

[CAPTION]

MOTION TO EXCLUDE VOUCHING TESTIMONY OF CHILD COMPLAINING WITNESS

The Defendant, by counsel, respectfully requests this Court exclude any vouching testimony of the child complaining witness. In support of this Motion, the Defendant would state the following:

1. The Defendant is charged with [insert offense].
2. The Defendant is scheduled to be tried on these charges on [insert date].
3. The complaining witness is a child who is [insert age].
4. The Defendant has reason to believe that the State intends to introduce testimony of the State witnesses' opinions as to the veracity of the child complaining witness and/or the truth of the child complaining witness' allegations, or the State's witnesses' opinions as to the lack of belief in Defendant's protestations of innocence.

5. The law in Indiana precludes any such "vouching" testimony and limits the testimony to the child witness' ability to recall and relate the events that occurred. Ind.R.Evid. 704(b).

6. Any such testimony that states the witness' opinion as to the truth of the child's allegations, the veracity of the child, or opinion as to disbelief of Defendant's protestations of innocence has long been held improper. Sheperd v. State, 538 N.E.2d 242 (Ind. 1989); Head v. State, 519 N.E.2d 151 (Ind. 1988). This is so regardless of whether the vouching is direct or indirect. Hoglund v. State, 962 N.E.2d 1230 (Ind. 2012) (holding that the adoption of Rule of Evidence 704(b) overruled prior case law permitting indirect vouching of child witnesses in sexual abuse cases).

7. Moreover, any testimony regarding the fact that the Department of Child Services has substantiated the allegations of abuse is an impermissible conclusion under Rule 704(b) and

irrelevant. Bradford v. State, 960 N.E.2d 871 (Ind.Ct.App. 2012).

8. Any probative value of vouching-type testimony is substantially outweighed by the unfair prejudice caused by the testimony, and thus, the testimony should be excluded under Indiana Rule of Evidence 403.

WHEREFORE, the Defendant, by counsel, requests that this Motion to Exclude be granted; and requests this Court to order the State of Indiana, through its prosecutors and its witnesses, not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly any information concerning opinions as to veracity of the complaining witness, the truth of her allegations, or disbelief of the Defendant's protestations of innocence, without first obtaining the permission of this Court, outside the presence and hearing of the jury. The Defendant further requests this Court to instruct the parties as to the limits of such opinion testimony, and to further instruct the State of Indiana and its witnesses not to make any reference to the fact that this Motion has been filed and granted, and to warn and caution each and every one of their witnesses to strictly follow these same instructions, and to grant all other relief just and proper in the premises.

(Signature)

CASE LAW

Bean v. State, 15 N.E.3d 12 (Ind.Ct.App. 2014) (DCS investigator's testimony that after conducting his investigation, he "draw[s] a conclusion [as] to my belief, did it happen, did it not happen, whatever the allegation may be," and he "drew the conclusion to substantiate the allegation, and it was upheld by our director and agreed with by the child[-]protection team." constituted impermissible vouching).

Hoglund v. State, 962 N.E.2d 1230 (Ind. 2012) (testimony that an alleged child victim is not prone to exaggerate or fantasize about sexual matters is inconsistent with rule of evidence prohibiting witnesses from testifying as to whether another witness testified truthfully, overruling Lawrence v. State, 464 N.E.2d 923 (Ind. 1984)).

Gutierrez v. State, 961 N.E.2d 1030 (Ind.Ct.App. 2012) (testimony by nurse and DCS investigator that they believed child witness, along with prosecutor's closing argument that he too believed witness, constituted vouching that rose to the level of fundamental error).

Heinzman v. State, 970 N.E.2d 214 (Ind.Ct.App. 2012) (DCS investigator's testimony that she substantiated child molest accusation, meaning that DCS has a "reason to believe" the report "may have some factual foundation" but not that the allegations were "absolutely" true, along with the trial court's admonishment, was not an improper opinion under Rule 704(b)).

Thompson v. State, 529 N.E.2d 877 (Ind.Ct.App. 1988) (the trial court erred in allowing the child's father to testify, "as hysterical and crying that she was I knew she was telling the truth...").

Douglas v. State, 484 N.E.2d 610 (Ind.Ct.App. 1985) (error to allow psychiatric social worker to give opinion, over the Defendant's objection, regarding the truthfulness of a child in a molestation case; witness testified, "I believe M.R. I think he's telling the truth"; held, conviction reversed).

Shepard v. State, 538 N.E.2d 242 (Ind. 1989) (prosecutor's question of a witness as to whether she believed the Defendant when the Defendant claimed he did not commit the crime was improper).