

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3022-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CORNELL CLARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD G. GREENWOOD, Reserve Judge, and MICHAEL G. GRZECA, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Cornell Clark appeals a judgment convicting him of delivering cocaine and an order denying his motion for a new trial. He argues that the trial court should have excluded testimony from Clark's aunt because she

was not disclosed on the State's witness list, and that the court committed plain error when it misstated a stipulation that the substance was cocaine. We reject these arguments and affirm the judgment and order.

¶2 As officers were taking Clark into custody on an unrelated charge, one of the officers observed Clark place an object in his aunt's jacket pocket. Another officer retrieved the item, which was later determined to be cocaine.

¶3 The State called Clark's aunt, Shirley Gentry, to testify that Clark put the cocaine in her pocket. Gentry was not listed on the prosecutor's witness list, contrary to WIS. STAT. § 971.23(1)(d) (1997-98). Nonetheless, the trial court allowed Gentry's testimony. The preferred sanction for failure to comply with the disclosure rule is to grant the opposing party a recess or continuance to allow a reasonable opportunity for investigation, cross-examination or rebuttal. *See Kutchera v. State*, 69 Wis. 2d 534, 542-43, 230 N.W.2d 750 (1975). Clark, however, did not request a continuance or a recess, suggesting that he was not surprised by Gentry's testimony. His failure to request a continuance also deprived the trial court of an opportunity to identify and cure any prejudice that arose from her testimony.

¶4 A defendant must show either surprise or prejudice to justify striking a witness's testimony. Clark established neither surprise nor prejudice from his aunt's testimony. Clark knew Gentry was present when the offense occurred. Her name and address appear in the complaint and were independently known by Clark. The police reports detail her role in the transaction. As in *State v. Koopmans*, 202 Wis. 2d 385, 550 N.W.2d 715 (1996), Gentry's testimony varied little from the officers' and could have been anticipated based on the officers' reports. The record provides no basis for believing that timely notice would have

assisted the defense in challenging Gentry's testimony. Therefore, the error in omitting her name from the witness list was harmless and we see no trial court error by permitting her to testify. *See id.* at 394, 396.

¶5 Before trial, the defense stipulated that the package found in Gentry's pocket was cocaine. After the jury was sworn, the court read some preliminary instructions that included a description of what constitutes evidence:

Let me tell you evidence is first the sworn testimony of witnesses ... exhibits the court has received ... any facts to which the lawyers have agreed or stipulated Now, they did stipulate to something, and the stipulation is that the material involved in the passage or the transfer was in fact cocaine. The lawyers stipulated to that, so I can tell you that right now.

¶6 The trial court's recitation of the stipulation could be construed in two ways. It could be construed as a stipulation that the material was cocaine, the correct interpretation. It could also be construed as a stipulation that cocaine was passed or transferred. Viewing the record as a whole, we conclude that there is no possibility the jury misconstrued the stipulation. Immediately after the preliminary instructions, the parties' opening statements clarified that the stipulation was "that the substance that was found in the plastic baggie was in fact cocaine." The only contested issue at trial was whether Clark slipped the cocaine into Gentry's pocket. The closing arguments also focused the jury's attention on whether a delivery occurred. In the context of the entire trial, no reasonable juror could have construed the trial court's recitation of the stipulation as a concession that a delivery occurred.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

