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Tenth Circuit

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Elisabeth A. Shumaker
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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. A.S., A Juvenile Male, Defendant-Appellant.	No. 19-9900

Before **HOLMES**, **McKAY**, and **KELLY**, Circuit Judges.

HOLMES, Circuit Judge.

A.S. was adjudicated a juvenile delinquent under the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. §§ 5031–5043, after the district court concluded that, when he was seventeen years old, he knowingly engaged in a sexual act with a victim, K.P., while she was incapable of appraising the nature of the conduct in violation of 18 U.S.C. § 2242(2)(A).[1] The court ordered A.S. to be

[1] We anonymize A.S.'s name, the victim's name, and the names of several other individuals to protect A.S.'s identity and the identity of the victim.

committed to eighteen months' custodial detention to be followed by twenty-four months' juvenile-delinquent supervision.

On appeal, A.S. raises three challenges. First, he argues that the district court erred in limiting cross-examination and excluding extrinsic evidence concerning a prior allegation of sexual assault that K.P. made. We reject this argument because the court's actions accorded with the Federal Rules of Evidence and did not violate A.S.'s constitutional rights. Second, A.S. argues that the evidence was insufficient to demonstrate that he knew that K.P. was incapable of appraising the nature of the sexual conduct, which he says was an element of the offense. However, we conclude that there was ample evidence for a reasonable factfinder—i.e., the court—to determine that this purported element was established, notably, evidence that A.S. engaged in sexual conduct with K.P. while he knew she was asleep and drunk. Third and finally, A.S. argues that the district court erred in imposing a dispositional sentence on him of custodial detention, but we conclude that the court's sentence did not constitute an abuse of its broad sentencing discretion. Thus, exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** the district court's judgment.

I

A

A.S., who hailed from a non-state territory of the United States, moved to Oklahoma to live with his cousin. When the events at issue here occurred, he was seventeen years old (albeit four months shy of his eighteenth birthday). A.S. and his cousin lived on the Fort Sill military base two houses away from a neighbor who was from the same American territory as them. One evening, the neighbor hosted a party that A.S. and other neighbors attended. Among those neighbors were K.P., the victim in this case, and C.P., her husband. The partygoers drank alcohol and danced. And K.P. had four drinks that night containing eight percent alcohol and got drunk.[2] As the party wound down, K.P. told C.P. that she was tired and that it was time to return home and go to bed. Once they were home, K.P. fell asleep quickly, but C.P. eventually returned to the party.

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[2] Admittedly, the record is not entirely clear concerning exactly how much alcohol K.P. drank. Reading from her report at the hearing, without objection, the nurse that K.P. spoke to the morning after A.S. sexually assaulted her testified that K.P. admitted having "four Straw-Ber-Ritas [between] 9:00 p.m. and 4:00 a.m." R., Vol. II, at 28; *accord* Suppl. R. at 6 (Sexual Assault Examination Forensic Report Form). A Straw-Ber-Rita has 8% alcohol. K.P.'s husband, in contrast, testified that K.P. had only one and a half drinks. However, we construe the facts in the light most favorable to the government and thus report that she had four drinks. *See United States v. Smith*, 606 F.3d 1270, 1280 (10th Cir. 2010). It is undisputed that K.P. was drunk. K.P. testified that she became drunk. And A.S. told an investigator that he thought K.P. was drunk.

K.P. remained asleep in the bedroom. She testified that she "woke up to what [she] thought was [her] husband [i.e., C.P.] having . . . intercourse with [her]." R., Vol. II, at 96 (Bench Trial Tr.). She explained that the individual who was having intercourse with her "was kissing [her] weird, and [she] just thought [her husband] was very drunk." *Id.* at 97. She "kept trying to turn [her] face away." *Id.* She testified that she "was saying [her] husband's name," but that the individual having sexual intercourse with her did not use her husband's name but, rather, uttered (what was later revealed to be) a variant of A.S.'s name, apparently his nickname. *Id.* at 98–99. She thought her husband was "messing with [her]," and eventually she "went back to sleep." *Id.* at 97–98. An indeterminate amount of time later, she was awakened again by the individual having sexual intercourse with her. But when the individual "asked [her] if [she] wanted a baby," she realized the individual was not her husband. *Id.* at 97; Suppl. R. at 7. She exclaimed, "[C.P.,] is that you?" and shoved the man off. Suppl. R. at 7. The individual pulled on his pants and ran away. K.P. ran out of her bedroom and found C.P. at the neighbor's party. She asked whether he had been in their bedroom having sex with her, and he denied this.

K.P. and C.P. later drove to the hospital where K.P. was examined by a nurse. The nurse took DNA from K.P.'s vagina and face. Several days later, law enforcement investigators interviewed A.S. Contrary to his later testimony before

the district court, A.S. told them that he "never touched, [or] kissed" K.P. and "denied ever being inside her residence." R., Vol. I, at 88 (Presentence Investigation Report). He provided law enforcement, however, with "a buccal swa[b] for DNA comparison." *Id.* Law enforcement subsequently learned that the "DNA recovered from a vaginal swab of K.P. matched the sample taken from A.S." *Id.* (bold-faced font omitted). And the parties would later stipulate that "[t]he major DNA profile [from the vaginal swab] matches [A.S.]." R., Vol. I, at 48 (Stipulation).

B

The government filed an information alleging that A.S. "committed an act of juvenile delinquency, to wit: knowingly engaging in a sexual act with another person [i.e., K.P.], while K.P. was incapable of appraising the nature of the conduct." R., Vol. I, at 8 (Juvenile Information).

Defense counsel moved to introduce evidence of a separate allegation of sexual assault made by K.P. Specifically, three weeks prior to the above sexual assault, K.P. and C.P. attended a party with an individual that we refer to here as D.M. K.P. alleged that D.M. forced her to perform oral sex on him at the party. Later that same night, both K.P. and C.P. fell asleep on couches in D.M.'s home. She alleged that, while they were asleep on the couches, D.M. attempted to assault her again. Early the following morning, K.P. told C.P. about both

assaults, and they reported the incidents to the police department of Lawton, Oklahoma, a municipality near Fort Sill. When law enforcement questioned him, D.M. initially denied having any sexual contact with K.P., but—after being asked to provide DNA—he admitted to both acts, although he claimed they were consensual. D.M. later agreed to take a polygraph, which provided a result of "Deception Indicated" when D.M. denied that he had forced K.P. to perform the sex acts. Nevertheless, K.P. decided not to go forward with the case for reasons that the record does not disclose.

The court held a hearing to decide whether evidence concerning this prior allegation of sexual assault would be admitted. At the outset, the court said it was "inclin[ed] . . . to not allow a mini trial on the issue of these other accusations." *Id.*, Vol. II, at 12. Defense counsel explained that A.S. wanted to call the alleged perpetrator of the prior alleged assault, introduce other evidence about the allegation, and cross-examine K.P. about the allegation. The government argued that the cross-examination and admission of extrinsic evidence concerning this prior allegation would not be appropriate under Federal Rule of Evidence 412 and that there was no evidence that the prior allegation was false. Defense counsel acknowledged that they could not "prove that [the] prior allegation [was] true or false." *Id.* at 17. After the parties' arguments, the court ruled as follows:

> What I'm going to do, I think there is some relevance as far as—to her credibility. I'm going to let you [i.e., defense counsel] question the witness about the prior allegations. I am not going to allow you to conduct a mini trial on it, but I will allow you to question the witness.

Id. at 18. In other words, the court authorized cross-examination of K.P. concerning the prior alleged sexual assault but declined to allow defense counsel to introduce extrinsic evidence about the incident. Defense counsel "appreciate[d] the ability to ask her [i.e., K.P.] questions about it" and, "notwithstanding" the court's ruling, proffered certain extrinsic evidence that counsel would have offered into evidence, if permitted to do so—specifically, "recordings [of interviews] provided from the Lawton Police Department in reference to that [prior] allegation as well as the polygraph examination report that contains a detailed interview of this other individual [i.e., D.M.]." *Id.*

The parties proceeded with the bench trial. The government called K.P., C.P., the nurse who evaluated K.P., the neighbor who hosted the party, and an investigator. A.S. testified in his own defense. The testimony largely conveyed the facts laid out above; however, we note two portions of the trial record particularly relevant to the issues on appeal.

First, at the end of the government's direct examination of K.P., the court initiated a bench conference. The court said:

> I am going to let you [i.e., defense counsel] go into the other incident but not the details of that. If you want to go into her

> accusations about what happened, you can do that. But I don't want you to go into the details.

Id. at 102. To "make sure that [defense counsel] underst[oo]d what [the judge was] saying," counsel stated the defense intended "to ask [K.P.] about the party at the other house in Lawton," intended "to ask her if there was an incident at that party involving another man other than [C.P.] and that it involved sexual contact," and intended "to ask her if there was a report at the Lawton Police Department." *Id.* Counsel did not "intend to ask her about fellatio or anything like that." *Id.* The court said those questions were "fine," and defense counsel did not propose any other questions on this issue, nor did defense counsel object to the scope of cross-examination that the court ultimately defined. *Id.*

Second, A.S. testified that K.P. had asked him "[i]f [he] could come . . . inside her house." *Id.* at 168. He said this was the first thing K.P. said to him, although she was looking at him and laughing at him earlier in the evening. He also testified that, later that night, some uncertain amount of time after the invitation to enter the house, he walked into K.P.'s bedroom while she was already inside and "woke her up." *Id.* at 172. He testified that she asked, "Who is this?" *Id.* He testified that he told her, "I am [A.S.]." *Id.* He said they began kissing, and she "didn't resist." *Id.* They then had sex.

After the parties made their closing arguments, the court announced that it had found, beyond a reasonable doubt, that A.S. was "guilty of an act of juvenile

delinquency." *Id.* at 211. The court acknowledged the stipulation that A.S.'s DNA had been found in K.P.'s vagina. The court found that K.P. was incapable of appraising the nature of A.S.'s sexual conduct because she was asleep and intoxicated. The court found A.S.'s testimony that K.P. invited him into the house "entirely incredible." *Id.* at 212. The court issued a further written order, explaining that it found (1) A.S. engaged in a sexual act with K.P., (2) K.P. was incapable of appraising the nature of the conduct because she was asleep and intoxicated, (3) A.S. knew K.P. was incapable of appraising the nature of the conduct because she was drunk and asleep, and (4) the offense was committed on the U.S. military post at Fort Sill (which satisfied the federal jurisdictional element of the offense). *Id.*, Vol. I, at 51–52 (D. Ct. Order).

After the district court adjudicated A.S. delinquent, the government submitted a memorandum advocating that A.S. be committed to detention for five years. The government also presented information about detention programs that would help rehabilitate A.S. and protect the public, including facilities with sex offender treatment. A.S. argued for local outpatient counseling services and vocational training programs, as well as for one residential, therapeutic program in New Mexico. Although the federal sentencing guidelines ("U.S.S.G." or the "Guidelines") do not apply in juvenile proceedings, the U.S. Probation Office nevertheless prepared a Presentence Investigation Report. A.S. filed no "specific

objections" to the factual findings of the report. *Id.*, Vol. II, at 221. The report noted that A.S. had no prior criminal history. Were he tried as an adult, it observed, A.S.'s Guidelines range would have been 97 to 121 months' imprisonment.

At the dispositional hearing, the court heard testimony from A.S.'s cousin, who apologized for A.S.'s behavior and claimed that it was out of character. A.S. apologized for his actions and promised that he would not be back before the court. After receiving further argument, the court announced its disposition:

> I have read and considered the presentence report in your case. I've also considered all that I've heard here today from yourself, your counsel, from your sister,[3] from the government. I've also considered the factors that go into a decision on a juvenile such as yourself. I'm satisfied that rehabilitation, deterrence, and incapacitation are all considerations the Court must make, having found you a juvenile delinquent in the prior proceeding. This was a very serious case, and there will be consequences to that. . . . It's the judgment of the Court that the defendant, [A.S.], is here[by] committed to official detention in the custody of the Attorney General for a term of 18 months. Upon release from official detention, the juvenile shall be placed on juvenile delinquent supervision for a term of 24 months.

Id., Vol. II, at 236–37 (Disp. Hr'g Tr.). A.S. timely appealed.

II

We address (A) whether the district court erred by limiting the scope of cross-examination of K.P. or excluding extrinsic evidence about her prior

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[3] A.S. referred to his cousin as his sister.

allegation of sexual assault, (B) whether sufficient evidence supported the district court's adjudication of delinquency, and (C) whether the district court abused its discretion in arriving at its sentencing disposition. We rule in favor of the district court's judgment on each issue.

A

A.S. argues that the district court erred in preventing him from presenting extrinsic evidence and cross-examining K.P. about her prior allegation of sexual assault. We conclude that the court did not abuse its discretion in its evidentiary rulings under the Federal Rules of Evidence and that A.S.'s constitutional rights were not violated.

1

"Because evidentiary decisions fall within the discretion of the trial court, we review such decisions for abuse of discretion." *United States v. Norman T.*, 129 F.3d 1099, 1105 (10th Cir. 1997). "A district court abuses its discretion only where it (1) commits legal error, (2) relies on clearly erroneous factual findings, or (3) where no rational basis exists in the evidence to support its ruling." *Dullmaier v. Xanterra Parks & Resorts*, 883 F.3d 1278, 1295 (10th Cir. 2018); *see also United States v. Batton*, 602 F.3d 1191, 1196 (10th Cir. 2010) ("[W]e will not disturb the district court's [evidentiary] ruling 'absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of

law or manifests a clear error of judgment.'" (quoting *United States v. Stiger*, 413 F.3d 1185, 1194 (10th Cir. 2005), *abrogated in part on other grounds as recognized in United States v. Ellis*, 868 F.3d 1155, 1177 (10th Cir. 2017))).

This general abuse-of-discretion standard of review extends to "a district court's determination regarding the admissibility of evidence under Rule 412." *United States v. Pablo*, 696 F.3d 1280, 1297 (10th Cir. 2012); *accord United States v. Ramone*, 218 F.3d 1229, 1234–35 (10th Cir. 2000). However, "[t]o the extent the challenge to the exclusion of evidence proffered by the defendant is based on a constitutional objection . . . , we review the district court's ruling excluding that evidence *de novo*." *Pablo*, 696 F.3d at 1297; *accord United States v. Powell*, 226 F.3d 1181, 1198 (10th Cir. 2000). Finally, it is axiomatic that we retain "discretion to affirm on any ground adequately supported by the record." *United States v. Damato*, 672 F.3d 832, 844 (10th Cir. 2012) (quoting *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005)); *accord United States v. Roederer*, 11 F.3d 973, 977 (10th Cir. 1993).

2

The district court's rulings expressly or tacitly implicate substantive standards that are derived from the Federal Rules of Evidence—Rules 412 and 608(b)—and the Sixth Amendment's Confrontation Clause. We briefly summarize these standards.

a

"In sexual-offense cases, evidence of the victim's sexual behavior is generally inadmissible." *United States v. Willis*, 826 F.3d 1265, 1277 (10th Cir. 2016) (citing FED. R. EVID. 412(a)). More specifically, Federal Rule of Evidence 412 states that "evidence offered to prove that a victim engaged in other sexual behavior" and "evidence offered to prove a victim's sexual predisposition" are "not admissible in a . . . criminal proceeding involving alleged sexual misconduct." FED. R. EVID. 412(a); *accord United States v. Isabella*, 918 F.3d 816, 838 (10th Cir. 2019). Assuming that this rule applies here, the only exception possibly relevant is for "evidence whose exclusion would violate the defendant's constitutional rights." FED. R. EVID. 412(b)(1)(C).

The rule "pits against each other two exceedingly important values—the need 'to safeguard the alleged [sexual assault] victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details,' and the need to ensure that criminal defendants receive fair trials." *Pablo*, 696 F.3d at 1297 (alteration in original) (citation omitted) (quoting FED. R. EVID. 412 advisory committee notes to 1994 amendments).

b

Federal Rule of Evidence 608(b) provides that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." FED. R. EVID. 608(b). As the district court here seemed to recognize, "[t]he reason for excluding such extrinsic evidence is to avoid mini-trials that may consume a disproportionate amount of time and confuse the issues." *United States v. Velarde*, 485 F.3d 553, 561 (10th Cir. 2007); *see Palmer v. City of Monticello*, 31 F.3d 1499, 1507 (10th Cir. 1994) ("The district judge did not abuse his discretion in finding that the resolution of that question would have diverted the trial from its main focus.").

While extrinsic evidence is not admissible to prove specific instances of a witness's conduct, "the court may, on cross-examination, allow them [i.e., specific instances of a witness's conduct] to be inquired into if they are probative of the character for truthfulness or untruthfulness of" the witness. FED. R. EVID. 608(b)(1); *see, e.g.*, *United States v. Woodard*, 699 F.3d 1188, 1194 (10th Cir. 2012). However, "[a]n attorney cross-examining" the witness under Rule 608(b) can "only ask about the alleged dishonest act" and then is "'stuck with' his answer, even a denial." *Seifert v. Unified Gov't*, 779 F.3d 1141, 1154 (10th Cir. 2015) (quoting *United States v. Frost*, 914 F.2d 756, 767 (6th Cir. 1990)).

c

The Confrontation Clause guarantees a defendant the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. This guarantee can be violated when, even if "some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to 'expose to the [factfinder] the facts from which [the factfinder], as the sole trier[] of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (per curiam) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). In other words, the Confrontation Clause can be violated when a district court impermissibly limits the "scope of cross-examination." *Davis*, 415 U.S. at 315–18.

As relevant here, "[e]vidence adduced by cross-examination concerning prior sexual intercourse may be required to be admitted by Confrontation Clause rights *where relevant and probative* on a central issue of sexual offense charges." *Powell*, 226 F.3d at 1198 (emphasis added); *cf. United States v. Tail*, 459 F.3d 854, 860 (8th Cir. 2006) ("[T]he propriety of excluding such evidence is strengthened where the prior incident is unrelated to the charged conduct, and where the defendant intends to use the evidence as part of an attack on the 'general credibility' of the witness." (quoting *United States v. Bartlett*, 856 F.2d 1071, 1088 (8th Cir. 1988))). Even so, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such

cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *accord United States v. Turner*, 553 F.3d 1337, 1349 (10th Cir. 2009).

3

A.S. argues that, by limiting the scope of cross-examination of K.P. and refusing to admit extrinsic evidence concerning K.P.'s prior allegation of sexual assault, "the district court erred in excluding patently relevant evidence bearing directly on the credibility of the complainant, and deprived [A.S.] of his constitutional right to confront his accuser." Aplt.'s Opening Br. at 8 (bold-faced font and capitalization omitted). A.S. does not contend that his evidence and cross-examination about K.P.'s prior accusation that she was sexually assaulted fall outside the ambit of Rule 412. *See id.* at 11–15. Accordingly, we are content to assume without deciding that the rule applies here.[4] However, A.S. insists that,

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[4] Recall that Rule 412 expressly applies only when the evidence is being offered for two specific purposes: (1) "to prove that a victim engaged in other sexual behavior," or (2) "to prove a victim's sexual predisposition." It necessarily follows that not all sex-related evidence concerning a victim of sexual misconduct falls within the ambit of the rule. *See, e.g.*, *United States v. Frederick*, 683 F.3d 913, 917 (8th Cir. 2012) (observing "that 'there is a question whether Rule 412 reaches the use of a prior false accusation of rape for impeachment purposes' and that it ha[s] been suggested by legal commentators

(continued...)

notwithstanding the general bar of this rule, the Constitution required the admission of his evidence. Thus, we inquire only into whether A.S.'s evidence was admissible under the constitutional exception set forth in Rule 412(b)(1)(C). We conclude that the constitutional exception did not apply; and that, even apart from Rule 412, A.S.'s effort to admit extrinsic evidence for impeachment purposes was barred by Rule 608(b). We also conclude that A.S. forfeited before the district court any challenge—notably, under the Confrontation Clause—to the court's limitations on the scope of his cross-examination of K.P. and that, in any event, his challenge on appeal fails on the merits. We thus affirm the district court's evidentiary rulings.

a

As noted, A.S. does not challenge the district court's conclusion that evidence that K.P. had recently accused D.M. of sexually assaulting her fell within Rule 412(a)'s prohibition. *See* FED. R. EVID. 412(a). Thus, A.S. is left to argue that the exclusion of this evidence "would violate [his] constitutional rights." *Id.* R. 412(b)(1)(c).

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[4](...continued)
that such evidence [i]s 'more properly analyzed under Rule 608(b)'" (quoting *Bartlett*, 856 F.2d at 1088)); *see also* FED. R. EVID. 412 advisory committee notes to 1994 amendments ("Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412."). Whether A.S.'s purposes for seeking to admit his sex-related evidence actually implicate Rule 412 is *not* a question that we need to reach in light of A.S.'s failure to challenge the rule's applicability.

A.S.'s problem, however, is that "the class of cases in which evidence otherwise barred by the rape shield statute has been deemed to be constitutionally compelled is restricted to those which demonstrate a theory of witness bias or motive to lie." Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295, 299 (2019); *see Van Arsdall*, 475 U.S. at 680 ("[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of *bias* on the part of the witness . . . ." (emphasis added)); *White v. Coplan*, 399 F.3d 18, 26 (1st Cir. 2005) ("Evidence suggesting a motive to lie has long been regarded as powerful evidence undermining credibility, and its importance has been stressed in Supreme Court confrontation cases.").

For example, in *Olden v. Kentucky* the defendant's "theory of the case was that [the purported victim] concocted [a] rape story to protect her [romantic] relationship with [a third party], who would have grown suspicious upon seeing her disembark from [the] car [of defendant's friend]." 488 U.S. 227, 230 (1988) (per curiam). The defendant sought to introduce evidence concerning the "current cohabitation" of the victim and the third party to prove this possible motive. *Id.* at 230. The Supreme Court reversed the trial court's order excluding cross-

examination on this topic, holding the trial court had failed to honor the defendant's "right to conduct reasonable cross-examination." *Id.* at 231.

Our decision in *United States v. Platero*, 72 F.3d 806 (10th Cir. 1995), is much the same. The defendant tried to introduce evidence of a sexual relationship between the victim and a third party in order to demonstrate that the victim had a motivation to tell the third party—who had witnessed the victim fixing her blouse while sitting in a car with the defendant—that the sexual encounter between the victim and the defendant was nonconsensual. *Id.* at 808–09. We held that evidence "should have been submitted to the jury, and [the defendant] should have been permitted to cross-examine [the victim] about her relationship with [the third party] . . . , under the relevance rationale of *Olden*." *Id.* at 815.

But A.S. does not argue, as in *Olden* and *Platero*, that K.P.'s prior sexual history with D.M. would have made her biased against him or indicated that she had a motivation to lie about their sexual encounter. And, although K.P. accused D.M. of sexually assaulting her, A.S. does not even argue on appeal that her accusation was false. Instead, he argues (1) that the excluded evidence about K.P.'s earlier "sexual interaction with [D.M.] after consuming alcohol," which she said was nonconsensual, was relevant to whether her inebriated reactions to A.S.'s sexual conduct with her, which she also said was nonconsensual, reflected

that she was unable to understand and acquiesce to his conduct; and (2) that K.P.'s "response during the investigation of the prior episode was equally relevant to evaluating her reluctance to answer questions on cross examination, the significance of variations in her accounts, and, *ultimately, her credibility*." Aplt.'s Opening Br. at 11 (emphasis added).

In other words, viewed broadly, A.S. seems to be arguing that the circumstances surrounding K.P.'s prior sexual interaction with D.M. were relevant, first, to whether, after consuming alcohol, K.P. was incapable of appraising the nature of A.S.'s sexual conduct, and, if so, whether A.S. would have known of her incapacity (as the parties agree the statute of conviction, § 2242(2)(A), requires); and, second, to whether K.P.'s testimony was credible generally. But A.S. offers no explanation of what his evidence would have revealed about K.P.'s sexual interaction with D.M.—be it her demeanor, physical responses, or otherwise—that would have had any bearing on whether she was incapable of comprehending the nature of A.S.'s sexual conduct with her or, more specifically, on whether A.S. would have known about her incapacity due to her reactions to him. Nor does he meaningfully explain what about K.P.'s response to the investigation of her prior sexual assault allegation would have called her general credibility into question. Because A.S. has "not developed" these

arguments, we may deem them waived. *United States v. Brinson*, 772 F.3d 1314, 1319 n.1 (10th Cir. 2014).

In any event, the Constitution does not mandate the admission of irrelevant or general impeachment evidence. *See United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005) (noting that "a criminal defendant does not have a constitutional right to present evidence that is not relevant and not material to his defense"); *Boggs v. Collins*, 226 F.3d 728, 737 (6th Cir. 2000) ("When faced with alleged prior false accusations of rape, federal courts have . . . [found] cross-examination constitutionally compelled when it reveals witness bias or prejudice, but not when it is aimed solely to diminish a witness's general credibility."); *cf. Willis*, 826 F.3d at 1278 ("Evidence that [the victim] had sex with another individual does not tend to make it more or less probable that [the victim] consented to sex with [the defendant]. Accordingly, that evidence was irrelevant to the only issue at trial. The district court therefore did not exceed its discretion in excluding it." (citation omitted)); Cavallaro, *supra*, at 309 (explaining that "the theory of the impeachment" which merely posits that a complainant previously "was lying about a sexual episode in which she consented and testified under oath that she had not consented" runs "through character for untruthfulness, rather than through bias," and thus "is not of constitutional stature").

A.S.'s primary responsive argument is that "[t]he policy considerations underpinning [Rule 412] were inapplicable in this case since the entire record is sealed, no jury was empaneled, and the victim was not subject to public scrutiny or disclosure." Aplt.'s Reply Br. at 8. As A.S. notes, a set of special procedural requirements governs juvenile proceedings, including specific requirements about the sealing of information, *see* 18 U.S.C. § 5038, and trial by a judge instead of a jury, *see United States v. Duboise*, 604 F.2d 648, 651–52 (10th Cir. 1979). A.S. argues that these safeguards would have maintained K.P.'s privacy, minimized the risk of embarrassment, and prevented sexual stereotyping based on past behavior. But we reject this argument.

Even assuming that the policy concerns animating Rule 412's evidentiary bar are less acute in the juvenile adjudicatory setting, we can hardly say that they are de minimis: the alleged victim would still be obliged to endure the disclosure of highly intimate, personal information to the judge and other strangers. And, more importantly, even if these concerns were less acute in the juvenile context, that would not give trial courts license to override the protective legislative judgment embodied in Rule 412, which "applies to both civil and criminal proceedings" and "encourages victims of sexual misconduct to . . . participate in legal proceedings against alleged offenders" by protecting them from disclosure of such intimate information "in most instances." FED. R. EVID. 412 advisory

committee notes to 1994 amendments. Put another way, courts are not free to independently create ad hoc exceptions—for juvenile proceedings or otherwise—to the legislative judgment that Rule 412 embodies.

And we already have concluded that A.S. fails to present a theory that fits within a constitutionally mandated exception to the rule's application. *See* Cavallaro, *supra*, at 296 ("The Court has long recognized and reinforced a hierarchy of impeachment, allowing evidence on a theory of bias virtually without restriction, even while approving strict legislative regulation of evidence that impeaches on theories other than bias, such as impeachment through character for untruthfulness or impeachment by contradiction." (footnote omitted)). Thus, assuming without deciding that Rule 412 applied to this evidence, we conclude that A.S. has not established a constitutional exception to its application.

b

Quite apart from Rule 412, any effort by A.S. to admit extrinsic evidence concerning K.P.'s prior allegation of a sexual assault by D.M. for impeachment purposes was barred by Rule 608(b).

A.S. argues that K.P.'s "response during the investigation of the prior episode," which he sought to prove in part through audio recordings of police interviews with her, was "relevant to evaluating her reluctance to answer questions on cross examination, the significance of variations in her accounts,

and, *ultimately, her credibility*." Aplt.'s Opening Br. at 11 (emphasis added). But Federal Rule of Evidence 608(b) states that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." FED. R. EVID. 608(b). And the district court appeared to rely in part on Rule 608(b) by stating that it was denying admission of the evidence to avoid a mini-trial. *See Velarde*, 485 F.3d at 561 ("The reason for excluding such extrinsic evidence [under Rule 608(b)] is to avoid mini-trials that may consume a disproportionate amount of time and confuse the issues.").

Yet A.S.'s opening brief does not cite Rule 608(b) once, or otherwise directly address the district court's rationale for excluding the evidence. Even if A.S.'s failure in this regard could be excused because the court's reliance on the rule was not express and arguably less than pellucid, the government highlighted the court's reliance on the rule in its responsive briefing. *See* Aplee.'s Response Br. at 18–20. But, even in reply, A.S. still failed to interact with Rule 608(b). Therefore, we are free to conclude that A.S. waived, at the very least, non-obvious arguments *against* the application of Rule 608's bar to extrinsic evidence. *See Eaton v. Pacheco*, 931 F.3d 1009, 1031 (10th Cir. 2019) ("Eaton doesn't respond to the state's mootness argument in his reply brief. Accordingly, we treat any non-obvious responses he could have made as waived and assume the state's

mootness analysis is correct."); *cf. Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994) (noting that "[w]hen an appellee advances an alternative ground for upholding a ruling by the district judge, and the appellant does not respond in his reply brief or at argument," "he waives . . . any objections not obvious to the court to specific points urged by the appellee").

But even if we were to conceive of A.S.'s argument as being that the Confrontation Clause trumps Rule 608(b), the argument fails. The Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam). Neither have we. *Velarde*, 485 F.3d at 562–63 (explaining that "[n]either this Court nor the Supreme Court has held that a defendant has a constitutional right [under the Confrontation Clause] to introduce extrinsic evidence" that a sexual assault victim falsely accused other people of sexual assault).

We have acknowledged that "there may be circumstances in which the Confrontation Clause would entitle a criminal defendant to introduce highly probative exculpatory extrinsic evidence," but we have also cautioned that, "if such constitutional exceptions exist, they are narrow." *Id.* at 562. In particular, we noted that those courts that have accepted such arguments have largely done so only when the prior accusations were "demonstrably false." *Id.* (quoting

Ellsworth v. Warden, 333 F.3d 1, 4 (1st Cir. 2003) (en banc)); *see also id.* ("And a federal district court, in an opinion affirmed in an unpublished circuit decision, allowed extrinsic evidence of three prior allegations that the complainant had admitted in writing to be false.").[5] But, as A.S. conceded before the district court, he could not establish that K.P.'s prior allegation of sexual assault by D.M. was false. *See* R., Vol. II, at 17 (Defense Counsel: "I can't . . . prove that prior allegation is true or false. . . . I'm without ability to prove that one way or the other."). He, moreover, did not believe that he needed to show that the allegation was false, telling the court, "That's not my burden, ..." *See id.* Thus, even if an exception to Rule 608(b) exists, it would not apply here.

Accordingly, quite apart from Rule 412, any effort by A.S. to admit extrinsic evidence concerning K.P.'s prior allegation of a sexual assault by D.M. was barred by Rule 608(b).

c

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[5] *See also United States v. Crow Eagle*, 705 F.3d 325, 328–29 (8th Cir. 2013) (per curiam) (holding the district court did not abuse its discretion in excluding witnesses' prior sexual assault allegations because the defendant "offer[ed] no evidence of the falsity" of the allegations and "[t]he right of confrontation . . . does not permit the impeachment of a victim with (alleged) prior false allegations if their probative value is weak"); *Quinn v. Haynes*, 234 F.3d 837, 846 (4th Cir. 2000) (denying habeas relief because the Supreme Court's decisions "involve impeachment based upon credibility-impugning facts that were not in dispute," while "the entire crux of the issue [here was] whether the credibility-impugning fact [i.e., that a prior allegation of sexual assault was false] existed at all").

Lastly, A.S. forfeited any argument that the district court improperly limited the scope of his cross-examination of K.P. and, thus, violated his rights under the Confrontation Clause. In any event, his argument fails on the merits.

Before trial, the court stated:

> What I'm going to do, I think there is some relevance as far as—to [K.P.'s] credibility. I'm going to let you [i.e., defense counsel] question [K.P.] about the prior allegations. I am not going to allow you to conduct a mini trial on it, but I will allow you to question [her].

R., Vol. II, at 18. Defense counsel acknowledged that "we certainly appreciate the ability to ask her questions about it," and, although counsel proffered some extrinsic evidence about K.P.'s prior allegation "[n]otwithstanding" the court's ruling, counsel did not further address at that time the issue of cross-examination, including its permissible scope. *Id.* at 18–19.

Then, during trial, the court said:

> I am going to let you [i.e., defense counsel] go into the other incident but not the details of that. If you want to go into her accusations about what happened, you can do that. But I don't want you to go into the details.

Id. at 102. The defense made sure that it would be able "to ask [K.P.] about the party at the other house in Lawton," "to ask her if there was an incident at that party involving another man other than [C.P.] and that it involved sexual contact," and "to ask her if there was a report at the Lawton Police Department." *Id.* The court authorized all three lines of questioning. Defense counsel did not propose

any other questions, nor did defense counsel object to the scope of cross-examination that the court ultimately defined.

Based on the foregoing events, we conclude that A.S. forfeited his challenge to the court's ultimate definition of the permissible scope of cross-examination by not lodging an objection to it. *See United States v. Roach*, 896 F.3d 1185, 1192 (10th Cir. 2018) ("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 . . . or by failing at trial to object to the limitation at all." (citations omitted)), *cert. denied*, 139 S. Ct. 845 (2019). More specifically, A.S. failed to explain to the court precisely what areas of cross-examination its limitations prevented him from pursuing. *See id.* at 1193 (requiring defendant to "assert the *particular topic* for cross-examination" in order to preserve an objection); *United States v. Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010) (holding that a defendant who argued on appeal that the court's "limitation [on cross-examination] violated her Confrontation Clause and due process rights" was required to argue under our plain-error rubric "[b]ecause [the defendant] made no objection at trial"). And, by failing here to "make an argument for plain error review," A.S. has now "effectively waived" his argument concerning the court's limits on cross-examination. *Fish v. Kobach*, 840 F.3d 710, 729–30 (10th Cir. 2016); *accord Havens v. Colo. Dep't of Corr.*, 897 F.3d

1250, 1260 (10th Cir. 2018) (explaining that "a litigant's 'failure to argue for plain error [review] and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court'" (alteration in original) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011))).

A.S.'s argument concerning these limits would fail on the merits in any event. A.S.'s argument in his opening brief only makes one specific contention that the district court impermissibly limited cross-examination: "By refusing to permit counsel to question [K.P.] about *the party in Lawton* . . . , the district court effectively blocked [A.S.]'s cross examination of the complainant." Aplt.'s Opening Br. at 15 (emphasis added). But the court did not actually impose such a limitation.

Specifically, counsel asked whether the defense would be able to inquire "about the party at the other house in Lawton" and "if there was an incident at that party involving another man other than [C.P.] and that it involved sexual contact." R., Vol. II, at 102. The court told counsel that it was "fine" to ask K.P. those questions. *Id.* Counsel then did so without objection. *Id.* at 115–16 ("And you were there at that party with [C.P.]; correct?" "And then I'm not going to go into this, but I'm just going to ask it this way. Something happened between you and another man, not [C.P.], then?"). Consequently, A.S. was not barred from

cross-examining K.P. concerning the party in Lawton. And, insofar as A.S. failed to ask an optimal series of questions on that subject, it is not because the court barred him from doing so. *See Ramone*, 218 F.3d at 1237 ("Defense counsel's own failure to seize [the] opportunity [to follow up on areas of cross-examination that it could pursue] does not show that the district court unfairly limited [the defendant]'s right to confront his accuser.").

To be sure, A.S. insists that the cross-examination here did "not equate to an unfettered cross examination of the complainant." Aplt.'s Reply Br. at 7. But "[a] criminal defendant's right to present a defense . . . is not unfettered." *Pablo*, 696 F.3d at 1295. Indeed, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination." *Van Arsdall*, 475 U.S. at 679; *see also id.* ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (quoting *Fensterer*, 474 U.S. at 20)). In other words, "[t]he right of confrontation through cross-examination is not absolute." *Hooks v. Workman*, 689 F.3d 1148, 1177 (10th Cir. 2012).

In sum, we conclude that A.S. forfeited his challenge to the district court's ultimate definition of the permissible scope of cross-examination by not lodging an objection to it at trial and waived review of the matter on appeal by not

invoking the plain-error rubric. And, in any event, his challenge fails on the merits.

***

For the foregoing reasons, we conclude that the district court did not abuse its discretion under the Federal Rules of Evidence in its evidentiary rulings—which prevented A.S. from presenting extrinsic evidence about K.P.'s prior allegation of sexual assault and limited his cross-examination of K.P. regarding that subject—and that those rulings did not violate A.S.'s constitutional rights.

B

A.S. next argues that the evidence was insufficient to satisfy one of the elements of the offense that the government was required to prove—namely, that A.S. knew that K.P. was incapable of appraising the nature of his sexual conduct. But we conclude that there was ample evidence for a reasonable factfinder—i.e., the court—to determine that this purported element was established.

1

We review the record for the sufficiency of the evidence de novo. *United States v. Smith*, 606 F.3d 1270, 1280 (10th Cir. 2010). "Evidence is sufficient to support a [ ] conviction if a reasonable [factfinder] could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along

with reasonable inferences therefrom, taken in a light most favorable to the government." *Id.* (first alteration in original) (quoting *United States v. Mains*, 33 F.3d 1222, 1227 (10th Cir. 1994)); *see also United States v. Roberts*, 787 F.3d 1204, 1211 (8th Cir. 2015) ("After a bench trial, we view the evidence 'in the light most favorable to the verdict, upholding the verdict if a reasonable factfinder could find the offense proved beyond a reasonable doubt, even if the evidence rationally supports two conflicting hypotheses.'" (quoting *United States v. Huggans*, 650 F.3d 1210, 1222 (8th Cir.2011))). "[W]e evaluate the sufficiency of the evidence by considering the collective inferences to be drawn from the evidence as a whole." *United States v. Ibarra-Diaz*, 805 F.3d 908, 931 (10th Cir. 2015) (quoting *United States v. Bader*, 678 F.3d 858, 873 (10th Cir. 2012)).

2

The district court found that A.S. violated 18 U.S.C. § 2242(2)(A), which states:

> Whoever, in the . . . territorial jurisdiction of the United States . . . , knowingly . . . (2) engages in a sexual act with another person if that other person is . . . (A) incapable of appraising the nature of the conduct . . . shall be fined under this title and imprisoned for any term of years or for life.

A.S. challenges the sufficiency of the evidence as to only one purported element of this offense: whether A.S. *knew* that the victim was incapable of appraising the nature of the sexual conduct. The government does not dispute that it was

required to prove this element, and we thus assume in resolving this case that it was obliged to carry this burden.[6] We simply ask whether the evidence was sufficient to support the court's finding that this assumed element was established beyond a reasonable doubt.

3

The district court found that K.P. was incapable of appraising the nature of A.S.'s sexual conduct "because she was asleep at the time of the sexual act and because she had been consuming alcohol between the hours of 9:00 p.m. and approximately 4:00 a.m." R., Vol. I, at 51. The court credited K.P.'s testimony that "she awoke to find someone attempting to have sex with her." *Id.* And specifically as to *A.S.'s knowledge* of K.P.'s incapacity, the court found:

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[6] We have never addressed whether the "knowingly" mens rea extends to knowledge of the victim's incapacity or only to knowledge that the defendant was engaging in a sexual act. The Eighth Circuit agrees with the approach the parties have taken here. *See United States v. Bruguier*, 735 F.3d 754, 763 (8th Cir. 2013) (en banc) ("[W]e conclude that the district court's failure to give [the defendant]'s instruction deprived him of his defense that he did not know [the victim] was incapacitated or otherwise unable to deny consent."); *accord United States v. Fast Horse*, 747 F.3d 1040, 1042 (8th Cir. 2014); *see also United States v. Harry*, No. 10-CR-01915-JB, 2014 WL 6065677, at *9 (D.N.M. Oct. 14, 2014) (unpublished) ("The Court determines that . . . Congress intended for the United States to prove beyond a reasonable doubt that [the defendant] knew that [the victim] could not communicate unwillingness to engage in a sexual act."). Because the parties do not dispute that this is the correct interpretation of the statute, we assume without deciding that the government was required to establish A.S.'s knowledge that K.P. was incapable of appraising the nature of the sexual conduct.

> A.S. knew K.P. was incapable of appraising the nature of the conduct. A.S. testified that K.P. and [C.P.] left the party and K.P. indicated their departure was because she was tired, it being long after midnight. A.S. testified that [C.P.] stated he was going to return to the party, he was also aware of K.P.'s alcohol consumption. Although it appears that K.P. consumed less alcohol than most people at the party, she testified that she was drunk and A.S. testified that she was drunk.

Id. Further, the district court relatedly found that "A.S. was aware of the late hour and that K.P. left the party to go to sleep." *Id.* at 55.

The district court's express factual findings regarding A.S.'s knowledge of K.P.'s incapacity are not clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985) (reviewing for clear error factual findings of trial court in bench trial); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 683 (10th Cir. 2010) (stating that we review a district court's factual findings from a criminal bench trial for clear error); *see also United States v. DeCorte*, 851 F.2d 948, 952–53 (7th Cir. 1988) (invoking *Anderson* in reviewing factual findings from a criminal bench trial for clear error). That is, its findings are supported by the record, and we hold no conviction, much less "a definite and firm" one, that the court factually erred. *Apollo Energies*, 611 F.3d at 683–84 (stating that "[a] finding of fact is not clearly erroneous unless it is without factual support in the record, or unless the court after reviewing all the evidence, is left with a definite and firm conviction that the district court erred" (quoting *United States v. Jarvison*, 409 F.3d 1221, 1224 (10th Cir. 2005))). We conclude,

moreover, that the court's findings about what A.S. knew satisfied, as a matter of law, the purported element of his offense that he knew about K.P.'s incapacity. In other words, we conclude that there was sufficient evidence from which a reasonable factfinder could determine that A.S. knew K.P. was incapable of appraising the nature of the sexual conduct because she was asleep and drunk.

In this regard, we underscore K.P.'s testimony that she was asleep when the assault began. *See* R., Vol. II, at 96–97 ("I woke up to what I had thought was my husband having—I thought my husband was having intercourse with me. . . . I woke up to, again, what I had thought was my husband having sex with me . . . ."). The district court was entitled to credit that testimony. And, thus, a reasonable factfinder could have inferred without difficulty that A.S. knew that, in her state of slumber, K.P. was incapable of ascertaining the nature of his sexual conduct.

There was ample evidence, moreover, that K.P. was drunk at the time of her sexual encounter with A.S. and A.S. knew it. Construed in the light most favorable to the government, the evidence at the hearing showed that K.P. had four drinks containing eight percent alcohol the night of the encounter and that she was drunk. *See id.* at 28 (reporting that K.P. admitted having "four Straw-Ber-Ritas [between] 9:00 p.m. and 4:00 a.m."); *id.* at 95 (Q: "Do you remember how much you had to drink?" A [by K.P.]: "Quite a bit." Q: "Were

you drunk?" A: "Yes."); *id.* at 114 (Q: "And you think now that you were drunk?" A [by K.P.]: "Yes."). Moreover, A.S., himself, told an investigator that he believed K.P. was drunk. *Id.* at 132–33 (Q: "And did you ask him, the defendant, if he believed that [K.P.], or who he referred to as 'that girl,' was also drunk?" A: "I did ask him. And the defendant said that she was drunk."). Thus, a reasonable factfinder also could have determined that K.P.'s level of intoxication was sufficiently high that it materially contributed to her inability to appraise the nature of A.S.'s conduct and A.S. knew this.

To be sure, A.S. gave a different account of what happened—i.e., he claimed that K.P. talked to him after he entered her bedroom and woke her up, kissed him without resistance, and then had sex with him—but the district court, as factfinder, was not required to believe A.S.'s account. *See United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) ("Where conflicting evidence exists, we do not question the [factfinder's] conclusions regarding the credibility of witnesses or the relative weight of evidence." (alteration in original) (quoting *United States v. Magleby*, 241 F.3d 1306, 1312 (10th Cir. 2001))); *see also Roberts*, 787 F.3d at 1211 (noting, in the bench-trial context, that the factfinder's verdict will be upheld "even if the evidence rationally supports two conflicting hypotheses" (quoting *Huggans*, 650 F.3d at 1222)). Indeed, the court expressly found "the Defendant's testimony largely incredible" because, beyond his own

testimony, "there [wa]s no evidence K.P. spoke with A.S. much less flirted with him." R., Vol. I, at 52. In this regard, another individual at the party testified that "K.P. spoke to almost no one other than her husband [C.P.], and that she did not flirt with A.S." *Id.* C.P. also "testified that K.P. did not speak with A.S. nor was she ever alone with him." *Id.* Therefore, the district court's decision to reject A.S.'s contrary account of whether K.P. was asleep when he first engaged in sexual conduct with her was reasonable.

Our conclusion that the evidence was sufficient to support a reasonable factfinder's determination that A.S. had knowledge of K.P.'s incapacity is highlighted by the similarity between this case and *Smith*. There, the defendant argued that "insufficient evidence was presented to support the jury's findings that he acted knowingly and that Jane Doe was unable to communicate unwillingness to partake in the sexual act." 606 F.3d at 1281. We rejected this argument, noting that the victim was "heavily intoxicated," had fallen asleep, and woke up to find the defendant "on top of her and engaged in sex." *Id.* Similarly, here, taking the evidence in the light most favorable to the government, we conclude that the evidence was sufficient to support a reasonable factfinder's determination that A.S. knew K.P. was incapable of appraising the nature of the sexual conduct because she was asleep and drunk. The district court did not clearly err in finding that A.S. had that knowledge at the time of his conduct.

C

Finally, we reject A.S.'s argument that the district court abused its broad discretion in imposing an eighteen-month term of detention.

1

Other circuits, and both parties, agree that "[w]e review a juvenile delinquency sentence under the [FJDA] for abuse of discretion." *United States v. H.B.*, 695 F.3d 931, 935 (9th Cir. 2012); *see also United States v. M.R.M.*, 513 F.3d 866, 868 (8th Cir. 2008) ("The district court enjoys 'broad discretion' when sentencing juvenile offenders under the FJDA—indeed, broader discretion than when sentencing an adult." (citation omitted) (quoting *United States v. K.R.A.*, 337 F.3d 970, 978 (8th Cir. 2003))). "A district court abuses its discretion only where it (1) commits legal error, (2) relies on clearly erroneous factual findings, or (3) where no rational basis exists in the evidence to support its ruling." *Dullmaier*, 883 F.3d at 1295.

2

The court imposed a disposition under 18 U.S.C. § 5037(a), which in pertinent part states:

> If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition . . . . After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. [§] 994, the court may suspend the findings of juvenile delinquency, place him on

> probation, or commit him to official detention which may include a term of juvenile delinquent supervision to follow detention.

A Sentencing Commission policy statement further provides that although the Guidelines "do not apply to a defendant sentenced under the [FJDA]," "the sentence imposed upon a juvenile delinquent may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor sufficient to warrant an upward departure from that guideline range." U.S.S.G. § 1B1.12 (2016). Beyond this guidance from the Sentencing Commission and some more specific directives (not material here) embodied in the remainder of § 5037, there are no other statutory or regulatory limitations that cabin a district court's discretion.

In light of the foregoing text, we read the statutory scheme to give district courts broad discretion to choose between the enumerated dispositional options. Our role is to review whether the court abused its discretion in picking among those options—for example, by basing its sentence on a clearly erroneous view of the facts, by imposing a sentence greater than that applicable to a similarly situated adult, or by arriving at a disposition not supported by a rational basis.

Despite this broad delegation of discretion, A.S. argues that we must review "whether the district court's disposition was *the least restrictive means* to accomplish the rehabilitation of the juvenile and to address the needs of the community." Aplt.'s Opening Br. at 20 (emphasis added). He argues that the

history of Congress's amendments to the FJDA's text and authority from the Ninth Circuit support his approach, which (for simplicity's sake) we call "the least-restrictive-disposition" rubric. We examine both asserted bases for this rubric but are left unpersuaded that it is appropriate here.

a

The modern version of § 5037 is the product of amendments commencing in 1974. *See* Juvenile Justice and Delinquency Prevention Act of 1974, PUB. L. NO. 93-415, 88 Stat. 1109, 1136–37. As amended then, the statute provided that "[t]he court may suspend the adjudication of delinquency or the disposition of the delinquent on such conditions as it deems proper, place him on probation, or commit him to the custody of the Attorney General." *Id.* at 1136. We have recognized that rehabilitation is an important goal of the FJDA. *See, e.g.*, *United States v. McQuade Q.*, 403 F.3d 717, 719 (10th Cir. 2005) ("The purpose of the federal juvenile delinquency process 'is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.'" (quoting *United States v. Anthony Y.*, 172 F.3d 1249, 1251–52 (10th Cir. 1999))). However, § 5037's text as amended in 1974 (like its text today) provides no guidance to district courts on how to exercise their broad discretion in selecting an appropriate disposition among the options the statute specifies; nor does it mandate that courts should impose in

each and every case the least restrictive disposition that will further the juvenile's rehabilitation.

In arguing to the contrary, A.S. directs us to language in a Senate Report associated with the amendments that stated:

> [I]t is necessary to amend the [FJDA] to guarantee certain basic procedural and constitutional protections to juveniles under Federal jurisdiction. The Committee believes that the Act should provide for the unique characteristics of a juvenile proceeding and the constitutional safeguards fundamental to our system of justice. . . . The Federal law also needs to be brought up-to-date to incorporate the rehabilitative concept of a juvenile proceeding as promulgated in model juvenile court acts.

S. REP. NO. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5312. While this language supports the general notion that Congress amended the FJDA with rehabilitation in mind, it was not specifically addressing § 5037—the dispositional sentencing provision at issue here. Moreover, these general statements about the committee's purposes do not change our understanding of the broad discretion that the *enacted legislative text* granted district courts, let alone persuade us to adopt the specific least-restrictive-disposition rubric that A.S. advances. *Cf.* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("Congress votes on the bill, not on the reports. No one can vote against a report, and the President cannot veto the language of a report.").

A.S. next points us to the Sentencing Reform Act of 1984, PUB. L. NO. 98-473, 98 Stat. 1987, which amended the FJDA. The Act's language that A.S. highlights reads:

> After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. [§] 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention.

98 Stat. 2013. A.S. argues that, "[r]ead in the complete context of the Sentencing Reform Act, Congress's description of dispositions, from least to most restrictive, is consistent with its explicit focus on rehabilitation of the juvenile." Aplt.'s Opening Br. at 23. We disagree. By its plain terms, this language simply prescribes dispositional options for the district court, without expressing a preference for a particular option or sequence of options. More specifically, we do not see in the ordering of the potential dispositions any "explicit focus on rehabilitation," *see id.*, let alone support for the least-restrictive-disposition rubric A.S. advocates.[7]

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[7] In his discussion of the 1984 amendments, A.S. also cites *United States v. R.L.C.*, 503 U.S. 291 (1992). That case held—as the Sentencing Commission's policy statement now acknowledges—that a juvenile can be sentenced to no more than the maximum sentence that the Guidelines prescribe for a similarly situated adult. *Id.* at 294. A.S. points to a footnote in a part of the opinion that only a plurality joined that acknowledges that "[w]hile it is true that some rehabilitative tools were removed from the juvenile penalty scheme in 1984 (continued...)

A.S., however, also points to Congress's 2002 amendments to the FJDA. *See* 21st Century Department of Justice Appropriations Authorization Act, PUB. L. NO. 107-273, 116 Stat. 1758, 1896–97. A.S. points out that, among other things, those amendments added "provisions regarding juvenile probation and sanctions for probation violations" and a provision stating that a district court, in committing a juvenile delinquent to detention, may include "a term of 'delinquent supervision to follow official detention.'" Aplt.'s Opening Br. at 25–26. He reasons that the amendments—along with those that the Sentencing Reform Act effected—evince Congress's "continuing intention to address juvenile delinquency through a combined effort of prevention, structured processes for determining whether the alleged act occurred, and *a graduated system of punishment* that [goes from] suspending the finding of delinquency, to a sentence of probation, [to] a term of official detention." *Id.* at 26 (emphasis added).

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[7](...continued)
[by the Sentencing Reform Act], the [FJDA] does not completely reject rehabilitative objectives." 503 U.S. at 298 n.2 (plurality opinion) (citation omitted). But we are hard pressed to see how this language helps A.S. much. Putting aside that it was not embraced by a majority of the Court, this language suggests that the FJDA is less focused on "rehabilitative objectives" after the Sentencing Reform Act than it was before. And the fact the FJDA "does not completely reject rehabilitative objectives" hardly suggests, as a matter of logic, that the statute assigns those objectives a position of primacy in a district court's dispositional calculus or otherwise bolsters in any meaningful way A.S.'s contention that the statute "incorporate[s] a hierarchical order guiding the courts' dispositional decisions," Aplt.'s Opening Br. at 26, by requiring them to apply the least-restrictive-disposition rubric in furtherance of the juvenile's rehabilitation.

However, we see nothing in the 2002 amendments' language—standing alone, or in combination with the Sentencing Reform Act's earlier amendments—that supports A.S.'s contention that Congress sought to mandate "a graduated system of punishment" that would take away the otherwise broad discretion of a trial judge to craft a disposition that is tailored to the particular needs and circumstances of the individual juvenile before him. As previously suggested, we do not deem it reasonable to infer from the mere fact that Congress provided an array of dispositional options in the FJDA that it "incorporated a hierarchical order guiding" courts' selection among those options. *Id.*

In sum, insofar as A.S. relies on the history of Congress's revisions to the FJDA's text to support his argument in favor of a least-restrictive-disposition rubric, he is misguided.

b

A.S.'s least-restrictive-disposition rubric primarily stems from decisions of the Ninth Circuit. In its seminal decision, *United States v. Juvenile*, 347 F.3d 778 (9th Cir. 2003), the Ninth Circuit enunciated the rule that "[y]outh who are adjudged to be delinquent under the FJDA must . . . be confined in the least-restrictive environment that will support their continued rehabilitation." *Id.* at 785. The court further held that "[i]t must be clear from the record, if not explicit, that a district court weighed all of the relevant factors and found that the

disposition imposed was the least restrictive means to accomplish a young person's rehabilitation, given the needs of the child and the community." *Id.* at 787. The *Juvenile* panel recognized that "the FJDA does not set out specific guidelines for crafting a juvenile sentence" but concluded that "the scope of a district court's sentencing discretion is limited by *the purposes* of the FJDA, which authorizes federal courts to sentence particular juveniles in the first place." *Id.* at 785 (emphasis added). In that regard, it reasoned that "so long as a juvenile remains within the auspices of the FJDA for sentencing, he or she is presumptively capable of rehabilitation, and any sentence imposed by a district court must accord with this presumption." *Id.*; *see also id.* ("In keeping with its rehabilitative goals, the FJDA disfavors institutionalization and in particular the warehousing of young people away from their communities."). The Ninth Circuit has adhered to *Juvenile*'s approach. *See United States v. JDT*, 762 F.3d 984, 1006 (9th Cir. 2014); *Jonah R. v. Carmona*, 446 F.3d 1000, 1010 (9th Cir. 2006).

However, we are unpersuaded by it. We are unaware of any other circuit that has embraced the Ninth Circuit's approach. And two circuits—the First and the Eighth—have affirmatively rejected it. *See M.R.M.*, 513 F.3d at 869; *United States v. Patrick V.*, 359 F.3d 3, 10–12 (1st Cir. 2004). In some material respects, the reasoning of those two circuits is akin to, and validates, our own: specifically, we believe that rehabilitation is only one goal among others—albeit an important

one—that animates the FJDA's dispositional sentencing scheme, and the FJDA cannot be read as obliging trial courts to assign rehabilitation to a place of primacy in their dispositional sentencing calculus.

Turning first to the Eighth Circuit in *M.R.M.*, the panel acknowledged that the broad dispositional discretion that it understood the FJDA to vest in trial courts was incompatible with the Ninth Circuit's approach, stating, "We have never adopted the Ninth Circuit's [least-restrictive-disposition] standard, and we decline to do so here." 513 F.3d at 869. The panel parted ways with the Ninth Circuit because "[t]he plain language of the FJDA imposes no least-restrictive disposition requirement, and the structure of the statute is ambiguous at best." *Id.* While "[r]ehabilitation is one purpose of the FJDA, . . . it is not the only purpose served by adjudications of juvenile delinquency." *Id.* (citation omitted). Therefore, "[n]othing in the statute precludes the district courts from giving due consideration, for example, to protection of the public or deterrence." *Id.*

Likewise, the First Circuit in *Patrick V.* rejected the defendant's argument "that the purpose of the FJDA is rehabilitation and that this purpose trumps all others." 359 F.3d at 10. The court noted that, to the contrary, the FJDA has dual objectives, "that of rehabilitation and that of protecting society." *Id.* at 9. The "absolutist view," i.e., of prioritizing rehabilitation above all else, "does not reflect the extent to which rehabilitation, with the growth of youth violence, has

increasingly shared the stage with goals of the criminal process." *Id.* at 10.

Like the First and Eighth Circuits, we are unpersuaded by the Ninth Circuit's absolutist approach. We instead agree that "[t]he plain language of the FJDA imposes no least-restrictive disposition requirement." *M.R.M.*, 513 F.3d at 869. Of course, district courts should consider rehabilitation in exercising their broad discretion to fashion appropriate, particularized dispositions for the juveniles before them. But they should consider this factor alongside other relevant factors, notably those that are implicit in the dispositional options that the FJDA prescribes. In this vein, given that the FJDA authorizes custodial detention, we are confident that the goals of incapacitation—and, more generally, public safety—and deterrence are among the appropriate considerations. Indeed, even A.S. does "not contend [that] considerations of public safety [a]re irrelevant to sentencing." Aplt.'s Reply Br. at 12.

3

Having set out the applicable legal standards, we summarize relevant district court proceedings that provide context to the court's disposition before concluding that the court did not abuse its discretion in arriving at its disposition for A.S.

In the district court, A.S. argued for several dispositional options: complete suspension of the finding of his delinquency, job-training programs in the

Western District of Oklahoma, outpatient counseling services in Lawton or Oklahoma City, or a therapeutic, residential program in New Mexico. He argued that these or similar programs would "help him become culturally adopted [sic] to the United States" and "give him some qualifications." R., Vol. II, at 228.

A.S. vigorously contended, moreover, that *any* term of custodial detention would *not* be a proper response to his "nonconforming behavior." *Id.*, Vol. I, at 68–69 (Def.'s Mem.). For its part, the government recommended that the court commit A.S. to official detention for five years. *Id.* at 56 (Gov.'s Mem.). It acknowledged at the dispositional hearing "that rehabilitation remains one of many important purposes of the [FJDA]," but noted that A.S. had neither accepted responsibility, nor demonstrated remorse, for his offense. *Id.*, Vol. II, at 234. Thus, it reasoned that detention would be important to deter A.S. from committing further sexual assaults. In particular, the government presented information about rehabilitation programs in Post, Texas; Rapid City, South Dakota; and Morgantown, Pennsylvania, that have sex offender treatment programs that could serve to both rehabilitate A.S. and protect the public. *Id.*, Vol. I, at 58–59.

At the dispositional hearing, the court heard testimony from A.S.'s cousin, who apologized for A.S.'s behavior. A.S. also apologized in the hearing for his own actions and promised that he would not be back before the court. The court then announced its disposition:

> I have read and considered the presentence report in your case. I've also considered all that I've heard here today from yourself, your counsel, from your sister,[8] from the government. I've also considered the factors that go into a decision on a juvenile such as yourself. I'm satisfied that rehabilitation, deterrence, and incapacitation are all considerations the Court must make, having found you a juvenile delinquent in the prior proceeding. This was a very serious case, and there will be consequences to that. . . . It's the judgment of the Court that the defendant, [A.S.], is here[by] committed to official detention in the custody of the Attorney General for a term of 18 months. Upon release from official detention, the juvenile shall be placed on juvenile delinquent supervision for a term of 24 months.

Id., Vol. II, at 236–37. While the court's pronouncement of its disposition was concise, A.S. fails to demonstrate that it evinces an abuse of the court's broad dispositional sentencing discretion.

A.S. argues that the court insufficiently considered his personal background in arriving at its disposition. A.S. explains that he was born and raised overseas in a non-state American territory and simply went to the party to socialize with other individuals from his home territory. A.S. further highlights that he has no prior criminal record or substance-abuse issues and, relatedly, argues that "[t]he events [of the night of the sexual assault] were not the culmination of an escalating history of misconduct . . . nor do they evidence failed efforts to correct his behavior." Aplt.'s Opening Br. at 28. Instead, A.S. argues that his

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[8] *See supra* note 3 (explaining that the district court was actually alluding to A.S.'s cousin, whom he referred to as his sister).

compliance on supervision demonstrates "his amenability to treatment." *Id.* In sum, A.S. asserts that "[t]he District Court's order requiring custodial confinement was unsupported by the facts and contrary to the purpose of the FJDA." *Id.*

However, A.S. does not contend that the district court was not fully aware of those allegedly mitigative facts concerning his background. Indeed, the court received ample information about them both through the PSR and through A.S.'s own testimony and allocution. But, in fashioning an appropriate disposition, it is beyond peradventure that the court was obliged to weigh the less favorable, aggravating facts alongside any mitigative facts. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 487 (2011) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996))); *Payne v. Tennessee*, 501 U.S. 808, 820 (1991) ("Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion . . . ."). And, in this vein, the court underscored that "[t]his was a very serious case, and there will be consequences [for] that." R., Vol. II, at 237. The court found that A.S. entered

the bedroom of a sleeping woman (i.e., K.P.) and raped her. A.S. then denied this to investigators and did not take responsibility. Although technically a juvenile, A.S. committed this offense when he was four months shy of his eighteenth birthday. *See* 18 U.S.C. § 5031 (noting that "a 'juvenile' is a person who has not attained his eighteenth birthday").

In substance, in addition to other relevant matters, the district court effectively weighed the mitigative aspects of A.S.'s history alongside the serious and troubling circumstances of his offense in arriving at a disposition that reasonably took into account the need for "rehabilitation, deterrence, and incapacitation." R., Vol. II, at 237. And, confirming that the court was not myopically focused on the last two factors, it is noteworthy that its detention disposition was significantly lower than the custodial sentence that the Guidelines would have prescribed for a similarly situated adult: the adult Guidelines range would have been 97 to 121 months' imprisonment.[9] Furthermore, A.S. points to

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[9] Indeed, A.S.'s sentence is less severe than courts have imposed on juveniles in analogous circumstances. For example, a Ninth Circuit panel affirmed a custodial sentence that kept a thirteen-year-old defendant in custody until his nineteenth birthday for sexually assaulting two people. *United States v. Juvenile* ("*Juvenile 2004*"), 119 F. App'x 890, 891 (9th Cir. 2004) (unpublished). Also, in *H.B.*, a juvenile received eighteen months' official detention and twelve months' juvenile-delinquent supervision after aiding another juvenile in the commission of a sexual assault against a female friend. 695 F.3d at 933–34. While A.S. is correct that his circumstances are different from those of the juveniles in these cases, not all of the differences cut in his favor. He was

(continued...)

no error of law or clearly erroneous determination of fact by the court.

In sum, "the task of reconciling the various considerations involved in the disposition of a juvenile adjudged delinquent following commission of a very serious and dangerous crime of violence is one that demands a wide range of discretion by the sentencing court." *Patrick V.*, 359 F.3d at 8. We cannot say that the district court abused its discretion here.

III

We conclude that (1) the district court did not err in excluding extrinsic evidence or limiting cross-examination concerning K.P.'s prior allegation of sexual assault, (2) the district court did not err in concluding that the evidence was sufficient to adjudicate A.S. delinquent, and (3) the district court did not err in imposing a sentence of custodial detention on A.S. We thus **AFFIRM** the judgment of the district court.

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[9](...continued)
significantly older than the juvenile in *Juvenile 2004* and, unlike the juvenile in *H.B.*, who aided and abetted a different juvenile's assault, A.S., himself, unlawfully entered K.P.'s home and assaulted her in her own bed.