO: No.

15 MS. ACOSTA: Okay. You clearly felt being hit
16 in the face?

17 RENE MALDONADO: Yes.

18 MS. ACOSTA: Okay. And had you touched her or
19 done anything before she hit you in the face?

20 RENE MALDONADO: No.

21 MS. ACOSTA: Okay. What was your reaction to
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1 being hit?

2 RENE MALDONADO: Stumbling. Shock. Disbelief.

3 MS. ACOSTA: Did you think you were going to get
4 hit again?

5 RENE MALDONADO: Yes.

6 MS. ACOSTA: Okay. So what did you do to avoid
7 getting hit again?

8 RENE MALDONADO: When I stumbled, I felt the, a foot
9 stool next to me and I picked it up to defend myself with.

10 MS. ACOSTA: Okay. Could you demonstrate to the
11 court how you held the foot stool to defend yourself?

12 RENE MALDONADO: To the right side of my head in
13 this manner.

14 MS. ACOSTA: Did you ever pick it up, put it
15 over your head, with your arms outstretched, and put it over Kim's
16 head?

17 RENE MALDONADO: No.

18 MS. ACOSTA: Okay. Are you able to see,
19 obviously you're not able to see where Kim is at. Do y --, are
20 you able to ever know where she is at?

21 RENE MALDONADO: No. Unless by sound.

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1 MS. ACOSTA: Okay. So if she's not talking, you
2 don't know where she is.
3 RENE MALDONADO: No.
4 MS. ACOSTA: Okay. And there was another person
5 in the home at this time?
6 RENE MALDONADO: Yes. There was.
7 MS. ACOSTA: Okay. Do you know where he was?
8 RENE MALDONADO: I believe he was asleep in his
9 room.
10 MS. ACOSTA: Okay. So he never came out while
11 any of this was going on, while this conversation was going on?
12 RENE MALDONADO: Yes. He did.
13 MS. ACOSTA: Okay. Wh --, at what point?
14 RENE MALDONADO: Uh, after hearing us yelling.
15 MS. ACOSTA: Okay. Did she, was that bef --,
16 after she had hit you?
17 RENE MALDONADO: Yes.
18 MS. ACOSTA: Okay. So when he came out, you
19 were already holding the foot stool?
20 RENE MALDONADO: I don't recall.
21 MS. ACOSTA: Okay. At some point, you put the
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1 | foot stool down, right?

2 | RENE MALDONADO: Yes.

3 | MS. ACOSTA: Okay. When did you put it down?

4 | Did you feel it was safe to put it down?

5 |

6 | RENE MALDONADO: Yes.

7 | MS. ACOSTA: Okay. Did you leave after you put

8 | it down?

9 | RENE MALDONADO: I put my shoes on and I left the,

10 | the home.

11 |

12 | MS. ACOSTA: Okay.

13 | RENE MALDONADO: To cool off.

14 | MS. ACOSTA: Okay. Did you tell her you were

15 | leaving?

16 |

17 | RENE MALDONADO: Yes. I told her I'm, I'm leaving

18 | so I, I'm going to take a walk so I can cool off and you can cool

19 | off.

20 | MS. ACOSTA: Okay. Did she say anything when

21 | you, when you told her you were leaving?

22 |

23 | RENE MALDONADO: Uhm, I went outside to sit down and

24 | she continued to follow me and, and yell at me, cussing at me.

25 | MS. ACOSTA: Okay.

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1 RENE MALDONADO: And then I --
2 MS. ACOSTA: Were you yelling at her?
3 RENE MALDONADO: No.
4 MS. ACOSTA: Did you ever threaten her?
5 RENE MALDONADO: No.
6 MS. ACOSTA: Okay. Did you ever pick up a foot,
7
8 foot still (sic), foot stool to, to threaten to hit her with it?
9 RENE MALDONADO: No.
10 MS. ACOSTA: Okay. You picked up a foot stool
11
12 to protect yourself, is that correct?
13 RENE MALDONADO: Yes.
14 MS. ACOSTA: And that was after she hit you in
15
16 the face?
17 RENE MALDONADO: Yes.
18 MS. ACOSTA: I have no further questions.
19 THE COURT: Okay. Any cross for, from the
20
21 Tribe?
22 MS. CASTRO: No, Your Honor.
23 THE COURT: No? Okay. Uhm, thank you Mr.
24
25 Maldonado, uhm.
26 RENE MALDONADO: Thank you.
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THE COURT: Okay. Okay. Ms. Nelson.

MS. ACOSTA: Thank you Tracy.

THE COURT: Thank you. Any other witnesses
Ms., uhm, Acosta?

MS. ACOSTA: No, Your Honor. Defense rests.

THE COURT: Okay. We will have co --, uh, do
you have any rebuttal Ms., uh, Castro?

MS. CASTRO: No, Your Honor.

THE COURT: No? We will have closing from, uh,
both the Tribe and the, uh, and defense counsel.

MS. CASTRO: Your Honor, the Tribe at this time
is requesting that the Defendant be found guilty for count one,
disorderly conduct, domestic violence, and count two, assault,
domestic violence. Testimony does show that the burden of proving
the Defendant's guilt beyond a reasonable doubt was met. After
hearing testimony from Officer Dale Pascual who stated that he did
speak to the Defendant on, on Yoem-Bo-Oh, when he made contact
with the Defendant, the Defendant was upset. The Defendant did
state that he was upset because a fight occurred in the home. He
also stated that the Defendant advised that he was hit, that he
was hit first, but that there was no markings shown. The officer

1 | did s --, also speak with Kimberly and this incident did occur at
2 | 7621 South Yoem-Bo-Oh. The victim, Kimberly Farmer, also
3 | testified that she was home on this morning and that she was home
4 | relaxing, or that she was trying to relax, when the Defendant came
5 | and was standing in front of her, in her face, where the Defendant
6 | had to push his face away in order to move away from him as the
7 | Defendant was arguing with her. She stated that when she moved to
8 | another couch, that the Defendant followed her, and again, that
9 | the Defendant was in her face, and that he was holding a foot
10 | stool over her head, and that is where the Defendant was, scared
11 | that she was going to get hit, and where count two comes in, where
12 | the imminent physical injury, where the Defendant was, scared that
13 | she was going to get hit by the, by the foot stool. Your Honor,
14 | both the officer and the victim did state that this did occur on
15 | August 2nd, at 5:23 a.m., at 7621 South Yoem-Bo-Oh, which is li--,
16 | within the exterior boundaries of the Pascua Yaqui Tribe. The
17 | Tribe also submitted into evidence, marked exhibit one, as the
18 | Defendant is enrolled with the Pascua Yaqui Tribe; therefore, Your
19 | Honor, the Tribe at this time is requesting that the Defendant be
20 | found guilty of said charges.

25 | THE COURT: Alright. Go ahead Ms. Acosta.
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1 MS. ACOSTA: Your Honor, as the Tribe correctly
2 points out, they do have the burden beyond a reasonable doubt to
3 prove these charges. For the first, f --, first, I would like to
4 point out that the complaint has two different times in it. Uhm,
5 count one says 5:23. Count two says 5:22. So I'd ask the court
6 to consider that, uhm, in its ruling because we have two different
7 times, uh, in the complaint. Count one, again, disorderly conduct
8 requires, uhm, the Tribe to prove beyond a reasonable doubt that
9 Mr. Maldonado made unreasonable noise in a public place. Uhm,
10 again, this allegedly occurred in the home. There's been no
11 evidence that Mr. Maldonado made unreasonable noise. Uh, I
12 believe that Ms. Farmer was testifying that he was bothering her
13 and asking her all kinds of questions, but I don't believe that
14 she ever said that he was making unreasonable noise, uhm, which
15 gets me also to count two. You know, a person has a right to
16 defend themselves. It is undisputed that she initiated physical
17 contact with him. By her own testimony, he had never yelled at
18 her or threatened her prior and so there is no reason for her to,
19 she, you know, she can downplay it as much as she wants, but she
20 assaulted him by pushing him in the face. That's an assault and
21 you cannot then claim, you know, to be a victim. Sh --, he did
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1 not threaten her with the foot stool. He picked it up. He
2 demonstrated to the court, he was trying to protect himself. He
3 told the officer that day, that's exactly what he did. He, you
4 know, made contact with him. He told him he was the victim. He
5 only did it to protect himself. Mr. Maldonado cannot see and if
6 somebody is hitting him in the face and he can't see what with,
7 it's reasonable for a person to pick up something to protect
8 themselves and there is sufficient evidence of justification.
9 It's the Tribe's burden to then prove that self defense was not,
10 uhm, warranted beyond a reasonable doubt and I, I don't believe
11 that they've been able to do that because by their own admission,
12 she initiated physical contact. She hit him in the face, whether
13 she pushed it or what, that's still an assault and, uhm, the code
14 requires intentionally placing somebody in reasonable apprehension
15 with imminent physical injury; however, we've raised self defense
16 and it's the Tribe's burden to disprove self defense and a --,
17 again, by their own testimony, they've not done that and you can't
18 have it both ways. You can't assault somebody and then claim, I'm
19 in fear, because a person has a right to protect themselves,
20 especially in his situation. He cannot see. He can hear and he
21 can gauge where people are but he can't see. He doesn't know what
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1 he was hit, his testimony has never waivered. He is consistent
2 with what he told the officer, uhm, that day. So, for those
3 reasons, uhm, I'd ask this court to find him not guilty of both
4 counts. I believe that the Tribe has not met their burden, uhm,
5 under either count.
6

7 THE COURT: At this time, having heard the
8 testimony, the court finds that the Tribe has met its burden of
9 proof in count one, disorderly conduct, and Defendant is found
10 guilty of that charge. For the second charge of assault, domestic
11 violence, the court finds that the Tribe has failed to meet their
12 burden of proof in this matter, and the Defendant is found not
13 guilty of count two. Uhm, Ms. Acosta, do you wish to proceed to
14 sentencing today or to set for another day and time?
15

16 MS. ACOSTA: Uh, if we could set for another day
17 and time.
18

19 THE COURT: Okay. May we have a date?

20 THE CLERK: December 18th at 3:30.

21 THE COURT: And Defendant will appear for
22 sentencing in count one on December 18th, 2012 at 3:30. And is
23 there any reason to change conditions of release?
24

25 MS. CASTRO: No, Your Honor. Same release
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1 conditions.

2 MS. ACOSTA: No, Your Honor.

3 THE COURT: This Defendant is stra--,
4 restrained from --

5 MS. CASTRO: I believe it's a no harm or harass.

6 RENE MALDONADO: It was no harm or harass.

7 MS. CASTRO: Yeah. It's a no harm or harass.

8 THE COURT: It's a no harm or harass? Okay.

9
10 And Ms. uh, uh, Wilson, is there any reason to change conditions
11 of release?

12
13 MS. WILSON: Uh, no, Your Honor. He's on
14 pretrial supervision, although limited, because of his dialysis
15 (inaudible)... I think we're fine though.

16
17 THE COURT: Okay. Again, Defendant will
18 continue under the same conditions of release. Is there anything
19 further?

20 MS. CASTRO: No, Your Honor.

21 MS. ACOSTA: No, Your Honor.

22 THE COURT: Court's adjourned.
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THE CLERK: All rise.

[END OF BENCH TRIAL]

[Transcriber's Certification Follows:]

C E R T I F I C A T E

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original digitally recorded court proceeding in the case referenced on page one above.

Transcription Completed: January 30, 2013

CHRISTINE MCGARVEY-LAW
LEGAL TRANSCRIPTION SERVICES PLUS, INC.
TRANSCRIBED BY: ANN GILLIAM

SIGNED BY: Christine McGarvey
CHRISTINE MCGARVEY

1 PASCUA YAQUI PUBLIC DEFENDER
7474 S. Camino de Oeste
2 Tucson, Arizona 85757

3 Marisa A. Samuelson, SBN 023811
4 Counsel for Appellant

PASCUA YAQUI TRIBE
COURT OF APPEALS

JAN 14 2013

ISSUED
CLERK OF COURT

5 IN THE PASCUA YAQUI TRIBE COURT OF APPEALS
6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
7

8 PASCUA YAQUI TRIBE,
9 Plaintiff/Appellee,

10 vs.

11 MALDONADO, RENE,
12 Defendant/Appellant.

) Court of Appeals Case No:
) Trial Court Case No.: CR-12-209
) **NOTICE OF APPEAL**
)

13
14 Pursuant to 3 PYTC Part II, Chapter 2-3, Section 90, Pascua Yaqui Tribe Rules of Appellate
15 Procedure, counsel for Appellant Rene Maldonado respectfully files a Notice of Appeal in the Appellate
16 Court from the Sentencing Order entered in this action by the Pascua Yaqui Tribal Court on December 18,
17 2012. A copy of the Court's Order is attached hereto as required by Section 90, Pascua Yaqui Rules of
18 Appellate Procedure.

19 The Appellant further requests that this Court enter an order directing the Clerk of the Pascua Yaqui
20 Tribal Court to prepare and submit the record within thirty (30) days.

21 DATED this 14th day of January, 2013.

22 PASCUA YAQUI PUBLIC DEFENDER

23
24 

25 Marisa A. Samuelson
26 Deputy Public Defender
27
28

///

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that the original copy of the Notice of Appeal was delivered this date to:

4 Clerk of the Court of Appeals
5 Pascua Yaqui Court of Appeals
6 7474 South Camino de Oeste
7 Tucson, AZ 85757

8 and that one copy of the Notice of Appeal was delivered this date to:

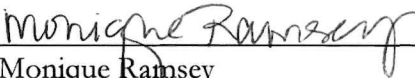
9 Hon. Cornelia Cruz
10 Pascua Yaqui Tribal Court
11 7474 South Camino de Oeste
12 Tucson, AZ 85757

13 and that one copy of the Notice of Appeal was delivered this date to:

14 Alfred Urbina
15 Chief Prosecutor
16 Office of the Prosecutor of the Pascua Yaqui Tribe
17 7474 South Camino de Oeste
18 Tucson, AZ 85757

19 DATED this 14th day of January, 2013.

20 PASCUA YAQUI PUBLIC DEFENDER

21 
22 _____
23 Monique Ramsey
24 Office Manager
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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION,

PASCUA YAQUI TRIBE)
Plaintiff)
VS.)
Maldonado Rene,)
Defendant)

No. CR-12-209

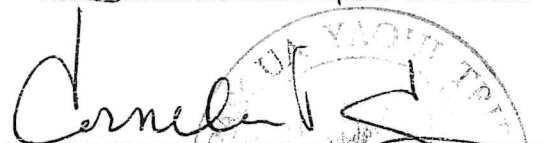
ORDER

The defendant appeared before this Court with legal counsel Melissa Acosta for Sentencing hearing on this 18th day of December, 2012. Patricia Castro appeared for the Tribe; David Flores, Chief Probation Officer appeared.

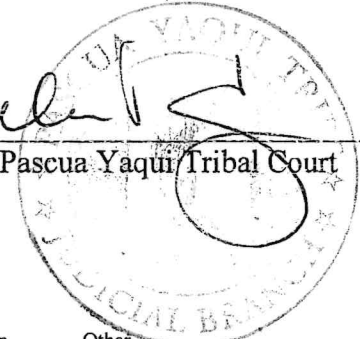
The Court finds that, defense counsel waives reading of the rights; that the Tribe makes recommendations of their own after consulting with the victim who is not present in Court; that the recommendations include jail days, fines, fees, counseling, probation and other recommendations; that the Probation Officer objects to the Tribe's recommendations given the defendant's medical history which includes dialysis and blindness which would make it difficult for the defendant to comply with the terms and conditions of probation and would be difficult to supervise the defendant and further recommends at least 24 hours in jail; that defense counsel objects and moves the Court to impose and suspend a fine and Court cost as the defendant is on a fixed and limited income; that the Tribe assures the Court that there is transportation provided for the defendant to attend counseling; that given the defendant's health issues, the Court will impose a sentence of a fine and Court cost along with a no harm or harass restriction as placing the defendant on probation will provide a hardship for the defendant given his medical limitations.

IT IS ORDERED THAT, the sentence is entered as follows: **CR-12-209, Count One- Disorderly Conduct Domestic Violence**, defendant shall pay a fine of \$200.00 and Court cost of \$100.00 and payments of \$25.00 per month shall made by the defendant towards the amount of \$300.00 beginning **January 31, 2013** until the balance is paid in full and defendant shall not harm or harass Kimberly Farmer for a period of six months; all payments made shall be in the form of money orders.

SO ORDERED THIS 18th DAY OF December, 2012.



Judge, Pascua Yaqui Tribal Court



Cc: 12-18-12

Date
 Tribe Defendant/Legal Counsel Probation Officer Detention Other