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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed April 22, 1987 94
vs.	)	
DOUGLAS ALAN DANNER,	)	7-12 86-145
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Marshall County (No. 85A1501), Sandra J. Holien, District Associate Judge.

The defendant appeals from his conviction, following a bench trial, of theft in the third degree. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Mark Lindholm, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

DONIELSON, P.J.

The defendant appeals from his conviction, following a bench trial, of theft in the third degree. At defendant's trial, the trial court refused to allow Jeanette Clark to testify due to the defense counsel's failure to notify the State that she would be called as a defense witness. The defendant contends that he was denied effective assistance by his trial counsel's failure to notify the State of his intention to call Ms. Clark. We affirm.

At defendant's bench trial, the only issue before the court was whether he had assisted Jeanette Clark in stealing certain merchandise from a K-Mart store. After the State had rested its case, defense counsel attempted to call Jeanette Clark as a witness. Defense counsel had failed to list Ms. Clark as an alibi witness and did not notify the State that she would testify on the defendant's behalf. The trial court refused to allow Ms. Clark to testify based upon defense counsel's failure to give timely notice to the State pursuant to Iowa Rules of Criminal Procedure 12(3) and 12(4). After the defendant testified, defense counsel again requested that Ms. Clark be permitted to testify. The trial court denied this request but allowed defense counsel to make an offer of proof concerning Ms. Clark's anticipated testimony. Defense counsel stated that Ms. Clark would have testified that she had acted alone in the K-Mart theft. The trial court subsequently found the defendant guilty as charged.

Generally, our review of criminal proceedings is on assigned error. State v. Hansen, 344 N.W.2d 725, 728 (Iowa App. 1983). Where, however, a criminal defendant, such as in the present case, raises issues involving the violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. Id.

The defendant contends that defense counsel's failure to comply with the provisions of Iowa Rules of Criminal Procedure 12(3) and 12(4) to preserve

and insure defendant's right to call Jeanette Clark as a witness constituted ineffective assistance of counsel. The defendant was charged with the offense of theft in the third degree in that he assisted Jeanette Clark in the theft of merchandise at the K-Mart store. Ms. Clark had previously plead guilty to theft in the third degree. The defendant denied that he assisted Ms. Clark in the theft of the merchandise. The defendant argues that Ms. Clark was the only person who could corroborate his testimony and that due to defense counsel's "total disregard" for the provisions of rules 12(3) and 12(4) Ms. Clark was not permitted to testify.

The general principles we apply in considering claims of ineffective assistance of counsel are well established and will not be repeated here. See State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984); Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983); Hinkle v. State, 290 N.W.2d 28, 30-31 (Iowa 1980). Generally, we will decline to decide ineffective assistance of trial counsel claims on direct appeal where the record is inadequate to address the contentions asserted. State v. Whitsel, 339 N.W.2d 149, 157 (Iowa 1983). Instead, such issues will generally be reserved for postconviction relief application. Id. The purpose of reserving ineffective assistance claims for postconviction relief is to allow the defendant an opportunity to fully develop an evidentiary record and to provide the attorney charged with ineffective assistance his or her day in court. State v. White, 337 N.W.2d 517, 519 (Iowa 1983).

The sole question before us is whether defense counsel was ineffective in failing to comply with Iowa Rules of Criminal Procedure 12(3) and 12(4). Rule 12(3) provides that at or before the time of the taking of a deposition of a prosecution witness, "the defendant shall file a written list of the names and addresses of all witness expected to be called for the defense . . . and the defendant will have a continuing duty before and throughout trial promptly

to disclose additional defense witnesses." Rule 12(4) provides that if the defendant takes a deposition of a prosecution witness but has not disclosed the list of defense witnesses expected to be called at least nine days before trial, the court may order the exclusion of the testimony of any such witness if no other remedy is adequate to protect the State from undue prejudice.

In State v. Marchellino, 304 N.W.2d 252 (Iowa 1981), the Iowa Supreme Court addressed the question of the scope of a defendant's duty under rule 12(3). In Marchellino, the defendant, in an attempt to bolster his testimony that he did not participate in an assault, called a witness to testify on his behalf. 304 N.W.2d at 253. The county attorney objected, stating that the defendant had failed to comply with rule 12(3). Id. The Iowa Supreme Court held that even though the defendant knew of the existence of the defense witness long before trial, if the defendant did not actually expect to call such witness to testify at an earlier time, the disclosure at the time of trial did not violate rule 12(3). Id. at 254-55.

In the present case the record fails to show when defense counsel actually expected to call Ms. Clark to testify. Defense counsel did admit that he had erred in failing to disclose Ms. Clark as a defense witness and that it had been an oversight. Yet the record fails to reveal when defense counsel actually expected to call Ms. Clark. Keeping in mind the Iowa Supreme Court's rationale in Marchellino, it would be very important to discern whether defense counsel expected to call Ms. Clark from the beginning or whether she was expected to be called only just before trial. Though it is not entirely clear from the record, apparently Ms. Clark had plead guilty to theft in the third degree sometime before the defendant's trial. It is not clear whether Ms. Clark was unavailable as a witness before defendant's trial or whether she was unwilling to testify until her own case had been resolved.

Because we do not believe that the record is sufficient to adequately evaluate the defendant's claim of ineffective assistance of counsel, we hold that defendant's claim may be more properly considered in an application for postconviction relief.

AFFIRMED.