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IN THE COURT OF APPEALS OF INDIANA

Akinfemiwa Akinribade,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 27, 2023

Court of Appeals Case No. 22A-CR-1757

Interlocutory Appeal from the Marion Superior Court

The Honorable Angela Dow Davis, Judge

Trial Court Cause No. 49D27-2108-F3-26885

Crone, Judge.

Case Summary

[1] Afkinfemiwa Akinribade was charged with rape and provided a DNA sample that was sent to the State's crime lab for testing. In this appeal, he challenges the trial court's order to disclose his expert's summary of the State's lab report.

We conclude that Akinribade waived any objection to the disclosure of the one page of the summary that he introduced into evidence at a deposition of the State's DNA analyst, but that the State failed to make the requisite showing of either substantial need or exceptional circumstances to justify the disclosure of the remaining pages of the summary under Indiana Trial Rule 26(B). Accordingly, we affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] In August 2021, Akinribade was charged with rape and provided a DNA sample that was sent to the local crime lab for testing. Crime lab DNA analyst Amanda Wilson generated a DNA profile from that sample and compared it with DNA profiles generated from samples from the alleged victim's sexual assault kit, and she compiled a report of her findings. Akinribade obtained a copy of the report and retained an expert who prepared a seven-page "Consultation Summary" of the report. Appellant's App. Vol. 2 at 175.

[3] In June 2022, Akinribade deposed Wilson. During the deposition, Akinribade handed Wilson the consultation summary's third page, which was entered into the record as Defendant's Exhibit B, and questioned her about it. After the deposition, the State filed a motion for discovery requesting disclosure of the entire summary, among other things. The trial court granted the State's motion without a hearing.

[4] Akinribade filed a motion to reconsider, in which he acknowledged that the State is "entitled to reports and identities of any expert witnesses that [he]

intends to call as witnesses at a trial or hearing[,]" but he stated that he did not intend to call any expert witnesses other than Wilson. *Id*. at 69. He also argued that his expert's consultation summary is protected by the work-product privilege. At a hearing on the motion, the State argued that Akinribade waived the privilege with respect to the entire summary by introducing the single page into evidence at Wilson's deposition. The trial court agreed with the State, and Akinribade now appeals.

Discussion and Decision

[5] "Trial courts have broad latitude with respect to discovery matters, and their rulings receive great deference on appeal." *Sisson v. State*, 985 N.E.2d 1, 14 (Ind. Ct. App. 2012), *trans. denied* (2013). "Our standard of review in discovery matters is abuse of discretion." *Williams v. State*, 819 N.E.2d 381, 384 (Ind. Ct. App. 2004), *trans. denied* (2005). "Thus, we will reverse only where the trial court has reached an erroneous conclusion which is clearly against the logic and effect of the facts of the case." *Id*.

[6] Our supreme court has explained that "Indiana's discovery rules are designed to permit 'liberal discovery' in order to provide the maximum amount of information possible to both parties as they prepare their cases and reduce the possibility of surprise at trial." *Minges v. State*, 192 N.E.3d 893, 897 (Ind. 2022) (quoting *State ex rel. Keller v. Crim. Ct. of Marion Cnty., Div. IV*, 262 Ind. 420, 426, 317 N.E.2d 433, 437 (1974)). "The Trial Rules govern discovery and, as incorporated by Indiana's Criminal Rules, 'apply to all criminal proceedings so

far as they are not in conflict with any specific rule adopted by this [C]ourt for the conduct of criminal proceedings.'" *Id*. (alteration in *Minges*) (quoting Ind. Criminal Rule 21).

[7] Indiana Trial Rule 26(B) governs scope of discovery and reads in pertinent part as follows:

> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party ….
>
> ….
>
> (3) *Trial Preparation: Materials.* **Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (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.
>
> ….

> (4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (B)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:
>
> ….
>
> (b) **A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only** as provided in Rule 35(B)[1] 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**[.]

(Bold emphases added.)

[8] Akinribade argues that the consultation summary of his expert, who is not expected to be called as a witness at trial, is not discoverable because the State failed to make the requisite showing of either substantial need or exceptional circumstances under Trial Rule 26(B) and that, in any event, the summary is protected by the work-product privilege. "The purpose of the privilege is to protect the mental impressions and legal theories of attorneys and their clients." *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 78 (Ind. 2006). It "protects materials prepared by agents for the attorney as well as those prepared

[1] Trial Rule 35(B) governs physical and mental examinations of persons and is not applicable here.

by the attorney himself." *State ex rel. Keaton v. Cir. Ct. of Rush Cnty.*, 475 N.E.2d 1146, 1147 (Ind. 1985), *overruled on other grounds by Minges*, 192 N.E.3d 893.

[9] The State does not challenge Akinribade's claim that the consultation summary is work product, but it argues that he waived the corresponding privilege with respect to the entire summary "the moment [he] introduced the report during the deposition and provided a copy to the testifying witness." Appellee's Br. at 9. The work-product privilege "is a qualified privilege and, as such, may be waived." *Spears v. State*, 272 Ind. 647, 650, 403 N.E.2d 828, 830 (1980) (citing *United States v. Nobles*, 422 U.S. 225, 238 (1975))*, superseded by rule on other grounds*. What constitutes a waiver depends on the circumstances. *Nobles*, 422 U.S. at 240 n.14.

[10] We agree with the State that Akinribade waived any privilege with respect to page three of the summary by introducing it into evidence at Wilson's deposition—at that point, its contents were disclosed to the State, so that particular bell cannot be unrung. But as for the remaining six pages of the summary, we agree with Akinribade that the State failed to make the requisite threshold showing of either substantial need or exceptional circumstances under Trial Rule 26(B), and thus we do not even reach the question of whether Akinribade waived the work-product privilege.

[11] The State directs us to Indiana Evidence Rule 501(b), which states in pertinent part, "Subject to the provisions of Rule 502, a person with a privilege against disclosure waives the privilege if the person or person's predecessor while

holder of the privilege voluntarily and intentionally discloses or consents to disclosure of any significant part of the privileged matter." Evidence Rule 502(a) provides,

> **Intentional Disclosure; Scope of a Waiver.** When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

The State argues,

> Here, the intentional disclosure was made when Akinribade entered page 3 of his report into the record as Defense Exhibit B and provided a copy to [Wilson]. This occurred during a deposition in this cause (i.e., court proceeding). Although … Wilson was not testifying at trial when he disclosed the report to her, the text of Evidence Rule 502 does not limit its application to only disclosures made during trial testimony.

Appellee's Br. at 10. The State further asserts, "Akinribade's proffered report contained various observations about [Wilson's] lab report. By disclosing the author of the report's observations, Akinribade thus opened the door for the provision of the complete context of those observations." *Id*. at 11 (citation and quotation marks omitted).

[12] We note that the State cites no authority to support its assertion that a deposition is a court proceeding for purposes of Evidence Rule 502(a), and we leave that question for another day. We further note that both the State and the dissent overlook the fact that the issue before us is the discoverability of an expert's report during discovery, which is governed by the Trial Rules, not the admissibility of the report in a "proceeding[] in [a court] of this State[,]" i.e., a trial or a hearing before a judge, which is governed by the Evidence Rules. Ind. Evidence Rule 101(a). In other words, Evidence Rule 502 is inapplicable here.

[13] Accordingly, we affirm the trial court's ruling as to page three of the summary, reverse the ruling as to the remaining six pages as an abuse of discretion, and remand for further proceedings consistent with this decision.

[14] Affirmed in part, reversed in part, and remanded.

Weissmann, J., concurs.

May, J., dissents with opinion.

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May, Judge, dissenting with separate opinion.

[15] When Akinribade introduced into the record at a deposition one page of an expert report that was protected from discovery by a work product privilege, he opened the door to the discovery of all seven pages of the report pursuant to Indiana Evidence Rule 502(a). The majority allows Akinribade to escape the repercussions of this intentional partial disclosure of attorney work product by holding the State did not demonstrate substantial need and exceptional circumstances creating undue hardship in the obtaining of substantially equivalent materials as required to obtain privileged materials under Indiana Trial Rule 26. In so holding, the majority chooses to "not even reach the

question of whether Akinribade waived the work-product privilege." *Slip op*. at 6-7. I, in contrast, believe waiver is the dispositive issue. Akinribade ought not be allowed to have his proverbial cake and eat it too. Therefore, I respectfully dissent.

[16] Indiana Evidence Rule 501(b) states:

> Subject to the provisions of Rule 502, a person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder of the privilege voluntarily and intentionally discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

It is undisputed Akinribade offered one page of his expert's seven-page report into evidence and asked the State's witness to explain the contents of that page, without any of the context provided by the remainder of his expert's report. Thus, Evidence Rule 502(a), which governs intentional disclosure of attorney work product, is relevant here. That rule states:

> When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

[17] Applying that framework, when Akinribade intentionally[2] disclosed one page of his expert's report, the State was entitled to discovery of the undisclosed information in the remaining six pages of that expert's report, so that the entire seven pages could be, in fairness, considered together. Contrary to the majority's holding, the State did not need to clear the "substantial need or exceptional circumstances" hurdle of Trial Rule 26 for waiver to occur under Evidence Rule 502(a). The situation here is much like when a defendant opens the door to questions about his criminal record by referencing past criminal convictions during his testimony and then has waived any protection provided to him by Evidence Rule 404. *See, e.g., Oliver v. State*, 755 N.E.2d 582, 586 (Ind. 2001) ("[w]hen a party touches upon a subject in direct examination, leaving the trier of fact with a false or misleading impression of the facts related, the direct examiner may be held to have opened the door to the cross examiner to explore the subject fully" even if the evidence would have been otherwise inadmissible). One cannot unring a bell, and Akinribade ought not now be permitted to claim work product privilege protects a report after he entered a portion of it into evidence.

[18] The majority refuses to apply Evidence Rule 502(a), however, because "the State cites no authority to support its assertion that a deposition is a court proceeding for the purposes of Evidence Rule 502(a), and we leave that issue

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[2] Had Akinribade inadvertently left the report in a stack of papers provided to another party or erroneously disclosed it in an incorrectly-addressed email, we would not be here. *See* Indiana Rule of Evidence 502(b) (inadvertent disclosure of a document does not operate as waiver of work product privilege).

for another day." *Slip op*. at n.2. I believe it is an accepted fact that a deposition is a court proceeding and, thus, the State was not required to set forth specific argument to demonstrate something that is well-known in trial practice. However, to clarify this accepted litigation concept, I will explain in detail why a deposition is a court proceeding for the purpose of the Indiana Rules of Evidence.

[19] First, a deposition is a court proceeding for purposes of the Evidence Rules because the structure of a deposition follows that of a proceeding in a courtroom almost exactly, except for the presence of the judge. As illustrated in the case before us, a deposition is sworn testimony, during which parties can enter evidence into the record, cross-examine witnesses, and make objections. In addition, a deposition is transcribed by a court reporter. (*See*, *e.g*, App. Vol. II at 83 (witness sworn), 150 (Akinribade objects), 81 (court reporter's certificate), 135 (Defendant's Exhibit B, page 3 of 7 of Akinribade's expert's report)). Further, depositions are admitted during trial as an exception to the hearsay rule.[3] Evid. R. 804 (exception to hearsay rule allowing the use of deposition testimony in lieu of live testimony under certain circumstances); *Burns v. State*, 91 N.E.3d 635, 639 (Ind. Ct. App. 2018) (victim's testimony via

[3] Indiana Trial Rule 32 is entitled "Use of Depositions in Court Proceedings" and I acknowledge that title could be read as contrary to my position that a deposition is part of a court proceeding. However, as I argue herein, to treat a deposition as separate from a court proceeding is practically incorrect and leaves available the flawed analysis presented by Akinribade and accepted by the majority. Further, Indiana Trial Rule 32(A) notes a deposition must be admitted pursuant to the Indiana Rules of Evidence, and I believe within the Indiana Rules of Evidence a deposition is part of a court proceeding.

deposition admissible at trial when victim unavailable). Further, many things that occur during depositions can have an impact on proceedings later held in the courtroom. *See, e.g., Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006) ("witness statements made during depositions are generally understood and widely recognized as testimonial"); *Diggs v. State*, 531 N.E.2d 461, 464 (Ind. 1988) ("deposition is admissible if the deponent invokes his Fifth Amendment privilege to remain silent when called as a witness"), *cert. denied* 490 U.S. 1038 (1989); *Brittain v. State*, 68 N.E.3d 611, 617-19 (Ind. Ct. App. 2017) (deposition testimony of victim did not violate Brittain's confrontation right under the United States Constitution and the Indiana Constitution because Brittain had an opportunity to cross-examine victim during the deposition), *trans. denied*; *Berkman v. State*, 976 N.E.2d 68, 77-78 (Ind. Ct. App. 2012) (deposition testimony including defendant's confession to the crime were admissible at trial), *trans. denied*, *cert. denied* 571 U.S. 863 (2013); *Kalwitz v. Estates of Kalwitz*, 759 N.E.2d 228, 233 (Ind. Ct. App. 2001) (admission of two exhibits during a deposition waived the Dead Man's statute during trial), *reh'g denied*, *trans. denied*; *Mundy v. Angelicchio*, 623 N.E.2d 456, 462 (Ind. Ct. App. 1993) (parties' failure to object to questions and answers during a deposition waives objection to the admission of those portions of the deposition); *and Osborne v. Wenger*, 572 N.E.2d 1343, 1344 (Ind. Ct. App. 1991) (portion of expert's deposition testimony excluded because, during the deposition, Osborne did not lay a sufficient foundation to qualify the expert to give the opinion in question). Thus, because a deposition has all but one of the components of a proceeding in

a courtroom and its contents can be used in lieu of live testimony or evidence at a proceeding in a courtroom, a deposition is a court proceeding.

[20] My belief is further supported by the dictionary definitions of the terms at issue. Black's Law Dictionary defines "proceeding" as it relates to the law as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." BLACK'S LAW DICTIONARY (11th ed. 2019), "proceeding". The definition provides a more detailed explanation:

> 'Proceeding' is a word much used to express the business done in courts. **A proceeding in court** is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action,' but it **may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment.** As applied to actions, the term 'proceeding' may include — (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the remittitur, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort.

Id. (*quoting* The Law of Pleading Under the Code the Codes of Civil Procedure, Edwin E. Bryant, 3-4 (2nd ed. 1899)) (emphasis added). In addition, "[t]he

taking of testimony before trial" is the primary function of a deposition. *See* BLACK'S LAW DICTIONARY (11th ed. 2019), "deposition" ("witness's out-of-court testimony that is reduced to writing (usu[ally] by a court reporter) for later use in court or for discovery purposes"). Based on the legal definitions of these words, a deposition is a court proceeding and thus encompassed as such in Indiana Evidence Rule 502(a).

[21] Because Akinribade waived work-product privilege when he intentionally introduced a portion of his expert's report during a deposition, I would hold the trial court did not abuse its discretion when it refused to overturn its grant of the State's motion for discovery of that expert's entire report. Therefore, I respectfully dissent.