IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2173
Criminal

UNITED STATES OF AMERICA,

APPELLEE,

vs.

FRITZ ARLO LOOKING CLOUD,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

The Honorable Lawrence L. Piersol
Chief Judge

APPELLEE'S BRIEF

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SUMMARY AND WAIVER OF ORAL ARGUMENT

The victim in this case, a member of the American Indian Movement (AIM) was murdered in December 1975 based upon a mistaken belief that she was a government informant. This execution style killing was committed by the appellant, Fritz Arlo Looking Cloud, acting in concert with two other individuals. Looking Cloud was convicted by a jury on February 13, 2004.

Looking Cloud appeals his conviction under 18 U.S.C. §§ 1111 and 1153, claiming that the district court erred in the admission of certain evidence and erroneously failed to dismiss the case based on sufficiency of the evidence. He also contents that he was denied effective assistance of counsel. The United States suggests that each party be granted twenty minutes oral argument in this case.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: PAGE

STATUTES AND OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

Appellant Looking Cloud was charged with the crime of first degree murder, in violation of 18 U.S.C. §§ 1111 and 1153 in a superseding indictment filed on April 20, 2003.

A jury verdict of guilty to the sole count of the superseding indictment was returned against Looking Cloud on February 13, 2004. He was sentenced to a term of life imprisonment on April 23, 2004.

Looking Cloud timely filed notice of appeal on May 3, 2004. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING TESTIMONY REGARDING ACTIVITIES OF THE AMERICAN INDIAN MOVEMENT.

United States v. Kristiansen, 901 F.2d 1463 (8th Cir. 1990)

United States v. Jolivet, 224 F.3d 902 (8th Cir. 2000)

Powell v. Burns, 763 F.2d 337 (8th cir. 1985)

United States v. Bettelyoun, 892 F.2d 744 (8th Cir. 1989)

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING INADMISSIBLE HEARSAY INTO EVIDENCE.

United States v. Oleson, 310 F.3d 1085 (8th Cir. 2002)

United States v. Fischl, 16 F.3d 927 (8th Cir. 1994)

Fed. R. Evid. 801(c)

III. WHETHER DEFENDANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL OR WHETHER THIS QUESTION WAS PROPERLY RAISED IN THIS PROCEEDING.

Strickland v. Washington, 466 U.S. 668 (1984)

United States v. Cook, 356 F.3d 913 (8th Cir. 2004)

United States v. Soriano-Hernandez, 310 F.3d 1099 (8th Cir. 2002)

IV. WHETHER THE EVIDENCE AT TRIAL AND ALL REASONABLE INFERENCES THEREFROM TAKEN IN THE LIGHT MOST FAVORABLE TO THE VERDICT WAS SUFFICIENT SO THAT A REASONABLE JURY COULD FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF FIRST DEGREE MURDER.

United States v. Simon, 376 F.3d 806 (8th Cir. 2004)

United States v. Martin, 369 F.3d 1046 (8th Cir. 2004)

STATEMENT OF THE CASE

The original indictment in this case, charging the defendants with first degree murder in violation of 18 U.S.C. §§ 1111 and 1153 was filed on March 20, 2003. Subsequently, the superseding indictment charging the same crime was filed on April 24, 2004. Defendant John Graham, a/k/a John Boy Patton, is currently facing extradition proceedings in this matter in Canada and has not faced trial. On February 8, 2004, Looking Cloud was tried before a federal jury, the Honorable Lawrence Piersol, Chief Judge, presiding. On February 13, 2004, the jury found Looking Cloud guilty of first degree murder as charged in the indictment. On April 23, 2004, Looking Cloud was sentenced to life imprisonment.

STATEMENT OF FACTS

On February 24, 1976, Roger Amiotte found the body of an unidentified female Indian on his ranch near Wanblee, South Dakota, on the Pine Ridge Indian Reservation. Transcript (hereinafter referred to as T) 23-26, 55. The body was in an advanced state of decomposition and could not be identified. T 36-37, 56, 64. Bureau of Indian Affairs police officers and FBI agents responded to the scene and the body was transported to the Indian Health Service Hospital in Pine Ridge, South Dakota. T 57. An autopsy was performed by pathologist W.O. Brown, M.D., of Scottsbluff, Nebraska. No x-ray machine was available to examine the body. Doctor Brown

concluded that the death was caused by exposure. T 39. Based on instructions received from the FBI Laboratory, Dr. Brown severed the hands from the body so that they could be transported to the FBI Laboratory in an attempt to identify the body through the fingerprints. T 40, 58, 64. It was not possible to obtain fingerprints from the hands while they were attached to the body due to the decomposed state of the hands. T 58, 64. Within a few days, an identification had been made by the fingerprint division of the FBI Laboratory determining that the decedent was Annie Mae Pictou, a/k/a Annie Mae Aquash, a member of the American Indian Movement (AIM), who was a fugitive on federal firearms charges. T 81-82, 111.

Once made aware of this information, FBI Agent William Wood sought an exhumation order from the district court. This was based on Woods' belief that there was a likelihood that the death was caused by some sort of foul play in spite of the results of the autopsy that had been performed. T 82.

A second autopsy was performed on August 11, 1976, by forensic pathologist, Dr. Garry Peterson, M.D. T 71-72. Doctor Peterson determined that the cause of Aquash's death was a close range gunshot wound to the back of the head of the decedent. T 77. A lead slug was visible on an x-ray that was obtained at that time and was thereafter extracted and sent to the FBI Laboratory where it was determined to

have come from a .32 caliber revolver. T 75-76, 83-84, 98-100. The body, along with the hands, was reinterred at that time. T 77, 88.

Federal authorities began a homicide investigation but due to a lack of cooperation on the part of many individuals suspected to have information regarding this matter, investigators were unable to identify a suspect. T 86, 88. Although the case remained open for many years after the discovery of the murder, no significant progress was made until about 1994 when a cooperating individual provided information to law enforcement. This ultimately led to an interview with Fritz Arlo Looking Cloud by U.S. Marshal Robert Ecoffey. T 412-13. When Ecoffey initially questioned Looking Cloud, he denied any knowledge of the matter. T 418. He did, thereafter, provide information on different occasions which did further the investigation of the case. As the investigation went forward, it revealed the following facts leading up to the death of Aquash, ultimately revealing that she was executed by various members of AIM due to the mistaken belief that she was an informant.

In the early and mid 1970's, AIM was extremely active in a number of places, including the Pine Ridge Indian Reservation. AIM was primarily responsible for the occupation of Wounded Knee, South Dakota, which took place February through May of 1973. T 112-18. During this period of time, there was a high level of hostility on the part of AIM members towards the tribal government on the Pine Ridge Indian

Reservation and the United States government, particularly the FBI. AIM first became active on the Pine Ridge Indian Reservation in February of 1972. T 113.

In 1972, Darlene "Ka-Mook" Nichols began a 17 year relationship with Dennis Banks, one of the leaders of AIM, who came to the Pine Ridge Indian Reservation. T 115. As a part of that relationship, Nichols became intimately involved in AIM activities, including the occupation of Wounded Knee. T 116-17. While present at Wounded Knee, she first met and then became friends with Aquash, a member of the Mik'maq tribe of Nova Scotia, Canada. T 118-19. Through the next couple of years, Nichols and Aquash met on various occasions and got to know each other well. T 120.

One of those occasions took place at a national AIM convention in Farmington, New Mexico, in June of 1975. T 121. During the course of that convention, there were rumors going around that Aquash was an informant. T 122-23. It was also rumored during the convention that AIM member Leonard Peltier took Aquash from the AIM camp in a car, put a gun to her head, and demanded to know if she was an informant. T 123-25. Aquash denied the accusations and responded by telling Peltier that if he believed the allegations, he should go ahead and shoot her. T 127.

During the same time period, Nichols became aware that Aquash was having an affair with Dennis Banks. This, not surprisingly, had a chilling effect upon the relationship between Nichols and Aquash. T 127.

After the AIM convention in Farmington, Nichols returned to the Pine Ridge Indian Reservation where she was present on June 26, 1975. T 128-29. On that day, two FBI agents were murdered in a firefight that occurred near Oglala, South Dakota, when the agents attempted to serve a warrant on an individual located near an AIM encampment. T 130.

Allegations continued to be made during that time period that Aquash was an informant. In July of 1975, while Nichols was in Custer during Dennis Banks' trial relating to the riot that occurred at the Custer, South Dakota, courthouse, another AIM member, Leonard Crow Dog, confronted Banks claiming that he had kicked Aquash off of his property and that she was a "fed". T 131-32.

On September 5, 1975, FBI and other law enforcement authorities conducted a search on the Leonard Crow Dog property on the Rosebud Indian Reservation and on the adjacent property of Al Running. At that time, Aquash was found on the Running property in possession of a weapon with an obliterated serial number and was arrested. She was ultimately indicted on charges related to that incident and then released on bond. T 135.

Not long thereafter, Nichols traveled to Shawnee, Oklahoma, with a number of other AIM members in a station wagon in which they were also transporting dynamite. While driving down the interstate in Kansas, the car started smoking, apparently due to a faulty muffler, which resulted in an explosion of the dynamite in the car. As a result of this incident, Nichols was arrested and spent three weeks in custody before being bonded out. T 137-39. She came back to the Pine Ridge Indian Reservation, at which time she reunited with Dennis Banks, who was then a fugitive on state charges. T 139-40. Nichols, Aquash, Dennis Banks, Leonard Peltier and Dave Hill all got together while in Pine Ridge. Hill and Peltier had Aquash personally make bombs so that her fingerprints would be on them. These bombs were ultimately placed by two power plants in Pine Ridge by Hill, Peltier, and Aquash. T 140-41.

Sometime shortly thereafter, these individuals obtained a motor home in Chadron, Nebraska, and Nichols, Peltier, Banks, Aquash, Dave Hill, and others all began traveling in the motor home. T 141-42. Ultimately, they traveled to Washington state where they hid out at the residence of John Chiquiti. T 142. While staying in the motor home at Chiquitis', Aquash was always watched and wasn't allowed to leave by herself. Peltier made statements during that time period, that he believed that Aquash was a "fed" and also claimed he was going to administer truth serum to her to determine whether or not she was. Peltier also made admissions in the

presence of Aquash and others regarding his involvement in the death of the two FBI agents on June 26, 1975. In describing the incident, Peltier stated "The motherfucker was begging for his life, but I shot him anyway." T 143-44.

In early November 1975 the group left the Chiquiti residence in Washington and started traveling south on the interstate to Oregon. They were stopped by the Oregon State Patrol which ultimately resulted in a shoot out in which Banks and Peltier escaped and Nichols and Aquash were arrested and incarcerated. T 145, 147. Nichols and Aquash shared a cell in the jail in Oregon. While in custody, Aquash was upset and crying. Nichols believed Aquash to be scared of both Leonard Peltier and Dennis Banks at that point. T 147. Nichols was returned to Kansas to face the pending charges there and Aquash was returned to South Dakota due to a bench warrant that was issued pursuant to her September 5th arrest and a court appearance that she had missed thereafter. T 148. Aquash appeared in court on November 24, 1975, and to her attorney's surprise, was released on bond again. Her trial was set for the next day in Pierre, November 25, 1975. T 194-97.

Late on November 24, 1975, or in the early morning hours of November 25, 1975, another AIM member, Evelyn Bordeaux, and her husband, Raymond Handboy, picked Aquash up from the St. Charles Hotel in Pierre where she was staying. Over the course of that night, they drove down to Denver, Colorado, and dropped her off

at a location to which she directed them. T 201-04. Ultimately, Aquash arrived at the home of Troy Lynn Yellow Wood in Denver, whose house was frequented by many AIM members and members of other political organizations that were in some fashion loosely affiliated with AIM. Aquash remained at the Yellow Wood house in Denver until approximately December 11, 1975.

On December 11, 1975, Angie Begay, a/k/a Angie Janis, who was an AIM member at the time, was contacted by another AIM member from Rapid City named Thelma Rios. Rios informed Begay that Aquash was an informant and that she needed to come back to Rapid City. T 213-14. Begay was instructed to tell somebody in Denver about this. Begay cannot recall if she told John Boy Patton, a/k/a John Graham, who she was living with at that time, or Theda Clarke, but she recalls that she passed the information along to one of the two of them. T 214. Thereafter, they went to the house of Troy Lynn Yellow Wood. T 214. A number of people met there in the kitchen. T 214-15. Among these people were Yellow Wood, Patton, and Arlo Looking Cloud. T 215-26, 229. There was discussion at the meeting of the allegation that Aquash was an informant. Ultimately, as a result of the meeting, Aquash was tied up and removed from the Yellow Wood residence against her will, scared and crying. T 216-26, 351-2. Looking Cloud, Graham, and Clarke placed Aquash in the back of Clarke's red Pinto station wagon in the cargo area, tied up and crying, and then

proceeded to drive the back roads from Denver to Rapid City. T 225-26, 253-55. They arrived at Thelma Rios's apartment at approximately 3 a.m., where Aquash was held captive for several hours. T 388, Ex. 45.

Thereafter, Aquash was taken to the Wounded Knee Legal Defense Offense Committee (hereinafter WKLDOC) house located in Rapid City. While there, Aquash came in contact with another AIM associate, Candy Hamilton. It was apparent to Hamilton that Aquash was extremely distraught and in fear and Hamilton offered Aquash the opportunity to come with her to Oglala, which opportunity Aquash refused. T 310-12. Aquash was apparently present at the WKLDOC house for several hours, but in the evening, was again taken by Looking Cloud, Graham, and Clarke.

Aquash was transported to the home of Cleo and Dick Marshall located in Allen, South Dakota on the Pine Ridge Indian Reservation. While they were at that house, Looking Cloud, Clarke, and Graham went in to the back bedroom with Dick Marshall. Aquash was left out in the kitchen area of the house with Cleo Marshall. A request was made to Dick Marshall to hold Aquash at the Marshall residence. He discussed this request with his wife, Cleo, who was unwilling to allow this. T 334-40.

Ultimately, they departed the Marshall residence and headed over to the residence of an individual in Rosebud, South Dakota, on the Rosebud Indian Reservation. T 35, 389. At that residence, Clarke and Graham went inside while Looking Cloud remained out in the vehicle with Aquash. Aquash begged for her life and begged to be released, according to statements made by Looking Cloud to others. T 389, 399. He refused to let her go. T 278-80, 389.

Near dawn, Aquash was then transported to a location on the Pine Ridge Indian Reservation approximately three miles north of the junction of South Dakota State Highways 73 and 44. The vehicle was stopped by the side of the road and Aquash, still tied up, was forced by Looking Cloud and Graham to walk to the edge of a cliff. T 415-16, Ex. 45. She again begged for her life and spoke of her two young daughters. T 278, 280, 406. She began to pray. T 354. Looking Cloud handed a revolver to John Graham. T 354. Aquash was shot once in the back of the head carrying out the execution which Looking Cloud, Graham, and Clarke had been assigned. T 354, 390. Her body was pushed off the cliff in the Badlands where it would lay for 2 ½ months before it was discovered. Looking Cloud and Graham then returned to the car where Clarke remained and the three then returned to Denver, their task accomplished. Ex. 45.

SUMMARY OF THE ARGUMENT

Appellant Looking Cloud makes four claims of error on appeal. The first of these is that the trial court abused its discretion in admitting various evidence regarding the American Indian Movement (AIM) at Looking Cloud's trial. The evidence regarding AIM was an integral part of the case brought by the United States and was properly admitted by the trial court.

Appellant also argues that the court committed reversible error in allowing certain hearsay evidence in the case regarding the fact that Aquash was believed to be an informant by various AIM members. This evidence was not admitted as hearsay, i.e., for the truth of what was asserted, and the court did not err in its admission.

Appellant Looking Cloud further claims he was denied effective assistance of counsel as defined in Strickland v. Washington, 466 U.S. 668 (1984), and therefore, his conviction should be reversed. This matter is not properly addressed on direct appeal, no record has been developed regarding the assistance of counsel provided, and trial defense counsel for appellant did not function in a deficient or incompetent fashion.

Finally, appellant also contends that the evidence was insufficient to support his conviction and that the trial court should have granted his motion for a judgment of

acquittal. The evidence, taken in the best light to support the jury's verdict, provides a more than adequate basis to support appellant's conviction for the crime of first degree murder.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY REGARDING ACTIVITIES OF THE AMERICAN INDIAN MOVEMENT.

Looking Cloud contends that the trial court erred in admitting certain testimony regarding the activities of AIM in the context of this case. At the outset, it should be noted that much of the testimony concerning AIM was not objected to by the defense in this case. Those instances would be judged by a plain error standard. T 113, 119, 134, 137. Certain instances were objected to and in that regard were properly preserved for appeal. T 117, 128-30, 139, 141, 144-46.

The standard of review of the trial court's evidentiary rulings is the abuse of discretion standard. United States v. Kristiansen, 901 F.2d 1463, 1465 (8th Cir. 1990); United States v. Jordan, 236 F.2d 953, 955 (8th Cir. 2001). "The district court is afforded wide latitude in making its reliability and relevance determinations." United States v. Jolivet, 224 F.3d 902, 905 (8th Cir. 2000)(citing Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 152 (1999). Absent objection, the standard of review is plain error. Powell v. Burns, 763 F.2d 337, 339 (8th Cir. 1985).

Looking Cloud asserts that none of the evidence concerning AIM had any probative value in this case regarding the issue of his guilt. He thereafter launches into a personal tirade of invective relating to the FBI and the United States government which is unsupported by the record of this case. He concludes by stating that it was a "circus atmosphere" at trial. Nothing could be further from the truth.

The reality regarding this case is that the victim, Aquash, was a member of AIM who was executed by other AIM members as a result of their erroneous belief that she was some type of federal informant against AIM. Her involvement in AIM activities and AIM's involvement into the events leading up to her death are inextricably interwoven into the fabric of this case and constitute the *res gestae* of the offense. United States v. Bettelyoun, 892 F.2d 744, 446-47 (8th Cir. 1989).

Virtually every individual who had information regarding the circumstances leading up to her death was an AIM member or associated with AIM. By the same token, virtually every activity that Aquash engaged in of significance during the relevant time period involved AIM and AIM members. The rumors and accusations regarding Aquash being an informant or a "fed" were all intertwined with various AIM members and AIM activities. The suggestion that it would have been possible to put this case in context and indeed to show to the jury how and why Aquash was executed without a discussion of AIM is simply specious.

First, it is significant that Aquash had information of a highly incriminating nature relating to other individuals. In that regard, it was pertinent that Leonard Peltier made admissions regarding the murder of the two FBI agents to Aquash. By the same token, it was pertinent that Aquash was present with Peltier and Banks when they fled the scene of the motor home shootout in Oregon. It was also pertinent that Aquash was made to participate in the making of bombs with Peltier, David Hill, and others and specifically with the intent that her fingerprints would be on the bombs so that she would be implicated if the bombs were to be found prior to detonation.

It is also critical to note the involvement of various AIM members such as Leonard Peltier and Leonard Crow Dog regarding the accusations that were made against Aquash. Because of the prominence of these individuals within the organization, their direct involvement strongly supported the United States' theory of the case that Aquash was executed for being a suspected informant.

Viewing the entire case in context, the involvement of Aquash in AIM and AIM in Aquash's death were not presented in an inflammatory fashion as can be seen from a reading of the record of this case. To the contrary, the discussions were very cursory and did not go into the details regarding the incidents such as the occupation of Wounded Knee and the murder of the two FBI agents near Oglala.

It would have been impossible for the prosecution to present its case without putting in the evidence regarding AIM contrary to appellant's contention that the activities of AIM were "totally irrelevant to this case". But for the activities of AIM, there never would have been a murder or a case. The district did not err in the admission of this evidence.

II. THE TRIAL COURT DID NOT ALLOW INADMISSIBLE HEARSAY INTO EVIDENCE AND THEREFORE DID NOT ERR.

Looking Cloud contends that the trial court allowed inadmissible hearsay into evidence in this case and thereby erred. Generally speaking, the instances complained of involve the admission of testimony regarding statements made to the effect that Aquash was an informant. Most of these instances were objected to and were therefore preserved for appeal. The trial court admitted these various statements because they were not being offered for the truth of the matter asserted, and therefore were not hearsay. Fed. R. Evid. 801(c). The standard of review regarding the admissibility of hearsay is the abuse of discretion standard. United States v. Fischl, 16 F.3d 927, 928 (8th Cir. 1994).

The evidence that Looking Cloud complains of as inadmissible hearsay was not offered to show the truth of the matters asserted therein and therefore was not hearsay. Accordingly, for that reason, his argument is utterly lacking in merit. He makes this

clear when he misstates what constituted the truth of the matter asserted. In his brief at page 26, appellant states "That testimony clearly was used to prove the truth of the matter asserted: that members of the American Indian Movement believed Anna Mae Aquash was an informant." This misperception totally negates appellant's argument. In fact, the truth of the matter asserted would have been that Annie Mae Aquash was an informant, not that these individuals believed that she was an informant. The truth of the matter asserted, whether or not Aquash was an informant, was of no significance to the case put forth by the United States. It was the belief that others held that resulted in the hostility against her and ultimately in the execution that was carried out by Looking Cloud in conjunction with other AIM members.

Looking Cloud further takes issue with the trial court's instruction at TR 122 where the trial court states:

> The requested testimony is hearsay, but I am going to admit it for a limited purpose only. This is a limiting instruction. It isn't admitted nor received for the truth of the matter stated. In other words, whether the rumor is true or not. It is simply received as to what the rumor was. So it is limited to what the rumor was, it is not admitted for the truth of the statement as to whether the rumor was true or not. So with that limiting instruction, which in part grants the objection, but the objection beyond that is overruled.

Looking Cloud first claims that the limiting instruction was technically inaccurate. The United States agrees that that is true in the sense that this testimony

was not hearsay within the legal definition of that term found in Fed. R. Evid. 801(c), but believes that the court merely tried to explain this to the jury in a way that was easily understandable to the jurors. In any event the court correctly explained that the truth of the statement as to whether the rumor was true or not, i.e., whether or not Aquash was an informant, was not the purpose of admitting this evidence. Rather, the purpose of admission of the evidence was to establish that there was a rumor existing that Aquash was an informant regardless of the truth thereof. The court ruled correctly in admitting this evidence and instructed the jury correctly as to its admissibility.

Even Looking Cloud, in his interview on March 27, 2003, stated that Theda Clarke told him that Aquash was being taken to South Dakota because she was an informant. So regardless of any other statements regarding this rumor that the court admitted, this issue clearly would have been before the jury. Therefore, even were there any error, which the United States maintains there was not, such error would have been harmless and could not constitute a basis for reversal. United States v. Oleson, 310 F.3d 1085 (8th Cir. 2002). Accordingly, appellant's second argument contending that hearsay evidence was erroneously admitted by the trial court lacks merit.

III. DEFENDANT WAS NOT DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL NOR IS THIS QUESTION PROPERLY RAISED IN THIS PROCEEDING.

Looking Cloud contends that his right to effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution was violated and he was thereby deprived of a fair trial, citing Strickland v. Washington, 466 U.S. 668, 687 (1984). Looking Cloud concedes that it is the rule of the Eighth Circuit that claims of ineffective assistance of counsel are not heard on direct appeal except under exceptional circumstances. No such exceptional circumstances appear in this case. See e.g., United States v. Cook, 356 F.3d 913, 919 (8th Cir. 2004).

Ineffective assistance of counsel claims are normally better addressed in post conviction proceedings, but are appropriate on direct appeal in exceptional cases, under circumstances where the record has been fully developed or to avoid a plain miscarriage of justice. United States v. Soriano-Hernandez, 310 F.3d 1099, 1105 n. 9 (8th Cir. 2002). As pointed out in Cook, "Ineffective assistance claims may also be appropriate on direct appeal when trial counsel's ineffectiveness is readily apparently or obviously deficient." Id. at 920 [citations omitted].

This is not such a case. The performance of trial counsel was not only not obviously deficient, but in reality was not deficient at all. The arguments of appellant that trial counsel was ineffective pertain to three issues. The first of these issues was

failure to object to the admission of the videotaped interview of Arlo Looking Cloud which occurred on March 27, 2003. Ex. 45. At the outset, the fact that there has been no examination of defense counsel's trial strategy in this regard makes it apparent why it is the rule in this circuit that such matters are normally only addressed on collateral attacks on convictions pursuant to 28 U.S.C. § 2255 rather than direct appeal. Putting that aside for the moment, there are very good strategic reasons why defense counsel would not have objected to the admission of this testimony.

Looking Cloud made admissions to many individuals over the years that were far more damaging than the admissions made in the tape recorded statement and earlier out-of-court statements made to Robert Ecoffey. The statements made to Ecoffey, although placing Looking Cloud at the scene, tended to minimize both his involvement and his knowledge of any information that would show that he knew that a murder was going to take place. Far more inculpatory in that regard were statements he made to Richard Two Elk and John Trudell in which he admitted that Aquash was begging for her life while they waited in the car at Rosebud and the statement to Two Elk that Looking Cloud provided the gun that was used to kill Aquash. It was the position of the defense that Looking Cloud was present every step of the way as charged by the prosecution, but that he lacked any knowledge and intent regarding the murder. Each of the statements to Ecoffey was consistent with that defense, in that

Looking Cloud claimed in the statements that he did not know Aquash was going to be killed until Graham shot her.

Contrary to Looking Cloud's appellate claims that this was ineffective assistance of counsel, it was rather a clever strategic way to put Looking Cloud's defense into evidence without being required to put Looking Cloud on the witness stand and subject him to cross examination. Certainly, this does not show that counsel was ineffective in a way that was readily apparent or was obviously deficient. The mere fact that the defendant has been convicted does not mean that counsel's strategic decisions were incorrect.

The next issue raised by appellant is that trial counsel was prejudicially ineffective because he failed to object to hearsay statements that Aquash feared for her life. It is the position of the United States that this evidence was admissible under Fed. R. Evid. 803(3) showing the victim's then existing mental, emotional, or physical condition. Under that rule, "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition" is an exception to the hearsay rule. The United States would further assert that in any event, the fact that Aquash was frightened was made evident in other ways beyond statements that she made in terms of observations by other witnesses such as Nichols and Candy Hamilton. Even were the hearsay not admissible, it was of such a minor nature that it would not have

affected the outcome of the case and certainly would not provide a basis for a finding of ineffective assistance of counsel. Appellant also contends that the failure of defense counsel to seek a jury instruction regarding hearsay evidence also gives rise to a finding that trial counsel was ineffective and prejudicially deficient. As stated in the second argument above regarding the hearsay evidence, the position of the United States is that the jury was correctly instructed regarding any "hearsay" that was admitted and therefore the failure to ask for an additional instruction could not have constituted ineffective assistance of counsel.

Finally, appellant complains the trial counsel was ineffective and prejudicially deficient because of a failure to object to two leading questions asked of witness Robert Ecoffey by the prosecution. The position of the United States regarding this matter is that the leading questions were appropriately used to develop Ecoffey's testimony regarding facts that were not in dispute at the trial and certainly did not provide any basis for stating counsel was deficient nor come close to meeting the Strickland standard regarding ineffective assistance of counsel.

Appellant has utterly failed to make a showing that it is appropriate to consider the matter of ineffective assistance of counsel on direct appeal. More significantly, he has failed to make a showing that trial counsel was ineffective. Appellant's claim of error in this regard provides no basis for reversal.

IV. THE EVIDENCE AT TRIAL AND ALL REASONABLE INFERENCES THEREFROM TAKEN IN THE LIGHT MOST FAVORABLE TO THE VERDICT WAS SUFFICIENT SO THAT A REASONABLE JURY COULD FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF FIRST DEGREE MURDER.

Appellant contends that the trial court erred in failing to grant the motion for a judgment of acquittal made by the defense in this case pursuant to Fed. R. Crim. P. 29. This argument was properly preserved for appeal by defendant's motion at the close of the evidence in this case. The district court denied the motion. The standard of review is to "review de novo the sufficiency of the evidence, viewing the evidence in the light most favorable to the verdict and upholding it if, based on all the evidence and all reasonable inferences, any reasonable juror could find the defendant guilty beyond a reasonable doubt." United States v. Simon, 376 F.3d 806, 808 (8th Cir. 2004) citing United States v. Martin, 369 F.3d 1046, 1059 (8th Cir. 2004). Based on that standard, the evidence presented in this case clearly supports the verdict.

Taking the evidence in the light most favorable to the verdict, it would show that the victim, Aquash, was likely believed in the AIM organization to be an informer or a "fed". While this belief was unsubstantiated and false, it nevertheless was what drove the actions that took place in this case.

When Aquash became a fugitive on federal charges on November 23, 1975, she fled South Dakota ultimately arriving in Denver, Colorado, at the home of Troy Lynn

Yellow Wood. Looking Cloud was in some fashion recruited to assist in taking Aquash back to South Dakota against her will and ultimately participating in her execution. It was clear that Aquash was tied up, taken from the Yellow Wood residence against her will, and transported from Denver to Rapid City in the rear cargo area of Theda Clarke's Ford Pinto station wagon with the assistance of Graham and Looking Cloud. Looking Cloud was aware that Aquash was being transported to South Dakota against her will because she was an informant.

Aquash was held as a captive the next day at both the Thelma Rios apartment and the WKLDOC house in Rapid City. She was next taken to the Dick Marshall house against her will and apparently, an attempt was made to leave her there as a captive. Looking Cloud was present when the discussions regarding this took place but denies that he was ever involved in any travel to the Marshall residence in Allen.

Thereafter, Aquash was transported and held against her will at a residence located in Rosebud, South Dakota, on the Rosebud Indian Reservation. While there, she begged for her life and begged Looking Cloud to allow her to go while Clarke and Graham were inside the house. It is noteworthy that Looking Cloud admits this to his AIM compatriots, but denies it when questioned by law enforcement, recognizing its incriminating nature. Looking Cloud refused to spare Aquash's life, and he, Graham,

and Clarke transported her to a location east of Wanblee, South Dakota, on the Pine Ridge Indian Reservation.

Looking Cloud and Graham forced Aquash to the edge of a cliff where she again begged for her life, at which time, according to admissions made by Looking Cloud, he provided a revolver to Graham who shot Aquash in the back of the head. Looking Cloud denied to law enforcement officials that he had the gun, which points to his knowledge of the incriminating nature of this fact. It could, of course, be inferred by the jury that Looking Cloud's statements in this regard were self serving, in that he, rather than Graham pulled the trigger. Regardless of which of the two pulled the trigger, they acted in concert to execute her, pushed her body off the cliff, and then left the scene and traveled together back to Denver, Colorado. Finally, although these facts were not in dispute, defendant Looking Cloud is an Indian and the location where the crime occurred is in Indian country.

The above constitute the facts taken in the best light to the verdict. Those are clearly facts from which a jury could have reasonably found the defendant to be guilty of the crime of first degree murder. The verdict should, in all respects, be upheld.

CONCLUSION

Appellant's allegations of error are lacking in merit and do not provide a basis for reversal of the conviction in this case. Defendant's conviction should, in all respects, be upheld and the judgment of the district court affirmed.

Respectfully submitted this _____ day of September, 2004.

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By:

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CERTIFICATE OF SERVICE

I, Robert A. Mandel, hereby certify that I served two true and correct copies of the above and foregoing Appellee's Brief on Terry H. Gilbert, Attorney at Law, 1370 Ontario Street, Suite 1700, Cleveland, OH 44113-1726, by first class mail, postage prepaid, this ____ day of September, 2004.

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ROBERT A. MANDEL

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Corel WordPerfect 9 and is 6,873 words in proportional spacing in 14-pt. type and is therefore in compliance with Fed. R. App. P. 32(a)(7). I further certify that I have provided to the Court and to each party separately represented by counsel a 3-1/2" diskette containing the full text of the brief. The diskettes have been scanned for viruses using InoculateIT version 4.53 and are virus free.

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ROBERT A. MANDEL