

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 13 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-10341

Plaintiff-Appellee,

D.C. No.

v.

3:19-cr-08235-SMB-1

ROY DOMINIC ROBLES,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
Susan M. Brnovich, District Judge, Presiding

Argued and Submitted November 17, 2022
Phoenix, Arizona

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.

Roy Robles appeals from his jury conviction for two counts of Sexual Abuse of a Minor, in violation of 18 U.S.C. §§ 2243(a), 2246(2), and 7; one count of Abusive Sexual Contact of a Minor, in violation of 18 U.S.C. §§ 2244(a)(3), 2246(3), and 7; and two counts of Abusive Sexual Contact without Permission, in violation of 18 U.S.C. §§ 2244(b), 2246(3), and 7. Robles argues that the district

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

court erred in granting the motion in limine of the United States (“Government”) to exclude the testimony of defense witness Jay Gates. “We review a district court’s evidentiary rulings for abuse of discretion.” *United States v. Stinson*, 647 F.3d 1196, 1210 (9th Cir. 2011). As the parties are familiar with the facts, we do not recount them here. We affirm.

The district court granted the Government’s motion to exclude Gates’s testimony because it was hearsay—which Robles concedes—and Robles failed to establish that this hearsay would be admissible for impeachment as a prior inconsistent statement. As the district court pointed out, defense counsel did not actually know whether Gates could testify to anything that would be inconsistent with the minor victim’s proposed or actual testimony. Given that lack of foundation, the district court did not abuse its discretion by excluding testimony that Robles, the proponent, never established would be admissible. *See United States v. Hale*, 422 U.S. 171, 176 (1975) (noting that before admitting a prior inconsistent statement of a witness for impeachment, “the court must be persuaded that the statements are indeed inconsistent”).

Robles asserts that the district court should have reserved ruling on the Government’s motion in limine or ordered a hearing on the scope of Gates’s assertion of the Fifth Amendment privilege against self-incrimination. Yet the court explicitly stated that it was granting the motion *without prejudice* based on

the motion's contents (which did not raise self-incrimination) and that if defense counsel actually produced Gates as a witness, the court "could have a hearing outside the presence of the jury."

After the minor victim testified, Robles could have definitively established whether Gates could offer a prior inconsistent statement to impeach her. Robles, however, never enforced a subpoena against Gates, did not accept the district court's invitation to have a hearing on Gates's anticipated testimony, and never renewed his objection to Gates's exclusion. Robles's choice not to pursue Gates's testimony despite ample opportunity does not amount to an abuse of discretion by the district court. *See Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 952 (9th Cir. 1998) ("Where the defendant himself knows that he may subpoena witnesses but elects not to, we have found no violation of the defendant's right to compulsory process.").

AFFIRMED.