MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tony Bennett Anthony,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 8, 2021

Court of Appeals Case No. 20A-CR-2174

Appeal from the Lake Superior Court

The Honorable Diane R. Boswell, Judge

Trial Court Cause No. 45G03-1803-F4-11

Weissmann, Judge.

[1] Tony Anthony appeals his child molesting conviction, arguing that one of the State's witnesses impermissibly vouched for the victim. We agree that the vouching testimony was improper. Nonetheless, we affirm Anthony's conviction because we find that error was harmless.

Facts

[2] Anthony is married to D.M.'s maternal grandmother. In late summer of 2017, D.M., then 12, told her mother that during a visit over the Fourth of July holiday, she awoke on three different occasions to Anthony touching her on her breast, bottom, and "private area." Tr. Vol. II, pp. 211, 216-217, 221-224, 227-228. An official investigation began in January 2018, when D.M. was hospitalized after a suicide attempt and told hospital staff about the touchings. Anthony was charged with one count of child molesting, a Level 4 felony.

[3] At jury trial, Detective Sean Buck testified to observing a forensic interview of D.M. When he began to describe how different children react to discussing sexual abuse, defense counsel objected, arguing that the testimony lacked proper foundation, was not relevant, and was an attempt by the prosecution "to have this person vouch for credibility." *Id.* at 89. Defense counsel continued, "I just object to this entire line of questioning. . . . It's not relevant, and it violates my client's right to have the jury decide credibility. . . ." *Id.* at 90.

[4] The trial court overruled the objection and allowed the State to proceed. Detective Buck testified about signs of witness coaching and confirmed that D.M.'s interview did not exhibit any of those signs. *Id.* at 92, 98. Defense

counsel only objected when the State asked if D.M. seemed "like she was searching for answers" during the interview, arguing in support of the objection that Detective Buck was not competent to testify to D.M.'s thought process. *Id.* at 97. The defense made no more objections during Detective Buck's direct examination. Defense counsel then cross-examined Detective Buck on coaching, confirming that he never interviewed D.M.'s mother to discern whether she coached D.M. to make the allegations against Anthony. *Id.* at 110-11.

[5] D.M.'s mother also vouched for D.M. but faced no objection. *Id.* at 144-45, 152-53, 189. For example, she testified, "I didn't believe [D.M.] was lying at all. Like, when she told me, I felt like she was telling the truth." *Id.* at 152.

[6] Ultimately, Anthony was convicted and sentenced to 5 years in the Department of Correction. He now appeals, asking us to vacate his conviction because Detective Buck's coaching testimony constituted improper vouching.

Discussion & Decision

[7] Indiana Rule of Evidence 704(b) states that "[w]itnesses may not testify to opinions concerning . . . the truth or falsity of allegations [or] whether a witness has testified truthfully . . . ." This rule also bars testimony comparing a witness's statements or demeanor to that of someone who was coached to lie. *See Sampson v. State*, 38 N.E.3d 985, 991-92 (Ind. 2015) (holding that "the subtle distinction between an expert's testimony that a child *has or has not been coached* versus an expert's testimony that the child *did or did not exhibit any 'signs or*

indicators' of coaching is insufficient to guard against the dangers that such testimony will constitute impermissible vouching. . . .") (emphasis in original). Anthony argues that Detective Buck's testimony falls into this category and the trial court abused its discretion in allowing it.

I. Waiver

[8] Before we can evaluate whether Detective Buck's coaching testimony constituted improper vouching, we must consider whether the issue is properly before us. The State argues that Anthony waived the issue when he failed to make a contemporaneous objection.

[9] Before 2013, our court required contemporaneous objections at the time the disputed evidence was introduced to preserve the issue for appeal. *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). To avoid lodging repeated objections to the same evidence, a litigant could request a continuing objection. *Dickey v. State*, 999 N.E.2d 919, 921-22 (Ind. Ct. App. 2013). In 2013, our rules of evidence were relaxed, allowing an objection to stand without formally lodging a continuing objection. Specifically, Indiana Evidence Rule 103(b) now provides "[o]nce the court rules definitively on the record at trial a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *See also Dickey*, 999 N.E.2d at 922 n.2 (observing that 103(b) had not yet gone into effect, so a continuing objection was required); *K.G. v. State,* 81 N.E.3d 1078, 1080 n.5 (Ind. Ct. App. 2017) (holding that a renewed objection at the start of trial adequately preserved that issue for appeal); *Laird v. State*, 103

N.E.3d 1171, 1181 (Ind. Ct. App. 2018) (May, J., concurring) (arguing that defendant's objections during opening statements should have been deemed sufficient to preserve the issue for appeal, as opening statements occur "at trial"), *trans. denied*.

[10] Anthony's initial objection to Detective Buck's testimony was adequate to preserve the issue of vouching for appeal, including for the coaching testimony. Anthony timely objected when Detective Buck was asked about children's usual reactions when discussing sexual abuse in forensic interviews. Like other cases in which an initial objection was sufficient, Anthony's objection was not limited to a single piece of evidence before the court. *See, e.g.*, *K.G.*, 81 N.E.3d at 1080 n.5 (allowing appeal based on objection to all evidence collected by a specific police officer); *Bailey v. State*, 131 N.E.3d 665, 676 (Ind. Ct. App. 2019) (allowing appeal based on objection to all evidence gathered in three searches). Rather, Anthony objected to the "entire line of questioning"—that is, Detective Buck's opinions regarding the nature of truthful forensic interviews in molestation cases. Tr. Vol. II, p. 90. This category includes coaching testimony. Anthony did not waive his objection.

II. Abuse of Discretion

[11] We now consider whether the trial court abused its discretion in allowing Detective Buck's coaching testimony, in violation of Indiana Rule of Evidence 704(b). We only disturb a trial court's ruling on the admissibility of evidence where it has abused its broad discretion. *Hoglund v. State*, 962 N.E.2d 1230,

1237 (Ind. 2012). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Applying this standard, we conclude Detective Buck's testimony was admitted in error.

[12] Our Supreme Court has held that testimony about witness coaching constitutes impermissible vouching—whether that testimony be that a child has or has not been coached or that a child did or did not exhibit signs of coaching. *Sampson*, 38 N.E.3d at 991-92. Such testimony generally runs afoul of Evidence Rule 704(b) unless the defendant "opens the door" to it. *Id.* at 992. A defendant can open the door to otherwise inadmissible evidence by introducing the issue at trial with evidence that "leave[s] the trier of fact with a false or misleading impression of the facts related." *Beauchamp v. State*, 788 N.E.2d 881, 896 (Ind. Ct. App. 2003). The State argues that Anthony did just that by denying D.M.'s accusations, providing alternate explanations for them, and pointing to the strained relationship between D.M.'s mother and Anthony's wife. Tr. Vol. II, pp. 67, 71; Tr. Vol. III, p. 166.

[13] Importantly, most of the alleged instances of door-opening occurred after the State elicited Detective Buck's testimony. This Court has found that where coaching testimony is elicited "neither in response to defense questioning, nor to rebut an express claim that [the witness] had been coached," it constitutes improper vouching. *Norris v. State*, 53 N.E.3d 512, 524 (Ind. Ct. App. 2016). Once Detective Buck's improper coaching testimony was introduced and defense counsel's objections were overruled, Anthony was not required to stay

mum to preserve his objection. *Thomas v. Thomas*, 577 N.E.2d 216, 219 (Ind. 1991) ("[A] party aggrieved by the erroneous admission of evidence, whose timely and proper objection has been overruled, [is allowed to] respond to such improper evidence without sacrificing the right to appellate recourse.").

[14] We therefore limit the scope of our review for abuse of discretion to statements made by the defense before Detective Buck's testimony on coaching. The State points to two. First: "The defense in this case is remarkably simple. [Anthony] didn't do this. This didn't happen." Tr. Vol. II, p. 67. And second: "[Y]ou're going to hear evidence that this was, and is[,] an extremely difficult relationship, mother and daughter. I'm talking about grandma and [D.M.]'s mom. It's bad and it's been bad for a long time, and daughter . . . right out of the box is making accusations against Tony. . . ." *Id.* at 71.

[15] Neither statement opened the door to Detective Buck's vouching testimony. First, there is no explicit mention nor straightforward implication of coaching. Second, when Anthony declared his innocence, he did not necessarily attack D.M.'s credibility. Credible people can be mistaken or confused. We are concerned that the State's position here would eviscerate the rule against coaching testimony set forth in *Sampson*. If denying an accusation in opening statements necessarily challenges a witness's credibility, most defenses would open the door to coaching testimony. And finally, it takes a great inductive leap to conclude that, by saying D.M.'s grandmother and mother had a difficult relationship, the defense accused D.M.'s mother of coaching D.M. to lie.

[16] Because Anthony did not open the door to Detective Buck's coaching testimony and timely objected to its admission, the testimony constituted impermissible vouching and was admitted in error.

III. Harmless Error

[17] We now determine whether this error requires reversal. Any error in the admission of evidence is not prejudicial—and, therefore, is harmless—if the same or similar evidence has been admitted without objection or contradiction. *Hoglund*, 962 N.E.2d at 1238.

[18] Defense counsel failed to object to the vouching testimony from D.M.'s mother, who repeatedly testified she thought her daughter was telling the truth. Tr. Vol. II, pp. 144-45; 152-53; 189. Anthony does not challenge this admission on appeal. Given the testimony by D.M.'s mother that her daughter was truthful, Detective Buck's vouching testimony suggesting the same is merely cumulative and, therefore, does not constitute reversible error. *See Hoglund*, 962 N.E.2d at 1240 (quoting *Wolfe v. State*, 562 N.E.2d 414, 421 (Ind. 1990) ("[T]he erroneous admission of evidence which is cumulative of other evidence admitted without objection does not constitute reversible error.").

[19] Moreover, as in *Hoglund*, "the State presented substantial evidence of [the defendant's] guilt through the [alleged victim's] testimony." *Id.* D.M. testified extensively, consistently, and unequivocally to all three touchings. She said the first touching occurred over the Fourth of July holiday. Tr. Vol. II, p. 211. She fell asleep while watching a movie in Anthony's living room and awoke to

Anthony touching her under her underwear and fondling her breast and bottom. *Id.* at 216-17. The second touching occurred during the same visit, in Anthony's guest bedroom. *Id.* at 220, 225. D.M. said she was lying on her stomach when she heard Anthony come in and felt him touch her "private area." *Id.* at 221-24. The third time occurred on the ride home from that visit. *Id.* at 227. Again, D.M. fell asleep and felt Anthony touch her vagina. *Id.* at 227-28. She said that when he believed she was waking up, he moved his hand to her thigh to "play[] it off like it was nothing." *Id.*

[20] After a brief stay at her dad's house, D.M. told her mom what happened. *Id.* at 232. She told her uncle one week later, and hospital staff months later in January 2018, when she was hospitalized after a suicide attempt. *Id.* at 240-44. A victim's testimony alone is sufficient to form the basis of a child molesting conviction. *Hoglund*, 962 N.E.2d at 1238-39. But D.M.'s testimony did not stand alone. Her mother confirmed that Anthony had been alone with D.M. on the dates in question. Tr. Vol. II, p. 141. Both D.M.'s mother and grandmother also testified that her personality changed the summer of the molestations.

[21] As Anthony's conviction is supported by substantial independent evidence of his guilt and the improper admission of the detective's vouching evidence was cumulative to other unchallenged vouching evidence, we conclude the trial court's error in admitting the detective's testimony was harmless. *See Wilkes v. State*, 7 N.E.3d 402, 406 (Ind. Ct. App. 2014) (finding improper vouching testimony was harmless in light of other evidence of guilt, including victim's testimony).

[22] We affirm the judgment of the trial court.

Kirsch, J., and Altice, J., concur.