ATTORNEY FOR APPELLANT

Matthew J. McGovern
Fishers, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

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

[1] 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.

[2] 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

[3] 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.

[4] 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.

[5] 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

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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.

immediately 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.

[6] 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.

[7] 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 been drinking a little too much, and "woke up next to V1" with his arm around her and

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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.

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.

[8] 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.

[9] 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.

[10] 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

[11] 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.

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

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

[13] 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)].
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> * * *
>
> 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).

[14] 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.

[15] 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.

[16] 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.

[17] 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.

[18] 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]

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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.

II. Evidence Rule 608

[19] 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.

[20] 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 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.*

[21] 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.

[22] 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.

[23] 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.

[24] 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.

[25] 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.

[26] 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 V1's character for truthfulness or untruthfulness.

[27] 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.

[28] 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.

[29] 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*.

[30] 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.

[31] 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.

[32] 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.

[33] 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).

[34] "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.

[35] 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

[36] 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).

[37] 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.

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Matthew Hayko,
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v.

State of Indiana,
Appellee-Plaintiff.

September 28, 2022

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

[38] 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.

[39] 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.

[40] 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 *reputation* for veracity.[8] The majority concludes that the trial court

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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.

[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

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.

[41] 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.

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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.").

[42] 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").

[43] 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).

[44] 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 WEINSTEIN'S EVIDENCE ¶ 608(04), at 608-20 (1981)).

[45] 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).

[46] 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. Caffee*, 840 P.2d 720, 722 (Or. Ct. App. 1992).

[47] 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. Caffee, 840 P.2d 720, 722 (Or. Ct. App. 1992) (emphasis added) (quoting Laird C. Kirkpatrick, OREGON EVIDENCE 345 § 608 (1989)).

[48] Accordingly, the court in *Caffee* 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)).

[49] 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).

[50] 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).

[51] 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.

[52] "[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).

[53] 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.

[54] 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 Evidenc*e § 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).

[55] 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.

[56] 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).

[57] 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.

[58] 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.

[59] 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.

[60] 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.