

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 26 2023

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 21-50313

Plaintiff-Appellee,

D.C. Nos. 3:14-cr-03256-JM-1

3:14-cr-03256-JM

v.

ALGERNON LUNDY, AKA Too
Beneficial,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted April 11, 2023**
Pasadena, California

Before: BERZON, MILLER, and LEE, Circuit Judges.

Algernon Lundy appeals the district court's order revoking his supervised release on the basis that he committed several violations of his release conditions, including assaulting his girlfriend ("the victim"). Lundy argues that the district court

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

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

erred by admitting body-camera video evidence of statements that the victim made to police to support its finding that Lundy assaulted her. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court.

We review the district court’s revocation of supervised release for abuse of discretion. *United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008). But we review de novo its determination to admit the victim’s statements because this issue implicates Lundy’s due process rights. *Id.* at 547–48.

Neither the Federal Rules of Evidence nor the Sixth Amendment’s Confrontation Clause apply to revocation proceedings. Fed. R. Evid. 1101(d)(3); *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005). The Fifth Amendment, however, guarantees a defendant “the right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause for not producing the witnesses.” *Perez*, 526 F.3d at 548 (quoting *Hall*, 419 F.3d at 986). Hearsay evidence is thus admissible against a defendant during revocation proceedings only if the government’s reasons for failing to produce a witness outweigh the defendant’s interest in confronting that witness. *See United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999).

A defendant’s interest in confronting an adverse witness depends on two main factors: (1) the importance of the witness’s statements to the district court’s finding that the defendant violated his conditions of supervised release, and (2) the

statements' reliability. *See id.* at 1171. Here, the victim's hearsay statements that Lundy threatened her with scissors, strangled her, and attempted to run her over with his car were crucial to the district court's finding that Lundy assaulted her. That bolsters his interest in confronting her.

Still, that interest is significantly diminished by the reliability of the victim's hearsay statements. To start, she made her statements while she was distraught during an emergency police response, a context that "lend[s] them credence" by diminishing the likelihood of fabrication. *See id.* Moreover, she provided accurate information about Lundy to corroborate her identification of him as her assailant, further contributing to her statements' reliability. *See Hall*, 419 F.3d at 987–88. Notably, she gave officers Lundy's birthdate and an accurate description of his physical appearance and vehicle. And she correctly stated that he had served a six-year federal prison sentence for offenses related to prostitution and that he had recently had his location monitor removed. Her account was also partially corroborated by a local resident who saw some of the altercation, and by her identification card, which was found in the open garage in which she said she sought refuge.

Further, the government had good cause for failing to produce the victim to testify at Lundy's revocation hearing because "despite substantial efforts to locate her, the government was unable to find her." *See Hall*, 419 F.3d at 988. At the

hearing, the government presented evidence demonstrating its ultimately unsuccessful efforts to secure her presence, including multiple attempts to reach her by phone and delivery of a subpoena to her last known residence.

In sum, the government's good cause for failing to produce the victim as a witness outweighs Lundy's interest in confronting her, given the reliability of her hearsay statements. *See Comito*, 177 F.3d at 1172. Therefore, the district court did not err by relying on her statements to revoke Lundy's supervised release.¹

AFFIRMED.

¹ The government's motion to transmit exhibits to the court (Dkt. No. 50) is denied as moot.