

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 15, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 00-3194**

**Cir. Ct. No. 96-CF-442**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL A. MYERS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Outagamie County:  
JOHN A. DES JARDINS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Myers appeals an order<sup>1</sup> denying his postconviction motion in which he sought relief from a judgment convicting him of sexually assaulting his son and exposing the child to harmful material. He argues that his trial counsel was ineffective for two reasons: (1) he should have stipulated to the element “for the purpose of sexual gratification” in order to bar other acts evidence designed to show his motive or intent; and (2) he should have compelled the State to narrow the time frame for these crimes from the eleven-month span recited in the complaint to enable Myers to present an alibi defense. The trial court concluded that Myers was not prejudiced by his counsel’s failure to stipulate to motive or intent because the other act would have been admitted for other purposes. The court refused to allow a postconviction hearing on the challenge to the complaint. We conclude that Myers was not prejudiced by his counsel’s failure to stipulate to the “for the purpose of sexual gratification” element because the testimony that was allowed by virtue of the failure to stipulate was not sufficiently prejudicial to undermine our confidence in the verdict. We also conclude that the record on appeal does not establish that the trial court improperly exercised its discretion when it refused to hold a postconviction hearing on trial counsel’s failure to challenge the complaint.

¶2 To establish ineffective assistance of counsel, Myers must show deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, he must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would

---

<sup>1</sup> The notice of appeal also purports to appeal the underlying judgment of conviction. Myers did not timely commence postconviction proceedings from the initial judgment. Therefore, this appeal is limited to the order denying his motion under WIS. STAT. § 974.06.

have been different. *Id.* at 694. A reasonable probability is one that undermines confidence in the outcome. *Id.*

¶3 Myers has not established a reasonable probability that his counsel's failure to stipulate to the "for purpose of sexual gratification" element affected the trial's outcome. As a result of the failure to stipulate, the prosecutor presented the following testimony from the child's mother:

Q During the time that you and Michael were together in your relationship, did he ever express to you a sexual fantasy involving children?

A Yes.

Q What was that fantasy that he expressed?

A That he wanted me—he wasn't working at the time, and he wanted me to take in baby-sitting jobs so that possibly he could videotape them doing things.

Q About how old do you think [her son] was when he said those things?

A He had to be approximately two to three years old.

¶4 As Myers himself noted, this testimony does not establish that he was interested in children sexually. Videotaping children "doing things" does not suggest improper conduct. The testimony was very brief, taking up less than a page of the 400-page trial transcript. The prosecutor's closing argument did not mention that testimony. Because Myers has not established a reasonable probability that the verdict resulted from that testimony, he has not established any prejudice from his trial counsel's failure to stipulate to the "for the purpose of sexual gratification" element.

¶5 The record before this court does not establish an erroneous exercise of the trial court's discretion for refusing to conduct a postconviction hearing on

Myers' claim that his counsel was ineffective for not challenging the complaint. The court may refuse to hold a postconviction hearing if the motion fails to raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates that he is not entitled to relief. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Myers has not provided this court with a transcript of the hearing at which the trial court determined that the *Machner*<sup>2</sup> hearing would be limited to the first issue. Without a transcript, this court must assume that the trial court's discretionary decision was supported by the missing transcript. *See Oxmans' Erwin Meat Company v. Blacketer*, 86 Wis. 2d 683, 689, 273 N.W.2d 285 (1979). The motion itself did not provide sufficient information to suggest that providing a more specific date for the offense could have resulted in a credible alibi defense.

*By the Court.*—Order affirmed.

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

---

<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

