SUMMARY
March 14, 2024

2024COA26

No. 19CA2313, *People v. Lopez* — Evidence — Testimony Concerning the Truthfulness of Another Witness — Opening the Door Doctrine

The defendant in this criminal case was convicted of multiple counts of sexual assault on a child and incest. On appeal, he argued that the trial court erred by admitting a forensic interviewer's testimony that the children did not show signs of having been coached in making their allegations.

A majority of a division of the court of appeals holds that although this kind of testimony is ordinarily inadmissible, the defendant opened the door to the testimony by pursuing a defense that the children had been coached to report the abuse. The dissent concludes that a defendant cannot open the door to expert testimony that the victims of the alleged sexual assault, whose

video recorded interviews were admitted into evidence, did not appear to be coached.

COLORADO COURT OF APPEALS **2024COA26**

Court of Appeals No. 19CA2313
Boulder County District Court No. 18CR1290
Honorable Andrew Hartman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Gustavo Lopez,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE HARRIS
Lipinsky, J., concurs
Schutz, J., dissents

Announced March 14, 2024

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¶ 1 A jury found defendant, Gustavo Lopez, guilty of sexually abusing his son, daughter, and niece, and of possessing child pornography.

¶ 2 The prosecution presented evidence that, while spanking his then five- or six-year-old son, Lopez inserted his finger into his son's anus, and when his daughter was about ten years old, Lopez drove her to a parking lot and tried to put her hand on his penis. Sometime after those incidents, while babysitting his then five-year-old niece, he performed oral sex on her.

¶ 3 The jury returned guilty verdicts on all counts.

¶ 4 On appeal, Lopez's primary argument is that the trial court erred by admitting expert testimony that the son and daughter did not show signs of having been coached in reporting the allegations. He also argues that the court gave the jury a coercive instruction during deliberations and improperly conducted a child competency examination during trial.

¶ 5 We conclude that defense counsel opened the door to the interviewer's testimony, and because we reject Lopez's other arguments as well, we affirm the judgment.

I. Coaching Testimony

¶ 6 Lopez contends that the interviewer's testimony that the children did not appear to have been coached was inadmissible because it vouched for the children's truthfulness.

A. Background

¶ 7 Two years before trial, Lopez's son and daughter underwent forensic interviews about their sexual abuse allegations. The forensic interviewer testified at trial as an expert.

¶ 8 During direct examination, the interviewer discussed the concepts of "suggestibility" and "coaching." She testified that she is trained to "look[] for coaching," and she explained what kinds of questions she would ask if she suspected that a child had been coached. One such question asks for "experience based detail[s]" because, according to the interviewer, "if a child is being coached, it is more difficult for them to describe all the details of what" happened, as the person coaching the child usually does not "tell[] the child to say all of these [details] as well."

¶ 9 On cross-examination, defense counsel returned to the topic of suggestibility. In response to counsel's questions, the interviewer acknowledged that she did not have any control over who the

children talked to before the interviews, and she did not know how many times the children had previously talked about the allegations. She agreed that unlike forensic interviewers, "normal people" might not know how to question children without suggesting answers.

¶ 10 Over defense counsel's objection, the court then asked the following juror question: "In your expert opinion, was either [the son's] or [the daughter's] behavior consistent with interviews where coaching was present?" The interviewer responded that, "[i]n [her] opinion," she did not "feel like [she] saw huge red flags" or "anything that indicated [coaching] because both children were able to provide very specific experience-based details" about the incidents.

B. Standard of Review

¶ 11 We review a trial court's evidentiary rulings for an abuse of discretion. *People v. Bridges*, 2014 COA 65, ¶ 8. The trial court permitted the challenged testimony on the theory that "coaching" testimony is "broader than merely commenting on credibility." But we can affirm the trial court's ruling on any ground supported by the record, even if the court did not articulate or consider that ground. *People v. Brown*, 2014 COA 155M-2, ¶ 15; *see also People*

v. Greenlee, 200 P.3d 363, 368 (Colo. 2009) ("[A] defendant's conviction will not be reversed if a trial court reaches a correct result although by an incorrect analysis." (quoting *People v. Quintana*, 882 P.2d 1366, 1375 (Colo. 1994))), *abrogated on other grounds by Rojas v. People*, 2022 CO 8.

C. Lopez Opened the Door to the Coaching Testimony

¶ 12 A witness may not testify that another witness, including a child victim, told the truth on a particular occasion. *Venalonzo v. People*, 2017 CO 9, ¶ 32. "This rule applies to both direct and indirect implications of a child's truthfulness." *Id.* Therefore, an expert witness may not opine that a child was not coached in making allegations, *Bridges*, ¶ 16, or — because it amounts to the same thing — that the expert did not see signs of coaching, *People v. Heredia-Cobos*, 2017 COA 130, ¶ 17. Coaching testimony is impermissible because it "constitute[s] conclusions about [the children's] truthfulness in their respective interviews," *Bridges*, ¶ 16, and is "tantamount to vouching for the child[ren]'s credibility," *Heredia-Cobos*, ¶ 14.

¶ 13 The People argue that even if coaching testimony is ordinarily inadmissible, Lopez opened the door to admission of the testimony

by advancing a defense that the children's allegations were the product of suggestibility or coaching. We agree.

¶ 14 A party may open the door to otherwise inadmissible evidence by selectively presenting facts that, without being elaborated on or placed in context, create a misleading impression. *See Golob v. People*, 180 P.3d 1006, 1012-13 (Colo. 2008). Thus, when the defense challenges a "child witness's credibility by suggesting that the witness had been coached, the defense opens the door to testimony that the witness didn't appear to have been coached." *Heredia-Cobos*, ¶ 24 (collecting cases adopting this rule); *cf. Venalonzo*, ¶ 44 (defense counsel opened the door to detective's otherwise inadmissible testimony that children only make up trivial stories, not serious accusations).

¶ 15 In *Heredia-Cobos*, ¶ 12, for example, the defendant challenged the admission of the forensic interviewer's testimony that she did not "see any indications of coaching during [the victim's] interview." But the defendant had pursued a theory that the child victim's family members had coached her on the details of the assault. *Id.* at ¶ 21. Beginning with the opening statement and continuing through the cross-examination of various witnesses, defense

counsel underscored that family members had gathered together before a detective interviewed them, and the victim had talked to her family about the incident; that family members "liked to gossip about other family members"; that a cousin had reminded the victim of certain details of the day of the incident; and that the victim's reports about the incident were inconsistent. *Id.* at ¶¶ 22-23. The division concluded that by pursuing a coaching theory, the defense opened the door to the otherwise inadmissible testimony. *Id.* at ¶¶ 20-25.

¶ 16 We reach the same conclusion here. The defense theory was that the children's allegations were either fabrications or false memories of abuse, resulting from the undue influence of their maternal grandmother, who wanted to maintain custody of the children.

¶ 17 Defense counsel began to advance the theory as early as voir dire by extensively questioning prospective jurors about children's suggestibility.

- Counsel asked the venire to comment on "how family members can possibly sway other family members [or] have influence on other family members."

- She asked one prospective juror whether she had any experience involving "people taking advantage of other people" or "trying to suggest to them things that maybe aren't real."
- Counsel followed up with that juror by asking, "Do you think that children might be easier to suggest or easier to maybe take advantage of in trying to manipulate reality from non-reality?"
- Counsel asked another prospective juror, "Do you think it's possible for adults to suggest to children that things happened that maybe never did happen?" When the juror asked for clarification, counsel used as an example a "five-year-old [who] is hanging out with grandma" and "grandma wants that five-year-old to stay with grandma." Counsel was interrupted by the prosecutor's objection, which the court sustained because defense counsel was essentially arguing her theory of the case.
- Counsel asked another prospective juror whether she thought it was possible "that a kid may come to believe something that's not true; not intentionally, but — I mean, they sincerely believe something happened just because of an influence of someone they are very close to?"

- Finally, counsel asked the prospective jurors to offer possible reasons an adult might try to influence a child's perception of a situation.

¶ 18 Then, in opening statement, counsel told the jury to pay attention to the "time line" in the case — "when things are happening, where the children are, who they are with when they are making these various allegations." She explained that the jurors would "hear some very different versions of events and those versions will differ based on who has control over the children."

¶ 19 During cross-examination of the daughter, defense counsel elicited testimony that a year after the incident, at an interview with a social services caseworker that the grandmother did not attend, the daughter had denied any wrongdoing by Lopez. Counsel then elicited testimony that by the time of the forensic interview in which she disclosed abuse, the daughter was living with grandmother and, before the interview, she "talked to [grandmother] about . . . why [she] was going [to the interview] and what [she] w[as] going to say." The daughter agreed with counsel that grandmother "wanted to make sure [the daughter] told [the interviewer] exactly what" the daughter did tell the interviewer. She also agreed that she had

spoken to her brother about the allegations and "the plan" was that the brother "was going to say some stuff [to the interviewer] too." Toward the end of the questioning, counsel elicited testimony that the daughter "want[s] to live with nana," that "nana knows [the daughter] want[s] to stay with her," and that "nana wants [the daughter] to stay with her."

¶ 20 Similarly, counsel elicited testimony from the son suggesting that his story changed after he began living with grandmother. Counsel asked whether he remembered telling the social services caseworker that Lopez did not touch him inappropriately. Then she asked him questions about living with grandmother at the time of the forensic interview, and the son agreed that he "talked to [his] grandma beforehand about it" and grandmother "wanted to make sure [he] told [the interviewer] what happened." The son also acknowledged that he told the interviewer that he did not want to live with his mother, because she "put [him] in danger," or his father; instead, he wanted to live with grandmother.

¶ 21 Counsel also elicited testimony from grandmother that, after discovering Lopez had abused the daughter, she did not call the

police or social services for almost a year — not until mother said she wanted to regain custody of the children.

¶ 22 Finally, during her examination of the forensic interviewer, counsel emphasized that multiple interviews of children were not a best practice due to suggestibility concerns and implied that the children in this case might have discussed the abuse allegations with many people before the forensic interview.

¶ 23 In our view, this case falls squarely under the rule articulated in *Heredia-Cobos*. By persistently advancing the theory that grandmother had influenced the children to fabricate the allegations or had manipulated them into creating false memories of abuse, Lopez opened the door to the forensic interviewer's testimony that she had not seen signs of coaching.

¶ 24 Still, in adopting the *Heredia-Cobos* division's analysis, we emphasize that an "opening the door" exception that allows coaching testimony to be admitted must be construed narrowly. The testimony is not admissible under this exception any time the defendant challenges the child victim's credibility. Rather, the record must establish — as it does in this case — that the defendant "clearly intended to suggest to the jurors" that the child

had been coached or otherwise improperly influenced by certain identifiable people. *Heredia-Cobos*, ¶ 23.

¶ 25 The dissent says that we are nonetheless going too far and that, by following *Heredia-Cobos*, we are running afoul of supreme court precedent. But the dissent also acknowledges that under *Venalonzo*, a defendant can open the door to an expert's testimony that "indirectly" comments on a witness's truthfulness. That is precisely what happened here.

¶ 26 Nor do we see *Liggett v. People*, 135 P.3d 725 (Colo. 2006), as inconsistent with our conclusion. In that case, the supreme court considered whether a witness may be asked if another witness "was lying" during their testimony. *Id.* at 728-29. According to the dissent, the court rejected the division's rule that would have allowed the testimony to be admitted if the other party opened the door. But in fact, the court expressly declined to address that issue. If anything, it suggested that the evidence might be admissible under an opening the door theory: in a footnote, the court explained that

> the court of appeals found an exception "when the defendant has opened the door by testifying about the veracity of other witnesses

> on direct examination." [*People v.*] *Liggett*, 114 P.3d [85,] 88 [(Colo. App. 2005)]. The court of appeals' exception resembles CRE 608(b), which permits the admission of otherwise inadmissible evidence where a defendant opens the door by opining on the veracity of another witness on direct examination. This evidentiary rule does not apply to Liggett and we do not address it here.

Id. at 732 n.2.

¶ 27 The testimony in this case is not the type prohibited by *Liggett*. The interviewer did not say that the children were not lying; she said that she did not see "red flags" that suggested coaching because the children provided "experience based details" about the incidents. One of the reasons the *Liggett* court disapproved of the "are they lying" questions is that a direct comment on a person's truthfulness "seeks information beyond the witness's competence." *Id.* at 731. The interviewer, though, was qualified as an expert in forensic interviewing and could legitimately testify that the children had given enough "experience based details" during the interview to make it unlikely that someone had fed them the allegations. And the interviewer's testimony about coaching did not foreclose a finding by the jury that the children were nonetheless incredible. As the court explained in *Liggett*, "are they lying" questioning

"ignores numerous alternative explanations for evidentiary discrepancies and conflicts that do not involve lying." *Id.* But eliminating coaching as one reason the children might be unreliable left open other possibilities, including animosity toward their father. Thus, even assuming a party cannot open the door to "are they lying" type questions, the interviewer's testimony would not be prohibited.

¶ 28 Finally, we note that *Liggett* did not usher in a hard and fast rule that one witness cannot comment on another witness's credibility. In addition to allowing such testimony under an opening the door theory in *Venalonzo*, the supreme court held in *Davis v. People*, 2013 CO 57, ¶ 19, that a police officer "may testify about his or her assessments of interviewee credibility when that testimony is offered to provide context for the [officer's] interrogation tactics and investigative decisions." Thus, we do not agree with the dissent that allowing an indirect comment on credibility under an opening the door theory is at odds with supreme court precedent.

¶ 29 However, we reiterate that unless the defendant opens the door under the narrow circumstances we have described, the trial

court commits error — potentially reversibly so — by allowing an expert to opine, even indirectly, about another witness's credibility.

¶ 30 In sum, though we disagree with the trial court's reasoning, we conclude that the court did not err by admitting the forensic interviewer's coaching testimony.

II. Response to Jury Question

¶ 31 Next, Lopez contends that the trial court erred in responding to the jury's question about whether it could return verdicts on fewer than all the charges.

A. Background

¶ 32 On the last day of trial, the parties concluded their closing arguments around midday, at which point the jury began to deliberate. Deliberations continued into a second day. Near the end of the second day, the jurors advised the court, via a preprinted form, that they wished to return the following day to continue deliberating. They also submitted the following question:

> Can we be hung on one or some of the counts and present verdicts of guilty or not guilty for the remaining charges? [Not saying this is the case!]

¶ 33 The trial court proposed giving the jury a modified *Allen* instruction. *See Allen v. People*, 660 P.2d 896, 898 (Colo. 1983).[1] The prosecutor initially agreed, but defense counsel objected to the modified *Allen* instruction because "that does not appear to be where we are at." Instead, defense counsel asked the court "to answer 'yes' to the jury question" — i.e., the jury could hang on some counts and reach a verdict on others.

¶ 34 The prosecutor then changed her mind about the modified *Allen* instruction, agreeing with defense counsel that, "based on the question, we are not at that point." But she disagreed that the court should answer the question "yes" because that response would "encourage [the jury] to hang." She asked the court to refer the jury back to the "separate and distinct charges" instruction, which directed the jurors to consider each charge independently of the others. At that point, defense counsel reiterated that she objected to a modified *Allen* instruction because the jury was not

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[1] "A modified *Allen* instruction is a supplemental jury instruction that the court may provide when the jury indicates that it can't come to unanimous agreement. In essence, it urges jurors to do so without sacrificing their independent judgment." *People v. Cohen*, 2019 COA 38, ¶ 6 n.2.

saying it was deadlocked but "just inquiring of whether or not [hanging on certain counts] is a legal possibility."

¶ 35 The trial court accepted the prosecutor's proposal, noting that it would not answer "yes" to the jury's question because it "did not want to encourage a hung jury, and the jury [had] explicitly" disclaimed that it was deadlocked.

¶ 36 The court then called the jury in and gave the following supplemental instruction:

> You did indicate that you wanted to come back at 9:00. There was also a question from the jury. In response to the question, I am going to, first of all, direct you to all the jury instructions, but then also read you in particular the instruction that says, 'In this case a separate offense is charged against Mr. Lopez in each count of the information. Each count charges a separate and distinct offense, and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count. The fact that you may find Mr. Lopez guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against the defendant. Mr. Lopez may be found guilty or not guilty of any one or all of the offenses charged.
>
> So apart from the grammar, that's the instruction that I will re-read you. And if there

> are further questions that arise tomorrow, let us know.

B. Standard of Review

¶ 37 We review the trial court's response to a jury question for an abuse of discretion. *People v. Cox*, 2023 COA 1, ¶ 16. A trial court abuses its discretion if its ruling is arbitrary, unreasonable, or unfair or is based on a misapplication of the law. *See People v. Hamilton*, 2019 COA 101, ¶ 51. In assessing whether a trial court's ruling is arbitrary, unreasonable, or unfair, we ask not whether we would have made a different decision but, rather, whether the trial court's decision fell within the range of reasonable options. *See Hall v. Moreno*, 2012 CO 14, ¶ 54.

C. The Court Did Not Abuse Its Discretion in Answering the Jury Question

¶ 38 Lopez argues, first, that the trial court "should have responded 'yes' to the jury's question," and, second, that referring the jury back to the "separate and distinct charges" instruction "was coercive under the circumstances."

¶ 39 With respect to his first argument, Lopez says it was the trial court's duty to clarify or correct any misconception the jury had as to the "applicable law." But the jury did not express any confusion

or misapprehension about the applicable law — that is, the law contained in any of the jury instructions. *Cf. Leonardo v. People*, 728 P.2d 1252, 1255-56 (Colo. 1986) (when the jury "affirmatively indicates that it has a fundamental misunderstanding" of a jury instruction, the court must clarify the matter, rather than referring the jury back to the original instructions). According to defense counsel, the jury was posing a hypothetical legal question about the verdicts. We are not aware of any authority requiring the trial court to give the jury an advisory opinion concerning the effect of a hung jury, and Lopez does not point us to any such authority. Nor is the court required to explain to the jury its right to not return a verdict on all counts. To the contrary, the court has "a common law right and duty to guide and assist the jury toward a fair and impartial verdict." *United States v. Porter*, 881 F.2d 878, 889 (10th Cir. 1989) (citation omitted); *cf. People v. Walden*, 224 P.3d 369, 380 (Colo. App. 2009) (court did not err by failing to inform deadlocked jury that the jurors would be excused and a mistrial declared if they were not able to reach a unanimous verdict). In our view, then, the trial court's decision not to inform the jury that it could hang "fell within the range of reasonable" responses to the jury's question.

Hall, ¶ 54 (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230-31 (Colo. App. 2006)).

¶ 40 Lopez's second argument is mostly foreclosed by his counsel's concessions in the trial court. He says that because the jury indicated it was deadlocked, the court had to first inquire whether further deliberations were likely to lead to a unanimous verdict and then, if so, decide whether to give a modified *Allen* instruction. But in the trial court, defense counsel argued that the jury was *not* deadlocked and therefore *objected* to the court taking the steps Lopez now says the court should have taken. So even if the court should have inquired and then given a modified *Allen* instruction, that claim of error is waived. *See People v. Rediger*, 2018 CO 32, ¶ 39 (defining waiver as the intentional relinquishment of a known right); *see also State v. Ford*, 2013 ME 96, ¶ 17 (defendant who objected to self-defense and voluntary intoxication instructions at trial could not argue on appeal that the court should have instructed the jury on those defenses).

¶ 41 But in any event, as both parties and the court acknowledged at the time, the jury's note did not indicate a deadlock. *See Cox*, ¶¶ 11, 20, 28 (jury did not indicate it was deadlocked when it asked

the court, "What happens if the jury fails to reach a unanimous decision?" and "Is there a max length for jury deliberations?").

¶ 42 To the extent Lopez contends that the supplemental instruction was nonetheless coercive, we disagree. He claims that by telling the jury that the verdicts "must either be guilty or not guilty," the court "effectively t[old] the jury to continue to deliberate indefinitely."

¶ 43 As an initial matter, we find it doubtful that any jury would believe it could be forced to deliberate forever. *See People v. Gibbons*, 2014 CO 67, ¶ 32. But even setting this doubt aside, we discern nothing coercive about the supplemental instruction.

¶ 44 For one thing, the instruction told the jury that it "may" (not "must") find Lopez "guilty or not guilty." Because the language was not mandatory, we think the instruction permitted the jury to pick a different option — in other words, the jury *could* find Lopez guilty or not guilty, but it could also fail to reach a verdict. More importantly, the jury had already decided, on its own, to continue its deliberations, so we have trouble understanding how an instruction to consider each charge separately would make the jury feel coerced into reaching a verdict. Under similar circumstances,

divisions of this court have upheld more direct and forceful supplemental instructions. *See, e.g.*, *Cox*, ¶¶ 12, 22-23 (where jury asked a question about the effect of a hung jury, court did not abuse its discretion by responding, "Please continue your deliberations"); *People v. Munsey*, 232 P.3d 113, 118 (Colo. App. 2009) (where jury asked a question about the effect of failing to reach a verdict on some counts, court did not abuse its discretion by instructing the jurors that "it was their sworn duty to return verdicts on all counts submitted to them"). And nothing in the supplemental instruction suggested that the jury could not later advise the court that it was deadlocked.

¶ 45 For these reasons, we reject Lopez's argument that the court's response to the jury question constituted an abuse of discretion.

III. Questioning During the Oath for Witnesses

¶ 46 Finally, Lopez contends that the court committed reversible error by asking the son some preliminary questions before he testified.

A. Background

¶ 47 During its administration of the oath to the son, the court asked the son a short series of questions:

COURT: [Son], if you could come up to this chair. [Son], how old are you now?

[WITNESS]: Ten.

COURT: Do you promise to tell the truth, the whole truth, and nothing but the truth?

[WITNESS]: Uh-huh.

COURT: Yes?

[WITNESS]: Yes.

COURT: Let me just ask you, do you know the difference between what is true and what is not true?

[WITNESS]: Uh-huh.

COURT: Yes?

[WITNESS]: (The witness nodded.)

COURT: Just say yes or no.

[WITNESS]: Yes.

COURT: If I said you're wearing a blue shirt, would that be true?

[WITNESS]: Yes.

¶ 48 At that point, defense counsel objected on the ground that the court was conducting a child competency hearing in front of the jury. The trial court said that it was administering an age-

appropriate oath and asked one additional question, "If I said that [the prosecutor] was wearing a white jacket, would that be true?" The son responded, "[Y]es." The court then told the prosecutor she could proceed with her direct examination.

B. Standard of Review

¶ 49 The parties agree that we review for an abuse of discretion the trial court's decision to question the son during the swearing in process. *Cf. People in Interest of M.W.*, 2022 COA 72, ¶ 12 (reviewing trial court's decisions concerning the administration of the trial for an abuse of discretion). If the court abused its discretion, we will reverse unless the error was harmless. *See Venalonzo*, ¶ 48.

C. The Court Did Not Commit Reversible Error by Questioning the Son

¶ 50 Under Colorado law, a child under the age of ten may testify in a criminal trial involving sexual abuse, but only if the child is "able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined." § 13-90-106(1)(b)(II), C.R.S. 2023. Thus, before a child under ten may serve as a witness, the trial court must determine whether the child

is competent to testify. *People v. Wittrein*, 221 P.3d 1076, 1079 (Colo. 2009). Though trial courts may make this determination at a competency proceeding in front of the jury, "by far the better practice is to hold child competency proceedings outside the presence of the jury." *Id.* at 1080.

¶ 51 Because Lopez's son was ten at the time of trial, the trial court correctly recognized that it did not need to conduct a child competency proceeding before allowing him to testify. Lopez contends, however, that the trial court's questions were the functional equivalent of a child competency proceeding rather than an age-appropriate oath, and that conducting the proceeding in front of the jury improperly bolstered the son's credibility.

¶ 52 In our view, the trial court's questions were part of an age-appropriate oath. Rule 603 of the Colorado Rules of Evidence states that "[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." By asking the ten-year-old son to demonstrate that he could tell truth from falsehood, the trial court impressed on his mind the duty to tell the truth. In the

context of a deposition, our supreme court has described a similar line of questioning as an age-appropriate oath. *See Thomas v. People*, 803 P.2d 144, 151 (Colo. 1990) ("The purpose of an oath was satisfied when the children were asked at the start of each videotaped deposition to explain the difference between the truth and a lie and were told at critical times that it was very important that they tell the truth."). And federal courts have likewise held it is proper for trial courts to ask child witnesses to demonstrate that they understand the difference between truth and falsehood as part of administering an age-appropriate oath.[2] *See United States v. Thai*, 29 F.3d 785, 811-12 (2d Cir. 1994) (trial court administered appropriate oath by asking thirteen-year-old witness several questions to establish that he understood the difference between truth and falsehood); *see also United States v. Counts*, No. 3:18-CR-00141, 2020 WL 598526, at *4 (D.N.D. Feb. 7, 2020) (unpublished order) (ruling that court would give the eleven-year-old witnesses an "age-appropriate oath" that included asking them if they knew the

[2] Because CRE 603 is modeled after Fed. R. Evid. 603, federal authority interpreting Fed. R. Evid. 603 is instructive. *See People v. Warren*, 55 P.3d 809, 812 (Colo. App. 2002).

difference between truth and falsehood and if they understood that lying is wrong).

¶ 53 But even assuming the trial court's questioning crossed the line from proper oath into something resembling a child competency hearing, any error was harmless. The trial court asked only two allegedly improper questions, both of which called for the son to answer whether it was true that an article of clothing was a certain color. In our view, these questions would not have prompted the jury to think the son was a particularly credible or sympathetic ten-year-old. Rather, these questions were simple, brief, and "directly related to [the son's] ability to be truthful." *Wittrein*, 221 P.3d at 1079-81 (any error in holding child competency proceeding in front of jury was harmless where prosecutor asked simple questions and jury was not told the purpose of the testimony); *cf. People v. West*, 2019 COA 131, ¶ 42 (direct questioning of a witness regarding the truthfulness of her own statements did not constitute improper bolstering).

¶ 54 Lopez's reliance on *People v. Rogers*, 800 P.2d 1327 (Colo. App. 1990), is misplaced. In that case, a division of this court held that the trial court reversibly erred by personally escorting the child

victim to and from the witness stand. *Id.* at 1329. The division concluded that the court's "very open and dramatic act" created an appearance of partiality to the child witness that, in turn, bolstered the child's credibility. *Id.* But here, the court's limited questioning, conducted during the oath, was neither "dramatic" nor likely to create an appearance of partiality toward the son.

¶ 55 We discern no abuse of discretion, but even if the court erred by asking the additional questions, any error does not require reversal of Lopez's convictions.

IV. Disposition

¶ 56 The judgment is affirmed.

JUDGE LIPINSKY concurs.

JUDGE SCHUTZ dissents.

JUDGE SCHUTZ, dissenting.

¶ 57 I agree with my colleagues in the majority that, during the trial, Lopez's counsel suggested that Lopez's daughter and son were coached by one or more family members. I also agree with my colleagues that the division in *People v. Heredia-Cobos*, 2017 COA 130, ¶¶ 7-25, concluded that, when a defendant suggests an alleged sexual assault victim has been coached, they "open the door" to testimony from an expert witness opining that the accuser does not appear to have been coached. But because I disagree with the breadth of the holding in *Heredia-Cobos*, I write separately to explain that disagreement and how it impacts my assessment of Lopez's appeal.

I. Prohibitions Against Bolstering

¶ 58 As the division in *Heredia-Cobos* acknowledged, longstanding Colorado precedent establishes that (1) a witness may not testify concerning the truthfulness of another witness and (2) testifying that a witness did not appear to be coached is tantamount to an opinion that the witness testified truthfully. *Id.* at ¶¶ 15-17. *People v. Bridges*, 2014 COA 65, explained the rationale for these holdings:

> Testimony about the credibility of another witness is admissible if it explains or provides context for why the interviewer conducted an interview in a particular manner. An interviewer may also help the jury make its own credibility determination by describing general indicia of coaching or untruthfulness in interviewees. But an interviewer may not usurp the jury's role of assessing the credibility of a particular witness's statement by offering an ultimate conclusion about the statement's truthfulness.
>
> Here, the forensic interviewer's testimony that S.B. and A.Q. had not been coached constituted conclusions about their truthfulness in their respective interviews. This was impermissible opinion testimony about the credibility of another witness's statement.

Id. at ¶¶ 15-16 (citations omitted).

¶ 59 The prohibition recognized by *Bridges* and the numerous cases on which its stands is based on a simple but profound truth: It is the sole province of the jury to determine whether a witness is credible. And the collective wisdom of the jury is more than adequate to make that conclusion without an expert witness providing their opinion about a witness's credibility. Stated another way, opinion testimony about whether a particular witness is being

truthful is inadmissible because it is not helpful to the jury. *See Liggett v. People*, 135 P.3d 725, 731-32 (Colo. 2006).

¶ 60 And ironically, though such opinion testimony is unhelpful, it poses very real dangers. Jurors often feel the burden of making the final determination whether a witness is credible or their testimony is truthful. Such pressures are particularly acute in sex assault cases, which are emotionally charged and present serious consequences for both the defendant and the alleged victims. Facing such pressures, there is a real risk that jurors may displace their burden to assess credibility by deferring to the opinion of a purported expert. That is why our appellate courts have repeatedly cautioned against the admission of expert testimony that an alleged sexual assault victim was being truthful, was credible, or was not coached. *Id.*

II. The Rationale and Limits of the "Opening the Door" Doctrine

¶ 61 Despite this context, the division in *Heredia-Cobos* concluded that a witness may "open the door" to otherwise inadmissible testimony that a particular witness did not appear coached. The "opening the door" concept is predicated on a rule of fairness: A party should not be permitted to submit testimony that creates a

misleading impression and then complain when the otherwise inadmissible testimony is admitted for the purpose of correcting the misimpression. *See, e.g.*, *Venalonzo v. People*, 2017 CO 9, ¶ 44. I have no qualm with the inherent fairness of this rule. And I have no qualm with the conclusion that a defendant may open the door to opinion testimony informing the jury about general behaviors that a coached witness may manifest. This provides the jury with assistance concerning the types of evidence that may be beneficial in assessing whether a witness was coached. But I disagree with the suggestion that the rule can or should be extended to permit a witness to testify that another witness was truthful on a particular occasion. This provides the jury with nothing more than a conclusion on an issue that the jury is exclusively entrusted to make.

¶ 62 Moreover, unlike the division in *Heredia-Cobos*, I do not believe the introduction of such opinion testimony is consistent with guidance provided by the supreme court. *Heredia-Cobos* cited cases from foreign jurisdictions that have apparently permitted such testimony based on opening the door principles. The division

also cited the Colorado Supreme Court's opinion in *Venalonzo* in support of its ruling. But I do not read *Venalonzo* so broadly.

¶ 63 In *Venalonzo*, a police officer provided the following testimony:

> The investigating police officer . . . told the jury about his interviews with A.M. and C.O. on the day of the incident. During cross-examination, the officer agreed with defense counsel that, based on his prior experience as a school teacher, young children were suggestible and sometimes made up stories or could be talked into doing so by other children. On redirect, the prosecutor asked the officer to clarify what types of stories children tended to make up. Venalonzo objected, asserting that the testimony would constitute improper bolstering, but the trial court ruled that Venalonzo had opened the door to the question. The officer responded that children make up stories about "trivial things" but that he had never experienced children of the victim's age "making things up . . . about something of a very serious nature."

Venalonzo, ¶ 9.

¶ 64 On appeal, Venalonzo challenged the redirect testimony as improper bolstering. The People countered that Venalonzo's cross-examination had opened the door to the testimony. The supreme court agreed with the People, reasoning as follows:

> Venalonzo argues that the trial court erred in permitting the investigating police officer to testify that, in his experience as a school

> teacher, children only make up trivial stories, not serious accusations. Normally, this statement would constitute improper testimony that the children were telling the truth. In this case, however, Venalonzo had previously questioned the officer about this exact issue when he asked whether, in the officer's experience, kids make things up. By doing so he opened the door for further questioning on this matter. The People were entitled to follow defense counsel's question about kids making things up with a question regarding what types of things they would make up. . . . The officer's testimony on redirect examination placed his answer on cross-examination in context and did not exceed the scope of cross-examination. Therefore, because Venalonzo opened the door to the officer's statements, the trial court did not err in admitting this testimony.

Id. at ¶ 44 (citations and footnote omitted).

¶ 65 While it is accurate to state that *Venalonzo* held that a defendant may open the door to testimony that is otherwise inadmissible, it does not state that a defendant may open the door to testimony that allows an expert witness to weigh in on whether an accuser is telling the truth. Rather, I read *Venalonzo* to stand for the proposition that an expert may provide testimony that indirectly supports a conclusion that a witness was truthful if necessary to correct a misimpression that was created by the

defendant's questioning. The indirect testimony in *Venalonzo* was that children generally fabricate only trivial things, not serious allegations. The primary purpose of this testimony was not to opine on whether the accuser was truthful. The indirect impact on the assessment of the accuser's veracity was permitted because the specific testimony was necessary to correct the misimpression created on cross-examination that children have a tendency to make up all kinds of things, whether trivial or serious. Thus, I do not read *Venalonzo* to teach that any time a defendant suggests that a child has been coached, the People may call a witness to directly testify that the child's testimony was not coached.[1]

¶ 66 To read *Venalonzo* this broadly would permit the exception to swallow the rule. In the vast majority of sex assault cases, like most cases — whether civil, criminal, or domestic — the parties challenge the veracity of a witness's testimony, whether due to

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[1] Indeed, the court in *Venalonzo v. People*, 2017 CO 9, ¶ 42, also held that it was improper for the prosecution to elicit testimony from the victim's mother concerning "[the victim's] veracity in this case, specifically regarding [the defendant]." The court reached this conclusion, "[e]ven assuming, without deciding, that defense counsel's questions attack[ing the victim's] character for truthfulness" opened the door to such questions. *Id.*

coaching, bias, veracity, or the like. In the typical case involving allegations of sex assault on a child, the defendant must either contest the veracity of the alleged victim or effectively confess to the allegations. But the logical extension of a broad "opening the door" rationale would permit an expert to opine whether the accusing witness was being truthful every time a defendant suggests that an accuser was coached. Such a result would usurp the jury's central function to determine whether a witness, in a particular case, should be believed.

¶ 67 Finally, I believe the broad "opening the door" rationale adopted by the majority and *Heredia-Cobos* runs contrary to established supreme court precedent prohibiting witnesses from opining on the credibility of other witnesses.

¶ 68 In *People v. Liggett*, 114 P.3d 85 (Colo. App. 2005), a division of this court addressed whether a prosecutor may ask a testifying defendant if another witness was lying. In assessing the issues, the division noted that four states have "created exceptions to the prohibition and have allowed questions on witnesses' veracity when the only possible explanation for the inconsistent testimony is deceit or lying or when a defendant has opened the door by

testifying about the veracity of other witnesses on direct examination." *Id.* at 87. The division elected to follow the reasoning of one of those cases, holding that "questions to the defendant regarding the veracity of other witnesses should be disallowed, except when the only possible explanation for the inconsistent testimony is deceit or lying or when the defendant has opened the door by testifying about the veracity of other witnesses on direct examination." *Id.* at 88 (citing *State v. Morales*, 10 P.3d 630, 633 (Ariz. Ct. App. 2000)).

¶ 69 The defendant appealed the division's decision to the Colorado Supreme Court. In assessing the issue, the court noted:

> While we have not addressed the specific issue of whether a prosecutor may ask a witness or defendant to opine on the veracity of others, our case law and evidentiary rules do provide guidance insofar as they weigh heavily against similar types of admissions. For example, in *Domingo-Gomez v. People*, 125 P.3d 1043, 1050-51 (Colo. 2005), we found a prosecutor's averments that the defendant and the defense witnesses "lied" during closing argument were improper statements of personal opinion. While we afford prosecutors wide latitude in presenting the People's case, the prosecutor may not communicate a personal opinion as to the veracity of witnesses. *Id.* at 1049-50. Similarly, in *Tevlin v. People*, 715 P.2d 338, 341 (Colo. 1986), this court found the trial

> court erred in allowing a social worker to testify that a victim was telling the truth when relating specific incidents of abuse. The testimony did not follow a character attack by the defense and pertained to a specific occasion of truthfulness rather than the victim's general character for truthfulness. *Id.* at 341. Accordingly, the testimony was found improper as a witness may not opine on the veracity of another on a specific occasion.

Liggett, 135 P.3d at 730-31. Based on the rationale of these cases, the supreme rejected the "opening the door" exception that the division had endorsed:

> First, we note that asking a witness to comment on the veracity of another witness offers little or no probative value. . . . And, where the witness expresses a belief as to the veracity of another witness, that statement of belief is simply irrelevant; it does nothing to make the inference that another witness lied any more or less probable. . . .
>
> Second, this form of questioning ignores numerous alternative explanations for evidentiary discrepancies and conflicts that do not involve lying. . . .
>
> Third, these questions infringe upon the province of the fact-finder and risk distracting the fact-finder from the task at hand. Credibility determinations are to be made by the fact-finder, not by the prosecutor or a testifying witness.

Id. at 731-32.

¶ 70 Based on these concerns, the court rejected the division's reasoning that a trial court may allow a witness to opine on the credibility of another witness when the defendant has "opened the door" to such testimony.

> There are other ways to emphasize conflicts in the evidence and raise questions as to a witness's credibility that do not involve asking "were they lying" types of questions. For example, a cross-examiner may ask non-prejudicial questions that highlight the discrepancies and later emphasize any conflicting accounts by juxtaposing them in closing argument. In contrast, asking a witness to opine on the veracity of another witness is prejudicial, argumentative, and ultimately invades the province of the fact-finder. These concerns far outweigh any supposed probative value elicited by such questions. Accordingly, we decline to adopt a case-by-case approach and side with the majority of jurisdictions in finding *such questions categorically improper*.

Id. at 732 (emphasis added).

III. Application of These Principles

¶ 71 Synthesizing the holdings in *Liggett* and *Venalonzo*, I conclude that if a defendant introduces testimony that an accuser has been coached, the People may introduce expert testimony explaining what factors the jury should consider in assessing whether an

accuser has in fact been coached. *See Venalonzo*, ¶ 44. Thus, I do not take issue with the forensic expert's testimony that

> [i]f a child is being coached, it is more difficult for them to describe all the details of what they can hear, what the room looked like, meaning what the clothing looked like that they were wearing, exactly what was said or how they felt in that situation. When a child is coached, it is typically difficult for them to recall that information because in coaching a lot of times people aren't telling the child to say all of these things as well.

This information was helpful because it provided the jury with tools by which it could consider the children's video recorded interviews — both of which were admitted into evidence — to resolve the coaching issue that the defendant interjected. *See Bridges*, ¶ 15 ("An interviewer may also help the jury make its own credibility determination by describing general indicia of coaching or untruthfulness in interviewees.").

¶ 72 What was not helpful to the jury, however, was asking the expert to opine whether these particular victims were coached — i.e., were they being truthful. Not only is such testimony of no probative value, but it is also inherently prejudicial because it invades the jury's hallowed duty to determine the credibility of a

witness. Thus, the trial court erred by permitting the following jury question and resulting testimony from the expert:

> Q. In your expert opinion was either [son]'s or [daughters]'s behavior consistent with interviews where coaching was present?
>
> A. In my opinion I don't feel like I saw huge red flags with that or anything that indicated that because both children were able to provide very specific experience-based details around the events that they did talk with me about.

¶ 73 As the supreme court has repeatedly cautioned, "Testimony that another witness is credible is especially problematic where the outcome of the case turns on that witness's credibility. This often occurs in child sex assault cases." *Venalonzo*, ¶ 33. The prosecution recognized the power of the expert's opinion testimony concerning coaching and amplified it in closing argument:

> [The forensic expert] also talked about how there were no signs of coaching with either of the children. No signs that they were told what to say in this interview. She talked about how that's something they look for when they are doing the interview. And they do specific questions and specific checks to make sure that they are not being told what to say, and they are not being coached. And she testified that she saw no signs of that with either [the daughter or son].

¶ 74 The prosecutor's emphasis of this testimony in closing argument both illustrated and emphasized its evidentiary importance to proving the charges against Lopez. *See People v. Jefferson*, 2014 COA 77M, ¶ 30 (the important and prejudicial impact of improper evidence was underscored by the prosecutor's refence to it in closing argument), *aff'd*, 2017 CO 35.

¶ 75 The People make two primary arguments why this preserved error was harmless. First, they point to the fact that Lopez's counsel interjected the issue of coaching into the case, beginning during jury selection and continuing through opening statements and the presentation of evidence. To the extent the People are arguing that, by interjecting the issue of coaching into the case, Lopez opened the door to expert testimony about the concept and indicia of coaching, I agree with their argument. *See Bridges*, ¶ 15. But, as previously noted, the forensic expert went a step further, opining that neither the daughter's nor son's interview reflected any type of coaching. This testimony was not helpful to the jury and invaded the jury's province to determine credibility. Simply because a party raises the notion that an accuser has been coached does not transform otherwise unhelpful testimony into something that is

helpful. Similarly, raising the issue of coaching does not give the prosecution license to invade the jury's exclusive role to determine the credibility of witnesses.

¶ 76 Second, the People argue that the forensic expert did not directly opine that the daughter and son were coached. Rather, the expert only stated that the children did not show indicia of having been coached. But this argument was expressly rejected by the division in *Heredia-Cobos*, ¶ 17:

> We aren't persuaded to the contrary by the People's assertion that testifying that a child didn't show signs of having been coached is not the same as testifying that the child hasn't been coached, and therefore isn't an assessment of the child's credibility. The subtle distinction urged by the People is likely to be lost on ordinary jurors; rather, ordinary jurors, putting two and two together, are likely to glean from such testimony that the interviewer believed the child hadn't been coached.

The same rationale applies here. The clear intent and meaning of the expert's testimony was to convey the conclusion that she did not believe the children had been coached. Indeed, the jury's question that generated the expert's improper testimony directly asked whether the children's answers were "consistent with

interviews where coaching was present." And the prosecutor drove home the obvious meaning of the expert's testimony in closing argument: "[The expert] talked about how there were no signs of coaching with either of the children."

¶ 77 The improper testimony was prejudicial to Lopez. There was no physical evidence of either incident described by the children, and there were numerous inconsistencies in their testimony, including the daughter's prior denial of the alleged assault. The children also delayed reporting the incidents. Because of the family dynamics present, coupled with the children's desire to live with their grandmother, they had an arguable motive to fabricate allegations. Thus, the credibility of the children's testimony went to the heart of the prosecution's case. Indeed, as evidenced by the jury's question posed to the forensic expert, the issue of whether the children had been coached was central to the jury's determination of the children's credibility. Under these circumstances, I am unable to conclude that "the error did not substantially influence the verdict or impair the fairness of the trial." *Bridges*, ¶ 10.

¶ 78 For these reasons, I respectfully dissent.