

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Detention of) No. 82568-8
)
GALE WEST,) EN BANC
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)
Petitioner.) Filed May 5, 2011
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_____)

FAIRHURST, J. — A jury found Gale West to be a sexually violent predator (SVP), and the trial court entered a civil commitment order under chapter 71.09 RCW. The Court of Appeals affirmed. *In re Det. of West*, noted at 147 Wn. App. 1017, 2008 WL 4867147 (2008). West requests a new trial for two reasons. First, West claims he was prejudiced by the trial court’s evidentiary rulings. Second, he believes he was entitled to discovery of the SVP evaluations done for other persons by the State’s testifying expert witness, Dr. Leslie Rawlings. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

After West’s 1974 conviction for two counts of sodomy, he was committed to

Western State Hospital for treatment as a sex offender. Over two years later, he was discharged and declared not amenable to treatment. While West was on work release in 1981, he kidnapped and attempted to rape a girl and was later convicted and sentenced to 20 years of imprisonment. During his incarceration, state officials repeatedly recommended that he get treatment for sexual deviancy. He refused. He claimed the programs were ineffective, created a risk of additional punishment, and resulted in negative evaluations based on only brief interviews. Before West's scheduled release from prison, the State filed an SVP petition on June 4, 2002. Pending his civil commitment trial, West was committed to the Special Commitment Center (SCC), where he voluntarily participated in the SCC's treatment program for 14 months. He quit treatment in 2003.

A. Evidentiary issues

Before trial, West moved to strike Dr. Henry Richards, the superintendent of the SCC, from the State's witness list. The trial court denied West's motion, ruling the State could "elicit testimony of a brief overview of the program in general and West's participation or lack of participation in the program." Clerk's Papers (CP) at 640. The court permitted West to "testify why he chose to terminate treatment, and give any information as to his understanding as to deficiencies in the treatment to support his reasons for terminating." *Id.* However, the court concluded, "This

does not open the door to collateral evidence on the strengths and weakness[es] of the program, including federal litigation.” *Id.* at 640-41.

Dr. Richards testified:

The Special Commitment Center’s treatment program is, I would say, it really has three components. One is just the environment of the Special Commitment Center itself. So we have different environments that comprise part of the treatment.

The initial environment that a resident might enter would be our total confinement center on McNeil[] Island, and that facility, as implied, is really designed to contain an individual and provide all the supports and security that make treatment possible.

The other environments we have are our transition facilities, one on McNeil[] Island and one here in Seattle. Those facilities are different, have somewhat of a different treatment, and are designed to have more access into the community and transition into the community. So that first component of the treatment is the holding environment itself and the staff, rules comprised in that facility.

Verbatim Report of Proceedings (VRP) (Jan. 31, 2007) at 158-59. West objected, and the trial court told the State to move on. Dr. Richards’ testimony continued:

[State]: At the facility on McNeil[] Island, are there phases of treatment in the treatment program?

[Dr. Richards]: Yes, there are. The cognitive behavioral treatment itself, the programs are directed by professional staff, consist of six phases of treatment, beginning with introduction, accepting and learning about one’s disorders, all the way through to practicing, showing that you can--you’ve learned and mastered certain skills that will reduce your recidivism risk and that you have chosen and demonstrated that you’ll likely continue to choose to exercise those skills in the future. So those are the phases one through six, with the sixth phase being a community transition phase.

Id. at 159. Dr. Richards further testified that West was held in the SCC and that he had participated in the voluntary treatment program for 14 months before stopping in 2003. West moved for a mistrial and, in the alternative, requested the court to instruct the jury that it was not to consider the community transition phases and must focus on the elements of an SVP finding. The court denied West's motion and did not instruct the jury. The jury did not ask Dr. Richards any follow-up questions.¹

In closing arguments, the State did not discuss the SCC, the treatment generally available there, or its transition facilities. The prosecutor focused solely on the conclusions that the jury should draw from West's previous crimes, his treatment history or lack thereof, and Dr. Leslie Rawlings' assessment of West.

B. Pretrial discovery issue

At a pretrial deposition, Dr. Rawlings, the State's expert witness, told West's counsel that he had evaluated 37 other persons for SVP status and had concluded that 22 of them qualified as an SVP and 15 did not. West subsequently served Dr.

¹Because SVP trials are civil in nature, jurors may ask questions of the witnesses. CR 43(k). West claims that the jurors asked Dr. Richards follow-up questions about the SCC. But the jury questions he cites were directed to Thomas Moore, a worker at Western State Hospital when West was there in the 1970s, regarding Western State Hospital's programs, as well as questions to Dr. Savio Chan, a retired psychologist who worked at the Department of Corrections' Twin Rivers Corrections Center and evaluated West in 1980, regarding the treatment programs at Twin Rivers and West's participation there, and finally questions to Dr. Leslie Rawlings, the State's expert witness who opined West meets the SVP criteria, regarding West's age, the risk effect of failing to complete treatment, the existence of risk assessments showing West's likelihood to reoffend as less than 50 percent, and the sample sizes of nontreated sex offenders in the empirical studies. The jury did not ask follow-up questions about the conditions or treatment phases at the SCC.

Rawlings with a notice to continue the deposition. The notice included a subpoena duces tecum requesting Dr. Rawlings to produce copies of the SVP evaluations and risk assessments (hereinafter, collectively, evaluations) that Dr. Rawlings had done for the 37 other persons. These evaluations break down into three categories: (1) evaluations of persons for whom the King County prosecutor's office filed an SVP petition (the practice of King County is to attach evaluations to SVP petitions, and they thus become public records) and Dr. Rawlings testified at trial; (2) evaluations of persons for whom the attorney general's office (AGO) filed an SVP petition (the practice of the AGO is to attach evaluations under seal to SVP petitions) and Dr. Rawlings testified at trial; and (3) evaluations of persons for whom the State did not file an SVP petition and thus Dr. Rawlings did not testify. Dr. Rawlings refused to comply.

West filed a motion to compel, citing four reasons why he needed the documents:

[F]irst, it is important for the respondent to examine other reports for fact similarities and outcome consistency; second, it is important to know the circumstances under which Dr. Rawlings was unable to reach a conclusion and compare the evidence cited in those cases to the evidence he cites supporting his opinion in Mr. West's case; [third], we think it necessary to determine whether all those individuals whom Dr. Rawlings found did not meet the criteria submitted to interviews; and finally, to verify the claims Dr. Rawlings has made about his reports.

CP at 1011. The trial court ultimately quashed the subpoena in part, concluding that

“reports generated by Dr. Rawlings for cases in which he was retained as a consulting expert by the state, and for which legal proceedings were not filed, were prepared in anticipation of litigation.” CP at 519. The court concluded these reports were not discoverable because West had not “demonstrated a substantial need of the materials in the preparation of his case nor that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” *Id.*

In an order clarifying the ruling and denying West’s motion for reconsideration, the court stated that the evaluations filed under seal by the AGO were included in the protective order. The court acknowledged work product protections might not apply to the evaluations, but said the “privacy rights of those evaluated” justified the protection. CP at 525. West was free to discover only the evaluations by Dr. Rawlings that were attached to King County’s SVP petitions.

At trial, Dr. Rawlings testified for two-and-one-half days, and the prosecutor began the direct examination of Dr. Rawlings by bolstering his credentials and objectivity, as follows:

Q: And when you’re hired by the Joint Forensic Unit to do a sexually violent predator evaluation, is it expected that you’re going to have any particular outcome when you do that evaluation, or not?

A: No, not at all.

Q. Okay. So what are the expectations when you conduct an evaluation for the Joint Forensic Unit?

A: The expectation is that you do a neutral, objective evaluation.

Q: Now, in your -- I think you said you have done 37 or 38 sexually violent predator evaluations. Do you have a sense or a figure of how many times you have found somebody met criteria as a sexually violent predator, and how many times you have found that they do not meet criteria?

[West objects. After a sidebar conference, the court overrules.]

Q: Dr. Rawlings, if you could tell the jury of the 37 or 38 sexually violent predator evaluations, how often have you found somebody has met criteria versus how many times they did not meet criteria?

A: Yes. Approximately 60 percent of the time it's been my conclusion that they have met the criteria, 40 percent of the time not.

VRP (Feb. 5, 2007) at 23-24.

The prosecutor relied on this testimony during closing argument after observing that Dr. Rawlings was “the only credentialed expert that you heard from.”

VRP (Feb. 13, 2007) at 9. (West had initially planned to call his own expert witness, Dr. Richard Wollert, who believed that West did not meet the criteria. But West did not actually call Dr. Wollert or any other expert.) In arguing why the jury should credit Dr. Rawlings' testimony, the prosecutor relied on the doctor's testimony about his 60 percent rate of finding an evaluated person as meeting the criteria for being an SVP:

Dr. Rawlings is a man who has been in the business of evaluating and

treating sex offenders for 30 years, since 1977. He says that he has evaluated and treated about a thousand, if I remember hearing it right. This has been his life's work.

When the State of Washington passed the sexually violent predator statute in 1990, the State psychological association said he's the guy we want to chair the task force. Why? Because he's got the expertise.

Dr. Rawlings told you that he's conducted 37 or 38 of these sexually violent predator evaluations, and he explained to you that he gets these from the Joint Forensic Unit, and that 60 percent of the time he's found that somebody meets criteria. Why is that important? It's important because it shows his objectivity, and he explained to you if he says this person is not likely to reoffend, that's it.

Id.

C. Court of Appeals decision

In an unpublished opinion, the Court of Appeals affirmed. On the evidentiary issues, the Court of Appeals concluded that "any error" was harmless. *West*, 2008 WL 4867147, at *8. On the discovery issue, the Court of Appeals held that West sought protected work product and failed to show substantial need for the documents. *Id.* at *4.

We granted West's petition for review. *In re Det. of West*, 166 Wn.2d 1032, 218 P.3d 195 (2009).

II. ANALYSIS

A. Evidentiary issues

We review a trial court's decision to admit or exclude evidence for an abuse

In re Det. of West, No. 82568-8

of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.*

1. *Relevancy of Dr. Richards' testimony*

Evidence must be relevant to be admissible. ER 402. In an SVP civil commitment trial, evidence is relevant only if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination whether the respondent is a sexually violent predator. *See* ER 401; RCW 71.09.060(1). This determination comprises 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 Det. of Post*, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010) (quoting RCW 71.09.020(18)²). Because relevance is a judgment dependent on the surrounding facts, the trial court enjoys broad discretion in deciding whether evidence is relevant to these three elements. *See In re Pers. Restraint of Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993).

The trial court acted within its discretion in concluding that Dr. Richards' testimony was relevant. The testimony provided context for the jury to weigh the significance of West's decision to stop participating in the SCC's voluntary

²The pertinent statutory subsection in effect at the time of the SVP petition filing against West was former RCW 71.09.020(16) (2002). The definition is the same today. A 2009 legislative amendment, which did not pertain to the statutory definition of SVP, renumbered the subsection to .020(18). *See* Laws of 2009, ch. 409, § 1.

treatment program. The jury could infer that West was less likely to be able--or willing--to control his mental abnormality or personality disorder if living freely in the community. Based on this inference, the jury could find West was more likely to reoffend.

We recently concluded in *Post* that similar testimony about the SCC's treatment phases and confinement conditions was irrelevant in the SVP civil commitment trial of Charles Post. *Post*, 170 Wn.2d at 314. In *Post*, the State used testimony about the SCC to argue that Post's best chance of avoiding recidivism was to complete treatment there. *Id.* at 307-08. *Post* is distinguishable from this case. In *Post*, we expressly limited our review to evidence about SCC programs in which Post had not yet participated. *Id.* at 310. Post did not challenge, and we declined to address, the lower court's conclusion that evidence of the SCC treatment Post had already undergone was relevant and admissible. *Id.* Here, unlike in *Post*, the purpose of the challenged testimony was to shed light on West's past treatment at the SCC, not to show the existence of preferable alternative treatments for the future. The brief testimony of Dr. Richards provided helpful background information for the jury to gauge the importance of West's decision to quit treatment as it related to his likelihood to reoffend.

However, the trial court should have given a limiting instruction in

accordance with ER 105. Upon a party's request, ER 105 requires the court to "restrict the evidence to its proper scope and instruct the jury accordingly." When evidence is proper for one purpose but inadmissible for another purpose, a limiting instruction is usually required. *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003). Here, a limiting instruction should have been given because West requested one and the State could have used Dr. Richards' testimony for two improper purposes.

First, when offered for the purpose of showing the respondent has a mental abnormality or a personality disorder, evidence of the SCC's treatment programs, confinement conditions, and transitional facilities is irrelevant and inadmissible, unless the testimony relates the respondent's treatment history. Certainly, the State is free to offer evidence of the treatment a sex offender should get and to compare that with the treatment the respondent has actually received. *See Post*, 170 Wn.2d at 313-14. However, the mere availability of treatment at the SCC is no more relevant to diagnosis than is the availability of such treatment at a secure facility in California. What matters for diagnosis is the respondent's response to treatment options that were actually presented to him.

The other obviously improper purpose for evidence of the SCC's treatment programs, confinement conditions, and transitional facilities is to establish that total

confinement or a less restrictive alternative would be prospectively better than unconditional release for reducing the respondent's risk of reoffense. *Id.* The jury must determine the SVP's dangerousness "if *not* confined in a secure facility." RCW 71.09.020(18) (emphasis added). Thus, while the SVP statute asks the jury to decide whether the respondent's risk of reoffense is so high that he should be committed to a secure facility, the statute does this by focusing the attention of the jury solely on what would happen if the respondent were living freely in the community. *Post*, 170 Wn.2d at 312. RCW 71.09.060(1) makes this point explicit, instructing that the jury may consider "only placement conditions and voluntary treatment options that would exist for the person if unconditionally released." *See also In re Det. of Turay*, 139 Wn.2d 379, 404, 986 P.2d 790 (1999). To be sure, the State may offer evidence of the treatment and placement conditions that are necessary to mitigate the respondent's dangerousness, and the State may offer evidence that these components are lacking in the respondent's proposed arrangements for unconditional release. *Post*, 170 Wn.2d at 313-14. However, the fact that the SCC has the necessary conditions and treatment programs is not relevant for this purpose. *Id.*

To avoid the jury considering Dr. Richards' testimony for these improper purposes, West asked the trial court to instruct the jury that it was required to focus

In re Det. of West, No. 82568-8

solely on the statutory elements of the SVP determination. Because there was no reason to refuse West's request, we conclude the trial court committed error.

2. *Unfair prejudice and confusion of the issues*

We next consider whether the trial court should have excluded Dr. Richards' testimony even though it was relevant. The trial court, in its sound discretion, may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403. A danger existed that the jury would base its SVP determination on its preference for the SCC or be misled into thinking it was supposed to determine whether West's risk of reoffense would be less if he were committed to the SCC. But the trial court carefully circumscribed Dr. Richards' testimony. He gave only a brief, generalized overview of the SCC before discussing the treatment program and West's choice to stop participating in it, focusing the jury on the proper purpose of whether West's decision to discontinue treatment would affect his ability to control his mental abnormality or personality disorder. When West objected, the court instructed the State to move on. In light of the relevance of Dr. Richards' testimony to the proper issue of the significance of West's decision to quit treatment, we conclude the trial court acted within its discretion.

West also argues that the testimony violated his right to a fair trial. This argument is not well developed, and we see no valid explanation for how Dr. Richards' probative, yet limited, testimony created an unfair trial.

3. *Evidence of the federal injunction and the SCC's treatment success*

West wanted to present evidence of the SCC's deficiencies and the federal injunction, as well as the efficacy of the SCC's treatment programs. Generally, evidence about the federal injunction that regulated the SCC for several years is irrelevant. *Turay*, 139 Wn.2d at 404. However, by offering evidence of West's decision to voluntarily quit the SCC treatment program, the State opened the door to West's rebuttal evidence explaining why he ceased treatment. Such rebuttal evidence about the SCC was relevant only if West knew about any deficiencies and they were a causal factor in West's decision. West did not say that the issues related to the federal injunction factored into his decision making, and nothing else in the record suggests that the federal injunction drove West's choice to quit treatment. Thus, the trial court acted within its discretion by excluding the evidence.

Turning to the evidence about the efficacy of the SCC's treatment programs, we consider such evidence's admissibility based on whether it is offered on cross-examination of the State's witness or direct examination during the defense's case. The trial court has discretion under ER 611(b) to limit cross-examination of a State's expert regarding the efficacy of the SCC's treatment programs because the scope of cross-examination should be limited to the issues raised on direct. *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 409, 219 P.3d 666 (2009). Because Dr.

Richards did not directly discuss the efficacy of the SCC treatment programs, the trial court acted within its discretion in excluding West's cross-examination questions.

On direct examination during the defense's case, evidence about the efficacy of the SCC's treatment programs is ordinarily "barely relevant" to a "side issue." *Id.* at 410 (quoting *In re Det. of Duncan*, 142 Wn. App. 97, 109-10, 174 P.3d 136 (2007)). Here, such evidence was relevant as rebuttal evidence if it bore on West's decision to end his voluntary treatment at the SCC. It did. West testified about his skepticism of the SCC's treatment programs. Testimony from an expert corroborating West's understanding of the SCC treatment programs could have buttressed his claims and taken some of the sting from the inference that West quit treatment for the wrong reasons. Nevertheless, the trial court had discretion and acted within it by limiting the rebuttal evidence to West's testimony. *See id.* Doing so eliminated the danger that a minitrial would ensue on the success rate at the SCC.

West argues that the trial court's evidentiary rulings on these points violated his due process rights to present a defense and cross-examine the witnesses against him. We disagree. The trial court's application of the evidence rules sufficed.

B. Pretrial discovery issue

West challenges the trial court's order partially quashing West's subpoena duces tecum for Dr. Rawlings' SVP evaluations of other persons. Whether West is entitled to the prior SVP evaluations depends on whether CR 26(b)(4) or CR 26(b)(5) governs West's discovery request for expert information, and if CR 26(b)(5) does, whether the controlling provisions are those in subsection (b)(5)(A) for testifying experts or those in subsection (b)(5)(B) for nontestifying experts. We review a discovery order under CR 26 for an abuse of discretion. *See T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

1. *CR 26(b)(4) - general work product protections*

CR 26(b)(4)³ creates an immunity from discovery for “documents and tangible things” if the items were “prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative.” This work

³CR 26(b)(4) provides, in relevant part:

Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

product protection makes “no distinction between attorney and nonattorney work product.” *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 402, 706 P.2d 212 (1985).

The requesting party may obtain discovery only after showing “substantial need of the materials” and that the materials’ “substantial equivalent” is not available through other means without “undue hardship.” CR 26(b)(4). Even after this showing, however, the requesting party usually may not discover “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.* This immunity for opinion work product is nearly absolute. *Pappas v. Holloway*, 114 Wn.2d 198, 211-12, 787 P.2d 30 (1990).

2. *CR 26(b)(5) - expert work product protections*

CR 26(b)(5)⁴ governs “[d]iscovery of facts known and opinions held by

⁴ CR 26(b)(5) provides:

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

experts . . . acquired or developed in anticipation of litigation or for trial.” The requesting party does not have to meet the substantial need or undue hardship requirements of CR 26(b)(4). However, depending on whether the expert is expected to be called at trial, the rule creates its own unique modifications of the permissible methods and the general right to discovery set forth in CR 26(a) and (b)(1). *See* CR 26(b)(5)(A)-(B).

CR 26(b)(5)(A) provides liberal discovery rules for the work product of experts whom a party expects to call to testify at trial. Because modern litigation often involves “intricate and difficult issues as to which expert testimony is likely to be determinative,” the aim of CR 26(b)(5)(A) is to make trials fairer and improve their truth-finding function by giving pretrial access to the other side’s expert witnesses in order to prepare for cross-examination and rebuttal. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee’s Note, 48 F.R.D. 487, 503 (1970).⁵ Accordingly, the rule gives parties the right to serve interrogatories regarding three topics: (1) the identity

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

⁵Because 1972 amendments were modeled on the federal rules, we consider the federal advisory committee comments to be highly persuasive authority on their meaning.

of the expert witnesses expected to testify, (2) “the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion,” and (3) any other “information about the expert as may be discoverable under these rules.” CR 26(b)(5)(A)(i). The rule also grants, as a matter of right, that a party may “depose each person whom any other party expects to call as an expert witness at trial,” so long as the deposition complies with the remainder of CR 26 and the entirety of CR 30 and 31, which govern depositions. CR 26(b)(5)(A)(ii). The rule thus “permit[s] a party routinely to depose the expert witnesses of other parties expected to be called at trial.” 3A Karl B. Tegland, *Washington Practice: Rules Practice CR 26* author’s cmts. at 618 (5th ed. 2006).

A nontestifying expert’s opinions and factual knowledge implicate distinct concerns, and therefore discovery of this work product has a separate rule defined in CR 26(b)(5)(B). It does not limit the methods of discovery, unlike subsection (b)(5)(A), but it allows discovery only upon a heightened showing of “exceptional circumstances.” CR 26(b)(5)(B).⁶ Because the expert is not expected to testify at trial, the interests in effective cross-examination and rebuttal are not at issue. Instead, four contrary interests prevail:

- (1) encouraging counsel to obtain necessary expert advice without fear that the adversary may obtain such information;
- (2) preventing

⁶CR 26(b)(5)(B) allows discovery without any showing of exceptional circumstances if the expert information involves a mental or physical examination ordered pursuant to CR 35.

unfairness that could result from allowing an opposing party to reap the benefits of another party's efforts and expense; (3) preventing a chilling effect on experts serving as consultants if their testimony could be compelled; and (4) preventing prejudice to the retaining party if the opposing party were allowed to call at trial an expert who provided an unfavorable opinion.

8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2032, at 94 n.4 (3d ed. 2010).

3. *Does CR 26(b)(4) or (5) apply to West's subpoena duces tecum?*

a. *Did the protections of either CR 26(b)(4) or (5) attach?*

Because the protections outlined in CR 26(b)(4) and (5) apply only when the requested documents were prepared, acquired, or developed in anticipation of litigation, we are confronted with the threshold question of whether the disputed materials fall into this category. “[T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2024, at 502 (2010). “The work product doctrine does not shield records created during the ordinary course of business.” *Morgan v. City of Federal Way*, 166 Wn.2d 747, 754, 213 P.3d 596 (2009) (citing *Heidebrink*, 104 Wn.2d at 396-97). In close cases, the inquiry is founded on the underlying purposes of work product protections and the expectations of the relevant actors. *See Heidebrink*, 104 Wn.2d at 400-01.

We think SVP evaluations are created because of the prospect of litigation. RCW 71.09.025(1)(b)(v) directs the state agency with jurisdiction over someone who potentially qualifies as an SVP to submit all relevant documentation to the local county prosecutor and the AGO. Among the required information is “[a] current mental health evaluation or mental health records review.” RCW 71.09.025(1)(b)(v). Carrying out these requirements, the End of Sentence Review Committee (ESRC) has a member of the Joint Forensic Unit prepare a forensic psychological evaluation. If the psychologist concludes that the sex offender meets the statutory definition of an SVP, the ESRC forwards the relevant information to the prosecuting authority. This process was the one under which Dr. Rawlings prepared the disputed evaluations. Because the prospect of an SVP civil commitment trial was the reason he was requested to prepare these documents, any applicable work product protections attach.

b. *Did CR 26(b)(4) or (5) apply?*

The trial court and the Court of Appeals applied the CR 26(b)(4) standard of substantial need and undue hardship. This was incorrect; only CR 26(b)(5) could apply. As we recognized in *Harris v. Drake*, 152 Wn.2d 480, 486, 99 P.3d 872 (2004), CR 26(b)(4) provides that its substantive barriers of substantial need and undue hardship are “[s]ubject to the provisions of subsection (b)(5).” And, by the

terms of CR 26(b)(5), discovery of facts held by an expert “may be obtained only as” provided in CR 26(b)(5). Thus, CR 26(b)(5) carves out a world unto itself for expert work product.

This textual reading of the rules is reinforced by a reference to their purposes. Adding the substantive barriers of substantial need and undue hardship on top of CR 26(b)(5)(B)’s safe harbor for nontestifying expert work product would create needlessly duplicative protections. More troubling, the liberal discovery rule for testifying experts would be no more. Rather than having interrogatories and depositions as a matter of right, a requesting party would have to establish a substantial need for the materials and undue hardship. We think this would be a return to the dangers that CR 26(b)(5)(A) was designed to avoid. *See* Advisory Committee’s Note, 48 F.R.D. at 503.

We reject the idea that CR 26(b)(5) applies through trial but CR 26(b)(4) attaches once trial concludes. We have held that the work product protections of CR 26(b)(5)(B) for nontestifying expert work product continue even after litigation concludes. *See Pappas*, 114 Wn.2d at 210; *Harris*, 152 Wn.2d at 489-90. We reasoned that protecting work product after trial is justifiable because doing so furthers the underlying purposes of existing pretrial protections. *See Pappas*, 114 Wn.2d at 210. Accordingly, where the liberal discovery rule in CR 26(b)(5)(A)

lacks protections for testifying expert work product before trial, we see no reason for retroactively creating such protections when trial concludes. Once CR 26(b)(5)(A) attaches to an expert's work product, it continues after the litigation ends.

Finally, we clarify any confusion from our decision in *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996). The lead opinion signed by four justices concluded that CR 26(b)(5) applies, but CR 26(b)(4) does not, when the object of discovery is a fact acquired or an opinion developed by a nontestifying expert in anticipation of litigation. *Firestorm*, 129 Wn.2d at 137. We agree, based on the text of the rules and their overarching purposes, with one important caveat. CR 26(b)(5) pertains only to the “facts known and opinions held by *experts*.” (Emphasis added.) We do not say that “the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation,” CR 26(b)(4), are subject to discovery under CR 26(b)(5).

Because West's subpoena sought factual knowledge and opinions held by an expert and developed in anticipation of litigation, the specialized rules of CR 26(b)(5) attached, to the exclusion of CR 26(b)(4). The State makes no claim that discovery of the information from Dr. Rawlings would reveal the opinion work product of an attorney.

4. *Did CR 26(b)(5)(A) or (B) permit the trial court to quash the*

subpoena?

Because the protections of CR 26(b)(5) continue after litigation, whether CR 26(b)(5)(A) or (B) applies depends on the expert's status at the time the protections of CR 26(b)(5) originally attached. Once an expert is a nontestifying expert for a case, the only way this status changes is by changing the expert's designation to a testifying witness in that case.

Therefore, for the 22 SVP trials in which Dr. Rawlings testified, the liberal discovery rule of CR 26(b)(5)(A) applies to the SVP evaluations. The trial court correctly permitted discovery of the SVP evaluations that King County filed publicly. However, the trial court abused its discretion by quashing West's subpoena for the SVP evaluations that the AGO filed under seal because CR 26(b)(5)(A) requires no showing of substantial need or exceptional circumstances.⁷

Although CR 26(b)(5)(A) explicitly permits only interrogatories and depositions, not requests for production of documents, the history and purposes of CR 26(b)(5)(A), as well as the overall structure of the discovery rules, suggest that the drafters of CR 26(b)(5)(A) intended to allow discovery of a testifying expert's written work product. Former CR 26(b) (1967) prohibited discovery of an expert's written opinions, but this provision was deleted in the 1972 amendments to the rule

⁷We were not presented with the privacy issues that animated the trial court's analysis for some of the evaluations. We therefore do not consider them.

that created CR 26(b)(5).⁸ Further, CR 26(b)(5)(A) stipulates that the deposition must be taken in accordance with CR 30 and 31. CR 30(b)(1) expressly contemplates that a subpoena duces tecum requesting documents may be served on a nonparty as part of an oral deposition. In fact, until the 2007 amendments to CR 45, the only method of requesting documents from a nonparty was a subpoena duces tecum served under former CR 45 (1993) in tandem with a deposition. The practice in Washington was to obtain documents from nonparties by noting a deposition and serving a subpoena duces tecum. Instead of asking any questions at the deposition, the requesting party would simply collect the documents. *See* 3A Tegland, *supra*, at 742-43. Therefore, when CR 26(b)(5)(A) was adopted, the drafters needed only to mention depositions in order to grant access to documents. CR 26(b)(5)(A) therefore permitted the subpoena duces tecum in West’s case, and the trial court abused its discretion by quashing it.⁹

With respect to the evaluations prepared in the 15 cases where Dr. Rawlings did not testify, the protections of CR 26(b)(5)(B) apply, and so West must show “exceptional circumstances” justifying discovery. To show “exceptional

⁸CR 26(b)(5) was originally numbered (b)(4). The current numbering came with the 1990 amendments. *See* 3A Tegland, *supra*. For the sake of clarity, we refer to the current numbering.

⁹Some authority suggests that a bare subpoena duces tecum, separated from the deposition procedure, is not permissible under CR 26(b)(5)(A). *See Marsh v. Jackson*, 141 F.R.D. 431, 433 (W.D. Va. 1992) (interpreting the federal analogue of CR 26(b)(5)(A), which also mentions only depositions, and holding that a bare subpoena duces tecum is not permitted). West, however, served the subpoena duces tecum in tandem with a deposition notice.

circumstances,” the requesting party must establish that “it is impracticable . . . to obtain facts or opinions on the same subject by other means.” *Harris*, 152 Wn.2d at 486. West fails to meet this burden. The subject matter of his discovery request was related to Dr. Rawlings’ skill, knowledge, bias, and credibility. West had several other means to obtain material on the same subject. He had access to the SVP evaluations that Dr. Rawlings did for King County-prosecuted cases, and he had the right to the evaluations for the AGO-prosecuted cases. Further, West had the right under CR 26(b)(5)(A) to discover information about Dr. Rawlings’ education, his professional background, and the bases for his opinion about West. Finally, although West did not choose to, he had the right, at public expense, to call an expert witness in his defense. *See* RCW 71.09.050(2). Such an expert could have challenged Dr. Rawlings’ methods. Therefore, West did not make an adequately compelling showing that discovery of Dr. Rawlings’ work product as a nontestifying expert was the only way to access information about his qualifications, bias, and credibility.

We hold, therefore, that the trial court abused its discretion under CR 26(b)(5)(A) by denying discovery of SVP evaluations in cases where Dr. Rawlings testified, but acted within its discretion under CR 26(b)(5)(A) in denying the request for the SVP evaluations in the cases where he did not testify.¹

¹West also argues that the trial court’s decision violated his due process rights to present a defense and cross-examine the witnesses against him. We disagree. Although CR 26 might have been violated, West was still free to depose Dr. Rawlings, he had access to the SVP evaluations

C. Harmless error

“Evidentiary error is grounds for reversal only if it results in prejudice. . . . An error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (citation omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). We think errors in pretrial discovery rulings in SVP cases are also subject to this same harmless error standard.

We conclude the evidentiary and discovery errors here were harmless. Unlike in *Post*, where we found prejudicial error, the State did not use the evidence about the SCC’s treatment programs, confinement conditions, and transitional facilities to argue that committing West was the better alternative. Dr. Richards’ testimony was brief and relatively minor in a trial with seven full days of witness testimony. The State’s closing argument focused narrowly on the statutory elements of the SVP determination. The jury heard ample testimony from several witnesses about West’s long history of sexual misconduct, which was much more extensive than the crimes for which he was convicted. Further, the State presented evidence about West’s pattern of refusing to obtain treatment, and of his previous reoffense when he was last released to the community in 1981. The jury heard evidence that West had a

done in cases prosecuted by King County, and he cross-examined Dr. Rawlings for a full day of trial. Further, West had the right to present his own expert’s testimony. We do not think due process requires more.

sparse plan for controlling his behavior if he were released, and Dr. Rawlings carefully explained his forensic evaluation of West. Dr. Rawlings was the only expert who testified; no other expert witness claimed that West did not have a mental abnormality or personality disorder. Although West should have received more discovery than he did, West still had access to Dr. Rawlings' evaluations from King County-prosecuted cases, and West had a full day of trial time to cross-examine Dr. Rawlings. In these circumstances, we find it highly unlikely that the outcome of the trial was materially affected by the errors here.

III. CONCLUSION

We reject West's argument that the testimony of Dr. Richards about the SCC's treatment phases, confinement conditions, and community transition programs was inadmissible under ER 402 and 403. We also reject West's contention that he should have been permitted to cross-examine Dr. Richards on the efficacy of the treatment programs at the SCC and to present evidence about the federal case on the unconstitutionality of the conditions at the SCC. We hold the trial court acted within its discretion in admitting Dr. Richards' testimony and limiting West's rebuttal evidence to his own opinions about the SCC's treatment programs. However, the trial court erred by refusing to give a limiting instruction.

We agree only in part with West's argument that the trial court abused its

discretion under CR 26 by partially quashing the subpoena duces tecum that West served on the State's testifying expert witness, Dr. Rawlings, for his prior evaluations of 37 other persons for SVP status. Some of these persons were brought to an SVP trial where Dr. Rawlings testified as an expert, and some were not. Because the evaluations were prepared in anticipation of litigation by an expert, they were subject to CR 26(b)(5). No special showing of need was necessary for the reports involving cases where Dr. Rawlings testified, and West's subpoena was a permissible discovery method under CR 26(b)(5)(A). Thus, it was improper to quash the subpoena with respect to Dr. Rawlings' expert work product for cases where he testified. However, West fails to show the exceptional circumstances required under CR 26(b)(5)(B) to obtain the work product prepared when Dr. Rawlings was a nontestifying expert. Therefore, the trial court did not abuse its discretion with respect to the SVP evaluations for the 15 cases that were never brought to trial.

Although some errors occurred, they were harmless. We affirm the decision of the Court of Appeals, although on different grounds.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Charles W. Johnson	Justice James M. Johnson
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Justice Gerry L. Alexander	Justice Debra L. Stephens
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Justice Tom Chambers	
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Justice Susan Owens	
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