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[SEAL]

IN THE
Indiana Supreme Court

Supreme Court Case No. 23S-CR-13

Matthew Hayko,

Appellant

–v–

State of Indiana,

Appellee

Argued: March 2, 2023 | Decided: June 22, 2023

Appeal from the Spencer Circuit Court

No. 74C01-1902-F3-58

The Honorable Jon A. Dartt

On Petition to Transfer from
the Indiana Court of Appeals

No. 21A-CR-2407

Opinion by Chief Justice Rush

Justices Massa, Slaughter, Goff, and Molter concur.

Rush, Chief Justice.

Who and what to believe are matters of personal choice. These choices are deeply consequential in a jury

trial, but they belong exclusively to each juror. Yet, our rules of evidence provide parties with several ways to influence a juror's credibility assessment. Indiana Evidence Rule 608(a), for example, allows parties to cut to the credibility core by eliciting a witness's opinion regarding another witness's character for truthfulness or untruthfulness.

This case implicates an issue of first impression under Rule 608(a): what is required to establish the proper foundation for a witness's opinion testimony? At trial, a defendant accused of molesting his minor daughter sought to admit opinions from three of his family members regarding the victim's untruthful character. The trial court excluded the proffered testimony for lack of foundation, which the defendant contends was reversible error.

We first clarify that the evidentiary foundation required to admit opinion testimony is less demanding than that required to admit reputation testimony. To lay a proper foundation for opinion testimony under Rule 608(a), the proponent must establish that the witness's opinion is both rationally based on their personal knowledge and would be helpful to the trier of fact. We hold the trial court erred in excluding the opinion testimony here, as the court relied on foundation considerations relevant only to reputation testimony. But we then hold the error was harmless and, thus, affirm.

Facts and Procedural History

Matthew Hayko and L.D. are parents to three daughters from their previous relationship, including V1, who was born in November 2006. After the couple separated, Hayko exercised visitation with V1 and her two sisters every other weekend during the school year. During a visit in February 2018, Hayko and his wife hosted another couple for dinner at their home, and they played a couple games together. While playing cards, Hayko—who had consumed around four to ten beers—rubbed V1's back. V1 asked Hayko to continue rubbing her back once the game was over, which he did as he tucked her into bed and lay down beside her.

In bed, Hayko put his hand under V1's bra and rubbed her breast "[s]kin to skin." He then put his hand under V1's underwear, inserted his finger into her vagina two or three times, and kissed her face and neck. Hayko eventually stopped touching V1 and left the room, but he returned within a few minutes and fell asleep in her bed. When they woke up the next morning, Hayko had his arm on V1's shoulder, realized he had fallen asleep, and noted it was "awkward." He apologized to V1 and asked her not to tell anyone about what happened, assuring her that it wouldn't happen again.

About a year later, Hayko took his daughters out to eat where V1 became "uncomfortable" while observing Hayko with his arm around her younger sister "the whole dinner." After returning to L.D.'s home that evening, V1 "started crying" and informed her mother

that Hayko had previously touched her inappropriately. L.D. subsequently brought V1 to their local child advocacy center where she underwent a forensic interview.

The following day, Hayko agreed to speak with law enforcement about V1's allegations. During that interview, Hayko told a detective he "had been drinking all day" and "was wasted" on the night of the incident. He remembered "waking up the next morning" in V1's bed with his "arm around her, cuddling her, kind of like I would if it was my wife," which was "awkward." He also recalled asking V1 to "keep this between us." Though Hayko did not remember fondling or touching V1, he declined to tell the detective that V1 "is a liar." And he acknowledged "if this did happen, you know, and I don't recall because I was drinking, wasted, or whatever" that "this would be an isolated incident."

The State subsequently charged Hayko with one count of Level 1 felony child molestation, one count of Level 3 felony child molestation, one count of Level 4 felony child molestation, and one count of Level 4 felony incest. Before trial, Hayko notified the State he intended to call three relatives as witnesses to testify about their opinion of V1's character for untruthfulness. The State objected, contending the witnesses lacked "adequate knowledge of the victim's character" and that they had "no recent contact or familiarity with the victim." After holding a hearing on the matter, the trial court issued an order requiring Hayko to make an offer of proof outside the jury's presence to demonstrate that the "character witnesses can meet

the foundation requirement of having an adequate basis to give an opinion as to the alleged victim's truthfulness or untruthfulness."

During that offer of proof at trial, Hayko elicited the opinions of his father (V1's paternal grandfather), his stepmother (V1's paternal step-grandmother), and his sister (V1's paternal aunt). Each testified they had known V1 since she was born, had spent time around her at various family gatherings throughout the years, had personally interacted with her and observed her interactions with others, and had last seen her shortly before she made the allegations. Based on their respective experiences, each witness opined that V1 had a dishonest character.

The trial court excluded their testimony, concluding that Hayko had not established a proper foundation. In reaching its conclusion, the court reasoned that the three witnesses were "too insular" of a group and their contacts with V1 were "not sufficient to justify an opinion about the child's reputation for truthfulness." Hayko objected, asserting the witnesses were "not there to talk about [V1's] reputation in the community," and that he established an adequate foundation for the witnesses to offer their opinions of V1's character based on their "personal observations" and "interactions" with the child. The trial court overruled the objection, reiterating it did not find "sufficient contacts" for the witnesses "to be able to form and express those opinions."

Also, during trial, V1 testified about the allegations; Hayko testified and denied touching V1 inappropriately; Hayko introduced messages he exchanged with L.D. in which the parents discussed V1's behavioral problems and her proclivity to lie and manipulate; and the State introduced Hayko's interview with law enforcement. The jury ultimately found Hayko guilty of Level 4 felony child molesting and not guilty of the remaining three counts. The trial court subsequently imposed a sentence of eight years, with two of those years suspended to probation.

Hayko appealed and raised several issues, including whether the trial court erred by denying his request for the three witnesses to testify as to their opinion of V1's untruthfulness. A divided Court of Appeals' panel found this issue dispositive and reversed, with the majority concluding that the court erred by excluding the opinion testimony and that the error was not harmless. *Hayko v. State*, 196 N.E.3d 259, 268 (Ind. 2022). Judge Tavitas dissented, believing the trial court acted within its discretion in excluding the testimony. *Id.* at 274 (Tavitas, J., dissenting).

The State petitioned for transfer, which we granted, vacating the Court of Appeals' opinion. Ind. Appellate Rule 58(A).[1]

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[1] We summarily affirm the part of the Court of Appeals' opinion that held the trial court did not err by admitting into evidence Hayko's statements to police. *See* App. R. 58(A)(2). And we briefly address two arguments Hayko raises related to his sentence, which the panel did not reach. He argues the trial court abused its discretion by identifying an improper aggravating

Standard of Review

Hayko argues the trial court abused its discretion by admitting vouching testimony, by permitting the State to condition the jury on V1's credibility during voir dire, and by excluding his proffered opinion testimony. Because we find the first two arguments lack merit,[2] our review is limited to whether the trial court

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circumstance. However, even if we agreed, he would not be entitled to relief. The trial court identified two other aggravating circumstances—Hayko abusing his position of trust with V1 and his criminal history—that Hayko does not challenge and that support the sentence imposed. *See*, *e.g.*, *Garrett v. State*, 714 N.E.2d 618, 623 (Ind. 1999) ("A single aggravating circumstance may be sufficient to support an enhanced sentence."). Hayko also argues his sentence is inappropriate under Appellate Rule 7(B). We disagree. Our Rule 7(B) authority is reserved "for exceptional cases," *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019), and we exercise that authority to "leaven the outliers," *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). This is not an exceptional case, as Hayko has failed to produce compelling evidence showing that the nature of his offense or his character renders his slightly enhanced sentence an outlier.

[2] The trial court did not abuse its discretion by denying Hayko's objection, under Evidence Rule 704(b), when V1's forensic interviewer answered "no" after the State asked her whether "delayed disclosure [is] necessarily a sign of deception." Rule 704(b), in relevant part, prohibits a witness from testifying that another "witness has testified truthfully." Ind. Evidence Rule 704(b). The forensic interviewer's answer did not relate to the truth or falsity of V1's allegations; it was merely an observation rooted in her experience regarding the behavior of child victims generally. *Cf. Ward v. State*, 203 N.E.3d 524, 532 (Ind. Ct. App. 2023). The trial court also did not abuse its discretion by denying Hayko's objections during voir dire, as the State's questioning did not condition the jury on V1's credibility. Rather, the State's questions were properly aimed at discerning whether a prospective juror had any opinion, belief, or bias about children and their

committed reversible error by excluding Hayko's opinion testimony.

We review a trial court's decision to exclude evidence for an abuse of discretion, which occurs when the court misinterprets the law. *See Smith v. Franklin Twp. Cmty. Sch. Corp.*, 151 N.E.3d 271, 273 (Ind. 2020); *Snow v. State*, 77 N.E.3d 173, 177 (Ind. 2017). Though Hayko contends the court's exclusion here denied him his constitutional right to present a defense, the fact that the trial court may have erred in excluding evidence does not transform that error into one of constitutional dimension. *See Hastings v. State*, 58 N.E.3d 919, 923 (Ind. Ct. App. 2016). And Hayko's alleged error is not one of constitutional dimension because he was able to exercise his right to present his defense—attacking V1's credibility—by presenting the jury with other, significant impeachment evidence. Thus, even if the court abused its discretion in excluding Hayko's opinion testimony, we review whether this non-constitutional error was harmless such that its "probable impact in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." App. R. 66(A).

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credibility, or whether they had any experiences that would impact their ability to evaluate a child's testimony concerning allegations of molestation. *Cf. Hopkins v. State*, 429 N.E.2d 631, 635 (Ind. 1981).

Discussion and Decision

Indiana Evidence Rule 608(a) allows a party to attack a witness's credibility in two distinct ways: (1) through "testimony about the witness's **reputation** for having a character for truthfulness or untruthfulness"; or (2) through "testimony in the form of an **opinion** about" the witness's character for truthfulness or untruthfulness. Ind. Evidence Rule 608(a) (emphasis added). However, "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." *Id.* Though this limitation does not apply when a party introduces evidence of a witness's untruthful character, that evidence must be supported by a proper foundation before being admitted.

We have clarified the foundational requirements for admitting reputation testimony, *Bowles v. State*, 737 N.E.2d 1150, 1153 (Ind. 2000), but we have not done the same for admitting opinion testimony until now. To lay a proper foundation for the admission of opinion testimony under Rule 608(a), the proponent must establish that the witness's opinion is rationally based on their personal knowledge and that the opinion would be helpful to the trier of fact. We hold that Hayko satisfied these requirements, and the trial court erred in excluding his proffered opinion testimony by relying on foundation considerations relevant only to reputation testimony. We then hold, considering all the evidence before the jury, that Hayko has not shown the court's error would have impacted a reasonable,

average jury to such an extent that it undermines our confidence in the verdict. We therefore affirm.

I. The trial court erred in excluding the opinion testimony.

Like experts, lay witnesses are permitted to offer their opinions on a variety of relevant matters. *Barcroft v. State*, 111 N.E.3d 997, 1003 (Ind. 2018). Still, "whether a witness is qualified to give an opinion" is a matter left to the trial court's discretion. *Kent v. State*, 675 N.E.2d 332, 338 (Ind. 1996). So too is whether the witness's testimony is supported by a proper foundation. *Hill v. State*, 470 N.E.2d 1332, 1336 (Ind. 1984). We first clarify the foundational requirements for admitting opinion testimony under Rule 608(a) and then determine whether the trial court abused its discretion when it excluded the opinion testimony of Hayko's witnesses.

A. The proponent establishes a proper foundation for opinion testimony under Rule 608(a) by demonstrating that the witness's opinion is both rationally based on their personal knowledge and would be helpful to the trier of fact.

When a witness testifies at trial, their credibility is subject to impeachment—that is, it may be attacked. *See* Evid. R. 404(a)(3), 607, 608, 609, 616. One impeachment mechanism, Rule 608(a), allows a party to attack a witness's credibility through reputation or opinion

testimony. Evid. R. 608(a). But the two are not equivalent. While reputation testimony reflects the consensus of **many** close to and familiar with a witness's character, *see Norton v. State*, 785 N.E.2d 625, 631-32 (Ind. Ct. App. 2003), opinion testimony reflects the judgment of a **single** individual. To be sure, not just anyone can offer their opinion about a witness's untruthful character. The question then is what a proponent must show to establish that a witness can reliably offer an opinion regarding another's character for truthfulness under Rule 608(a).

In answering this question, we find two evidentiary rules instructive. The first is Rule 602, which provides that a "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Evid. R. 602. And the second is Rule 701, which limits a lay witness's testimony in the form of an opinion to one that is both "rationally based on the witness's perception" and "helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Evid. R. 701. Informed by these relevant constraints, an opinion on another's character for truthfulness or untruthfulness under Rule 608(a) must stem from the testifying witness's personal knowledge of that character. And because a witness offering such an opinion is not testifying as an expert, their personal knowledge must be the rational product of the witness's own perception—such as interactions or observations—and also be helpful to the trier of fact. *Cf. In re A.F.*, 69 N.E.3d 932, 949 (Ind. Ct.

App. 2017), *trans. denied*; *Dunn v. State*, 919 N.E.2d 609, 612 (Ind. Ct. App. 2010), *trans. denied*; *Tolliver v. State*, 922 N.E.2d 1272, 1278 (Ind. Ct. App. 2010), *trans. denied*; *Prewitt v. State*, 819 N.E.2d 393, 413-14 (Ind. Ct. App. 2004), *trans. denied.*

Yet, the State argues more should be required, contending a proponent must also show the "opinion is based on sufficient and recent contact" with the witness whose credibility is being attacked. Hayko disagrees, noting the vast majority of jurisdictions do not impose these requirements and emphasizes that cross-examination allows parties to expose such deficiencies with the witness's opinion. We share Hayko's perspective.

Most jurisdictions—federal and state alike—do not require a proponent to establish sufficient and recent contacts in laying a foundation for opinion testimony about a witness's character. Indeed, such a showing is not required under Federal Rule of Evidence 608(a), which is identical to our rule. *See*, *e.g.*, *United States v. McMurray*, 20 F.3d 831, 834 (8th Cir. 1994); *United States v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982); *United States v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979). And most states interpreting their analogous evidentiary rules have reached the same conclusion. *See*, *e.g.*, *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 895 A.2d 405, 419-20 (2006); *State v. Carsner*, 126 Idaho 911, 894 P.2d 144, 150 (1995); *State v. Dutton*, 896 S.W.2d 114, 118 (Tenn. 1995); *Honey v. People*, 713 P.2d 1300, 1302-03 (Colo. 1986) (en banc); *State v. Hernandez*, 184 N.C. App. 344, 646 S.E.2d 579, 583

(2007). These courts aptly recognize the distinction between reputation evidence and opinion evidence—particularly that the foundational requirements for the latter are less stringent than those for the former.

But, as the State observes, not all states embrace a minimal foundational standard for the admission of opinion testimony. For instance, Oregon and Maryland require a proponent to also establish frequent and recent contact between the character witness and the principal witness. *Devincentz v. State*, 460 Md. 518, 191 A.3d 373, 390-91 (2018); *State v. Paniagua*, 286 Or. App. 284, 341 P.3d 906, 910 (2014).

We decline to embrace this minority approach for several reasons, the first being that it fails to distinguish between the nature of reputation and opinion evidence, as each serves a distinct purpose. For reputation evidence, a showing of sufficient acquaintance makes sense "to ensure that the testimony adequately reflects the community's assessment." *Watson*, 669 F.2d at 1382. But opinion evidence is "a personal assessment of character," and thus, the witness is not relating community feelings; they are simply providing their own "impression of an individual's character for truthfulness." *Id.*

Additionally, while parties may take issue with the credibility of a witness's opinion when it is rooted in remote experiences, these concerns can be adequately addressed during cross-examination. That is, parties may expose any remote-contact concerns in an opinion witness's testimony and thereby provide the factfinder

with additional evidence from which to make the ultimate credibility determination. Further, there is no objective reason why a witness's opinion premised on less-recent interactions is inherently unreliable. Likewise, there is no objective way to determine when a witness's interactions are too remote or infrequent.

Finally, establishing a proper foundation for opinion testimony does not require its admission. Indeed, the trial court can still exclude the testimony under other evidentiary rules. For example, courts retain discretion—based on the facts and issues in a particular case—to assess the evidence's probative value and determine whether it is substantially outweighed by one of Rule 403's dangers. *See*, *e.g.*, *United States v. Turning Bear*, 357 F.3d 730, 734-35 (8th Cir. 2004); *State v. Tetreault*, 31 A.3d 777, 782-83 (R.I. 2011); *see also State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771, 774 (1995) (explaining that, in addition to Rule 403, trial courts may exclude opinion testimony under Rules 402 and 611).

To reiterate—based on Rules 602 and 701 and informed by the approach taken in a majority of jurisdictions—we hold that, to lay a proper foundation for the admission of opinion testimony under Rule 608(a), the proponent must establish that the witness's opinion is both rationally based on their personal knowledge and would be helpful to the trier of fact. Yet, even when foundation is established, the trial court retains discretion to exclude the evidence based on other rules of evidence. We now apply these principles to assess the court's decision to exclude the opinion testimony here.

B. The opinion testimony was supported by a proper foundation.

At trial, Hayko sought to introduce three opinion witnesses: his father (V1's paternal grandfather), his stepmother (V1's paternal step-grandmother), and his sister (V1's paternal aunt). During an offer of proof, Hayko elicited testimony from these witnesses to establish a foundation for their opinions. Each witness testified they had known V1 since she was born, had been around her multiple times a year at family gatherings, had directly communicated with her and personally observed her interactions with others, and had last seen her not long before the allegations. Based on those experiences, V1's paternal grandfather opined that V1 has a "[d]ishonest" character, and her paternal step-grandmother similarly testified that V1 is "very dishonest." She based her opinion on witnessing V1 lie to Hayko after hitting another child and after taking a toy from another child. Likewise, V1's paternal aunt opined that V1 is "a very dishonest child." She explained that she started to notice V1's dishonest character when her personality began to develop as a toddler and recounted witnessing V1 lie.

The above testimony established a proper foundation for each witness's opinion of V1's character for untruthfulness. Their opinions were rationally based on their personal knowledge, specifically their own observations of and interactions with V1, which occurred on multiple occasions. And those opinions would be helpful to the jury because V1's credibility was central to the charges against Hayko. Although we have for the

first time clarified and applied the requirements for laying a proper foundation for opinion testimony under Rule 608(a), the trial court here nonetheless erred—albeit understandably—in excluding the evidence.

The trial court erred because its decision was based exclusively on considerations related to establishing a foundation for reputation testimony. Indeed, the court concluded the witnesses were "too insular" and their contacts with V1 were "not sufficient to justify an opinion about the child's reputation for truthfulness." The court further reasoned the witnesses' testimony was not sufficiently reliable "because it would be based off the same set of biases." But whether the witnesses were too insular or lacked sufficient contacts with V1 does not negate that their opinions were rationally based on their personal knowledge or that they would have been helpful to the jury. Additionally, though the trial court suggested it addressed whether a foundation had been laid under Rule 608(a) in its entirety, the court did not distinguish between reputation and opinion testimony. And there is no basis in the record for us to conclude the court relied on a different evidentiary rule to exclude the evidence.

Simply put, the trial court's conflation of reputation and opinion testimony—a misinterpretation of the law—resulted in the erroneous exclusion of Hayko's opinion testimony for lack of foundation. We now determine whether that error requires reversal.

II. Exclusion of the opinion testimony was harmless error.

A trial court's error in excluding evidence does not require reversal if the error was harmless. For non-constitutional errors, like the one here, our harmless-error analysis is found in Appellate Rule 66(A):

> No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.

App. R. 66(A). Though neither party cited this rule in their briefing on this issue, their omissions illustrate a larger, confusing trend in Indiana caselaw. We thus rectify that confusion today.

In the two-plus decades since Rule 66(A)'s adoption, its application in our appellate courts has been far from consistent. *See* Edward W. Najam, Jr. & Jonathan B. Warner, *Indiana's Probable-Impact Test for Reversible Error*, 55 Ind. L. Rev. 27, 35-50 (2022). Much of the inconsistency stems from caselaw reviewing whether an error is harmless under Trial Rule 61. Rule 61 instructs an evidentiary error is not grounds for "reversal on appeal unless refusal to take such action appears to the court inconsistent with substantial justice" and directs courts to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Ind. Trial Rule 61

(punctuation omitted). The similarities between Trial Rule 61 and Appellate Rule 66(A) have produced discrepancies about which rule governs appellate review of non-constitutional errors and how the rule should be applied.

Appellate Rule 66(A), not Trial Rule 61, defines reversible error for our appellate courts.[3] When an appellate court must determine whether a non-constitutional error is harmless, Rule 66(A)'s "probable impact test" controls. Under this test, the party seeking relief bears the burden of demonstrating how, in light of all the evidence in the case, the error's probable impact undermines confidence in the outcome of the proceeding below. *See Mason v. State*, 689 N.E.2d 1233, 1236-37 (Ind. 1997); Najam & Warner, *supra* at 50-51. Importantly, this is not a review for the sufficiency of the remaining evidence; it is a review of what was presented to the trier of fact compared to what should have been presented. And when conducting that review, we consider the likely impact of the improperly admitted or excluded evidence on a reasonable, average jury in light of all the evidence in the case. *See Tunstall v. Manning*, 124 N.E.3d 1193, 1200 (Ind. 2019). Ultimately, the error's probable impact is sufficiently

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[3] Judge Najam and Jon Warner aptly recognize the "on appeal" language in Trial Rule 61 "simply recognizes that, on occasion, Indiana's trial courts also engage in a manner of appellate review, such as when they engage in judicial review of state or local government agency decisions. But a trial court's judicial review differs from an appellate court's review of reversible error." Najam & Warner, *supra* at 50.

minor when—considering the entire record—our confidence in the outcome is not undermined.

Here, Hayko argues the error denied him the opportunity to impeach V1's credibility, which was vital to his defense. To be sure, credibility is often a central issue in child molestation cases, so impeachment evidence plays a pivotal role for the defense. *See*, *e.g.*, *Baker v. State*, 948 N.E.2d 1169, 1179 (Ind. 2011). And, as indicated in Section I, Hayko should have been permitted to attack V1's credibility with the opinion testimony of his three witnesses. But we must consider all the evidence before the jury to determine whether the excluded evidence would have impacted a reasonable, average jury to such an extent that we lack confidence in the verdict. Because we remain confident in the verdict despite the trial court's error, the error was harmless.

In reaching this conclusion, we initially observe that Hayko presupposes the opinion testimony carried a probative value favorable to him. Yet, as revealed in the offer of proof, each witness was a member of Hayko's immediate family, so the potential for bias loomed. Moreover, during cross-examination, the State extracted the basis for the witnesses' opinions, which included recounting stories of V1, as a young child, lying about both stealing a toy and getting into an altercation with another child. It is not, however, uncommon for young children who steal toys or hit others to lie to avoid consequences for these acts. So, while it's possible that a reasonable, average jury would have found the witnesses' opinions undermined V1's

credibility, it's also possible the opinions would have had little to no effect. Accordingly, it is not readily apparent a reasonable, average jury would have weighed the witnesses' opinions of V1's character for untruthfulness in a manner favorable to Hayko.

That said, if the excluded testimony was the only evidence attacking V1's credibility, our confidence in the verdict would wane considerably. But the record reveals Hayko impeached V1's credibility through other evidence. For example, he told the jury that V1 was "manipulative, vindictive" and that he "knew she was a liar." He also admitted into evidence text messages between himself and V1's mother about V1's untruthful character. In one message, V1's mother advised Hayko to join her in keeping "a log of all of [V1's] incidents" because "[i]t's too hard . . . to remember all the episodes she has" and that if she didn't see "improvement" in V1's behavior, she would "look into a counselor for her." In another message, V1's mother told Hayko that V1 was "learning how to manipulate" people and that, in light of her "manipulative" behavior, "[y]ou can't believe everything that comes out of her mouth."

The jury also had the opportunity to directly assess V1's allegations and credibility through her own testimony. Specifically, she told the jury Hayko "put his hand under [her] bra and started rubbing [her] breast." She also said Hayko touched underneath her underwear and "put his finger inside" her vagina two or three times while kissing her, recalling that Hayko made a "low groan noise" during this time. And when they awoke the next morning, she stated that Hayko

apologized to her, instructed her not to "tell anyone" what happened, and assured her "it won't happen again." The jury then listened as Hayko's attorney questioned V1's allegations and her credibility during cross-examination.

Further confirming the error does not undermine our confidence in the verdict is the fact that the jury heard Hayko provide inconsistent answers when questioned about V1's allegations. In his pre-trial interview, the jury listened as Hayko explained he was "wasted" the night he fell asleep in V1's bed and remembered waking up next to her the following morning "cuddling, you know, laying close to her, like, as if she was my wife." He admitted telling V1 to "keep this between us." Then, after the detective explained to Hayko the nature of V1's allegations, he asked, "Do you know what that sounds like? It sounds like, okay, been drinking, you wasn't realizing what you was doing, and then at some point you do realize. Does that make sense?" Hayko responded, "Yeah, it does." While Hayko denied touching V1 in the ways alleged, he also stated, "[I]f this did happen, you know, and I don't recall because I was drinking, wasted, or whatever," it "would be an isolated incident." When questioned at trial, however, Hayko provided a different version of events. For example, he testified that he was "not wasted" on the night of the incident and that he could "recall everything" that happened. Thus, a reasonable, average jury would find that just as V1's credibility was at issue, so too was Hayko's.

Ultimately, we recognize that impeachment evidence can have a profound effect in child molestation

cases, as they often turn on credibility determinations. But the erroneous exclusion of some impeachment evidence will not necessarily undermine our confidence in the jury's verdict. This case is one such example. Hayko has not shown, considering all the evidence before the jury, that the excluded opinion testimony would have impacted a reasonable, average jury to such an extent that undermines our confidence in the verdict. The error is therefore harmless.

Conclusion

Hayko laid a proper foundation to admit his proffered opinion testimony, and the trial court erred in excluding that evidence for lack of foundation. But because we conclude the error was harmless, we affirm.

Massa, Slaughter, Goff, and Molter, JJ., concur.

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IN THE
COURT OF APPEALS OF INDIANA

Matthew Hayko, *Appellant-Defendant*, v. State of Indiana, *Appellee-Plaintiff*.	September 28, 2022 Court of Appeals Case No. 21A-CR-2407 Appeal from the Spencer Circuit Court The Honorable Jonathan A. Dartt, Judge Trial Court Case No. 74C01-1902-F3-58

Baker, Senior Judge.

Statement of the Case

Our Rules of Evidence "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and

securing a just determination." Indiana Evidence Rule 102. Upon that foundation, we begin with the premise that all relevant evidence is admissible subject to delineated categories of excluded evidence. *See* Indiana Evidence Rule 402. In this case of first impression, we write to clarify and delineate the two separate kinds of evidence under Evidence Rule 608—opinion testimony and reputational testimony—and their respective foundational requirements to ensure that a just determination in a fair proceeding is not denied.

Matthew Hayko appeals from his conviction after a jury trial of one count of Level 4 felony child molesting, contending in part that the trial court's conflation of the foundational requirements for reputational testimony under Evidence Rule 608 as to his proffered opinion testimony under the Rule, denied him the right to present a defense. This case alleged violations of no greater position of trust than that of a parent to his child, and Hayko's conviction turned on the jury's credibility determination in this "he said, she said" case. Finding that the court misinterpreted the Rule and thus did not allow Hayko the fair opportunity to challenge the "she said" part of the evidence with his proffered witnesses, we reverse and remand for a new trial. Though that issue alone is dispositive, we also address the court's admission of Hayko's statement to police because the issue is likely to recur in the new trial. On that issue, we agree with the trial court and affirm. Thus, we affirm in part, and reverse and remand in part for a new trial.

Facts and Procedural History

At trial, the following evidence supported Hayko's conviction. V1,[1] who was born in November of 2006, is Hayko's oldest daughter. Hayko and V1's mother, L.D., have three daughters between them, including V1. The girls live with L.D., and Hayko exercises parenting time with them every other weekend. Hayko lives in Gentryville, Indiana, with his wife, A.A., and their two children.

On the weekend of February 24th and 25th of 2018, when V1 was eleven years old, she and her siblings were with Hayko for parenting time. On the evening of February 24th, Hayko consumed several beers.[2] He played cards with V1 and rubbed her back as they did so. When it was V1's bedtime, he went with her to her room and continued to rub her back. He then put his hand under her bra and rubbed her breasts. He kissed V1 and put his hand in her underwear. When he awoke the next morning, he apologized to V1 and told her that neither of them should tell anyone about what had happened.

Approximately a year later, V1 observed Hayko put his arm around her younger sister during their parenting time. Upon returning home to L.D., V1 immediately

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[1] V1 was the designation given to Hayko's daughter during the trial. We continue to use it here.

[2] During his interview with Indiana State Police Detective Charles Pirtle, Hayko stated that "I had maybe several beers, ten (10) or more beers." Tr. Vol. V, p. 44. At trial, Hayko said that he had consumed "maybe three (3) or four (4) beers." *Id.* at 36.

told her mother about what Hayko had done to her in 2018. As V1 made the disclosure to her mother, she was distraught and crying.

Tammy Lampert, the executive director of a children's advocacy center, conducted a forensic interview of V1 on February 20, 2019. The next day, Hayko and his wife drove to child protective services offices in Rockport, Indiana after being contacted by Amy Jarboe, an employee there. However, Hayko was interviewed there by Indiana State Police Detective Charles Pirtle. Hayko was told that he could leave at any time. Hayko could leave the room as well as exit the building without having to pass through a locked door.[3] Detective Pirtle tried "to put [Hayko] at a little bit of ease and comfort, that [he] wasn't there to embarrass him," and testified "that's why he was glad [he] got to talk to [Hayko] there and not have to come to his house or his place of employment." Tr. Vol. IV, pp. 187-88.

Initially during the interview, Hayko claimed he could not remember the time frame of February 2018. He later recalled waking up in the same bed as V1, "cuddling [V1] like he would cuddle his wife in bed." *Id.* at 187. Hayko did not recall going to bed with V1, but remembered waking up in bed with her and thinking "this was crazy." *Id.* at 191. Hayko said that he "had

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[3] The record from the suppression hearing reflects that Hayko was led to a room in the child advocacy center building that was off-limits to the public. Though he was escorted to the room and ingress to it was made through a locked door, no key or other implement was required to exit from the room or that area. *See* Tr. Vol. II, pp. 6-7.

been drinking a little too much, and "woke up next to VI" with his arm around her and thought, "You're not [my wife]." Tr. Vol. V, p. 7. Hayko also told Detective Pirtle that,

> What I'm telling you is, is that I'm not—I'm not going to sit here and say that—you know, that my daughter is a liar. That's not what I'm trying to say. What I'm trying to tell you, is, is that, you know, there's alcohol involved. I had been drinking all day, was wasted.

Tr. Vol. IV, pp. 190-91.

He remembered telling V1 at the time, "Just keep this between me and you." *Id.* Hayko also shared with Detective Pirtle that he had a problem with alcohol and that on the night in question, he "maybe blacked out." *Id.* at 195. He admitted to drinking "ten (10) or more beers." Tr. Vol. V, p. 44.

The State charged Hayko with one count of Level 3 felony child molesting, one count of Level 4 felony child molesting, one count of Level 4 felony incest, and one count of Level 1 felony child molesting.

At trial, during voir dire, the State asked the potential jurors about witness credibility, their opinions about the truthfulness of children as witnesses, and their perceptions about how children would react to discussing sexual topics. During the State's case-in-chief, Lampert testified over objection about delayed disclosure and children's reactions to molestations. During his case, Hayko asked to present testimony from witnesses regarding their opinion of V1's character. In the

offer to prove, the three witnesses testified independently about their interactions with V1 and their opinion that V1 was untruthful. The court concluded that Hayko had not laid a proper foundation for that testimony and denied it. At the conclusion of the jury trial, Hayko was found guilty of one count of Level 4 felony child molesting and was acquitted on all other counts. The court sentenced Hayko to a term of eight years executed with two years suspended to probation. Hayko now appeals.

Discussion and Decision

I. Admission of Hayko's Statement to Police

Because it is likely that this issue will present itself again upon retrial, we first address Hayko's challenge to the admission of his statement to police. In particular, Hayko challenges the court's decision to admit the portion of his statement to Detective Pirtle that he did not want to call V1 a liar and the State's characterization of that statement at trial as an admission. Hayko says that he was in custody at the time the statement was made and that the statement is inadmissible because he was not given his *Miranda*[4] warnings prior to speaking with Detective Pirtle.

Our standard of review of a trial court's admission of evidence is an abuse of discretion. *Mack v. State*, 23 N.E.3d 742, 750 (Ind. Ct. App. 2014). "A trial court abuses its discretion if its decision is clearly against

[4] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

the logic and effect of the facts and circumstances before the court or if the court misapplies the law." *Id.*

As our Supreme Court has stated,

> The custody inquiry is a mixed question of fact and law: the circumstances surrounding [the defendant's] interrogation are matters of fact, and whether those facts add up to *Miranda* custody is a question of law. *See Thompson v. Keohane*, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).
>
> We defer to the trial court's factual findings, without reweighing the evidence; and we consider conflicting evidence most favorably to the suppression ruling. *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006). But we review de novo the legal question of whether the facts amounted to custody. [*State v.*] *Brown*, 70 N.E.3d [331, 335 (Ind. 2017)].
>
> * * *
>
> Custody under *Miranda* occurs when two criteria are met. First, the person's freedom of movement is curtailed to "the degree associated with a formal arrest." *Maryland v. Shatzer*, 559 U.S. 98, 112, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010) (quoting *New York v. Quarles*, 467 U.S. 649, 655, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)). And second, the person undergoes "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v. Fields*,

> 565 U.S. 499, 509, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012).

State v. E.R., 123 N.E.3d 675, 680 (Ind. 2019).

Here, the court admitted Hayko's statement in evidence. And the record contains facts supporting the court's decision that the statement was not the result of a custodial interrogation. Hayko drove to the child protective services building with his then-wife A.A. after being contacted by Amy Jarboe, an employee with child protective services. He was led through the building into an area not accessible to the public and out of public view. Though the record is unclear as to whether Hayko expected to be interviewed by law enforcement as well at that time, Detective Pirtle made clear from the outset that he worked for the Indiana State Police, and Hayko participated in the interview, nonetheless.

Jarboe was in the interview room with Pirtle and Hayko for the first fifteen minutes of the thirty-to-thirty-five-minute interview before Detective Pirtle asked her to leave. Detective Pirtle stated that his reason for doing so was to reduce the amount of embarrassment to Hayko by having to discuss allegations of criminal sexual behavior in mixed company. Pirtle also attempted to place Hayko at ease by informing him that any time he did not feel comfortable with the questioning he could leave. He also told Hayko that he was aware of Hayko's reputation in the community and that he did not wish to embarrass him by interviewing him at his home or at his place of business.

The interview lasted thirty to thirty-five minutes and at no point was Hayko handcuffed, even though Detective Pirtle stated that he did not believe him. And though Hayko argues that coercive language was used during the interview, the record reflects that Hayko initiated further contact with Pirtle by telephone after the interview to add to his statement. This supports the inference that Hayko was not as intimidated by Detective Pirtle as he now claims on appeal. Though Hayko argues the existence of factors that favor a finding that he was in custody, those factors are offset by the factors listed above. The trial court did not abuse its discretion by admitting the statement in evidence as it was not a custodial statement made without the benefit of *Miranda* warnings.

As for the State's characterization of Hayko's statement as an admission, we observe that attorneys are permitted to characterize the evidence, discuss the law, and attempt to persuade the jury to a particular verdict. The ABA's Standards for Criminal Justice state in part:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

> (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

ABA, Standards for Criminal Justice, Standard 3-5.8.

On retrial, the court will be in the best position to determine whether the closing arguments stay within those parameters should Hayko choose to challenge the State's characterization of the evidence.[5]

II. Evidence Rule 608

Next, Hayko argues that the trial court abused its discretion by denying his request for witnesses to testify as to their opinion of V1's untruthfulness under Rule 608. We agree.

The standard of review for admissibility of evidence issues is whether the trial court's decision was an abuse of discretion. *Allen v. State*, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004), *trans. denied.* The decision to admit or exclude evidence will not be reversed absent a showing of manifest abuse of a trial court's discretion resulting in the denial of a fair trial. *Id.* As a general rule, errors in the admission or exclusion of evidence are to be

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[5] During closing argument at trial, the State referred to Hayko's statement as an admission, and responded to Hayko's explanation of his statement in rebuttal closing argument by referring to it as an admission. *See* Tr. Vol. V, pp. 95, 118.

disregarded as harmless unless they affect the substantial rights of a party. *Id.* In determining whether an evidentiary ruling affected a party's substantial rights, we must assess the probable impact of the evidence on the trier of fact. *Id.*

The State directs us to the well-settled concept that a trial court's evidentiary rulings are presumptively correct, and the defendant bears the burden on appeal of persuading us that the court erred in weighing prejudice and probative value under Evidence Rule 403. *See Anderson v. State*, 681 N.E.2d 703, 706 (Ind. 1997). We are also mindful that we will sustain the trial court's ruling if it can be affirmed on any basis found in the record. *See Crawford v. State*, 770 N.E.2d 775, 780 (Ind. 2002). However, a trial court also abuses its discretion if it has misinterpreted or misapplied the law. *State v. Smith*, 179 N.E.3d 516, 519 (Ind. Ct. App. 2021), *trans. denied.* Such is the case here.

Evidence Rule 608 provides as follows:

> **Rule 608. A Witness's Character for Truthfulness or Untruthfulness**
>
> **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

Two cases cited at trial discuss Rule 608, but those cases address the reputation component of the Rule. In *Bowles v. State*, 737 N.E.2d 1150 (Ind. 2000), as in *Norton v. State*, 785 N.E.2d 625 (Ind. Ct. App. 2003), we were called upon to address alleged errors in rulings on the admissibility of reputational evidence under the Rule. The foundation required for such evidence as established under *Bowles* and *Norton* is as follows: (1) the general reputation must be held by an identifiable group of people; (2) this group of people must have an adequate basis upon which to form their belief in this reputation; (3) the witness testifying must have sufficient contact with this group to qualify as knowledgeable of this general reputation; and (4) the group must be of a sufficient size such that the belief in this general reputation has an indicium of inherent reliability. 737 N.E.2d at 1153; 785 N.E.2d at 631.

The court assessed the proffered testimony and concluded that it consisted of:

> three (3) family members on the father's side that had experiences with the child mostly involving events at family gatherings, some of which were when the child was much younger, and none of which have been in the last two (2) years. The family members were from, if I understand correctly, Charlestown, Indiana and Washington, Indiana, none of which were located in the child's community of residence. After listening to this evidence, the Court finds this group is too insular under Indiana caselaw and their contacts are not sufficient to justify an opinion about the child's reputation

> for truthfulness. Under Indiana law, their testimony is not reliable pursuant to the caselaw because it would be based off the same set of biases.

Tr. Vol. IV, p. 120.

The State acknowledges that the court's discussion includes the foundational requirements for reputation testimony, but argues that the court's discussion "was merely addressing the entire 608 argument." *Id.* at 122; *see* Appellee's Br. p. 15 ("merely covering all the possible bases for admission under Rule 608(a)"). However, we have found no caselaw that sets out the foundational requirements for admissibility of opinion testimony. We conclude that the court's discussion covered only the requirements for reputational evidence and not those of opinion testimony.

The opinion testimony clearly was relevant to the issue of V1's credibility. Witnesses were allowed to contradict Hayko's version of the incident leading to the allegations, but because of the court's ruling, Hayko was left to defend his version without available opinion testimony about V l's character for truthfulness or untruthfulness.

The State cites to 12 Robert Lowell Miller, Jr., Indiana Practice, Indiana Evidence section 608.104, in support of its argument that the court did not misapply the Rule. Section 608.104 reads as follows:

> Rule 608(a) provides that opinion testimony . . . concerning a witness's character for truthfulness is admissible. A witness stating an

> opinion as to another's character for truthfulness must satisfy the requirements for lay opinion testimony established in Rule 701. In practice, this amounts to a foundation little different from that required for reputation evidence: the opinion must be rationally based on the witness's perception and helpful to the trier of fact. Because Rule 608(b) precludes impeachment by proof of specific acts of conduct, the witness cannot tell about the specific occurrences that give rise to the opinion, although the witness who offers the opinion can testify to his own conduct with respect to the impeachee. Opinion testimony on truthfulness, like reputation evidence, should relate to the time of trial or a reasonable time before trial. The trial court has discretion under Rule 403 concerning the admissibility of evidence under Rule 608(a).

12 Robert Lowell Miller, Jr., Ind. Prac., Ind. Evid. § 608.104 (4th ed. Aug. 2021 update) (footnotes omitted). The State emphasizes the portion of Miller's explanation about opinion testimony that "this amounts to a foundation little different from that required for reputation evidence," to support the court's conclusion. *See* Appellee's Br. p. 15. We disagree.

In Miller's opinion, an opinion witness under Rule 608(a) should meet the requirements for lay opinion testimony under Rule 701. Rule 701 provides that,

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

> (a) rationally based on the witness's perception; and
>
> (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue.

We agree with Miller's observation in this regard.

However, we do not find persuasive Miller's observation that "In practice, this amounts to a foundation little different from that required for reputation evidence[.]" 12 Miller, Indiana Practice, §608.104 (4th ed. Aug. 2021 update). Reputation evidence foundational requirements go beyond those set out in Rule 701 as established in *Bowles* and *Norton*.

The language of Rule 608(a) is identical to that of Federal Rule of Evidence 608(a). The following commentary has been cited by federal courts in support of a lesser foundational requirement for opinion testimony than reputational testimony. *See* 3 Weinstein's Evidence ¶ 608[04], at 608-20 (1978). Weinstein was quoted by the Fifth Circuit Court of Appeals in its decision in *United States v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979) as follows:

> Witnesses may now be asked directly to state their opinion of the principal witness' character for truthfulness and they may answer for example, "I think X is a liar." The rule imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and

> to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principal witness.

As respects Indiana's Rule 608, we do not believe that the admission of opinion testimony should be limited in the way reputation evidence is limited. For example, we conclude that a witness's testimony about their perception of the victim's character for truthfulness at the time the accusations are made is particularly helpful. And like Weinstein, we agree that cross-examination remains a beneficial tool in probing the opinion testimony in a variety of ways.

These are two distinct types of evidence under the Rule and the foundation for the testimony as opinion testimony had been met in this instance. For these reasons, we conclude that the court abused its discretion by ruling that the testimony was inadmissible.

We next turn to whether the court's error was harmless and conclude that it was not. Indiana Trial Rule 61 provides as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial

> justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

"An error is harmless when it results in no prejudice to the "substantial rights" of a party." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). The "basic premise holds that a conviction may stand when the error had no bearing on the outcome of the case." *Id.* "At its core, the harmless-error rule is a practical one, embodying the principle that courts should exercise judgment in preference to the automatic reversal for error and ignore errors that do not affect the essential fairness of the trial." *Id.* (internal quotations omitted).

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Kubsch v. State*, 784 N.E.2d 905, 923-24 (Ind. 2003). The *Kubsch* Court further stated,

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a

> defense. This right is a fundamental element of due process of law.

Id. at 924.

The jury acquitted Hayko of all but one of the charged counts. And that conviction turned on the jury's witness credibility assessment. Hayko was not allowed to present evidence directly bearing on the issue of witness credibility to present his defense. We conclude that the error was not harmless as it affected the essential fairness of the trial.

Conclusion

In light of the foregoing, we affirm the trial court's ruling on the admissibility of Hayko's statement to Detective Pirtle. However, we reverse and remand for a new trial on the issue of the admissibility of the proffered opinion testimony under Rule 608(a).

Affirmed in part, and reversed and remanded in part for a new trial.

Bailey, J., concurs.

Tavitas, J., concurs in part and dissents in part with opinion.

IN THE
COURT OF APPEALS OF INDIANA

Matthew Hayko, *Appellant-Defendant*, v. State of Indiana, *Appellee-Plaintiff*.	September 28, 2022 Court of Appeals Case No. 21A-CR-2407

Tavitas, Judge, concurring in part and dissenting in part.

I concur with the majority's holding that the trial court did not err by admitting into evidence Hayko's statement to the police. I respectfully dissent, however, from the majority's conclusion that the trial court erred by excluding opinion testimony regarding the victim's character for truthfulness. Because admission of such opinion testimony has the potential to be problematic, we should give trial courts wide leeway when deciding to admit or exclude such evidence. Here, the trial court decided to exclude the opinion of character testimony proffered by Hayko, a decision that was well within the trial court's discretion in such matters.

The admission of evidence regarding a witness's character for veracity is governed by Indiana Evidence Rule 608(a), which provides:

> Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for

> having a character for truthfulness or untruthfulness, *or by testimony in the form of an opinion about that character*. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

Evid. R. 608(a) (emphasis added).[6] Thus, Evidence Rule 608(a) permits two forms of evidence regarding a witness's character for veracity:[7] reputational evidence and opinion evidence.

In the present case, Hayko sought to admit testimony from three witnesses regarding their *opinion* of the victim's character for veracity, rather than the victim's

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[6] The Advisory Committee Commentary to Evidence Rule 608 notes that:

> Rule 608(a) change[d] [then] existing Indiana law by permitting opinion testimony to be used to establish character for purposes of impeachment and rehabilitation. It also limits the inquiry to the character trait of truthfulness and untruthfulness. Permitting opinion testimony to be used to establish character recognizes that most testimony relating to general reputation is in reality merely an expression of the testifying witness's opinion. Limiting character testimony for purposes of impeachment or rehabilitation to the trait of truthfulness and untruthfulness is appropriate as that is the trait most relevant to credibility.

Robert L. Miller, 13 IND. PRACTICE, Ind. Evidence 608 (4th ed. 2022 Update).

[7] Evidence Rule 608(a) uses the terms "character for truthfulness or untruthfulness." For the sake of clarity, I refer to character for "veracity," by which I mean to encompass both truthfulness or untruthfulness.

reputation for veracity.[8] The majority concludes that the trial court improperly analyzed the admissibility of these character witnesses' testimony as reputational, not opinion, evidence. To be sure, the trial court did reference the analysis relevant to reputational evidence. *See* Tr. Vol. IV p. 120. Hayko explained to the trial court that his witnesses would testify as to their opinion of the victim's character for untruthfulness, not the victim's reputation for truthfulness. The trial court then stated: "I do not find there was sufficient contacts in this particular case to be able to form and express those opinions." *Id.* Thus, the trial court did address Hayko's argument regarding opinion-based testimony. It merely found the foundation for such opinion-of-character evidence to be lacking.

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[8] "It is important to distinguish between a witness testifying that 'John Smith, in my opinion, is a liar' and the same witness testifying that 'the testimony which John Smith gave this morning about the auto accident is a lie.' The former may be admissible, but the latter clearly is not." *State v. Eldred*, 559 N.W.2d 519, 527 (Neb. Ct. App. 1997); *see also* Ind. Evidence Rule 704 ("Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; *whether a witness has testified truthfully*; or legal conclusions."). Thus, opinions regarding a witness's truthfulness that are based solely on another witness's observations of the first witness at trial are inadmissible. *See State v. Sims*, 608 A.2d 1149, 1155 (Vt. 1991) (noting that where a witness knows a complainant only through the case at trial, "the witness's opinion that the complainant has a truthful character is tantamount to an opinion that the complainant's allegations in the case are true. It is no longer an opinion as to the complainant's character for truthfulness, but is an opinion as to the complainant's truthfulness on this occasion.").

The proponent of opinion testimony regarding character for veracity must lay a proper foundation before such evidence is admissible. By permitting *opinion* evidence regarding another witness's character for truthfulness or untruthfulness, Evidence Rule 608(a) necessarily implicates Evidence Rule 701, which governs the admission of opinion evidence by lay witnesses. This rule provides that, "if a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Evid. R. 701.

Reading Evidence Rules 608(a) and 701 together, it is apparent that opinion testimony regarding the character of a witness for veracity must be rationally based on the character witness's perceptions and be helpful to the determination of a fact at issue. *See United States v. Cortez*, 935 F.2d 135, 139-40 (8th Cir. 1991) (noting that "admissibility of opinion testimony by lay witnesses is [] limited by Rule 701[.]") (citing *United States v. Dotson*, 799 F.2d 189, 192-93 (5th Cir.1986)). Accordingly, if a trial court determines that the opinion testimony will not be helpful, the court may use its discretion to exclude the opinion testimony. *See Avel Pty. Ltd. v. Breaks*, 985 F.2d 571 (9th Cir. 1993) (holding that district court did not abuse its discretion by excluding testimony of defendant's former business partner regarding the partner's opinion of defendant's character for untruthfulness where district court judge

determined that the testimony was not "useful to a jury").

Of course, the burden is on the proponent of the character witness to establish this foundation. *Smith v. State*, 751 N.E.2d 280, 283 (Ind. Ct. App. 2001) (holding that party seeking to admit evidence bears the burden of laying a foundation for the admission of such evidence), *aff'd on reh'g*, 755 N.E.2d 1150 (Ind. Ct. App. 2001), *trans. denied.* Although there appears to be no Indiana cases discussing the foundational requirements for opinion of character evidence, other jurisdictions have addressed the foundational requirement of opinion testimony under their respective versions of Evidence Rule 608(a).

Some courts require only personal knowledge of the witness whose character for veracity is to be attacked. In *United States v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982), the court held that, for the admission of an opinion of another witness's character for untruthfulness, "foundation of long acquaintance is not required for opinion testimony." Instead, the court concluded that "the opinion witness must testify from personal knowledge," and "once that basis is established the witness should be allowed to state his opinion, 'cross-examination can be expected to expose defects.'" *Id.* (quoting 3 WENSTEIN'S EVIDENCE ¶ 608(04), at 608-20 (1981)).

Courts that have only minimal foundational requirements have held that excluding opinion testimony regarding a witness's character for veracity is improper

where the character witness has some basis to form an opinion of the other witness's character for veracity. *See*, *e.g.*, *United States v. Jewell*, 614 F.3d 911, 926 (8th Cir. 2010) (holding that district court erred in excluding testimony of attorney regarding his opinion of defendant's ex-wife's character for veracity where attorney had represented defendant in his divorce); *State v. Blair*, 583 A.2d 591, 593-94 (1990) (holding that trial court erred in excluding testimony of witness who would have testified that, in his opinion, the alleged victim had a character for untruthfulness based on his own knowledge); *Honey v. People*, 713 P.2d 1300, 1303 (Colo. 1986) (holding that trial court erred by excluding testimony of witness regarding his opinion of the complaining witness's character for veracity where character witness saw complainant "two or three times a week over a two month period" during which time the character witness had "ample opportunity to observe" the complainant); *United States v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982) (concluding that district court erred by excluding testimony of witnesses who had formed an opinion regarding the character for untruthfulness of the government's main witness because the opinions were based on personal knowledge). *Cf. United States v. Lollar*, 606 F.2d 587, 588-89 (5th Cir. 1979) (holding that district court properly admitted testimony of former employer regarding defendant's character for truthfulness).

Other courts, however, have required more. For example, in *State v. Paniagua*, 341 P.3d 906, 910 (Or. Ct. App. 2014), the Oregon Court of Appeals explained "when

determining if the proponent of the evidence has laid a foundation for the character witness's opinion testimony," the trial court must "consider whether the witness's contacts with the person were sufficient to allow the witness to form an opinion about the person's propensity to tell the truth in all the varying situations of life." Thus, "[w]hen the witness's contacts with the person are minimal, it is less likely that those contacts will have provided the witness with an opportunity to form an opinion about the person's character, even if the witness can cite individual acts of untruthfulness." *Id.*; *see also State v. Coffee*, 840 P.2d 720, 722 (Or. Ct. App. 1992).

The Oregon Court of Appeals has also held that:

> "A character witness, whether testifying in the form of reputation or opinion, will not be allowed to testify until a foundation has been laid showing that the witness has sufficient acquaintance with the reputation of the person in the relevant community *or sufficient personal contact with the individual to have formed a personal opinion. The contact must have been sufficiently recent so that there will be a current basis for the testimony*."

State v. Coffee, 840 P.2d 720, 722 (Or. Ct. App. 1992) (emphasis added) (quoting Laird C. Kirkpatrick, OREGON EVIDENCE 345 § 608 (1989)).

Accordingly, the court in *Coffee* held that the trial court did not abuse its discretion by excluding the testimony of a character witness because the witness "did not have recent contacts with the victim sufficient to make

her able to offer an opinion regarding her truthfulness." *Id.*; *see also Honey v. People*, 713 P.2d 1300, 1303 (Colo. 1986) ("In deciding whether to admit an opinion as to a witness's credibility, a court may consider how well the witness knows the witness to be impeached and under what circumstances the witness giving the opinion knew the witness to be impeached."); *State v. Oliver*, 354 S.E.2d 527, 540 (N.C. Ct. App. 1987) ("There must be a proper foundation laid for the admission of opinion testimony as to another's character for truthfulness. That foundation is personal knowledge.") (citing *State v. Morrison*, 351 S.E.2d 810, 815 (N.C. Ct. App. 1987)).

Similarly, McCormick's treatise on evidence concludes:

> Other problems arise when the attack on character is by opinion, as authorized by Federal Rule of Evidence 608(a). To begin with, *the opinion must relate to the prior witness's character trait for untruthfulness, not the question of whether the witness's specific trial testimony was truthful.* Moreover, a lay person's opinion should rest on some firsthand knowledge pursuant to Rule 602; the opinion ought to be based on rational perception and aid the jury, as required by Rule 701. *The lay witness must be sufficiently familiar with the person to make it worthwhile to present the witness's opinion to the jury.* However, specific untruthful acts cannot be elicited during the witness's direct examination even for the limited purpose of showing the basis of the opinion. An adequate preliminary showing to meet the

> requirements of Rule 701 consists of evidence of sufficient acquaintance with the witness to be impeached.

1 McCormick on Evidence, *Character: Impeachment by Proof of Opinion or Bad Reputation §* 43 (8th ed.) (emphases added).

Thus, there is no error in excluding opinion of character evidence where the character witness did not have sufficient personal knowledge on which to base such an opinion. *See United States v. Garza*, 448 F.3d 294, 296 (5th Cir. 2006) (holding that district court did not err in excluding testimony of former federal investigator regarding his opinion of the credibility of police officer to whom defendant allegedly confessed because witness did not have sufficient information to form a reliable opinion); *State v. Paniagua*, 341 P.3d 906, 910-911 (Or. Ct. App. 2014) (holding that trial court did not err by excluding testimony of witness regarding her personal opinion about victim's character for veracity where witness had only brief, recent contact with victim).

Even in cases where the foundational requirements for such opinion testimony have been met, opinions as to a complainant's character for veracity by witnesses, especially expert witnesses, are dangerous because such opinions are too easily taken for comment on the credibility of the complainant's allegations. *State v. Sims*, 608 A.2d 1149, 1155 (Vt. 1991). This is where Evidence Rule 403 comes into play.

"[E]vidence admissible under Rule 608(a) may still be excluded under Rule 403 'if its probative value is substantially outweighed by its needlessly cumulative nature,' subject to the caveat that such an exclusion of testimony sought to be presented by a criminal defendant must not be used in a way that violates the defendant's sixth amendment rights." *United States v. Turning Bear*, 357 F.3d 730, 734-35 (8th Cir. 2004) (quoting *United States v. Davis*, 639 F.2d 239, 244 (5th Cir. 1981)); *see also Blair*, 583 A.2d at 593-94 ("We also agree that the court has discretion under V.R.E. 403 and 602 to exclude this kind of opinion evidence if 'the witness lacks sufficient information to have formed a reliable opinion.'") (quoting 3 WEINSTEIN'S EVIDENCE ¶ 608[04], at 608).

To avoid such dangers, trial courts should allow a preliminary examination, preferably outside the presence of the jury, "to determine relevance as well as a foundation for [character] opinion evidence." *State v. Benoit*, 697 A.2d 329, 331 (R.I. 1997). The trial court here held such a preliminary hearing.

The trial court has the discretion to determine whether a sufficient foundation has been laid for the opinion testimony. Roger Park, Tom Lininger, THE NEW WIGMORE, *A Treatise on Evidence §* 3.2 (1st Ed. Supp. 2022) ("The question whether the proponent has laid a sufficient foundation for reputation or opinion testimony is a matter within the discretion of the trial judge."). As Chief Justice Rush wrote for our Supreme Court in *Snow v. State*,

> Trial judges are called trial judges for a reason. The reason is that they conduct trials. Admitting or excluding evidence is what they do. That's why trial judges have discretion in making evidentiary decisions. This discretion means that, in many cases, trial judges have options. They can admit or exclude evidence, and we won't meddle with that decision on appeal. There are good reasons for this. Our instincts are less practiced than those of the trial bench and our sense for the rhythms of a trial less sure. And trial courts are far better at weighing evidence and assessing witness credibility. In sum, our vantage point—in a far corner of the upper deck—does not provide as clear a view.

77 N.E.3d 173, 177 (Ind. 2017) (internal citations and quotations omitted).

I would, therefore, hold that, when determining whether an opinion regarding the character for veracity of a witness is admissible under Evidence Rule 608(a), a trial court should do as the trial court did here—require the proponent of such evidence to lay a sufficient foundation for such an opinion in a preliminary hearing outside the presence of the jury. The proponent of the opinion evidence must establish that the character witness had "sufficient personal contact with the [subject of the opinion] to have formed a personal opinion," and that this contact was "sufficiently recent so that there will be a current basis for the [opinion] testimony." *Caffee*, 840 P.2d at 722.

This fulfills the requirement of Evidence Rule 701 that the opinion be rationally based on the witness's perception and be helpful to a determination of a fact in issue. Even if the opinion testimony meets these requirements, the trial court must also determine, under Evidence Rule 403, whether the probative value of such evidence is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. The trial court acts as a gatekeeper taking into consideration the evidence and in consideration of the rules of evidence. *See Bedolla v. State*, 123 N.E.3d 661, 666 (Ind. 2019) (referring to trial court as "gatekeeper" with regard to evidentiary issues).

In the present case, I am unable to conclude that the trial court abused its considerable discretion by excluding the evidence of Hayko's character witnesses. All three character witnesses had some contact with the victim, usually at family gatherings, a few times per year. All three witnesses would have testified that, in their opinion, the victim had a character for untruthfulness. None of the proposed character witnesses, however, had seen the victim in the two years before trial due to a protective order.

The victim was eleven years old when the crime took place, and she was almost fifteen years old when she testified. As anyone who has raised a child can attest to, children undergo significant change in a short period. Even if the victim happened to be a fibber as a young child, does this mean that she would lie, under

oath, as a more mature teenager? I fear that allowing such character evidence in this case could open a Pandora's box of minimally relevant and potentially confusing character evidence, especially regarding child victims.

Certainly, it is in no one's interest to permit a defendant to be convicted based on the testimony of a known liar. It is for this reason that Evidence Rule 608(a) allows the admission of testimony in the form of an opinion of another witness's character for veracity. But in order to prevent trials from devolving into sub-trials regarding such opinion-of-character testimony, trial courts must necessarily exercise their considerable discretion in such matters. Trial courts must also require that the proponent of such evidence establish a foundation for such opinion testimony, so that it will be rational based on the witness's perception and helpful to the jury.

The trial court here determined that there was insufficient *recent* contact to permit the admission of the character witnesses' opinions of the victim's character for untruthfulness at the time of trial. I find this to be within the trial court's discretion in evidentiary matters. I, therefore, respectfully dissent.

In the
Indiana Supreme Court

Matthew Hayko, Appellant, v. State of Indiana, Appellee.	Supreme Court Case No. 23S-CR-13 Court of Appeals Case No. 21A-CR-2407 Trial Court Case No. 74C01-1902-F3-58

Order

Appellant's Petition for Rehearing is hereby DENIED.

Done at Indianapolis, Indiana, on 8/18/2023.

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.