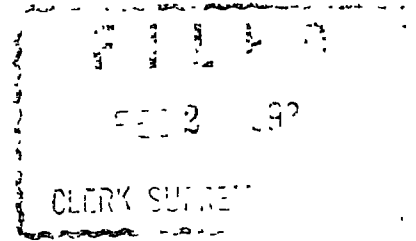


IN THE COURT OF APPEALS OF IOWA

No. 2-589 / 91-1446



STATE OF IOWA,

Appellee,

vs.

KRISTOPHER J. JOHNSON,

Appellant.

Appeal from the Iowa District Court for Polk County,
Richard A. Strickler, Judge.

Johnson appeals his convictions, following a jury trial, of murder in the first degree and robbery in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, John Sarcone, County Attorney, and Steven Foritano, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

The State charged Kristopher Johnson with first-degree murder and first-degree robbery involving the death of Don Conklin, a service station cashier, in Des Moines. Johnson filed a notice of intent to rely upon an intoxication defense. Later Johnson filed an application for transport to the office of Dr. Michael Taylor, a clinical psychologist, for a psychiatric evaluation. Johnson retained Dr. Taylor for the purpose of preparing a defense. The district court granted defendant's application. The State learned of the visit and moved to compel Dr. Taylor to reveal his findings.

At a July 29, 1991, hearing, defense counsel disclosed he did not intend to call Dr. Taylor as a witness at trial. Johnson then argued (1) disclosure of Dr. Taylor's findings could not be compelled under Iowa Rule of Criminal Procedure 13(3)(b) because Dr. Taylor would not be called as a witness, (2) the State could not compel an examination under rule 10(11)(b) for an intoxication defense, (3) it denies him due process and effective assistance of counsel to turn a doctor consulted for purposes of preparing a defense into an adverse witness at trial, and (4) it denies him equal protection because the State would not have known of the consultation if Johnson were not an indigent defendant who needed to apply for court approval of the examination. The district court sustained the motion to compel.

At trial, Conklin's coworker testified concerning the events leading to the victim's death by a shotgun blast and Johnson's subsequent arrest at the station. Dr. John Garfield, who testified for the defendant, stated Johnson's intoxicated state rendered him incapable of forming specific intent at the time of the offense. On rebuttal, Dr. Taylor testified to the contrary. Dr. Taylor listed about a dozen materials which he reviewed prior to trial. The list of reviewed materials included depositions from two alleged accomplices, James Hodson and Mark Lewis. Johnson objected to Dr. Taylor's testimony contending the testimony was based, in part, upon the depositions and reports of his accomplices. Dr. Taylor subsequently denied the accomplices' statements influenced his ultimate conclusion. The district court denied Johnson's motion to strike, noting Dr. Taylor was already precluded from quoting anything from Johnson or his accomplices.

The jury found Johnson guilty as charged, and the district court sentenced him to concurrent prison terms of life and up to twenty-five years on the respective counts. Johnson now appeals.

Defendant contends the district court lacked authority to compel Dr. Taylor to produce his report and testify against Johnson. He argues a physician-patient privilege precluded the State from using evidence of Taylor's report. The Iowa Supreme Court recently addressed this issue in State v. McDaniel, 485 N.W.2d 630 (Iowa 1992).

The supreme court held the State may call the first examining psychiatrist as a rebuttal witness at trial. Id. at 631-32. The State's application to compel Taylor to testify is not an attempt to compel discovery of a privileged matter. Johnson sought retention of Dr. Taylor for the purpose of preparing a defense. "A physician-patient privilege does not arise when a defendant is examined at state expense by a psychiatrist to assist in preparing a defense." Id. at 632; see State v. Craney, 347 N.W.2d 668, 671 (Iowa), cert. denied, 469 U.S. 884 (1984)). Johnson's earlier retention does not bar the State's access to Taylor. McDaniel, 485 N.W.2d at 633. "Otherwise a criminal defendant could block the State from testimony of likely experts by procuring as many examinations from as many experts as possible." Id.

In this case Johnson relied on an intoxication defense. Johnson contends the State was not entitled to use Taylor under Iowa Rules of Criminal Procedure 10(11)(c) and 13(3)(b). He argues when a defendant relies on an intoxication defense rather than an insanity or diminished responsibility defense, the district court lacked discretion to order the examination of defendant. We find no merit in this argument. Rule 10(11)(c) does not prohibit disclosure of a defendant's expert. Johnson also argues rule 13(3)(b) prohibits the State from calling Taylor as a rebuttal witness. As stated in McDaniel, nothing in Iowa Rule of Criminal Procedure 13(3)(b)

prevented the State from calling Dr. Taylor to testify in rebuttal. Id.

We also reject Johnson's equal protection contentions. The State learned of Taylor's evaluation of Johnson when it was served with defendant's application for transportation to Taylor's office. Johnson claims the State learned of Dr. Taylor only because he was indigent and could not afford bail therefore he was required to file an application for transport. The equal protection rights of defendant were not violated. Id.

II. At trial Dr. Taylor testified defendant could form the relevant specific intents. Defendant contends Dr. Taylor's opinion testimony was improper because it was based, in part, upon inadmissible hearsay. Johnson argues Dr. Taylor's testimony was based in part upon the reports and depositions of alleged accomplices of the defendant who were not called to testify by the State.

The admissibility of expert opinion testimony rests largely in the trial court's discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). We will reverse only on a clear showing of abuse of discretion. Id. In order to show an abuse of discretion, a party generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (citation omitted). As we examine the trial court's ruling, we are mindful "[t]he general rule in this

jurisdiction is one of liberality in the admission of opinion evidence." State v. Hummell, 228 N.W.2d 77, 82 (Iowa 1975).

When asked what materials he had reviewed prior to trial, Dr. Taylor noted, inter alia, the depositions of two alleged accomplices. Later Dr. Taylor clarified he had read these materials but they had no impact on his opinion regarding whether defendant could form specific intent. Dr. Taylor's opinion was not based on inadmissible hearsay. We conclude the trial court did not abuse its discretion in allowing Taylor to testify about defendant's ability to form specific intent.

AFFIRMED.