COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2646-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAROLD A. KUIK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Harold Kuik appeals a judgment convicting him of four counts of delivering a controlled substance and one count of possession with intent to deliver. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. First, Kuik argues that his

counsel was constitutionally ineffective because counsel never subpoenaed Kuik's son, Benjamin, to testify at trial. Kuik contends that Benjamin may have taken responsibility for the drugs found in their home or he may have invoked his Fifth Amendment rights, causing the jury to believe he was responsible. Second, he claims his attorney failed to adequately discuss the case with Kuik before trial, did not give Kuik the opportunity to listen to audiotapes of the drug transactions and did not provide Kuik with copies of the police reports. Because we conclude that Kuik has established neither deficient performance nor prejudice, we affirm the judgment and order.

¶2 To establish ineffective assistance of counsel, Kuik must show that his counsel's performance was deficient and prejudicial to his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To establish prejudice, Kuik must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** at 694.

¶3 Kuik's defense to the possession charge was that he and his wife had moved out of the residence two weeks before the search warrant was executed and he did not know that drugs were in his residence. His son, Benjamin, was at the residence at the time the warrant was executed and he was also arrested. At the time Kuik spoke with his trial counsel, however, Benjamin's whereabouts were not known. Kuik's trial counsel cannot be faulted for failing to subpoena a witness who could not be found.

¶4 In addition, Kuik has not established prejudice from counsel's failure to subpoena Benjamin. Kuik presented no evidence that Benjamin would take responsibility for the drugs found in the residence. Even if he did, the State presented substantial evidence that Kuik sold drugs out of the dwelling. By Kuik's own testimony, he lived in the dwelling during the time several of the drug sales took place. Kuik has not established that counsel's failure to subpoena Benjamin had any significant impact on the verdict.[1]

¶5 Likewise, Kuik has not established any prejudice from his counsel's failure to provide him with copies of the police reports, to allow him to listen to the audiotapes of the drug transactions or to discuss the case with him before trial in greater detail. To establish prejudice, Kuik would have to show that additional preparation, the police reports or the audiotapes would have provided evidence that undermined the State's witnesses' credibility or provided some exculpatory information. Kuik's trial attorney testified that he listened to the audiotapes and found them unintelligible and useless. They were not admitted into evidence. Kuik has identified nothing significant in the police reports and has not indicated how additional meetings with his attorney would have affected the outcome of the trial.

[1] Kuik also suggests that, if Benjamin invoked his Fifth Amendment rights, the jury may have drawn the inference that Benjamin was responsible for the drugs in the dwelling. A jury may not draw any inference from a witness's claim of privilege, and the preferred practice is to require a witness to invoke the privilege outside of the jury's presence. *See* ***State v. Heft***, 185 Wis. 2d 288, 302, 517 N.W.2d 494 (1994). Furthermore, the drugs may be possessed by more than one person. Any inference that Benjamin possessed the drugs would not necessarily exculpate his father.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).