No. 82568-8

SANDERS, J.* (dissenting) — The majority permits inadmissible testimony by Dr. Henry Richards in Gale West's sexually violent predator (SVP) trial and quashes West's subpoena duces tecum for documents with which to impeach Dr. Rawlings' testimony. Because admission of Richards' testimony was not harmless error and West was erroneously precluded from obtaining all of Rawlings' evaluations, notwithstanding his objectionable testimony about the results of nondisclosed evaluations, I dissent.

Relevancy of Dr. Richards' Testimony

Dr. Richards'[1] testimony about the Special Commitment Center's (SCC) treatment phases, confinement conditions, and community transition programs was irrelevant and inadmissible. The proper focus of a civil commitment trial must be on the individual's mental health and likelihood of reoffending as a result thereof, not on general confinement conditions and programs. *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 409-10, 219 P.3d 666 (2009). The State argues West was more likely to reoffend "due to his failure to complete SCC treatment that was

*Justice Richard B. Sanders is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

[1] Dr. Richards had never treated West and had no personal knowledge of his needs.

available to him." State's Suppl. Br. at 9. The issue, however, under the statute is whether he is likely to reoffend as a result of a mental disorder, not how effective treatment may be. Moreover, West's failure to complete the voluntary treatment program is *not* relevant to show West would receive, allegedly, more effective treatment if confined at the SCC, nor is that consideration relevant in itself.

This court previously addressed the relevance of confinement conditions in *In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). In *Turay*, the respondent in an SVP commitment trial sought to introduce evidence about the conditions of confinement at the SCC and a federal court verdict that the SCC had violated his constitutional right to adequate mental health treatment. *Id*. at 385-86, 403. The Court of Appeals upheld the trial court's exclusion of such evidence, holding, "The trier of fact's role in an SVP commitment proceeding . . . is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement." *Id*. at 404. And yet evidence of confinement conditions was precisely what was admitted in this case. This was manifest error under *Turay*.

Further, RCW 71.09.060(1) prohibits testimony about the treatment West would receive if committed. That statute unambiguously states, "In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder *may consider only*

placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." RCW 71.09.060(1) (emphasis added). What treatment West had or could have had at the SCC if committed is neither a voluntary treatment option nor a placement condition he would have had if unconditionally released. The statute, therefore, bars admission of this evidence.

The admission of Richards' testimony is also barred under RCW 71.09.020(18). The determination of relevance in an SVP civil commitment trial is comprised of three elements: "(1) that the respondent 'has been convicted of or charged with a crime of sexual violence,' (2) that the respondent 'suffers from a mental abnormality or personality disorder,' and (3) that such abnormality or disorder 'makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.'" *In re Detention of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010) (quoting RCW 71.09.020(18)). Contrary to the State's assertions, State's Ans. to Pet. for Review at 5, West's *treatment experience* does not fall under any of the SVP determining factors; it is not central to his current diagnosis nor his risk of reoffending.

In *Post*, the State introduced evidence about the treatment available to Post if he were civilly committed and the possibility of future release to a less restrictive alternative. Post argued evidence about the treatment and possibility of future

release to a less restrictive alternative if committed as an SVP is irrelevant to the determination of whether he is currently an SVP. The court agreed and held the erroneous admission of the evidence was *not* harmless.

Likewise, the analogous situation here makes the error *not* harmless. The explanations of the treatment programs and transition facilities at the SCC have no relevance to any part of the statute. The existence of the SCC programs have nothing to do with whether West was convicted or charged with a crime, whether he suffers from a mental abnormality or personality disorder, or whether he is likely to engage in predatory acts of sexual violence as a result thereof if he is not confined. Instead, the admission of this testimony serves to bias the jury toward committing West as an SVP. This testimony draws the jury's focus away from whether West has a mental abnormality that would increase his chances of reoffending to the expansive treatment programs available if committed. Dr. Richards' testimony does not rebut West's treatment plan but instead presents an alternative to it – an irrelevant alternative to the question of whether West's plan will be successful. It is inconsequential the jury did not ask Richards any follow-up questions regarding the treatment available at the SCC. It is also irrelevant the State did not discuss the treatment available at the SCC or its transition facilities in closing arguments. The jury was already tainted with this inadmissible testimony and we cannot know its effect.

The majority attempts to distinguish the *Post* holding that testimony about the SCC's treatment phases and confinement conditions are irrelevant in SVP commitment trials. The majority says West's case is different because *Post* did not consider the relevancy of evidence on the treatment phases and confinement conditions Post had actually experienced and there was nothing to suggest Post quit voluntary treatment at the time of trial. Majority at 10. However, these are side issues that do not address the fact *Post* holds Richards' testimony irrelevant and therefore inadmissible. *See Duncan*, 167 Wn.2d at 410. The court abused its discretion when it admitted Richards' irrelevant testimony. This testimony violated ER 102, ER 402, and *Turay*.

Pretrial Discovery Issue – Subpoena Duces Tecum

Moreover, the trial court abused its discretion when it denied West the opportunity to summon relevant evidence by subpoena duces tecum. Rawlings used alleged prior work product to bolster his credibility, claiming 40 percent of the people he evaluates for the State are not SVPs in his estimation. There are three elements to an SVP determination but Rawlings' credibility is *not* one of them. While the jury may consider Rawlings' credibility to assess how much weight to give his testimony, it was not necessary for the State to introduce Rawlings' statistics to prove a required statutory element. West objected to the introduction of

Rawlings' claim at trial in part because West had been denied discovery necessary to refute it,[2] Verbatim Report of Proceedings (VRP) (Feb. 5, 2007) at 24, yet the court allowed it anyway. The State's decision to emphasize Rawlings' impartiality opened the door to the subject of his credibility, certainly making it fair game on cross-examination.

"'[I]t is rarely justifiable for the prosecution to have exclusive access' to relevant facts." [3] *United States v. Salerno*, 505 U.S. 317, 323-34, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992) (quoting *Dennis v. United States*, 384 U.S. 855, 873, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966)). West has a constitutional right to "'a meaningful opportunity to present a complete defense',"[4] which includes vigorous cross-examination.[5] *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.

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[2] This court did not have access to a transcript of the sidebar conference. However at oral argument, West's attorney stated the comment at sidebar was, "because we were denied discovery this should not have been allowed, in all fairness." Wash. Supreme Court oral argument, *In re Detention of Gale West*, No. 82568-8 (May 27, 2010), 37 min., 11 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http:www.tvw.org.

[3] Broad access to discovery is the centerpiece of a fair trial. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

[4] Due process protections apply to civil commitment trials. *In re Det. of Young*, 122 Wn.2d 1, 48, 857 P.2d 989 (1993); *In re Det. of Stout*, 159 Wn.2d 357, 369-70, 150 P.3d 86 (2007).

[5] "[I]t is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him." *Elm Grove Coal Co. v. Director*, *Office of Workers' Comp. Programs*, 480 F.3d 278, 301 (4th Cir. 2007).

Ed. 2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). That opportunity would be an empty one if the State were permitted to preclude a challenge to Rawlings' claim.

Rawlings' claim the fact that he finds evaluated individuals are not SVPs 40 percent of the time lends credence to his assertions of objectivity and impartiality. However, the State was improperly allowed to insulate its expert from full, fair, and effective cross-examination by claiming a work-product privilege for materials Rawlings prepared at the State's request and that the State purports to use to prove Rawlings' fairness and lack of bias.[6] "It would be manifestly unfair to allow a party to use the privilege to shield information which it had deliberately chosen to use offensively." *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176, 179 (D. Del. 2003). But the State here did just that: have its cake and eat it too. And the majority erroneously allows this to happen.

The majority misapplied the narrower discovery rule CR 26(b)(5), which addresses experts *expected* to be called at trial and experts *not* expected to be called at trial. But this rule does not address the scenario here, where an expert's work in *other cases* is put at issue by the State.

Even if we assume, arguendo, that CR 26(b)(5)(B) *did* apply to Rawlings' reports in the 15 cases where he did not testify, these reports are not shielded from

[6] Rawlings has testified for the State favoring civil commitment on 22 occasions. He has never testified on behalf of an individual facing commitment. VRP (Feb. 6, 2007) at 111.

discovery under the rule because West demonstrates the requisite "'exceptional circumstances'" justifying discovery. The majority asserts the "exceptional circumstances" requirement is not met, claiming West has not established that "'it is impracticable . . . to obtain facts or opinions on the same subject by other means.'" Majority at 25 (alteration in original) (quoting *Harris v. Drake*, 152 Wn.2d 480, 486, 99 P.3d 872 (2004)). The subject here is the content of 15 evaluations where Rawlings claims he concluded SVP requirements were not met. West meets this standard by the simple fact he does not have *any other* source for discovering the contents of those 15 evaluations not produced, where Rawlings asserts he did not make an SVP finding. Further, the alleged information in these 15 cases is *not* the same information as the 22 cases where Rawlings did testify based on an SVP finding. Maybe Rawlings was not telling the truth[7] or maybe Rawlings was influenced by his employer;[8] facing indefinite confinement, West has a right to challenge this expert's alleged impartiality.

[7] The State argues that "it is unlikely that a licensed professional would lie on such a basic matter." State's Ans. to Pet. for Review at 15. However, even Rawlings cannot escape human nature; Rawlings is dependent on the State for his fee. At the time of West's trial, Rawlings' pending bill to the State for his work on West's case was $46,000. Perhaps future employment contracts with the State depend on Rawlings "finding" an outcome satisfactory to his client. Only the evaluations would put this concern to rest.

[8] "[T]he impact of expert witnesses on modern-day litigation cannot be overstated; yet, to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired . . . . Thus, full, effective cross examination is critical to the integrity of the truth-finding process." *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (citations omitted).

Instead of CR 26(b)(5), the rule applicable where a party is seeking an expert's work-product in *other* cases is CR 26(b)(4). Expert work-product in other cases should be analyzed as any other nonattorney work-product under CR 26(b)(4), i.e., expert work-product in other cases is not subject to CR 26(b)(5). CR 26(b)(4) creates an immunity from discovery for items in the broad category of "documents and tangible things" if "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." But this immunity is not absolute. A requesting party may obtain discovery if a "substantial need of the materials" exists and the materials' "substantial equivalent" is not available through other means without "undue hardship." CR 26(b)(4). As discussed above, West has shown "substantial need" for the 15 non-SVP reports because the information does not exist elsewhere and the State is offensively using the alleged privilege against disclosure.[9]

Heidebrink v. Moriwaki,[1] 104 Wn.2d 392, 402, 706 P.2d 212 (1985),

[9] "The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party." *Pappas v. Holloway*, 114 Wn.2d 198, 210, 787 P.2d 30 (1990); *Heidebrink*, 104 Wn.2d at 401.

[1] *Heidebrink* is not directly on point; it involves work product for that case, not a previous case. The work product at issue was a statement by a party, fully subject to deposition and cross-examination. A nonparty expert's work is distinguishable because of the difficulty in evaluating it and its ability to mislead. *See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 595, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Furthermore, the *Heidebrink* court suggests a case-by-case analysis: "[T]he better approach to the problem is to look to the specific parties involved and the expectations of those parties. With these parties in mind, the scope of CR 26(b)(3) should provide protection when such protection comports with the underlying rationale of the rule to allow broad discovery, while maintaining certain

recognizes "the possibility of impeachment alone" is insufficient to show substantial need and undue hardship under CR 26(b)(4) *where the requesting party has another source for the same information*.[11] It is true West was free to discover information about Rawlings' education, professional background, and the bases for his opinion about West – but these inquiries do not shed light on Rawlings' assertions about his lack of bias and credibility based on nondisclosed evaluations.[12] The majority and lower courts found West did not have substantial need for Rawlings' non-SVP reports because some of Rawlings' SVP reports had been publically filed in other SVP cases. However, those reports offer no insight into the unfiled cases[13] where we are told Rawlings found the State should not seek to

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restraints on bad faith, irrelevant and privileged inquiries in order to ensure just and fair resolutions of disputes." *Heidebrink*, 104 Wn.2d at 400 (what was formerly CR 26(b)(3) is now (b)(4)).

[11] An SVP evaluation report contains, at a minimum, a complete social and sexual history, complex judgments regarding volitional impairment, predictive statements focused specifically on sexual violence, and an analysis of standard clinical data on likely risk factors and mathematical quantification of risk based on scale scores. It would be impossible for Dr. Rawlings, or any other expert, to answer questions under oath as to an exact methodology and the resulting determination without first consulting that evaluation. If a witness uses a writing to refresh his memory for the purposes of testifying, an adverse party is entitled to have that writing produced, if the interest of justice so demands. ER 612. Accordingly, the "fact similarities and outcome consistency" and underlying methodology used to determine the alleged 40 percent statistic was not available to West, absent access to Rawlings' reports.

[12] West did not seek these reports primarily for impeachment; rather this information was important to compare other individuals' patterns of sexually offending behavior with West's own history. West could not challenge Rawlings' bias or inconsistency without assessing the basis of his claimed independence.

[13] Comparing the negative evaluations would yield important information about Rawlings'

commit an offender as an SVP.

The trial court's denial of the subpoena duces tecum violated West's federal and state constitutional right to present a meaningful defense. And admission of prohibited, irrelevant testimony was not harmless error.

assessments of dangerousness for other sexual offenders, including the type of offenses, the number of victims involved, previous diagnoses, the age of the offenders, the amount of time they spent in prison, and the individual's amenity to speaking with the evaluator.

Accordingly, I dissent.

AUTHOR:
Richard B. Sanders, Justice Pro Tem.

WE CONCUR: