SUMMARY
April 22, 2021

2021COA52

No. 18CA0899, *Peo v Battigalli-Ansell* — Crimes — Internet Luring of a Child — Internet Sexual Exploitation of a Child; Evidence — Testimony by Experts — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

A division of the court of appeals considers for the first time the admissibility of expert testimony regarding fantasy age role-play in a criminal case arising from an adult's sexually-oriented communications with a self-identified fourteen-year-old girl on a social media website that allows people to communicate anonymously with random strangers. In this case, the defendant testified that he believed he was communicating with an adult who had adopted the persona of a fourteen-year-old girl. (In fact, the defendant was communicating with law enforcement investigators.) The defendant was convicted of internet exploitation of a child,

which requires proof that the defendant knew or believed he was communicating with a person under fifteen years of age.

The division holds that the trial court did not abuse its discretion by excluding the expert's proposed opinion that the defendant's communications were consistent with fantasy age-play because that opinion constituted improper bolstering of the defendant's testimony that he believed he was communicating with an adult. The division rejects the defendant's other arguments and affirms the judgment of conviction.

COLORADO COURT OF APPEALS **2021COA52**

Court of Appeals No. 18CA0899
Jefferson County District Court No. 16CR2629
Honorable Christie A. Bachmeyer, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Daniel Battigalli-Ansell,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE LIPINSKY
Richman and Casebolt*, JJ., concur

Announced April 22, 2021

Philip J. Weiser, Attorney General, Trina K. Taylor, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Haddon, Morgan, and Foreman, P.C., Norman R. Mueller, Adam Mueller, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 Visitors to many online chatrooms can hide their true selves behind false identities. A much-reproduced New Yorker cartoon depicting a dog at a computer keyboard, observing to a canine friend, "on the internet, no one knows you're a dog," reveals a fundamental truth of cyberspace. An individual communicating with another through chats and instant messages has the ability to fashion an online identity completely separate from one's real persona.

¶ 2 Omegle is a social media site that allows people to communicate anonymously with random strangers through videos and instant messages. Some participants in Omegle choose to cloak themselves with an invented persona during those communications. The option of appearing on an escapist website anonymously makes it impossible to determine whether a person with whom one is chatting on the site is who he or she claims to be. Not everyone who spends time on Omegle is acting a part.

¶ 3 The record reflects that Omegle does not bar children from accessing its website. Nothing on Omegle states that its chat feature is limited to adult users. Because children can communicate with adults online, the General Assembly has created

criminal offenses to protect children under the age of fifteen from website contacts that may result in sexual exploitation or luring. *See People v. Helms*, 2016 COA 90, ¶ 25, 396 P.3d 1133, 1142 (explaining that "the benefit of protecting children from sexual exploitation via the Internet is an important state interest").

¶ 4 Appellant, Daniel Battigalli-Ansell, was charged with internet luring of a child and internet sexual exploitation of a child based on the sexually tinged messages and images he sent to a person who claimed on Omegle to be a fourteen-year-old girl (the alleged victim). But the alleged victim was, in reality, adult law enforcement personnel searching for individuals preying on children they met online.

¶ 5 The prosecution's evidence included transcripts of Battigalli-Ansell's online chats and exchanges of text messages with the alleged victim. Battigalli-Ansell testified at trial that he believed the alleged victim was a role-playing adult. A jury disagreed and convicted him of internet sexual exploitation of a child based on his communications with the alleged victim.

¶ 6 This appeal presents two issues. First, did the trial court reversibly err by limiting the opinion testimony of Battigalli-Ansell's

expert witness? Second, did the trial court err by quashing his subpoena duces tecum for the personnel file of a law enforcement investigator who may have included false information in the warrant the investigator signed for Battigalli-Ansell's arrest?

¶ 7 We hold that the trial court did not abuse its discretion by making these rulings and affirm Battigalli-Ansell's judgment of conviction.

I. Background

¶ 8 On June 24, 2016, Battigalli-Ansell and an investigator with the Jefferson County District Attorney's Child Sex Offender Internet Investigations Unit, who was posing as a fourteen-year-old girl named "Brooke," met on Omegle and exchanged instant messages.

¶ 9 "Brooke" identified herself as a fourteen-year-old girl. Battigalli-Ansell told her he was a twenty-two-year-old male named "Michael." After a brief exchange of messages, Battigalli-Ansell asked "Brooke" whether she would have sex with a twenty-two-year old. "Brooke" replied, "why not?"

¶ 10 They exchanged several more messages, the majority of which were sexual in nature. "Brooke" sent Battigalli-Ansell her alleged phone number. In a text to "Brooke's" phone number, Battigalli-

Ansell asked her for a picture and a call to confirm she was a girl. After "Brooke" sent an image of an eighteen-year-old woman (actually, a female intern at the Investigations Unit) and a female investigator claiming to be "Brooke" called him, he sent "Brooke" a photograph of his penis.

¶ 11 The same investigator again randomly connected with Battigalli-Ansell on Omegle on July 28, 2016. This time, Battigalli-Ansell introduced himself as a twenty-two-year-old named "Dan" and the investigator again posed as a fourteen-year-old girl named "Brooke." Battigalli-Ansell and "Brooke" exchanged messages over Omegle. Battigalli-Ansell asked "Brooke" for her number to text her a picture of his penis. "Brooke" gave him a phone number. Battigalli-Ansell and "Brooke" exchanged text messages of a sexual nature and phone calls. Battigalli-Ansell then sent "Brooke" photos of his penis. The charges against Battigalli-Ansell rested on these communications.

¶ 12 Battigalli-Ansell endorsed Dr. Marty Klein, a licensed marriage and family therapist and certified sex therapist, as an expert witness. After several motions and hearings, the trial court issued a written order that significantly limited the opinions Dr. Klein

could provide to the jury. At trial, consistent with the court's ruling, Dr. Klein explained fantasy-based erotic role-play and its context in online chat rooms.

¶ 13 The jury convicted Battigalli-Ansell of internet sexual exploitation of a child arising from his communications with "Brooke" on July 28 and 29, 2016. The jury acquitted him of the remaining charges.

II. The Trial Court's Limitations on the Expert's Testimony

¶ 14 Battigalli-Ansell contends that, by limiting the expert witness's testimony, the trial court violated his constitutional right to present a defense.

A. Additional Facts

1. Pre-Trial Motions and Hearings

¶ 15 Battigalli-Ansell's disclosures included an eleven-page summary of Dr. Klein's proposed testimony. The prosecution asked the court to strike all or portions of Dr. Klein's proposed opinion testimony for two principal reasons. First, the prosecution argued that the testimony would not assist the trier of fact to understand the evidence or to determine a fact in issue under CRE 702. Second, the prosecution contended that the testimony would

improperly usurp the court's function by expressing an opinion on the applicable law or legal standards. The prosecution did not challenge Dr. Klein's qualifications, however.

¶ 16 The court ordered Battigalli-Ansell to brief "the scope of testimony and possible scenarios under which [Dr. Klein] will testify and what that testimony will entail for each scenario." Defense counsel filed an offer of proof summarizing Dr. Klein's proposed opinion testimony. The prosecution filed an objection to the offer of proof and again asked the court to strike Dr. Klein's proposed testimony in its entirety.

¶ 17 Following this round of briefing, the court held another hearing on Dr. Klein's proposed testimony. At this hearing, the court asked which specific opinions the defense wished to present at trial. Defense counsel responded that Dr. Klein would offer all the opinions "outlined in [the disclosure] until or unless the [c]ourt says [the defense] can't." Dr. Klein, participating by videoconference, then described his proposed trial testimony, which tracked the opinions summarized in the disclosure.

¶ 18 The court subsequently set a status hearing and requested additional briefing on which opinions, if any, Dr. Klein should be

allowed to present. In its brief, the prosecution quoted an email exchange with defense counsel addressing the scope of Dr. Klein's proposed testimony. In the email exchange, the prosecution asked defense counsel to confirm that the defense intended to call Dr. Klein at trial to testify regarding four specific opinions:

> 1. the definition of fantasy role-play and age-play;
>
> 2. scientific studies indicate that fantasy role-play is a normal part of human sexual interaction;
>
> 3. science indicates that millions of adults play erotic games centered around age-play, and age-play does not indicate a predilection to pedophilia or an inclination to have sex with minors; and
>
> 4. the transcripts of Battigalli-Ansell's communications with "Brooke" that Dr. Klein reviewed are "consistent" with fantasy age-play.

¶ 19 Defense counsel responded,

> Yes as to the 4 areas you have outlined . . . .
>
> Dr. Klein will testify . . . that fantasy role play is a normal part of human sexual interaction and does not necessarily indicate a real world desire to engage in the role played behaviors outside of the fantasy realm.
>
> Dr. Klein will testify that, upon review of the chats which form the corpus of the charges herein, there is nothing inconsistent with fantasy age play by an individual harboring no desire to move the fantasy into reality.
>
> The basis of Dr. Klein's opinions covers the range set forth in the offers of proof, his report, and his testimony on November 2, 2017, including the extent to which the normalcy of sexual fantasies is not well understood in the general population and that often intimate partners fail to recognize and accept, without therapeutic help, the benign nature and normalcy of such fantasies in their partners[.]

¶ 20 Based on this exchange of emails, the prosecution told the court that Dr. Klein's proposed opinions fell into six categories and argued that the court should not allow the jury to hear any of them:

> A. The definition of fantasy role-play and age-play.
>
> B. Scientific studies indicate that fantasy role-play is a normal part of human sexual interaction.
>
> C. Science indicates that millions of adults play erotic games centered around age-play and that that does not indicate a

predilection to pedophilia or an inclination to have sex with minors.

D. The transcripts from this case are "consistent" with fantasy age-play.

E. Fantasy role-play, and specifically age-play, does not necessarily indicate a real world desire to engage in the role-play behaviors outside of the fantasy realm.

F. Despite the normalcy of sexual fantasies, they are not well understood in the general population. Often, intimate partners fail to recognize and accept, without therapeutic help, the benign nature and normalcy of such fantasies in their partners.

¶ 21 At a final hearing on Dr. Klein's testimony, the trial court asked whether defense counsel "want[ed] to make any further argument . . . after seeing the [prosecution's] brief." The court and defense counsel then engaged in a colloquy regarding which of Dr. Klein's opinions the defense sought to present at trial. The court requested this clarification to avoid discovering "there's something different that has come up" after it ruled on Dr. Klein's permissible opinions. Defense counsel responded he intended to call Dr. Klein to testify regarding opinions A through F and no other opinions.

¶ 22 Following the hearing, defense counsel filed a response to the prosecution's brief focusing exclusively on the admissibility of opinions A through F.

2. The Trial Court's Order on Opinions A through F

¶ 23 The court entered a written decision addressing which of the six categories of opinions Dr. Klein would be permitted to provide at trial. (Although the court's written order identified opinions A through F as 1 through 6, we refer to the opinions as A through F for clarity.) The court concluded that, as stated in Dr. Klein's proposed opinion A, he could "explain fantasy role playing in the context of texting in a chat room, and the mechanics surrounding a chat room on the internet." But the court noted that, "except as it relates to the context of chat rooms, and brief testimony that sexual fantasies about adult and adolescent sex partners are common and are not abnormal, Dr. Klein's testimony concerning such fantasies would be a needless waste of time, might create confusion and would not be helpful to the jury."

¶ 24 The court held that Dr. Klein would not be permitted to present opinions B through F under CRE 403 and 702. (Despite

the court's ruling, however, Dr. Klein provided certain of these opinions at trial as a consequence of the scope of the prosecutor's cross-examination. The prosecutor asked Dr. Klein, "do people fantasize about having sex with children?" Because this question "opened the door" to further questioning concerning fantasies about sex with children, the court allowed Dr. Klein to testify on redirect examination that people fantasize about sex with "teenagers" and that "fantasies about having sex with minors [do] not predict . . . sexual behavior with minors.")

B. Preservation and Waiver

¶ 25 As an initial matter, the parties dispute whether Battigalli-Ansell preserved his challenge to the trial court's ruling on the scope of Dr. Klein's opinions. In addition to the court's ruling on opinions B through F, Battigalli-Ansell argues on appeal that the trial court erred by barring Dr. Klein from offering the additional opinions set forth in the disclosures. The ten additional opinions included the following:

- "Age play is a normal part of fantasy role-play in human sexual interaction and this fact is widely misunderstood."

- "The desire to engage in sexualized fantasy role play, including age play, does not create or manifest the desire to connect with underage individuals for actual sexual contact, and the psychological studies which show that age play is not pedophilia or related to pedophilia."
- "What would be considered 'unusual' sexual fantasizing is common and normal; what many might consider 'perverse' fantasies are common but do not make those engaged in the fantasy play 'perverts.'"
- "A complete explication of how fantasy role play involves suspension of disbelief, and how participants remain in their role despite objective manifestations or clues which are inconsistent with the adopted roles."
- "The unspoken rules of fantasy play such as, while engaged in fantasy play, never discuss the world outside the game and never assume you know anything about other players or why they picked the persona and role they did."
- "The defendant's actions and the conversations in this case are not inconsistent with a person who is involved in

role play with another adult and the basis for that opinion."

- "The myriad of reasons people adopt alternate personas in fantasy play, including stress relief, loneliness or curiosity; it can be a way of managing psychological deficits such as shyness, a sense of inadequacy, fear of closeness, authenticity or spontaneity, or previous trauma."
- "Educating the jury about the 'non-pathological use of sexual fantasies . . . as a stimulus for sexual excitement in individuals without a paraphilia.'"
- "How the use of the internet allows people to 'experience' taboo sexual feelings, attractions and responses in fantasy — without the risk of harming themselves or others and without experiencing the guilt they would surely feel in real life."
- "How research has shown that engaging in fantasy play can be validating, rewarding, even thrilling."

¶ 26 The People contend that Battigalli-Ansell preserved his arguments regarding opinions B through F but waived, or invited

the error regarding, his arguments concerning the additional opinions when defense counsel agreed at the final hearing to narrow the scope of Dr. Klein's proposed testimony. We agree that Battigalli-Ansell preserved his arguments only as to opinions B through F.

¶ 27 The law recognizes a material distinction between invited error, a waiver of an argument, and a forfeited argument. "[I]nvited error prevents a party from complaining on appeal of an error that he or she has invited or injected into the case; the party must abide the consequences of his or her acts." *People v. Rediger*, 2018 CO 32, ¶ 34, 416 P.3d 893, 901. "Waiver, in contrast to invited error, is 'the *intentional* relinquishment of a *known* right or privilege.'" *Id.* at ¶ 39, 416 P.3d at 902 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). A forfeiture occurs when a party "fail[s] to make the timely assertion of a right." *Id.* at ¶ 40, 416 P.3d at 902 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

¶ 28 Battigalli-Ansell argues that he preserved his arguments regarding the additional opinions through the initial disclosure of Dr. Klein's proposed testimony and Dr. Klein's testimony at the October 2, 2017, hearing. He asserts that the disclosures and

testimony put the trial court on notice of "the extent of Dr. Klein's proposed testimony and [the trial court] had the opportunity to rule on the range of the expert testimony . . . ." But, as noted above, at the final hearing, defense counsel informed the court that he intended to call Dr. Klein to provide opinions A through F and no other opinions.

¶ 29 Based on the colloquy between defense counsel and the court at the final hearing, we agree that Battigalli-Ansell waived his argument regarding the additional opinions because defense counsel affirmatively responded that opinions A through F were the opinions Dr. Klein intended to offer. Under these circumstances, defense counsel intentionally relinquished any argument that Dr. Klein should be permitted to provide additional opinions.

C. Standard of Review

¶ 30 We review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion. *People v. Martinez*, 2020 COA 141, ¶ 61, ___ P.3d ___, ___. "A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law." *Id.* (citation omitted).

D. Legal Authority

¶ 31 "CRE 702 and CRE 403 govern the admissibility of expert testimony." *People v. Martinez*, 74 P.3d 316, 323 (Colo. 2003).

¶ 32 CRE 702 provides that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In applying CRE 702, a court should "focus on the reliability and relevance of the proffered evidence and . . . determin[e] as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury." *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001). "Usefulness means that the proffered testimony will assist the fact finder to either understand other evidence or to determine a fact in issue. Usefulness thus hinges on whether there is a logical relation between the proffered testimony and the factual issues involved in the case." *People v. Ramirez*, 155 P.3d 371, 379 (Colo. 2007) (citations omitted).

¶ 33 In deciding whether an expert should be permitted to provide certain opinions at trial, a court must also consider CRE 403's

limitations on the admissibility of evidence. *See* CRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "Even though the proffered testimony may be admissible under the liberal standards of CRE 702, the court must also apply its discretionary authority under CRE 403 . . . . Essentially, evidence should be excluded when it has an undue tendency to suggest a decision on an improper basis." *Ramirez*, 155 P.3d at 379.

¶ 34 Further, a witness may not provide an opinion as to whether another witness is telling the truth on a specific occasion. *Venalonzo v. People*, 2017 CO 9, ¶ 32, 388 P.3d 868, 877; *see* CRE 608(a). "The danger in admitting such testimony lies in the possibility that it will improperly invade the province of the fact-finder. Testimony that another witness is credible is especially problematic where the outcome of the case turns on that witness's credibility." *Venalonzo*, ¶¶ 32-33, 388 P.3d at 877 (citation omitted).

¶ 35 And while an expert may testify to general characteristics of an individual or the individual's communications, an expert may only do so when it "(1) relates to an issue apart from credibility and (2) only incidentally tends to corroborate a witness's testimony." *People v. Relaford*, 2016 COA 99, ¶ 31, 409 P.3d 490, 496 (quoting *People v. Cernazanu*, 2015 COA 122, ¶ 20, 410 P.3d 603, 607).

¶ 36 Few cases have considered the admissibility of expert opinions in cases involving fantasy age role-play. In *United States v. Grauer*, 805 F. Supp. 2d 698, 708 (S.D. Iowa 2011), *aff'd*, 701 F.3d 318 (8th Cir. 2012), and *People v. Boles*, 280 P.3d 55, 58 (Colo. App. 2011), the courts noted in passing that a defense expert had testified that the defendant's communication with the alleged victim was "consistent with" fantasy age role-play. But those cases did not address the admissibility of the opinion testimony. That issue is squarely presented here.

E. Application

¶ 37 The mental state element for the offense of internet sexual exploitation requires that the defendant "knows or believes" that the person with whom he was communicating was under the age of fifteen. The primary, if not the only, disputed issue in this case is

whether Battigalli-Ansell "knew or believed" that the person with whom he was communicating (who was in fact a law enforcement officer) and to whom he sent photographs of his "intimate parts" was under the age of fifteen. *See* § 18-3-405.4, C.R.S. 2020. Battigalli-Ansell argues that Dr. Klein's proposed opinions B through F were "relevant to the mental state element" of the counts with which he was charged.

¶ 38 Contrary to Battigalli-Ansell's argument, however, we discern no abuse of discretion in the trial court's decision that Dr. Klein could not provide those opinions.

¶ 39 The trial court explained why it would not permit Dr. Klein to provide opinions B through F:

- Opinion B is of minimal relevance.
- Opinion C is irrelevant because "[p]edophilia is irrelevant to this case" and "[a] desire to actually have sexual contact with an adolescent is not an element of either of the charged offense."
- Opinion D would "in essence, suggest an opinion as to the [d]efendant's belief or state of mind at the time of the alleged crime." Therefore, "Dr. Klein's testimony on this

subject would be no more helpful than the arguments of counsel . . . ."

- Opinion E would carry a substantial risk of confusion of the issues because "[a] desire to actually have sexual contact with an adolescent is not an element of either of the charged offenses."
- Opinion F is irrelevant and "would carry a substantial risk of confusion of the issues."

1. Dr. Klein's Testimony on Opinions B, C, E, and F Was Not Relevant

¶ 40 At most, Dr. Klein could offer opinion testimony relevant to the facts underlying the charges against Battigalli-Ansell. *See Ramirez*, 155 P.3d at 379. As noted above, he was charged with internet luring of a child, section 18-3-306, C.R.S. 2020, and internet sexual exploitation of a child, section 18-3-405.4.

¶ 41 Section 18-3-306(1) states,

> An actor commits internet luring of a child if the actor knowingly *communicates* over a computer or computer network, telephone network, or data network or by a text message or instant message to a person who the actor *knows or believes* to be under fifteen years of age and, in that communication or in any subsequent communication by computer,

> computer network, telephone network, data network, text message, or instant message, describes explicit sexual conduct as defined in section 18-6-403(2)(e), and, in connection with that description, makes a statement persuading or inviting the person to meet the actor for any purpose, and the actor is more than four years older than the person or than the age the actor believes the person to be.

(Emphases added.) Section 18-3-405.4 states, in pertinent part,

> (1) An actor commits internet sexual exploitation of a child if the actor knowingly importunes, invites, or entices through *communication* via a computer network or system, telephone network, or data network or by a text message or instant message, a person whom the actor *knows or believes* to be under fifteen years of age and at least four years younger than the actor, to:
>
> . . . .
>
> (b) Observe the actor's intimate parts via a computer network or system, telephone network, or data network or by a text message or instant message.

(Emphases added.)

¶ 42 Divisions of this court have held that a defendant commits these offenses even if the person with whom the defendant is communicating in the prohibited fashion is an undercover law enforcement officer claiming to be under the age of fifteen, so long

as the defendant "believes" the person is under fifteen years of age. *See Boles*, 280 P.3d at 64.

¶ 43 But the elements of these offenses do not require proof of a desire to have sexual contact with a juvenile. Rather, the crux of the offenses is that the defendant knew or believed he was *communicating* with a person under fifteen years of age. It is irrelevant whether, as opinions C and E addressed, the defendant sought to have sexual contact with the other person. We conclude the trial court did not abuse its discretion by barring Dr. Klein from testifying on opinions C and E because those opinions did not relate to any of the elements of the charged offenses.

¶ 44 In addition, opinions B and F, which addressed whether fantasy age role-play is widespread or normal, were also irrelevant to the sole issue at trial — whether Battigalli-Ansell believed he was communicating with a person under fifteen years of age or someone older. Thus, the trial court did not abuse its discretion by excluding Dr. Klein's testimony regarding opinions B and F.

¶ 45 Counsel for Battigalli-Ansell suggested during oral argument that Dr. Klein's opinions were admissible to neutralize jurors' possible belief that participation in fantasy age role-play was

"perverse" or "unusual." But we decline to address this argument because Battigalli-Ansell did not develop it in his briefs. *See People v. Becker*, 2014 COA 36, ¶ 23, 347 P.3d 1168, 1173 ("Because the People first raised this argument during oral arguments before us, we do not address it here."). In any event, the court instructed the jury that its verdict "must not be influenced by sympathy, or prejudice." We "presume, in the absence of evidence to the contrary, that the jury followed the court's instruction[s]." *Sauser*, ¶ 96, ___ P.3d at ___.

¶ 46 Accordingly, the trial court did not abuse its discretion by excluding opinions B and F.

2. The Trial Court Did Not Abuse Its Discretion by Excluding Dr. Klein's Testimony on Opinion D

¶ 47 Although opinions B, C, E, and F did not address issues relevant to the charges against Battigalli-Ansell, opinion D was relevant to the key question in this case — whether Battigalli-Ansell believed he was communicating with a fourteen-year-old, as "Brooke" self-identified. In opinion D, Dr. Klein proposed to explain that the transcripts of Battigalli-Ansell's chats with "Brooke" were consistent with communications between people engaged in fantasy

age role-play, a topic outside the knowledge of an ordinary juror. *See People v. Conyac*, 2014 COA 8M, ¶ 30, 361 P.3d 1005, 1017 (explaining that "expert testimony that sex offenders are generally not strangers to their victims was properly admitted because [such] testimony concerned criminal methods outside the common knowledge of lay jurors" (citing *United States v. Batton*, 602 F.3d 1191, 1202 (10th Cir. 2010))); *see also Relaford*, ¶ 28, 409 P.3d at 496 ("Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation . . . is helpful and appropriate in cases of sexual abuse of children . . . ." (quoting *People v. Whitman*, 205 P.3d 371, 383 (Colo. App. 2007))). We see no meaningful distinction between the analysis of the proposed opinion testimony of prosecution experts in these cases and an analysis of whether the court should allow a defense expert to provide certain opinions. The rules of evidence apply equally to prosecution and defense experts.

¶ 48 In opinion D, Dr. Klein proposed to shed light on Battigalli-Ansell's state of mind when communicating with "Brooke" by comparing those communications with the communications of

individuals engaged in fantasy age role-play. We conclude that this testimony would have improperly bolstered Battigalli-Ansell's contention that he believed he was communicating with an adult playing the role of a fourteen-year-old girl. *See Venalonzo*, ¶ 35, 388 P.3d at 878.

¶ 49 In *Venalonzo*, the supreme court held that a forensic interviewer's opinion testimony that the behavior of an alleged victim of child abuse was "common among children whom she previously interviewed" was inadmissible because it "improperly bolstered the children's credibility and led to the impermissible inference that the [child was] telling the truth about the incident . . . ." *Id.* at ¶¶ 6, 35, 388 P.3d at 872, 878. As a general rule, "witnesses are prohibited from testifying that another witness is telling the truth on a particular occasion." *Id.* at ¶ 32, 388 P.3d at 877.

¶ 50 The line between opinion testimony that improperly bolsters a witness's credibility and admissible testimony that may only collaterally enhance the witness's credibility is sometimes a difficult one to draw. *See People v. Fortson*, 2018 COA 46M, ¶¶ 105, 107, 114, 116, 421 P.3d 1136, 1250-51 (Berger, J., specially concurring).

But when an "expert assumes the role of not only educating the jury on general [witness] characteristics but also opines that the particular [witness's] conduct is in conformity with those characteristics, the expert probably crosses the line." *Id.* at ¶ 114, 421 P.3d at 1251.

¶ 51 Here, we agree with the trial court's determination that, through opinion D, Dr. Klein was improperly attempting to offer an opinion regarding Battigalli-Ansell's understanding at the time he exchanged messages with "Brooke." In offering proposed opinion D, Dr. Klein was not acting as a "cold" expert — one who "knows little or nothing about the facts of the particular case, often has not even met the victim, and has not performed any forensic or psychological examination of the victim," and who educates the jury regarding certain general characteristics; here, the general characteristics of adults engaged in online fantasy age role-play. *See id.* at ¶ 116, 421 P.3d at 1251. Significantly, Dr. Klein was not proposing to describe to the jury what characteristics of a dialogue generally inform his determination that the dialogue is "consistent with" role-playing, as opposed to opining on the nature of the specific communications between Battigalli-Ansell and "Brooke." The

record is devoid of any explanation of how Dr. Klein reached his conclusion that a particular dialogue is "consistent with" role-playing. In sum, opinion D was not materially different from an opinion that Battigalli-Ansell was engaged in role-playing while communicating with "Brooke" — in other words, that Battigalli-Ansell believed he was chatting with an adult posing as a fourteen-year-old.

¶ 52 As noted above, the trial court allowed Dr. Klein to "explain fantasy role playing in the context of texting in a chat room, and the mechanics surrounding a chat room on the internet." In light of this ruling, Dr. Klein testified at trial to "what fantasy erotic role play is and how it[] [is] manifested in [i]nternet chat rooms." He explained what people may fantasize about, why people may fantasize, and how they may engage in fantasy on Omegle.

¶ 53 This was proper expert testimony because it did not attempt to characterize Battigalli-Ansell's communications with "Brooke." Rather, in these opinions, Dr. Klein described the general characteristics of fantasy erotic role-play. In contrast, Dr. Klein's proposed opinion D — that "[t]he transcripts from this case are 'consistent' with fantasy age-play" — crossed the line of bolstering

because the defense offered it to suggest that Battigalli-Ansell was telling the truth when he claimed he believed at the time that "Brooke" was a role-playing adult. *See Venalonzo*, ¶ 35, 388 P.3d at 878; *see also Relaford*, ¶ 27, 409 P.3d at 490.

¶ 54 Battigalli-Ansell primarily relies on *United States v. Hite*, 769 F.3d 1154 (D.C. Cir. 2014), to support his argument that the trial court erred by excluding portions of Dr. Klein's testimony. But the opinions discussed in *Hite* were materially different from the opinions at issue in this case.

¶ 55 In *Hite*, the defendant was convicted under 18 U.S.C. § 2422(b) of attempting to persuade a minor to engage in unlawful sexual activity. *Id.* at 1158. The court of appeals concluded that the trial court erred by excluding expert testimony

> (1) on "the difference between a desire actually to engage in sexual activity with a minor and mere fantasy and role playing," . . . (2) on his diagnosis that Hite does not suffer from any of the psychiatric conditions that are "associated with a desire to have sexual contact with children or that may predispose an individual to want to engage in sexual activity with a child," . . . and (3) on the relationship between viewing child pornography and sexual interest in children . . . .

Id. at 1168.

¶ 56 *Hite* held that the expert should have been allowed to provide opinions (2) and (3) because "the central focus of Hite's defense was that he was fantasist with no real sexual interest in children." *Id.* at 1169-70. In addition, the court concluded that the expert should have been allowed to testify regarding opinion (1) because "it can shed light on what may be an unfamiliar topic to most jurors." *Id.* at 1170. The court explained that, "[w]hile [the expert] may not testify that Hite lacked the requisite intent, expert testimony that generally explains the world of sexual fantasy on the [i]nternet is permissible." *Id.* (citation omitted).

¶ 57 None of the proposed opinions at issue in *Hite* improperly suggested that Hite lacked the intent to engage in unlawful sexual activity with a minor. But, in contrast, the opinion that "[t]he transcripts from this case are 'consistent' with fantasy age-play" addressed more than the general characteristics of people who engage in fantasy age role-play; it improperly bolstered Battigalli-Ansell's testimony about his subjective beliefs. Further, the trial court properly permitted Dr. Klein to testify as to the general characteristics of participants in fantasy age role-play.

¶ 58 We therefore conclude that the trial court did not abuse its discretion by excluding opinion D.

III. Subpoena Duces Tecum

¶ 59 Battigalli-Ansell also contends the trial court violated his right to due process by quashing his subpoena duces tecum for, and refusing to conduct an in camera review of, the personnel file of the investigator who posed as "Brooke." We conclude that the trial court did not abuse its discretion by quashing the subpoena because Battigalli-Ansell did not satisfy the requirements of *People v. Spykstra*, 234 P.3d 662 (Colo. 2010), which governs his entitlement to the file.

A. Additional Background

1. The *Franks* Motions

¶ 60 Following Battigalli-Ansell's arrest, his lawyer filed two pretrial motions for review of the arrest warrant under *Franks v. Delaware*, 438 U.S. 154 (1978). Under *Franks*, a defendant has a Fourth Amendment right to a hearing upon a substantial preliminary showing that the affiant included in the affidavit supporting the defendant's arrest warrant "a false statement knowingly and intentionally, or with reckless disregard for the truth," and that "the

allegedly false statement [was] necessary to the finding of probable cause." *Id.* at 155-56.

¶ 61 In his *Franks* motions, Battigalli-Ansell alleged that the investigator's affidavit supporting the warrant contained false statements and omissions. He requested that the arrest warrant, "as well as any orders based upon its finding of probable cause [and] any evidence obtained as a fruit of said arrest, be vacated . . . ."

¶ 62 At the hearing on Battigalli-Ansell's *Franks* motions, the court reviewed the investigator's affidavit supporting the warrant for Battigalli-Ansell's arrest and found the following:

- Although the affidavit misrepresented where "Brooke" claimed to live, the statement was not substantially misleading, nor did it invalidate the entire search warrant.
- Although the investigator misstated whether Battigalli-Ansell or "Brooke" initiated the conversation about the parties' residences, the misstatement was neither material nor relevant to a determination of probable cause.

- While the affidavit did not state that the investigator was forty-six-years-old or that the photograph he sent to Battigalli-Ansell depicted a person over the age of fifteen, those omissions were not material.

¶ 63 The court concluded probable cause existed for Battigalli-Ansell's arrest based on the allegations in the affidavit regarding his conversation with "Brooke" and that "he understands that she's 14 or under the age of 15" and denied the motions.

2. Motion to Quash

¶ 64 Following the hearing on the *Franks* motions, Battigalli-Ansell served a subpoena duces tecum on the Adams County Sheriff's Office for "[a]ll files of Adams County Sheriff's Office personnel investigations and actions concerning [the investigator,] whether sustained or not for *in camera* review . . . ," and filed a motion to reconsider the rulings on *Franks* motions. The investigator had worked at the Adams County Sheriff's Office for nearly two decades. The prosecution filed a motion to quash the subpoena.

¶ 65 A representative of the Adams County Sheriff's Office delivered the personnel file to the court at a hearing on the motion to quash

and other pending motions. But the court did not turn over the file to defense counsel.

¶ 66 The court asked defense counsel why he wanted to see the file, noting, "[s]o you basically don't know if there is any [relevant documents] . . . . I'm just trying to figure out why you think there is [sic] any documents out there" to which the defense was entitled. The defense counsel and the court then engaged in the following colloquy:

> [Defense counsel]: Because the conduct of the officer in this case is so outrageous and so violative of both investigatory techniques as well as legal principles, that we reasonably believe that this – his previous employment would contain any similar acts of – acts which would bear upon his credibility.
>
> THE COURT: How do you know that? I'm just trying –
>
> [Defense counsel]: We don't know that, Judge, because we don't have access to the records.

¶ 67 Defense counsel argued that the defense was entitled to the personnel file under each element of the *Spykstra* test. The court deferred its ruling on the motion to quash.

¶ 68 At a subsequent hearing, the trial court granted the motion to quash the subpoena after finding that Battigalli-Ansell had not

established that the defense was entitled to the personnel file under the *Spykstra* test.

B. Standard of Review

¶ 69 We review a trial court's decision to quash a subpoena for an abuse of discretion. *Spykstra*, 234 P.3d at 666; *People v. Herrera*, 2012 COA 13, ¶ 10, 272 P.3d 1158, 1161.

C. Applicable Law

¶ 70 Crim. P. 17(c) permits the prosecution and defense to compel third parties to produce evidence, such as "books, papers, documents, photographs, or other objects" for use at trial. The court, on motion, "may quash or modify the subpoena if compliance would be unreasonable or oppressive." Crim. P. 17(c).

¶ 71 There are limits on the documents that can be subpoenaed under Crim. P. 17(c). For example, a Crim. P. 17(c) subpoena may not be used as an investigatory tool or as a means for discovery. *Spykstra*, 234 P.3d at 669 ("[S]ubpoenas are for the production of 'evidence.' . . . [Crim. P. 17(c)] does not create an equivalent to the broad right of civil litigants to discovery of all information that is relevant or may lead to the discovery of relevant information."). For this reason, in *Spykstra*, our supreme court adopted a test modeled

after that set forth in *United States v. Nixon*, 418 U.S. 683 (1974), for determining whether a subpoena served in a criminal case constitutes improper discovery. The *Spykstra* test sets forth guidelines for determining whether a court may quash or modify a challenged subpoena. 234 P.3d at 669. It provides that,

> when a criminal pretrial third-party subpoena is challenged, a defendant must demonstrate:
>
> (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
>
> (2) That the materials are evidentiary and relevant;
>
> (3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
>
> (4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
>
> (5) That the application is made in good faith and is not intended as a general fishing expedition.

Id. (footnote omitted).

¶ 72 In addition, where a subpoena is issued for materials potentially protected by a privilege or a right of confidentiality, "the

defendant must make a greater showing of need and, in fact, might not gain access to otherwise material information depending on the nature of the interest against disclosure." *Id.* at 670. And while the United States and Colorado Constitutions guarantee a defendant the right to confrontation, the right "does not guarantee 'access to every possible source of information relevant to cross-examination.'" *Id.* at 670 (quoting *Dill v. People*, 927 P.2d 1315, 1322 (1996)); *see* U.S. Const. amend. VI; Colo. Const. art. II, § 16.

¶ 73 Thus, under Crim. P. 17, courts must balance "a defendant's right to exculpatory evidence with the competing interests of a witness to protect personal information and of the government to prevent unnecessary trial delays and unwarranted harassment of witnesses." *Spykstra*, 234 P.3d at 671.

D. The Trial Court Did Not Abuse Its Discretion by Quashing the Subpoena

1. *Spykstra* Governs the Defense's Right to Obtain the File

¶ 74 As an initial matter, Battigalli-Ansell contends that *Spykstra* is inapplicable because, in that case, the supreme court "recognized the prosecution's standing to challenge a third-party subpoena *before* production of the materials" and, in this case, the third party

voluntarily complied with the subpoena by providing the investigator's personnel file to the court. We disagree.

¶ 75 In *Spykstra*, the supreme court held that "the District Attorney has an independent interest in the prosecution of the case that confers standing to move to quash [the defendant's] subpoenas." *Id.* at 666. And the court noted that Crim. P. 17(c) "permits motions to quash or to modify a subpoena but does not expressly limit or enumerate who may bring such a motion." *Id.* at 667.

¶ 76 Contrary to Battigalli-Ansell's contention, we see no reason for conferring standing to quash a subpoena only before the materials are provided to a court. We therefore conclude that *Spykstra* applies here because the prosecution had standing to challenge the subpoena served on the Adams County Sheriff's Office.

2. The Trial Court Did Not Abuse Its Discretion by Not Conducting an In Camera Review of the File

¶ 77 Battigalli-Ansell further argues that, rather than applying the *Spykstra* test, the court should have decided whether he was entitled to the investigator's personnel file based on an in camera review of the file, under *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980), and *People v. Walker*, 666 P.2d 113 (Colo.

1983). (We note that *Martinelli* addressed discovery in a civil case, and not discovery in the criminal law context. *See* 199 Colo. at 168-69, 612 P.2d at 1087-88. In *Walker*, however, the supreme court relied on the standards announced in *Martinelli* in considering a defendant's request for police department files in a criminal case. 666 P.2d at 122 ("[I]nformation contained in the [officers'] files should be disclosed to defense counsel in accordance with the standards announced in *Martinelli* . . . .").)

¶ 78 In *Martinelli* and *Walker*, the supreme court recognized that a trial court may conduct an in camera review of police personnel files that the defense has requested, so long as the files could be relevant. *See Martinelli*, 199 Colo. at 167-69, 612 P.2d at 1086-88 (explaining that the trial court should have conducted an in camera inspection of the subject files to determine their relevance); *see also Walker*, 666 P.2d at 121-22 (holding that, where the defendant was charged with assaulting a police officer, the trial court should have allowed the defense to obtain files relating to sustained excessive force complaints against the subject officers; the information contained in those complaints "could be relevant").

¶ 79 But trial courts are not *required* to conduct an in camera review of documents subpoenaed by a defendant in a criminal case before determining whether the documents must be produced to the defense. In *Spykstra*, our supreme court explicitly said that it does not "adopt a mandate of in camera review, although such a review may in some instances be necessary in the interest of due process." 234 P.3d at 670.

¶ 80 Thus, if a defendant fails to make an initial showing that the subpoenaed materials are relevant, a trial court does not abuse its discretion by declining to conduct an in camera review before ruling on the defendant's right to see the materials. *See People v. Blackmon*, 20 P.3d 1215, 1220 (Colo. App. 2000) (concluding that the trial court did not abuse its discretion by refusing to grant the defendant's request for an in camera review of the officer's records because "[o]ther than bare allegations that the requested documents would relate to the officer's credibility, defendant did not show how they would be relevant to his defense of the charges against him").

¶ 81 Because Battigalli-Ansell did not establish the relevance of the investigator's personnel file, as explained further *infra* Part III.D.3.b,

the trial court did not abuse its discretion by refusing defendant's request for an in camera review of the file.

3. The Trial Court Did Not Err by Ruling that Battigalli-Ansell Failed to Establish the Requirements for Production of the File Under *Spykstra*

¶ 82 Battigalli-Ansell argues that the trial court misapplied the first and second elements of the *Spykstra* test. Specifically, he contends that the court erroneously concluded that he "failed to establish a reasonable likelihood that the subpoenaed material[s] exist[]" because the Adams County Sheriff's Office produced them and that the materials were relevant and evidentiary because they "bear directly on [the investigator's] credibility . . . ." We disagree.

a. First Element of *Spykstra*

¶ 83 Under the first element of the *Spykstra* test, the trial court found that

> the defendant has failed to establish a reasonable likelihood that the subpoenaed material exists by setting forth a specific factual basis for seeking information requested.
>
> Specifically, . . . there is no reference to specific instances in which complaints may have been filed regarding truthfulness or untruthfulness, or complaints or internal

> affairs investigation conducted in regards to this [investigator.]
>
> Instead the subpoena just generally requests access to all files assuming that they're in existence. This appears to the [c]ourt to be an attempt to conduct discovery, and cannot meet the Spykstra first test.

¶ 84 The subpoena broadly requested "[a]ll files of Adam's County Sheriff's Office personnel investigations and actions concerning [the investigator,] whether sustained or not . . . ." Battigalli-Ansell failed to set forth a specific factual basis demonstrating a reasonable likelihood that the materials he sought existed and contained material evidence.

¶ 85 He contends that he satisfied the first element because the Adams County Sheriff's Office produced the file to the court. But the mere existence of a personnel file does not mean that any document within the file calls the employee's credibility into question. Specifically, Battigalli-Ansell did not establish that the personnel file contains complaints or internal investigations involving misstatements by the investigator. *See id.* Rather, it appears that Battigalli-Ansell served the subpoena in the hope that the investigator's personnel file would include some document

showing that the investigator engaged in misconduct. This is the type of investigatory tool that is not permitted under the first element of *Spykstra*.

¶ 86 We therefore discern no abuse of discretion in the trial court's holding that Battigalli-Ansell failed to establish the first element of *Spykstra*.

b. Second Element of *Spykstra*

¶ 87 The trial court also ruled that Battigalli-Ansell did not meet the second element of the *Spykstra* test. The trial court concluded that

> the defendant has not demonstrated satisfactorily to the [c]ourt that the documents requested in the subpoena are evidentiary or relevant. While Spykstra . . . noted that an absolute determination of admissibility a[t] this stage is not warranted, the defendant still must demonstrate that the documents sought have a tendency to make the existence of any fact that's of consequence to the determination of [the] action more probable or less probable than it would be without the evidence under 401.
>
> . . . .
>
> The . . . file that has been asked for from the personnel file does not have evidentiary relevance to the guilt or innocence of the

> defendant. Nor are other specific . . . files related to facts or circumstances in this case.
>
> Rather, defense respectfully argues that because there [were] misrepresentations on the affidavit, that if there are any files or any complaints about any of his truthfulness, that would be admissible.
>
> Even if that is true – I'm not sure that would be true under 608 or 404 – if it was true, the [c]ourt would find that generally that would be searching for evidence that doesn't exist.

¶ 88 Battigalli-Ansell responds that the materials he sought were relevant potential evidence because they would bear directly on the investigator's credibility. But we agree with the trial court that Battigalli-Ansell's general statements about the contents of the personnel file did not establish the relevance of any particular document within the file.

¶ 89 At most, the personnel file might have included information that Battigalli-Ansell could have used on cross-examination to challenge the investigator's credibility. But, as noted, the right to an effective cross-examination "does not guarantee 'access to every possible source of information relevant to cross-examination.'" *Spykstra*, 234 P.3d at 670 (quoting *Dill*, 927 P.2d at 1322); *see Blackmon*, 20 P.3d at 1220 (finding no abuse of discretion when the

trial court quashed "a subpoena duces tecum broadly requesting all documents within three years prior to the request bearing on truthfulness . . . ."). Significantly, Battigalli-Ansell did not demonstrate how the investigator's credibility would be relevant to his defense that he did not know or believe he was communicating with someone under fifteen years of age.

¶ 90 We therefore conclude the trial court did not abuse its discretion by ruling that Battigalli-Ansell did not meet the second element of *Spykstra*.

c. Third, Fourth, and Fifth Elements of *Spykstra*

¶ 91 Battigalli-Ansell argues that the trial court erred by not making findings under the third, fourth, and fifth elements of the *Spykstra* test. We need not address these elements, however, because, as noted above, we hold that the trial court did not abuse its discretion by determining that Battigalli-Ansell did not satisfy the first two elements of the *Spykstra* test and therefore did not err by quashing the subpoena.

IV. Conclusion

¶ 92 The judgment of conviction is affirmed.

JUDGE RICHMAN and JUDGE CASEBOLT concur.