

## APPENDIX A

896 F.3d 1185  
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,  
v.  
Shane ROACH, Defendant-Appellant.  
No. 17-2085

|  
Filed July 24, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the District of New Mexico, No. 1:15-CR-02732-JAP-1, of sex trafficking by means of force, threats, fraud, and coercion. Defendant appealed.

Holdings: The Court of Appeals, Matheson, Circuit Judge, held that:

[1] defendant forfeited Confrontation Clause challenge to limitation of cross-examination of witness on appeal, and

[2] even assuming district court abused its discretion in limiting cross-examination of witness, any errors were harmless.

Affirmed.

West Headnotes (13)

[1] Criminal Law  
    - Exclusion of evidence

To preserve an objection to the exclusion of evidence for appeal, the proponent must make an offer of proof at trial, first, describing the evidence and what it tends to show and, second, identifying the grounds for admitting the evidence; this is so unless the nature of the excluded evidence and the ground for admitting it was apparent from the context. Fed. R. Evid. 103(a)(2).

Cases that cite this headnote

[2] Criminal Law  
    - Exclusion of evidence

Unless the context in which evidence is offered makes clear the reason for the proffer, error cannot be assigned to the exclusion of evidence without an offer of proof.

Cases that cite this headnote

[3] Criminal Law  
    - Exclusion of evidence

To preserve an objection to the exclusion of evidence for appeal, a proponent may present the offer of proof in his questioning and objections at trial, motions in limine, or pretrial conferences.

Cases that cite this headnote

[4] Criminal Law  
    - Witnesses  
    - Criminal Law  
    - Necessity of specific objection  
    - Criminal Law  
    - Adding to or changing grounds of objection

When a district court restricts cross-examination at trial, the party seeking to cross-examine forfeits a challenge on appeal by failing to state the ground for objection, stating a different ground at trial than on appeal, or by failing at trial to object to the limitation at all.

Cases that cite this headnote

[5] Criminal Law  
--Objections to evidence in general

An appellant who fails to preserve an evidentiary objection below may argue and establish plain error on appeal by showing that the district court committed (1) error (2) that is clear or obvious under current law, and which both (3) affected her substantial rights and (4) undermined the fairness, integrity, or public reputation of judicial proceedings; failure to argue plain error on appeal waives the argument.

Cases that cite this headnote

[6] Criminal Law  
--Reception of evidence

Defendant forfeited Confrontation Clause challenge to limitation of cross-examination of witness on appeal, in prosecution for sex trafficking by means of force, threats, fraud, and coercion, although defendant mentioned Confrontation Clause in his second set of pretrial motions; defendant's Confrontation Clause arguments concerned district court's refusal to allow his lawyer to cross-examine witness about length of her potential sentence, her alleged lie to her pretrial services officer, and her possible alleged scheme to use prepaid gift cards for fraud, defendant failed to identify any of these topics for cross-examination in his pretrial motions, and when defendant did raise these issues at trial, he failed to state Confrontation Clause ground on which court should permit cross-examination. U.S. Const. Amend. 6.

Cases that cite this headnote

[7] Criminal Law  
--Reception of evidence

Defendant waived on appeal argument that district court's rulings limiting cross-examination of witness violated Confrontation Clause, in prosecution for sex trafficking by means of force, threats, fraud, and coercion; defendant failed to raise Confrontation Clause objection in district court, and defendant failed to argue plain error on appeal. U.S. Const. Amend. 6.

Cases that cite this headnote

[8] Criminal Law  
--Rulings as to Evidence in General

Appellate court will not reverse a defendant's conviction on the basis of a district court's erroneous admission or exclusion of evidence if the error was harmless to the defendant.

Cases that cite this headnote

[9] Criminal Law

~Prejudice to rights of party as ground of review

A non-constitutional error is harmless unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect.

Cases that cite this headnote

Even assuming district court abused its discretion in limiting cross-examination of witness, any errors were harmless, in prosecution for sex trafficking by means of force, threats, fraud, and coercion; limitations did not substantially influence outcome of case, defendant challenged witness's credibility throughout cross-examination, defendant called two witnesses to impeach witness's character for truthfulness, and jury had ample evidence to convict defendant without witness's testimony.

[10] Criminal Law

~Review De Novo

Criminal Law

~Rulings as to Evidence in General

To determine whether erroneous admission or exclusion of evidence was harmless, appellate court reviews the entire record *de novo*, examining the context, timing, and use of the erroneously admitted or excluded evidence at trial and how it compares to properly admitted evidence.

Cases that cite this headnote

[11] Criminal Law

~Presumption as to Effect of Error; Burden

The government bears the burden to show that a nonconstitutional error is harmless by a preponderance of the evidence.

Cases that cite this headnote

Cases that cite this headnote

[13] Criminal Law

~Grounds in general

For purposes of cumulative error, appellate court aggregates all the errors that it has found to be harmless and determines whether their cumulative effect on the outcome of the trial mandates reversal.

Cases that cite this headnote

\*1187 Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:15-CR-02732-JAP-1)

Attorneys and Law Firms

Aric G. Elsenheimer, Assistant Federal Public Defender, Office of the Federal Public Defender for the District of New Mexico, Albuquerque, New Mexico, for Defendant-Appellant.

James R.W. Braun, Assistant United States Attorney (James D. Tierney, Acting United States Attorney, on the brief) Office of the United States Attorney for the District of New Mexico, Albuquerque, New Mexico, for Plaintiff-Appellee.  
Before MATHESON, MCKAY, and MCHUGH, Circuit Judges.

Opinion

MATHESON, Circuit Judge.

A jury convicted Shane Roach of coercing D.G. into prostitution in violation of 18 U.S.C. § 1591(a)(1). Mr. Roach recruited D.G. and, with help from Angela Santillanes, prostituted D.G. to clients. D.G. became scared and reached out for help, leading to Mr. Roach's and Ms. Santillanes's arrests.

The Government charged Mr. Roach and Ms. Santillanes under § 1591(a)(1), but after Ms. Santillanes agreed to testify against Mr. Roach, it dropped her charge. At trial, Mr. Roach attempted to cross-examine Ms. Santillanes about three topics. The Government successfully objected.

On appeal, Mr. Roach argues that the district court's rulings preventing cross-examination violated (1) the Confrontation Clause and (2) the Federal Rules of Evidence, and because these errors were not harmless, we must vacate his conviction and remand for a new trial.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm Mr. Roach's conviction because (1) Mr. Roach waived his Confrontation Clause arguments, and (2) any error in limiting his cross-examination under the evidence rules was harmless.

## I. BACKGROUND

### A. Factual Background

#### 1. The Prostitution Operation

In April 2015, Mr. Roach found D.G.'s advertisement on Backpage.com ("Backpage"), a website where prostitutes solicit clients, and offered to be her pimp. On their second in-person meeting, she agreed.

From May to June 2015, Mr. Roach and Ms. Santillanes managed the prostitution operation, advertising D.G.'s services on Backpage and arranging for her to meet clients in motels and hotels. Clients scheduled an appointment through "Diamond"—Ms. Santillanes's alias—who then would inform Mr. Roach. He would then contact D.G. through a prepaid TracFone he bought for her. The client would meet D.G. in her room, and she would collect payment after the sex act. She saw three to six clients a day. Mr. Roach would then collect the money from her.

Mr. Roach controlled the enterprise and D.G.'s activities. He chose her rates, selected her clients, and kept the proceeds. D.G. testified that he controlled her contact with others, in part by keeping her identification (e.g., driver's license) and her personal cellphone. In his testimony, Mr. Roach disputed the level of control he had outside of client matters.

### 2. The Arrests and Search

In June 2015, D.G. started to fear that Mr. Roach was going to send her to another pimp. She notified Life Link, an organization that offers "program[s] for victims of human trafficking." ROA, Vol. III at 514. It contacted the Albuquerque Police \*1188 Department.<sup>1</sup> Police then contacted D.G., and she eventually disclosed her location. The police removed her from her motel room and interviewed her. She divulged Mr. Roach's first name, identified him in an online photograph, and identified his car.

D.G. testified that she had also contacted the police, but <sup>1</sup> the testifying detective did not mention her call at trial.

After further investigation, officers obtained a warrant to track and search Mr. Roach's car and to search his residence. After tracking his car's location, they stopped it, discovered Mr. Roach and Ms. Santillanes inside, and arrested them. Executing the search warrant, law enforcement searched Mr. Roach's Albuquerque apartment and found prepaid gift cards that had been used to purchase advertisements on Backpage.<sup>2</sup>

Officers also discovered heroin; a digital camera with photos of D.G.'s identification and photos used for her Backpage advertisement; and a .22 caliber firearm, which D.G. identified as Mr. Roach's.

## B. Procedural Background

### 1. First Indictment, Government Deal, and Superseding Indictment

In July 2015, a grand jury indicted Mr. Roach and Ms. Santillanes on one count of sex trafficking by means of force, threats, fraud, and coercion in violation of 18 U.S.C. § 1591(a)(1). The Government made a deal with Ms. Santillanes: she agreed to testify against Mr. Roach in exchange for having her charge dismissed. In April 2016, a superseding indictment charged Mr. Roach alone with violating § 1591(a)(1).<sup>3</sup>

3 In the superseding indictment, the Government originally charged Mr. Roach with two counts of sex trafficking under § 1591(a)(1): trafficking (1) D.G. between May 27, 2015 and June 11, 2015 and (2) Ms. Santillanes between March 1, 2015 and June 11, 2015. Before trial, the Government dismissed the second count.

### 2. Pretrial Motions

Mr. Roach filed a pretrial motion to cross-examine Ms. Santillanes regarding her dismissed charge. He also filed a set of three pretrial motions to cross-examine Ms. Santillanes about her prior and current involvement in prostitution. The district court granted Mr. Roach's first motion and denied the others.<sup>4</sup>

4 We describe these motions in greater detail in our discussion of Mr. Roach's Confrontation Clause arguments.

### 3. Trial Testimony

Mr. Roach's trial spanned four days. This appeal concerns the testimony of three witnesses: D.G., Ms. Santillanes, and Mr. Roach. We provide an overview of their testimony here.<sup>5</sup>

5 We describe their testimony in greater detail in our discussion of Mr. Roach's Confrontation Clause and rules of evidence arguments.

#### a. D.G.

D.G. testified about her initial meeting with Mr. Roach, day-to-day activities working for him, and her escape. She also testified about specific instances when Mr. Roach was controlling and violent, stating that he isolated her from the outside world using violence, intimidation, and threats.

#### b. Ms. Santillanes

Ms. Santillanes corroborated much of D.G.'s testimony. She confirmed that Mr. Roach had been both controlling and violent toward D.G. The district court limited defense counsel's cross-examination on three lines of questioning: (1) the length of Ms. Santillanes's potential sentence under \*1189 18 U.S.C. § 1591(a)(1), (2) lying to her pretrial services officer about residing with her grandparents, and (3) her potential fraud scheme with the prepaid gift cards discovered in Mr. Roach's apartment. Mr. Roach contests these limitations on appeal.

#### c. Mr. Roach

Mr. Roach confirmed that he, Ms. Santillanes, and D.G. had engaged in a commercial prostitution enterprise, but he denied controlling D.G. through violence, intimidation, and threats. He disputed D.G.'s testimony about specific instances of violence and intimidation, but did admit that he hit her at least once. He characterized their professional relationship as consensual and supportive.

### 4. The Verdict and Sentence

The jury found Mr. Roach guilty. The district court imposed a sentence of 180 months in prison. Roach filed this timely appeal.

## II. DISCUSSION

On appeal, Mr. Roach argues that the district court improperly barred his cross-examination of Ms. Santillanes on the three topics identified above.

First, he argues the district court violated the Confrontation Clause because it “limited [his] cross-examination of Ms. Santillanes to such an extent that the jury did not receive sufficient information to make a discriminating appraisal of Ms. Santillanes'[s] motives and bias.” Aplt. Br. at 36. We hold that Mr. Roach waived his Confrontation Clause arguments because he failed to raise them below and did not argue plain error on appeal.

Second, he argues in the alternative that the court abused its discretion under the Federal Rules of Evidence. *See* Aplt. Reply Br. at 4. But even assuming a rules violation, we hold any error was harmless.

We therefore affirm Mr. Roach's conviction.<sup>6</sup>

We address Mr. Roach's Confrontation Clause arguments first and then turn to his evidence-rules arguments. Mr. Roach primarily raises constitutional arguments on appeal. Briefing on his nonconstitutional arguments is sparse.

### A. *Confrontation Clause*

Mr. Roach not only failed to make a Confrontation Clause argument below, his failure to argue plain error here waives this issue on appeal.

#### 1. Additional Factual Background

We first provide additional background on (a) Mr. Roach's pretrial motions and (b) defense counsel's cross-examination at trial.

#### a. *Pretrial motions*

##### i. First pretrial motion

Mr. Roach filed a “motion to allow cross-examination of D.G. and [Ms. Santillanes] regarding outstanding dismissed without prejudice charges.” ROA, Supp. Vol. I at 44 (capitalization omitted). He stated that Ms. Santillanes was “initially charged as a codefendant … regarding … the charge of sex trafficking involving D.G.,” but the Government “moved to dismiss the charge against [her].” *Id.* at 46. He argued that he should be allowed to question Ms. Santillanes about her motivations for testifying. *Id.* at 47. He made no mention of his Sixth Amendment right to confrontation nor a relevant Federal Rule of Evidence, but instead cited two cases. *Id.* (citing *Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978) and *United States v. Harris*, 462 F.2d 1033, 1035 (10th Cir. 1972) ). Neither case concerned allegations of a Confrontation Clause violation. The district court granted the motion.

##### \*1190 ii. *Other pretrial motions*

Mr. Roach also filed three motions in limine to cross-examine Ms. Santillanes about (1) her promoting prostitution in the present case and previously in the states of Arizona, New Mexico, and Texas; (2) prostituting an individual in a related case; (3) her conviction for prostitution in Arizona; (4) prostituting herself while living with Mr. Roach; and (5) answering phone calls for Mr. Roach about D.G.

In each motion, he argued that exclusion of the questioning would violate his right to confrontation. Because, Mr. Roach contended, the questioning would reveal Ms. Santillanes's biases, prejudices, and motives, he had a right under the Confrontation Clause to cross-examine her on these five topics. He also relied on Federal Rules of Evidence 404(b), 412, and 608. The district court denied the three motions.

b. *Trial cross-examination*

At trial, defense counsel attempted to cross-examine Ms. Santillanes about the three aforementioned topics. The Government objected, and the district court sustained the objections.

i. Length of sentence

After asking Ms. Santillanes about her dropped charge, defense counsel cross-examined her about the length of her potential sentence:

[Defense Counsel]: And that was quite a break, because before that happened, you were facing a pretty lengthy prison sentence, right?

[Government]: Objection. Ask that we approach.

The Court: Go ahead and state your objection.

[Government]: We're getting into punishment which I believe is not permissible evidence.

The Court: That's correct. That's an incorrect form to inform the jury that there is a severe punishment.

ROA, Vol. III at 407-08. Defense counsel agreed with the court's statement and explained that he "wasn't attempting to introduce anything about [Mr. Roach's] potential punishment," but rather "[his] question was aimed toward [Ms. Santillanes's] understanding, her motivation to testify falsely." *Id.* at 409. The court instructed counsel to "avoid any questions about punishment," *id.*, and informed the jury to disregard the question, *id.* at 410. Defense counsel did not pursue this matter further. He did not mention the Confrontation Clause.

ii. Statement to pretrial services officer

Before defense counsel resumed cross-examination of Ms. Santillanes on the second day of trial and before the jury returned to the courtroom, he requested "to cross-examine Ms.

Santillanes on lying to her pretrial services officer." *Id.* at 399. The proposed cross-examination was based on her attorney's having filed a pretrial motion stating her grandparents were willing to serve as her third-party custodians after the Government dropped her charges. *Id.* Defense counsel contended that when the probation officers "went to go visit [her grandparents, they] told them she had not stayed with them, and furthermore that she would not have permission to stay with them if she had asked." *Id.*

The Government objected to this request, arguing it would elicit "improper impeachment evidence under any of the rules." *Id.* The prosecutor stated that Ms. Santillanes "didn't lie" and explained:

What happened is that her original plan was to stay with those people, and when she got up here, they told her that they wouldn't allow her to stay with them, so she was staying with a third party that \*1191 she was not authorized to be. But there isn't criminal conduct in any way. And at best, it could be described as a misunderstanding between the probation officer and Ms. Santillanes.

*Id.* at 399-400.

The district court agreed with the Government and stated that it was "familiar with what happened because she was under pretrial supervision, and reports were sent to me from pretrial services." *Id.* at 400. "[I]f that testimony were allowed, [Ms. Santillanes] would probably try to explain ... what happened, and it might result in others having to be called as witnesses to testify." *Id.* It "[did not] think it [was] proper impeachment." *Id.* Defense counsel said nothing further on the issue.

iii. Prepaid gift cards

Finally, defense counsel questioned Ms. Santillanes about her collection of used prepaid gift cards:

[Defense Counsel]: And would you save all of those credit cards<sup>7</sup> even after there was no money left on them?

[Ms. Santillanes]: Yes.

[Defense Counsel]: Why?

[Ms. Santillanes]: Because there may have been something that myself and [Mr. Roach] were interested in doing after the prostitution.

[Defense Counsel]: Well, this thing you were talking about that you were interested in, [Mr. Roach] didn't know anything about it, right?

[Ms. Santillanes]: No, but he showed a lot of interest in it, so we started talking about it together, and what we could do with it.

[Defense Counsel]: And you were essentially instructing [Mr. Roach] on how to commit fraud, right?

*Id.* at 414-15. At that point, the Government objected as to relevance. *Id.* at 415. Defense counsel explained that Ms. Santillanes "was interested in perpetrating some sort of a fraud.... [s]o it goes to her credibility." *Id.* The Government argued that the deadline had passed for Rule 404(b) evidence and it could not evaluate this line of inquiry without adequate notice. *Id.* at 416.

Counsel was referring to prepaid gift cards as credit cards.

The district court then asked how this cross-examination would impeach Ms. Santillanes's testimony because she would be "talking about a crime that [had not been] committed." *Id.* at 417. Counsel responded:

[W]hat I was talking about, and this went along testimony I was developing, that [Ms. Santillanes] was the one that knew all about the criminal activity, and she would teach [Mr. Roach] about that.

*Id.* The court then said that counsel had already developed that point because Ms. Santillanes had testified to teaching Mr. Roach about the prostitution

business. *Id.* It concluded that the evidence was inadmissible "under the language of 404(b)" and that defense counsel should "stay away from it." *Id.* Defense counsel did not argue further.

## 2. Legal Background

We provide legal background on (a) offers of proof to preserve an objection for appeal, (b) offers of proof in the context of limitations on cross-examination, and (c) waiver.

### a. Offers of proof

[1] [2] To preserve an objection to the exclusion of evidence for appeal, the proponent must make an offer of proof at trial, "first, describ[ing] the evidence and what it tends to show and, second, identify[ing] the grounds for admitting the evidence." *United States v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001); *see also* Fed. R. Evid. 103(a)(2). This is so unless the nature \*1192 of the excluded evidence and the ground for admitting it was "apparent from the context." *Adams*, 271 F.3d at 1241 (quotations omitted); *see also* Fed. R. Evid. 103(a)(2). "Unless the context in which evidence is offered makes clear the reason for the proffer, error cannot be assigned to the exclusion of evidence without an offer of proof." *United States v. Martinez*, 776 F.2d 1481, 1485 (10th Cir. 1985).

Rule 103(a)(2) provides that "if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." The provision does not mention, as our *Adams* case does, that the offer of proof must not only describe the evidence but also identify the grounds for admitting it. The advisory committee notes to Rule 103(a) make clear, however, that "[r]ulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge." Fed. R. Evid. 103(a) advisory committee's note to 1972 proposed rules.

[3] The proponent may present the offer in his questioning and objections at trial, *see Adams*, 271 F.3d at 1241, motions in limine, *see United States v. Mejia-Alarcon*, 995 F.2d 982, 988 n.3 (10th Cir. 1993), or pretrial conferences, *see Frederick v. Swift Transp. Co.*, 616 F.3d 1074, 1083 (10th Cir. 2010).

b. *Limitations on cross-examination*

An offer of proof is generally necessary to preserve an excluded line of cross-examination questioning. “Federal Rule 103 does not carve out any exception for questions posed on cross.” McCormick on Evidence ch. 6, § 51, at n.17 (Kenneth S. Broun ed., 7th ed. 2016). In *United States v. Martinez*, we determined the defendant failed to preserve his argument that the district court improperly limited his cross-examination of a government witness. 776 F.2d at 1485-86. On appeal, the defendant asserted that the district court should have allowed the cross-examination under Federal Rules of Evidence 404(b) and 406, but “[n]o offer of proof was made, and the trial judge was not given any indication of defendant’s presently expressed purpose for his inquiry.” Id. at 1485. Because defense counsel did not tell the judge the evidentiary ground nor “the reason for the cross-examination,” he failed to preserve his challenge for appeal. Id. at 1485, 1486.

[4] When a district court restricts cross-examination at trial, the party seeking to cross-examine forfeits a challenge on appeal by failing to state the ground for objection, id.; stating a different ground at trial than on appeal, *United States v. Gramajo*, 565 F. App’x 723, 727 n.2 (10th Cir. 2014) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1, 10th Cir. R. 32.1); *United States v. Faruki*, 803 F.3d 847, 856 (7th Cir. 2015); *United States v. Reaves*, 649 F.3d 862, 865 (8th Cir. 2011); or by failing at trial to object to the limitation at all, *United States v. Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010).

c. *Waiver*

[5] An appellant who fails to preserve an evidentiary objection below may argue and establish plain error on appeal, *United States v. LaHue*, 261 F.3d 993, 1009 (10th Cir. 2001), by showing that the “district court committed (1) error (2) that is clear or obvious under current law, and which both (3) affected her substantial rights and (4) undermined the fairness, integrity, or public reputation of judicial proceedings,” *Mullins*, 613 F.3d at 1283. Failure to argue plain error on appeal waives the argument. *United States v. Solomon*, 399 F.3d 1231, 1238 (10th Cir. 2005); *United States v. MacKay*, 715 F.3d 807, 831 (10th Cir. 2013).

a. *Mr. Roach failed to raise a Confrontation Clause objection below*

[6] Mr. Roach failed to raise the Confrontation Clause issue below for all three lines of questioning, either at trial or in his pretrial motions. To preserve the issue, he needed to describe (1) the evidence and (2) the ground to admit it. See *Adams*, 271 F.3d at 1241. He failed to do the former in his pretrial motions and the latter at trial.

As previously explained, Mr. Roach’s Confrontation Clause arguments concern the district court’s refusal to allow his lawyer to cross-examine Ms. Santillanes about (1) the length of her potential sentence under 18 U.S.C. § 1591(a)(1), (2) her alleged lie to her pretrial services officer, and (3) her possible alleged scheme to use the prepaid gift cards for fraud. In his pretrial motions, Mr. Roach failed to identify any of these three topics for cross-examination.

In his first motion, he argued that he should be allowed to question Ms. Santillanes about her deal with the Government. But he did not mention the length of her potential sentence under 18 U.S.C. § 1591(a)(1) as a cross-examination topic.<sup>10</sup> In his other three motions, he argued that he should be able to cross-examine Ms. Santillanes about her prior and current participation in prostitution under his constitutional right to confrontation, but he did not mention any of the three topics he raises on appeal.<sup>11</sup>

\*1193 3. Analysis

9 Moreover, he did not mention his right to confrontation under the Sixth Amendment as a ground for cross-examination about her deal.

Mr. Roach cites *United States v. Szabo*, 789 F.2d 1484 (10th Cir. 1986), to argue that he sufficiently preserved the constitutional argument in his first pretrial motion, but *Szabo* is distinguishable. In *Szabo*, the defendant had filed a motion in limine arguing that a government witness's statements "ha[d] no indicia of reliability and [did] not provide the functional equivalent of cross-examination." *Id.* at 1486.

We addressed his Confrontation Clause argument on appeal because "the constitutional issue was at least arguably raised at one time during the proceedings below, by way of the motion in limine." *id.* at 1487, in that it contained the phrase "indicia of reliability," the Confrontation Clause standard at the time for admitting hearsay evidence for an unavailable declarant.

Here, Mr. Roach's motion in limine did not "arguably raise[ ]" a Confrontation Clause claim with respect to the length of sentence. It not only failed to mention the Confrontation Clause or its underlying standard, it also did not mention the length of the sentence as a topic for cross-examination.

10 As mentioned above, the three motions requested the opportunity to cross-examine Ms. Santillanes about (1) her promoting prostitution in the present case and previously in the states of Arizona, New Mexico, and Texas; (2) prostituting an individual in a related case; (3) her conviction for prostitution in Arizona; (4) prostituting herself while living with Mr. Roach; and (5) answering phone calls for Mr. Roach about D.G.

Although Mr. Roach is correct that he need not "specifically mention[ ] the Confrontation Clause" when it is apparent from the context, Aplt. Br. at 40; see *Adams*, 271 F.3d at 1241, he must also assert the *particular topic* for cross-examination, see *United States v. Summers*, 414 F.3d 1287, 1297 n.7 (10th Cir. 2005) (preserving the constitutional argument by demanding cross-examination of co-defendant's hearsay statement at trial); *United States v. Szabo*, 789 F.2d 1484, 1487 (10th Cir. 1986) (preserving the constitutional argument by requesting cross-examination of co-conspirator's hearsay statements in a motion in limine). In his pretrial motions, Mr. Roach failed to raise the length of Ms. Santillanes's potential sentence, the alleged lies to her pretrial services officer, and the alleged prepaid card scheme.

\*1194 When Mr. Roach did raise these issues at trial, he failed to state a Confrontation Clause ground on which the court should permit the cross-examination. Indeed, Mr. Roach concedes that he "did not mention the Confrontation Clause at trial," Aplt. Reply Br. at 3, but argues he sufficiently raised his

constitutional arguments in his pretrial motions. He claims that he "repeatedly stress[ed] ... the constitutional basis for his requests for cross-examination of Ms. Santillanes on various topics," and that any restriction on such questioning "would violate the Confrontation Clause." Aplt. Br. at 39-40. We disagree. Although he mentioned the Confrontation Clause in his second set of pretrial motions, he neglected to mention the three topics for cross-examination in any of his pretrial motions. It was therefore not "apparent" when he pursued cross-examination on these topics at trial that he was relying on the Confrontation Clause. *Adams*, 271 F.3d at 1241.<sup>11</sup>

11 Mr. Roach also argues that "the combination of Mr. Roach's frequent pretrial assertions of his constitutional right to cross-examination, the district court's recognition of that right and Mr. Roach's objections to curtailing his cross-examination during trial preserved the Confrontation Clause issues." Aplt. Br. at 41. But because his pretrial motions failed to identify any of the cross-examination topics he wished to pursue at trial and now on appeal, and because he failed to object based on confrontation regarding these topics at trial, we do not discern an adequate contextual ground, and certainly not a "clear" one, *Martinez*, 776 F.2d at 1485, for Mr. Roach to overcome his forfeiture of his Confrontation Clause arguments.

In sum, because Mr. Roach neither mentioned the three topics in his pretrial motions nor the Confrontation Clause at trial, he forfeited his arguments below.

b. *Mr. Roach fails to argue plain error on appeal*

[7]Mr. Roach fails to argue plain error on appeal. He therefore has waived his Confrontation Clause arguments about the three lines of questioning and we do not consider them further. See *Solomon*, 399 F.3d at 1238; *MacKay*, 715 F.3d at 831.

## B. Rules of Evidence

Mr. Roach argues "even assuming arguendo [he] did not preserve the cross-examination restrictions as constitutional issues, he preserved them for non-constitutional review under the abuse-of-discretion standard." Aplt. Reply Br. at 4. He contends the district court abused its discretion under the Federal Rules of Evidence when it prevented him from cross-examining Ms. Santillanes on the three topics.

Although we question whether Mr. Roach adequately preserved his nonconstitutional objections, we need not address that issue nor whether the district court abused its discretion. Even assuming the district court abused its discretion, any error was harmless.

### 1. Legal Background

“A party may claim error in a ruling to ... exclude evidence only if the error affects the substantial right of the party....” Fed. R. Evid. 103(a). “The rule does not purport to change the law with respect to harmless error.” Fed. R. Evid. 103(a) advisory committee’s note to 1972 proposed rules.

[8] [9] [10] [11] “We will not reverse a defendant’s conviction on the basis of a district court’s erroneous admission [or exclusion] of evidence if the error was harmless to the defendant.” United States v. Kupfer, 797 F.3d 1233, 1243 (10th Cir. 2015); see United States v. Irving, 665 F.3d 1184, 1209 (10th Cir. 2011) (applying to excluded evidence). “A non-constitutional error is \*1195 harmless unless it had a ‘substantial influence’ on the outcome or leaves one in ‘grave doubt’ as to whether it had such effect.” United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). “To make this assessment, we review the entire record de novo, examining the context, timing, and use of the erroneously admitted [or excluded] evidence at trial and how it compares to properly admitted evidence.” Kupfer, 797 F.3d at 1243 (quotations omitted). The government bears the burden to show that a nonconstitutional error is harmless by a preponderance of the evidence. See United States v. Jones, 818 F.3d 1091, 1101 (10th Cir. 2016).

### 2. Analysis

[12] [13] Mr. Roach argues the district court’s limitations on cross-examination had a “substantial influence on the verdict.” Aplt. Br. at 55. But for three reasons, the Government has demonstrated that the limitations—individually or cumulatively—did not substantially influence the outcome of the case.<sup>13</sup>

12 To the extent Mr. Roach attempts to present a cumulative error argument regarding the restrictions on the three lines of questioning, “we aggregate all the errors that we have found to be harmless and determine whether their cumulative effect on the outcome of the trial mandates reversal.” United States v. Anaya, 727 F.3d 1043, 1060-61 (10th Cir. 2013) (quotations omitted). For the reasons presented above, we conclude that any evidence-rules errors, considered individually or together, did not substantially affect the outcome of the trial. See *id.* at 1061.

13 The Government primarily argues that any constitutional error—as opposed to nonconstitutional error—was harmless. As it recognizes, the standard for a harmless constitutional error is whether we are “able to declare a belief that it was harmless beyond a reasonable doubt.” Rivera, 900 F.2d at 1470 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). This standard requires more from the Government than showing a nonconstitutional error was harmless.

First, Mr. Roach challenged Ms. Santillanes’s credibility throughout the cross-examination. Defense counsel questioned her about her past methamphetamine use and how she was still testing positive for drugs a year after charges had been brought in this case. He also asked her about “not telling [Mr. Roach] that you were actively prostituting” when she was romantically involved with him, which “was a pretty big lie, right?” ROA, Vol. III at 403. Most important, he inquired about the deal she made with the Government to testify. Although the district court blocked questions about the length of the potential sentence, counsel was able to ask about her charges being dropped in return for her testimony.

Second, Mr. Roach called two witnesses to impeach Ms. Santillanes’s character for truthfulness. He questioned Vanessa Baca, who “ha[s] children with [Mr. Roach’s] cousin,” *id.* at 639, about her “opinion as to [Ms. Santillanes’s] truthfulness,” *id.* at 644. She responded that Ms. Santillanes was not truthful. Similarly, he asked Christopher Baca, Mr. Roach’s former roommate, a similar question, and he gave the same answer. See *id.* at 661-62.

Third, even assuming the blocked cross-examination would have put Ms. Santillanes’s credibility into further doubt, it would not have substantially influenced the outcome of the case. The jury had ample evidence to convict Mr. Roach without her testimony. Under 18 U.S.C. § 1591(a)(1), the Government needed to prove that Mr. Roach knowingly “recruit[ed], entice[d], harbor[ed], transport[ed], provide[d], obtain[ed], advertise[d], maintain[ed], patronize[d], or

solicit[ed]" D.G., knowing that "means of force, threats of force, fraud, [or] coercion" would be used to "cause [her] to engage in a commercial sex act." \*1196 18 U.S.C. § 1591(a)(1).<sup>14</sup> D.G. described incidents in which Mr. Roach attacked or threatened her. For example, she testified that when he learned she had been speaking with others on Facebook, he drove her to the outskirts of Albuquerque. With a gun in his lap, he told her that he was disappointed with her because she was talking to "a bunch of people." ROA, Vol. III at 502-03. Mr. Roach then slapped her face "multiple" times and warned that, if she left him, he would hurt one of her family members. *Id.* at 504-05. Mr. Roach disputed these episodes, but he did testify to an occurrence when he hit D.G. He admitted to "slapp[ing] her with an open hand once across her face," *id.* at 706-07, because he believed that she was "still doing side dates," *id.* at 705. The evidence thus showed that Mr. Roach used violence to coerce D.G. into prostitution.

Section 1591(a) reads in full:

14

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1).

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. § 1591(a).

Even if we "are not totally free from doubt about whether" the limitations on cross-examination "may have had some influence on the outcome of the case," "we do not have *grave* doubt that the errors," alone or cumulatively, "had a *substantial* effect on the outcome." *United States v. Charley*, 189 F.3d 1251, 1270 n.29 (10th Cir. 1999) ("Grave doubt, by definition, does not refer to every level of doubt, and *substantial* influence, by definition, does not mean any or some influence."). Assuming that the district court abused its discretion in limiting cross-examination, any errors were harmless because they did not have a substantial influence in the outcome of the case.

### III. CONCLUSION

Mr. Roach's challenge on appeal to the district court's foreclosure of his three lines of cross-examination fails. He has waived his Confrontation Clause arguments, and any error under the rules of evidence was harmless. We uphold Mr. Roach's conviction and affirm the district court's judgment.

All Citations

896 F.3d 1185

## APPENDIX B

UNITED STATES DISTRICT COURT  
District of New MexicoUNITED STATES OF AMERICA  
v.

SHANE ROACH

**Amended Judgment in a Criminal Case - Reason:**  
Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)**(defendant found guilty after plea of not guilty to  
indictment)**

Case Number: 1:15CR02732-001JAP

USM Number: 81540-051

Defendant's Attorney: David C. Serna

## THE DEFENDANT:

pleaded guilty to count(s) **Indictment**.  
 pleaded nolo contendere to count(s) which was accepted by the court.  
 was found guilty on count(s) **Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count</i>
18 U.S.C. Sec. 1591(a)	Sex Trafficking by Means of Force, Threats, Fraud, and Coercion	06/11/2015	

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. Sec. 3553(a). The Court also believes the sentence is reasonable and provides just punishment for the offense.

The defendant has been found not guilty on count(s).  
 Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/13/17

Date of Imposition of Judgment

/s/ James A. Parker  
Signature of JudgeHonorable James A. Parker  
Senior United States District Judge  
Name and Title of Judge4/18/17

Date

DEFENDANT: **SHANE ROACH**  
CASE NUMBER: **1:15CR02732-001JAP**

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **180 months.**

The court makes the following recommendations to the Bureau of Prisons:  
**Safford Federal Correctional Institution, Safford, Arizona, if eligible**

**The Court recommends the defendant participate in the Bureau of Prisons 500 hour drug and alcohol treatment program.**

The defendant is remanded to the custody of the United States Marshal.  
 The defendant shall surrender to the United States Marshal for this district:  
 at on .  
 as notified by the United States Marshal.  
 The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:  
 before 2 p.m. on .  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_ with a certified copy of this judgment.

\_\_\_\_\_  
**UNITED STATES MARSHAL**

By \_\_\_\_\_  
**DEPUTY UNITED STATES MARSHAL**

**DEFENDANT: SHANE ROACH**  
**CASE NUMBER: 1:15CR02732-001JAP**

## **SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of: 5 years.

### **MANDATORY CONDITIONS OF SUPERVISION**

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (Check, if applicable.)
4.  You must cooperate in the collection of DNA as directed by statute. (Check, if applicable)
5.  You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
6.  You must participate in an approved program for domestic violence prevention. (Check, if applicable)
7.  You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. (check if applicable)
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

### **STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: SHANE ROACH  
CASE NUMBER: 1:15CR02732-001JAP

### **SPECIAL CONDITIONS OF SUPERVISION**

**You must not use or possess alcohol.**

**You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.**

**You must not communicate, or otherwise interact, with the victim(s), either directly or through someone else.**

**You must undergo a sex offense-specific assessment to determine the level of risk for sexual dangerousness, recidivism, and amenability to treatment and formulate treatment recommendations if treatment is necessary. You may be required to pay all, or a portion of the cost of the assessment.**

**You must cooperate and comply with the United States Probation Office's Computer Restriction and Monitoring Program (CRMP).**

**You may, with the written approval of the probation officer, possess a computer(s) or a personal internet capable device. You must identify your computer system, internet capable device, data storage device(s), computer data storage media, or any other electronic equipment capable of storing retrieving and/or accessing data that you possess or use. You will agree to only use the internet capable device(s) that are authorized by the probation officer. You must disclose any username or identification(s) and password(s) for all computer or internet capable devices. You must submit to the probation officer, on a monthly basis any cellular or telephone/internet service provider billing records or receipts, to verify that you are not utilizing services that are prohibited.**

**You must permit random unannounced examination of your computer system(s), (as defined in 18 U.S.C. 1030(e)(1)), data storage device(s), computer data storage media, internet capable device(s) or any other electronic equipment capable of storing retrieving and/or accessing data under your control to ensure compliance with the computer monitoring condition. These searches shall be conducted for the purpose of determining whether the computer contains prohibited data prior to installation of monitoring software; to determine whether the monitoring software is functioning effectively after installation, and to determine whether there have been attempts to circumvent the monitoring software after installation. You must inform any other users that said systems, devices, etc., may be subject to examination. Failure to submit said devices to an examination may be grounds for revocation.**

**You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.**

**You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing may include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an**

alcohol monitoring technology program, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must submit to a search of your person, property, residence, vehicle, papers, computers (as defined in 18 U.S.C. 1030(e)(1)), other electronic communications or data storage devices or media, or office under your control. The probation officer may conduct a search under this condition only when reasonable suspicion exists, in a reasonable manner and at a reasonable time, for the purpose of detecting evidence related to sex trafficking, alcohol, controlled substances, firearms, ammunition, dangerous weapons or other contraband. You must inform any residents or occupants that the premises may be subject to a search.

You must participate in and successfully complete a community-based program which provides education and training in anger management.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature

Date