APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 22-2393

TYLER A. GONZALES, formerly known as Tyler A. Montour,
Petitioner-Appellant,

v.

CHERYL EPLETT, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 1:19-cv-01604-WCG — **William C. Griesbach**, *Judge*.

ARGUED MARCH 31, 2023 — DECIDED AUGUST 9, 2023

Before EASTERBROOK, RIPPLE, and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge*. Tyler Gonzales[1] was convicted in 2015 of charges arising out of a shooting in a parking lot. He is currently serving a 25-year prison sentence, which will be followed by 15 years' extended supervision. Believing that he

[1] Throughout most of the proceedings, petitioner was using the name Tyler A. Montour. He changed his name at some point, however, and is now known as Tyler A. Gonzales. We use his current name.

received constitutionally ineffective assistance of counsel at his trial, he has turned to federal court for a writ of *habeas corpus*. The district court concluded, however, that Gonzales has not satisfied the stringent requirements for such relief, and so it denied his petition. This is one of those cases in which the standard of review matters. We are deeply troubled by the performance of defense counsel. But 28 U.S.C. § 2254 requires us to defer to a state court's decision unless it is not only wrong, but unreasonable. We conclude that the state court did not stray beyond that extreme limit, and so we affirm.

I

The events underlying this case unfolded during the early morning hours of June 12, 2015. Petitioner Gonzales had gotten into an altercation with Adrian Valadez and Blake Kruizenga at the Hawk's Nest Bar. After a heated argument, Gonzales left the bar and got into a car with his brother-in-law, Pedro Gonzalez. As Pedro Gonzalez drove away, Gonzales shot from the passenger window of the car toward Kruizenga and Valadez, who were standing in the parking lot. Gonzales fired the gun about six or seven times and hit Kruizenga in the leg.

Charged under state law with attempted first-degree intentional homicide and being a felon in possession of a firearm, Gonzales was offered an opportunity to plead guilty to recklessly endangering safety and unlawful possession of a firearm for a recommended ten-year sentence of confinement. Under Wisconsin law, recklessly endangering safety is a lesser-included offense of attempted first-degree intentional homicide, meaning that a defendant who commits attempted intentional homicide necessarily commits reckless

endangerment as well, but the lesser charge carries a milder punishment.

Attempted first-degree intentional homicide requires the intent to cause the death of another human being and steps toward the commission of that crime. See Wis. Stat. § 940.01 (defining first-degree intentional homicide); Wis. Stat. § 939.32 (defining attempt). To show intent, the prosecution must prove that the defendant "has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Wis. Stat. § 939.23. First-degree recklessly endangering safety is defined as "recklessly endanger[ing] another's safety under circumstances which show utter disregard for human life." Wis. Stat. § 941.30. Attempted first-degree intentional homicide carries a maximum prison sentence of 40 years, as compared with first-degree recklessly endangering safety, for which the sentence is capped at 7.5 years. The maximum sentence for unlawful possession of a firearm is five years' confinement.

After conferring with his defense counsel, Melissa Frost, Gonzales rejected the plea deal and requested a speedy trial. Frost advised Gonzales that she believed they should seek a full acquittal. Her assessment rested heavily on her prediction that the state was going to have a hard time getting the central witnesses, Valadez and Kruizenga, to testify, particularly if Frost and Gonzales succeeded in securing an early trial date. Kruizenga had absconded from probation and the state was still looking for him. All the witnesses had lengthy felony records, and their accounts of the evening varied. They were drunk and there were inconsistencies in their stories about where they were standing, the color of the car, how many shots were fired, and whether there was a third passenger in

the car. Frost believed she could capitalize on witness unavailability and the impeachment fodder to create reasonable doubt about whether Gonzales was the shooter.

It turned out that Frost had been far too optimistic. At trial, it quickly became clear that all the state's witnesses had been located, were cooperating, and were going to testify that Gonzales was the shooter. Worse yet, Pedro Gonzalez had been offered immunity and was prepared to testify that he drove the car while Gonzales shot at Valadez and Kruizenga. The state's case was thus impressive, featuring three eyewitnesses, all of whom would identify Gonzales as the shooter.

Seeing the writing on the wall at the end of the second day of trial, Gonzales confidentially admitted to Frost that he was the shooter. He asked her if he should testify and explain that he was not trying to hit anyone and was just trying to scare Valadez and Kruizenga. Frost advised Gonzales not to do that. By that point in the trial, she thought that Gonzales's testimony would guarantee conviction; he would be caught dead to rights on the unlawful possession count and, even if he managed to undermine the state's showing of intent to commit attempted intentional homicide, he very well could face conviction on that count as well. Frost had reserved her opening statement until after the state's case-in-chief, but she did not make any adjustments to her presentation of the case, despite Gonzales's private confession to her. She proceeded with their "all-or-nothing" strategy, pursuing acquittal rather than trying to focus the jury on the reckless-endangerment count. The gamble did not work: the jury convicted Gonzales of the more serious crime.

Frost expressed discomfort with her strategy as early as sentencing. She described the trial as bizarre and felt

responsible for not pursuing the lesser-included offense. And our review of the record indicates that there is a great deal to criticize in her performance. Her cross-examination of the state's witnesses failed to bring out material inconsistencies in the testimony; worse, it invited the state's witnesses to reiterate their testimony that Gonzales was armed and shooting toward them. In addition, rather than coming up with a revised trial plan in the evenings, she wasted time reviewing jail calls to see if there was evidence of a side deal or an undisclosed police report. Her cross-examination of Pedro Gonzalez also failed to shake his story.

After sentencing, the court appointed a new lawyer to represent Gonzales, and new counsel filed for post-conviction relief as permitted by Wisconsin law, Wis. Stat. § 974.02, raising a claim of ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984). The Wisconsin trial court held an evidentiary hearing at which it examined Frost's performance. Both Gonzales and Frost testified at the hearing. Frost fell on her sword. She testified that it "never even crossed [her] mind" to argue for the lesser-included offense, that she had tunnel vision about pursuing the acquittal, and that she had felt no need to adjust her trial strategy even when it became clear that the state's witnesses were all available. Gonzales testified that he and Frost never seriously discussed the lesser-included offense.

It also turned out that three jurors told Frost after the trial that they did not understand the difference between attempted first-degree intentional homicide and first-degree recklessly endangering safety. They disclosed that the jury just picked attempted intentional homicide for the conviction because they knew Gonzales had been the one who pulled the

trigger. Gonzales wound up with a sentence of 25 years in prison, to be followed by 15 years' extended supervision. Of that, 20 years was for the attempted first-degree intentional homicide, twice what the state had offered before trial, and nearly three times the statutory maximum Gonzales would have faced if the jury had convicted on the lesser-included offense.

The Wisconsin trial court concluded that Frost's performance, taken as a whole, did not fall below the constitutionally permissible minimum. Pursuing acquittal was reasonable, it concluded, based on the character of the eyewitnesses, and it thought that Frost's decision not to shift her strategy mid-trial fell within the boundaries of acceptable legal strategy. It agreed with Frost that Gonzales's suggested testimony would have guaranteed a conviction. The court also suggested that it would have been difficult for Frost to argue both for acquittal and, in the alternative, for a conviction only on the lesser-included offense. Even though inconsistent defenses are not strictly forbidden, the court observed that they are often incredible to a jury. The court also briefly addressed prejudice and concluded that there was sufficient evidence to convict Gonzales of attempted intentional homicide, and so the outcome would not have changed even if Frost had adjusted her approach.

The Wisconsin appellate court affirmed the trial court's bottom line, but it rested its opinion solely on Frost's performance, declining to reach the issue of prejudice. Gonzales's lawyer then filed a no-merit petition with the Supreme Court of Wisconsin pursuant to Wisconsin's Rules of Appellate Procedure. See Wis. Stat. § 809.32(4). Gonzales personally did not avail himself of the option of filing a supplemental petition.

The state supreme court denied the no-merit petition in a standard order.

Gonzales then turned to federal court with a petition under 28 U.S.C. § 2254 for a writ of *habeas corpus*. The state moved to dismiss the petition for failure to exhaust his state remedies. It contended that Gonzales's failure to file a supplemental petition in the state supreme court was fatal to his request for *habeas corpus* relief. The district court denied the motion to dismiss, but it ultimately ruled in the state's favor on the ground that the state appellate court (the last state tribunal to issue a fully reasoned opinion, see *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)), had not been unreasonable when it found that Frost's performance was not constitutionally deficient. It also expressed skepticism that Gonzales could demonstrate prejudice. Nonetheless, it found that reasonable jurists could reach a contrary decision, and so it issued a certificate of appealability. This appeal followed.

II

In this court, the state begins by reiterating its exhaustion argument, which if accepted would lead to a finding of procedural default for Gonzales. To reach the merits of Gonzales's petition, we must ensure that he fairly presented the claim "through one complete round of review in state court." *Brown v. Eplett*, 48 F.4th 543, 552 (7th Cir. 2022) (citing *Baldwin v. Reese*, 541 U.S. 27, 29 (2004)). We assess *de novo* the district court's ruling on procedural default. *Hicks v. Hepp*, 871 F.3d 513, 530 (7th Cir. 2017).

The state argues that Gonzales defaulted by failing to comply with the petition procedure established by Wisconsin law. See Wis. Stat. § 809.32. If an attorney concludes that a direct

appeal to the Supreme Court of Wisconsin lacks "any arguable merit within the meaning of *Anders v. California*, 386 U.S. 738 (1967)," the attorney must file a no-merit petition. That petition must include a statement of the case, and counsel must append the lower court opinions. If the defendant disagrees with that assessment and believes the appeal has merit, he or she must then file a supplemental petition stating the issues for review and an argument for why review is proper. See Wis. Stat. §§ 809.32(1) & (4). Gonzales did not file a supplemental petition; instead, he relied on his attorney's no-merit filing.

While this does not strictly comply with Wisconsin procedural rules, the failure to file a supplemental petition does not automatically doom a *habeas corpus* petition. The record as a whole is what matters. The federal court should determine "whether the petitioner has fairly presented his federal claim to the state court," looking at factors such as (1) the presence of a federal constitutional analysis; (2) the citation to state court cases that apply constitutional analysis; (3) the framing of the claim in accordance with "a specific constitutional right"; and (4) the use of a fact pattern "that is well within the mainstream of constitutional litigation." *Brown*, 48 F.4th at 552. "All four factors need not be present to avoid default … ." *Id.* (quoting *Whatley v. Zatecky*, 833 F.3d 762, 771 (7th Cir. 2016)).

These considerations weigh in Gonzales's favor. Even without a supplemental petition, the state supreme court had a comprehensive account of the case. The no-merit petition filed by Gonzales's attorney alerted the court to the potential constitutional arguments in the case and thus did what an *Anders*-type brief is intended to do. The statement of facts

explained both the deficiencies in Frost's performance and the prejudice Gonzales faced as a result. The petition also cited the relevant state-court cases, including *State v. Machner*, 92 Wis. 2d 797 (Wis. Ct. App. 1979), which establishes the Wisconsin post-trial procedure for dealing with ineffective assistance of counsel claims, and *State v. Maloney*, 2005 WI 74, a case from the Supreme Court of Wisconsin that follows the *Strickland* standard. Even though the no-merit petition did not directly engage in a federal constitutional analysis, not every factor needs to be present to preserve a petitioner's claim. We have considered the state's assertions otherwise, including its analogies to other cases involving Wisconsin no-merit petitions, and find none persuasive. We thus reject the procedural-default argument and move to the merits of Gonzales's petition.

III

The standard of review for a *habeas corpus* petition is established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We may issue the writ only if the state-court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Though we must defer to any reasonable state court decision, our review of the district court's decision is *de novo*. See *Bell v. Hepp*, 70 F.4th 385, 389 (7th Cir. 2023). And since "AEDPA deference only applies to issues that the last reasoned state court decision reached on the merits," we conduct

a *de novo* review of issues that were not reached on the merits. *Dunn v. Jess*, 981 F.3d 582, 591 (7th Cir. 2020).

But before we turn to AEDPA, it is important to understand Gonzales's underlying claim. The Sixth Amendment right to the assistance of counsel is a right to *effective* assistance. *Strickland*, 466 U.S. at 686. In order to show ineffectiveness, the defendant must prove that (1) "counsel's representation fell below an objective standard of reasonableness … under prevailing professional norms," and (2) "the deficient performance prejudiced the defense." *Id.* at 687–88. Even without AEDPA, this is a tough standard to meet, given the Supreme Court's admonition that "[a] court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). Layering AEDPA on top of that standard makes it even harder to prevail on this type of claim.

The central question in this case is whether Frost provided constitutionally ineffective assistance, taking her performance as a whole. Gonzales argues that Frost exhibited plan-continuation bias, or "tunnel vision"; she remained doggedly focused on acquittal even after it became impossible, never updating her understanding of the evidentiary landscape or adapting to the realities of the case's developments, and her cross-examinations were a disaster. Gonzales contends that Frost's decisions were unreasoned, rather than the product of intentional strategy. This distinction is significant; the Supreme Court has told us to defer to an advocate's "strategic choices about which lines of defense to pursue," but only if those choices are "based on professional judgment" and

"assumptions [that] are reasonable." *Id.* at 681 (internal quotations omitted).

To evaluate Frost's performance and her failure to pivot, it is helpful to examine her decisions at three critical moments: 1) before trial, when she advised Gonzales against taking the plea offer; 2) mid-trial, when she continued to pursue acquittal even though she knew that all the state's witnesses were available, and she also had Gonzales's confidential confession; and 3) at closing argument, when she did not argue for the lesser-included offense.

For the first point, we now know in hindsight that it was a mistake for Gonzales and Frost to pass on the plea deal that was offered. But Frost's choices at that time fell within the wide range of professional judgment and reasonable assumptions. Frost considered the availability of the eyewitnesses, their credibility, the inconsistencies in their accounts of the shooting, and other available impeachment fodder such as the eyewitnesses' lengthy criminal records. As the district court noted, Frost also accounted for the "prosecutor's trial skills and his potential for alienating the jury." Her choice to proceed to trial and pursue full acquittal thus passed muster under the applicable deferential standard.

Frost's choices become less defensible as we move along the timeline. As of mid-trial, she continued to pursue acquittal even though she knew by then that the state's case was much stronger than she had anticipated. Her expectation that the key eyewitnesses would be unavailable or impeachable was foiled; all eyewitnesses appeared in court and named Gonzales as the shooter, including Gonzales's own brother-in-law. Gonzales himself sensed that things were not going well, and so he offered his own testimony, which would have admitted

to reckless endangerment while undermining his criminal intent for homicide. Since Frost had reserved her opening statement, she was free to incorporate these changes into her presentation to the jury. She had managed to elicit evidence that would have helped her build a case for the lesser-included offense. There were statements from a ballistics officer that bullets were recovered from targets that were low to the ground, and Kruizenga was hit low to the ground, just slightly above his ankle. Another testifying officer explained that someone firing a gun with the intent to kill would aim at "center mass." Frost could have emphasized this evidence to illustrate that Gonzales was aiming low, with no intent to kill.

But that pivot would have been difficult, and we must resist the lure of hindsight. Frost reasonably could have concluded, in the exercise of her professional judgment, that such a pivot would have been dangerous for Gonzales. It would have guaranteed his conviction on at least two counts—reckless endangerment and unlawful possession of a firearm. And through cross-examination she had brought out problems with witness credibility and inconsistencies in eyewitness accounts. As the state pointed out at oral argument, her cross-examinations elicited several significant admissions from the state's eyewitnesses. Those admissions included Pedro Gonzalez's concession that he lied to police when they questioned him the day after the shooting, his forfeiture of an unlawfully owned gun, and his deletion of text messages between him and petitioner Gonzales from the night of the shooting. Frost also elicited the facts that Pedro Gonzalez was offered immunity for his testimony, and that he had a motive to harm Kruizenga and Valadez in retaliation for their involvement in a home invasion at his house. Frost's cross-examinations also brought out Valadez's admission that he told police that

Pedro Gonzalez was a passenger in the car, not the driver. Though ultimately ineffective, these cross-examinations aligned with Frost's acquittal strategy by creating motive and opportunity for Pedro Gonzalez, rather than petitioner Gonzales, to be the shooter. In sum, we can only speculate whether Frost realistically could have shifted her strategy at that point. She had only bad choices, and she may have chosen the best of that bad lot.

The final stage, the closing argument, is the most vulnerable part of Frost's performance. Closing arguments can be significant game changers. Indeed, "no aspect of [partisan] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Herring v. New York*, 422 U.S. 853, 862 (1975). And we know that three jurors told Frost after the trial that they did not understand the difference between attempted intentional homicide and reckless endangerment during their deliberations. Had Frost been able to clarify the difference, it might have had an effect.

But the simple reality of the situation is that the state had put on a strong case and boxed Frost into a difficult position. The risks of conceding that Gonzales was the shooter were huge, given the evidence supporting the attempted homicide charge, including Kruizenga's testimony that he saw straight down the barrel of Gonzales's gun. Even more damning, Kruizenga was actually hit by a bullet. And as the state trial court emphasized, juries are often skeptical about inconsistent defenses, and so any argument in the alternative about the lesser-included offense might have weakened Gonzales's case. If we give Frost every benefit of the doubt, it is possible that there is just enough to support her decisions at each turn.

Nonetheless, Frost's overall performance is hard to justify, and we are greatly troubled that the idea of strategic adaptation to the state's actual case "never even crossed her mind." Gonzales also makes a good point about plan-continuation bias. An attorney's choice rigidly to pursue a losing strategy certainly can support an ineffective assistance of counsel claim. If we were writing on a clean slate, this would be a close case.

But we are not the primary decisionmakers. This is a *habeas corpus* action, and our role is severely limited by AEDPA. For ineffective assistance of counsel arguments, the Supreme Court has said that the AEDPA layer makes our assessment of counsel's performance (and of prejudice, if that were at issue) doubly deferential. See *Richter*, 562 U.S. at 105. First, as we already have noted, we presume that "counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* at 104. Second, we must defer to the state court's assessment of counsel's performance unless "there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. Gonzales cannot clear the second of those hurdles. Even if we might have found that this is one of the unusual cases in which counsel's performance was constitutionally deficient, we cannot say that there is no possibility for fairminded disagreement on that point.

It is worth noting, as we conclude, that the state trial court (whose findings strongly influenced the state appellate court) seems to have reached its decision in large part because of the strength of the state's case when all was said and done. It thought that there was little Frost could have done, in the face of that evidence. As we already have discussed, the record

showed, with little contradiction, that Gonzales shot in the direction of the eyewitnesses. This undermines his insistence that he was shooting at the ground and not trying to hit anyone. And the state trial court reasonably concluded that the act of shooting at a person supports a conviction for attempted first-degree intentional homicide. The court put the point bluntly, using language that mirrors the Wisconsin definition of criminal intent: "Anyone with half a brain knows that if you fire a gun in the direction of somebody, their death could occur, that you are aware that their death could occur and is probable to occur."

Given the standards that bind us, we conclude that Gonzales has not advanced a successful claim for *habeas corpus* relief based on ineffective assistance of counsel. Though Gonzales marshals strong arguments, we cannot say that the state appellate court unreasonably applied *Strickland* or relied on unreasonable determinations of fact.

IV

We AFFIRM the district court's denial of Gonzales's petition for a writ of *habeas corpus*.

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

August 9, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*
KENNETH F. RIPPLE, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*

No. 22-2393	TYLER A. GONZALES, formerly known as Tyler A. Montour, Petitioner - Appellant v. CHERYL EPLETT, Warden, Respondent - Appellee
Originating Case Information:	
District Court No: 1:19-cv-01604-WCG Eastern District of Wisconsin District Judge William C. Griesbach	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

Clerk of Court

form name: **c7_FinalJudgment** (form ID: **132**)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 6, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 22-2393

TYLER A. GONZALES, formerly known as Tyler A. Montour,
Petitioner-Appellant,
v.
CHERYL EPLETT, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 1:19-cv-01604-WCG

William C. Griesbach, *Judge*.

O R D E R

On consideration of the petition for rehearing filed by Petitioner-Appellant on September 21, 2023, all members of the original panel have voted to deny the petition for panel rehearing.

Accordingly, the petition for rehearing is hereby DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TYLER A. MONTOUR,

Petitioner,

v. Case No. 19-C-1604

CATHY A. JESS,

Respondent.

DECISION AND ORDER DENYING WRIT OF HABEAS CORPUS

On September 30, 2015, a Walworth County jury found Petitioner Tyler Montour guilty of one count of attempted first-degree intentional homicide and one count of possession of a firearm by a felon in violation of Wis. Stat. §§ 939.32(1)(a), 940.01(1)(a), and 941.29(2). Montour was sentenced to 25 years of initial confinement and 15 years of extended supervision. The Wisconsin Court of Appeals affirmed his conviction, and the Wisconsin Supreme Court denied his petition for review. On November 1, 2019, Montour filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, claiming that his Sixth Amendment right to the effective assistance of counsel was violated because his attorney unreasonably failed to argue for the lesser-included offense of first-degree recklessly endangering safety. Respondent moved to dismiss based on procedural default. Because the issues raised by Respondent's motion and the underlying merits were substantial, the Court appointed counsel. Respondent's motion to dismiss was denied, and the petition is now fully briefed and ready for decision. For the following reasons, the Court will deny Montour's petition for writ of habeas corpus.

BACKGROUND

On June 23, 2015, Montour was charged with attempted first-degree intentional homicide and with possession of a firearm by a felon. The charges stemmed from an incident that occurred outside a Walworth County bar in the early morning hours of June 12, 2015. According to the complaint, Montour ran into Blake Kruizenga, Adrian Valadez, and Alex Valadez at the Hawk's Nest Bar in Delavan, Wisconsin. Montour bore some animosity toward Kruizenga and Adrian Valadez. Several years earlier, Kruizenga and Valadez had entered the home of Montour's sister and her husband, Pedro Gonzalez, while masked and armed, threatened them, struck Gonzalez in the head with a gun, and stole some "weed." Though charged with the home invasion robbery and various other crimes relating to the incident, a jury had acquitted Kruizenga of all charges except possession of a firearm by a felon. Dkt. No. 34-9 at 91:08–93:05; 196:05-09. Valadez entered a guilty plea to a theft charge. Dkt. No. 34-9 at 09-10. Montour was angry about the outcome.

While at the bar on June 23, 2015, Montour and Kruizenga briefly exchanged words in the restroom and, shortly thereafter, Montour left. Sometime thereafter, Kruizenga and Adrian Valadez left the bar and were standing outside. At some point, they saw a dark-colored sedan approach, leading them to believe that the driver of the vehicle intended to run them over. Kruizenga claimed that, as the vehicle drove by, Montour was hanging out the window, shouted a racial epithet at them, and fired multiple gunshots in their direction. Adrian Valadez likewise identified Montour as the shooter. As Kruizenga fled the scene of the shooting, he realized that he had been shot in the lower leg, although he did not suffer any serious complications as a result.

At trial, Montour was represented by Attorney Melissa Frost. Frost later testified that, from the outset, she and Montour had determined that they would proceed to trial. That decision was driven, in part, by Frost's belief that the State may have encountered difficulties securing the

cooperation of witnesses. Frost indicated that, at the time the case was filed, the State had not located Kruizenga, who had violated his probation by going to the bar with known felons. Frost filed a speedy trial demand, hoping to proceed to trial as quickly as possible and deprive the State of its key witnesses. There was also reason to believe the State's witnesses had serious credibility problems. In addition to the home invasion/robbery Kruizenga and Adrian Valadez had committed several years earlier, Kruizenga had nine prior convictions and had lied in his initial statements to his probation officer about his presence at the bar and his companions. Adrian Valadez was likewise on probation, had five prior convictions, and originally told police that another individual was driving a white car and that Gonzalez and Montour were both passengers. Gonzalez, as the actual victim of the crimes committed several years earlier by Kruizenga and Valadez, had at least as strong a motive as Montour to shoot at them. He also had seven prior convictions. Under these circumstances and given the evidence, Frost adopted a theory of defense that Montour was not the shooter.

Prior to trial, the State made an offer to Montour that in exchange for Montour pleading guilty to the lesser-included offense of first-degree recklessly endangering safety, the State would recommend ten years of initial confinement. Frost conveyed the offer to Montour but said that their discussion about it was "brief," noting that she indicated they had a strong case for acquittal and that the state court judge may not go along with the State's sentencing recommendation. Ultimately, she did "not encourage him to take the offer." Dkt. No. 34-12 at 23:14–15. Frost further stated that she told Montour that this was an exceptional case where "it might actually be better for us if we went to trial and lost at sentencing than if we didn't go to trial and proceeded to sentencing." *Id.* at 24:1–3. Montour rejected the State's offer and his case proceeded to trial.

On the morning of jury selection, Frost "still believed that the state's witnesses perhaps were not going to show up." *Id.* at 28:8–9. It became clear early on, however, that the State's witnesses would appear. During *voir dire*, the State noted that Kruizenga was sitting in the front row. And in opening argument, the prosecutor said the State would call Kruizenga, Adrian Valadez, Alex Valadez, and Pedro Gonzalez, the driver of the vehicle from which the shots were fired, to testify. Frost reserved her opening statement until she presented her case-in-chief.

Kruizenga took the stand first. He testified that he saw Montour hanging out the passenger window of a vehicle driving past him, heard him shout a racial epithet, and saw him fire several shots from a black handgun. Kruizenga stated that he was roughly ten to fifteen yards away from Montour when the shots were fired and that he could see down the barrel of the gun. The State then called Adrian Valadez. He corroborated Kruizenga's testimony and testified that he was at the bar when a vehicle drove toward them. Adrian saw Montour in the passenger seat of the vehicle, heard him shout a racial epithet, and witnessed Montour fire several shots in his general direction. Next on the stand was Alex Valadez. Alex corroborated the testimony of Kruizenga and Adrian concerning the confrontation between Montour and Kruizenga, where Kruizenga and Adrian were located during the shooting, and the fact that Montour was not present in the bar when he heard gunshots outside of the bar.

Pedro Gonzalez testified under a grant of immunity. Gonzalez stated that he picked up Montour from the bar and that Montour pointed to Kruizenga and Valadez and asked Gonzalez if he wanted to fight them. With Montour in the passenger seat, Gonzalez began to drive off. But Montour told Gonzalez to take a left down an alley, which took them toward Kruizenga and Valadez. As the vehicle passed Kruizenga and Valadez, Gonzalez heard gunshots coming from his right side, prompting him to quickly drive away. Gonzalez said that it was difficult to testify

against Montour because he had known him for more than ten years, he went to school with him, and Montour was the brother of his girlfriend.

Following the second day of the trial, Frost met with Montour. Montour told Frost that he wanted to take the stand and testify that he was a participant in the shooting. Specifically, Montour would have conceded that he was the shooter but that he only intended to scare Kruizenga and Valadez by shooting in their general direction. Frost "strongly encouraged" Montour not to testify because she believed that, if he did, "the trial was going to be over." *Id.* at 37:8–10. Frost indicated that she was still solely focused on the theory that Montour did not commit the crime.

The day after meeting with Montour, Frost gave her opening statement. Frost stated that the jury would hear from an investigator and from a few witnesses who would "kind of go through again some things that happened that night and some things that may have been said to the police." Dkt. No. 34-11 at 4:17–21. She emphasized that the defense would be brief. Frost recalled both Adrian Valadez and Kruizenga, both of whom again testified that they witnessed Montour fire a handgun in their direction. Montour expressly waived his right to testify.

During the jury instruction conference, the court raised the issue of whether it would be appropriate to instruct the jury on the lesser-included offense of first-degree recklessly endangering safety. Frost indicated that she did not want the jury instructed on the lesser-included offense, but that she did not have a "solid legal basis or really any legal basis for objecting to it." *Id.* at 65:18–19. As such, the Court instructed the jury on both attempted first-degree intentional homicide and first-degree recklessly endangering safety.

During closing arguments, the State emphasized much of what it had already demonstrated to the jury through each witness but further remarked that the jury was "not going to need" the first-degree recklessly endangering safety instruction because "you do not fire a handgun at

another human being from ten feet away with any other intention than to kill them." *Id.* at 93:17–25. Frost, on the other hand, stuck with her theory that Montour was not the shooter. In essence, Frost challenged the credibility of the witnesses who had identified Montour as the shooter. She noted the inconsistencies in their stories and argued that Kruizenga and Adrian Valadez had picked Montour as the shooter because they had seen him in the bar earlier that evening. She argued Gonzalez was intimidated by police. Frost did not address the lesser-included offense of first-degree recklessly endangering safety in her closing argument. After deliberating, the jury found Montour guilty of attempted first-degree intentional homicide and possession of a firearm by a felon.

Following sentencing, Montour was represented by Attorney Ann Auberry. Auberry filed a petition for a new trial pursuant to Wis. Stat. § 809.30 and asserted that Frost provided ineffective assistance of counsel by failing to argue in support of the lesser-included offense. In an accompanying affidavit, Montour stated that Frost told him that a jury "would never convict" him on the charge of attempted first-degree intentional homicide and that they never discussed the possibility of pursuing the lesser-included offense. Dkt. No. 34-12 at 73:1–4. The trial court proceeded to hold a *Machner* hearing to further develop these assertions.

At the hearing, Frost criticized her own performance during Montour's trial. She noted that she was not thinking as clearly as she normally would and, at one point, was admonished by the judge in front of the jury. Frost was also asked whether she considered changing her strategy after each of the State's witnesses appeared and testified. In response, Frost stated that she did not and that it "never even crossed [her] mind" to change her strategy and argue for the lesser-included offense. She also indicated that she had never discussed the possibility with Montour. *Id.* at 33:2.

Ultimately, Frost indicated that her strategy was a "bad decision" and that she should have talked to Montour more about the strategy when he indicated his desire to testify. *Id.* at 40:18–20.

The trial court denied Montour's motion. It found that Frost "engaged in deliberate trial strategies based on the circumstances, the facts of the case, the discussions that she had with the defendant before trial and her own experience which she has 17 years as an attorney, 10 primarily as defense counsel." Dkt. No. 34-13 at 13:8–12. The trial court remarked that the case was "a defense attorney's dream" because of the ability to discredit the witnesses and victims, even if they were cooperative with the State. *Id.* at 13:13–20. It also stated that Frost was not deficient by failing to argue for the lesser-included offense. The trial court further noted that the defense was "going for all or nothing" and that Montour chose not to take the plea agreement offered by the State before trial. *Id.* at 15:1–4. The court concluded Frost's performance was not deficient, noting:

> [The case] looked like, at the time, a great case for being able to show reasonable doubt or be able to show that the State cannot make their case beyond a reasonable doubt. I find that their strategy and her decision to use that strategy as counsel was reasonable given the facts that they knew at the time. I definitely find it was within the range of professionally competent assistance.

Dkt. No. 34-13 at 13:21–14:02.

The Wisconsin Court of Appeals affirmed. Dkt. No. 34-5. The Wisconsin Court of Appeals recited many of the trial court's findings and ultimately concluded that Frost did not perform deficiently. *Id.* at ¶ 16. The court noted that Frost "developed and pursued a strategy that Montour was not the shooter" and that Montour "chose to pursue that strategy while withholding crucial information that undermined that strategy," namely, that he was the shooter. *Id.* The Wisconsin Court of Appeals, citing state law, stated that Montour could not "create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." *Id.*

(citing *State v. Gary M.B.*, 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475 (internal quotation marks omitted)). Having concluded that Frost did not perform deficiently, the court declined to consider whether Montour was prejudiced. *Id.* at ¶ 17. The Wisconsin Supreme Court denied review.

On November 1, 2019, Montour filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition asserts that Frost provided ineffective assistance of counsel by failing to pursue the lesser-included offense of first-degree recklessly endangering safety, which Montour claims was "the only reasonable defense to the charge" of attempted first-degree intentional homicide. Dkt. No. 1 at 3. As framed in Montour's briefing, "the issue is whether trial counsel performed deficiently *by failing to argue altogether* for the lesser-included offense." Dkt. No. 61 at 4 (emphasis in original).

LEGAL STANDARD

Montour's petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, which limits the power of federal courts to grant writs of habeas corpus based on claims that were adjudicated on the merits by a state court. Under AEDPA, a federal court may grant habeas relief when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" United States Supreme Court decisions, or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *see also Woods v. Donald*, 575 U.S. 312, 315 (2015).

A state court decision is "contrary to . . . clearly established Federal law" if the court did not apply the proper legal rule, or, in applying the proper legal rule, reached the opposite conclusion as the Supreme Court would have on "materially indistinguishable" facts. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court's decision is an unreasonable application of

established precedent when that state court applies Supreme Court precedent in "an objectively unreasonable manner." *Id.* This is, and was meant to be, an "intentionally" difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington*, 562 U.S. at 103).

Montour's sole ground for relief is premised upon ineffective assistance of counsel. "The benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon has having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. If a petitioner fails to make a showing on either component, then the results of the trial cannot be said to be unreliable. *Id.*

To show deficient performance, Montour must demonstrate "that counsel's representation fell below an objective standard of reasonableness" and must take into account the "wide latitude counsel have in making tactical decisions." *Id.* at 688–89 (citation omitted). And this Court's "scrutiny of counsel's performance must be highly deferential." *Id.* at 689. To demonstrate prejudice, "[i]t is not enough for [Montour] to show that the errors had some conceivable effect on

the outcome of the proceeding . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the proceeding." *Id.* at 693. Based on the totality of the evidence, Montour must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694–95. Where, as here, a petitioner asserts ineffective assistance counsel in the context of a habeas corpus proceeding, federal courts engage in "doubly deferential review under AEDPA." *Minnick v. Winkleski*, 15 F.4th 460, 468 (7th Cir. 2021) (quoting *Wilborn v. Jones*, 964 F.3d 618, 620 (7th Cir. 2020) (internal quotation marks omitted). "Deference is layered upon deference in these cases because federal courts must give 'both the state court and the defense attorney the benefit of the doubt.'" *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

ANALYSIS

A. Whether the State Court's Adjudication Was Based on an Unreasonable Determination of the Facts

Montour begins by arguing that the state court made an unreasonable factual finding when it stated that he and Frost "wanted a speedy trial because they believed that the State's witnesses had credibility issues." *Montour*, 384 Wis. 2d 271, ¶ 6. He asserts that this was an unreasonable conclusion because Frost's strategy was not developed on the basis of witness credibility but rather witness *availability*. Montour further argues that the Wisconsin Court of Appeals compounded this error when it relied on the factual finding to assess Frost's performance. *See id.* at ¶ 11 ("Given the state of the evidence before trial, *including the somewhat shaky witness testimony* . . . counsel made a reasonable decision to employ an 'all or nothing' strategy throughout the trial." (emphasis added)).

"A finding of fact . . . is not unreasonable simply because a federal habeas court would have reached a different conclusion." *Hicks v. Hepp*, 871 F.3d 513, 525 (7th Cir. 2017) (internal

citation omitted). Rather, Montour must rebut the Wisconsin Court of Appeals' factual findings by "clear and convincing evidence." *Id.* (internal citation and quotation marks omitted). To support his position, Montour makes much of the fact that Frost repeatedly indicated that she was operating on the belief that the State's witnesses would not show up at trial. But Montour fails to recognize that Frost stated that her belief regarding availability of witnesses was only "part of" her strategy. *Id.* In formulating her strategy, Frost also considered the "nature and character" of the State's witnesses and how she anticipated they may act on the stand in the event the State was able to locate them. Dkt. No. 34-12 at 24:04. True, Frost cited her belief that the State's witnesses would not show up, but there is evidence in the record that also supports the conclusion that Frost's strategy was, at least in part, based on her assessment of the credibility of the State's potential witnesses. As she testified at the postconviction motion hearing, Frost viewed the case as "a great case for trial," a view that the trial court shared. *Id.* at 47:03–04; Dkt. No. 34-13 at 13:21–14:02. Frost noted that her assessment was also based upon her view of the prosecutor's trial skills and his potential for alienating the jury. *Id.* at 47:09–18. Montour has failed to rebut the state court's factual findings by clear and convincing evidence.

B. Whether the Wisconsin Court of Appeals Unreasonably Applied *Strickland*

The Wisconsin Court of Appeals' decision describes the trial court's factual findings extensively but provides only a brief analysis of the merits of Montour's ineffective assistance of counsel claim. Its explanation consists of a single paragraph:

> Applying the law governing deficient performance to the circuit court's findings and considering the foregoing, we conclude that counsel did not perform deficiently. Trial counsel developed and pursued a strategy that Montour was not the shooter. Montour chose to pursue that strategy while withholding crucial information that undermined that strategy. Montour argues that the way the evidence came in necessitated a strategy change. As is clear from the record, the strategy issues arose because Montour belatedly informed his counsel that he was the shooter. "[A] defendant cannot create his own error by deliberate choice of

> strategy and then ask to receive benefit from that error on appeal." *State v. Gary M.B.*, 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475 (citation omitted).

Montour, 384 Wis. 2d 271, ¶ 16.

It is clear that the Wisconsin Court of Appeals applied *Strickland*. *Id.* at ¶¶ 13–16. Therefore, the only question for this Court to decide is whether the Wisconsin Court of Appeals did so reasonably. In order for the Wisconsin Court of Appeals' decision to be an unreasonable application of *Strickland*, it must be "objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam) (internal quotation marks and citation omitted). Because there are "countless ways to provide effective assistance in any given case," *Strickland*, 466 U.S. at 689, "the range of reasonable applications [of *Strickland*] is substantial." *Harrington*, 562 U.S. at 105. The question "is not whether counsel's actions were reasonable" but whether there is "any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*[1]

Montour asserts that his trial counsel provided constitutionally ineffective assistance in failing to pursue the lesser included offense of recklessly endangering safety. The Seventh Circuit has recognized that "[s]trategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer*, 589 F.3d 353 (7th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690). Here, there is a reasonable argument that Frost satisfied the *Strickland* standard. Armed with the knowledge that the State may have difficulty locating its witnesses and that, even if they were located, they may have questionable credibility, Frost and Montour pursued a speedy trial with their theory of defense centered on the idea that Montour was not the shooter. After the State's witnesses appeared and identified Montour as the shooter, Montour disclosed to Frost that he was the shooter but that he

[1] *Harrington* also cautions the Court to "guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." 562 U.S. at 105

only intended to scare, not kill, Kruizenga and Valadez. Faced with this sudden revelation, Frost had to choose whether to make a fundamental change in her trial strategy and argue for the lesser-included offense, nearly guaranteeing that Montour would be convicted, or move forward with her existing theory that Montour was not the shooter and seek acquittal. Believing that the trial would "be over" if Montour testified to his intent, she advised Montour not to exercise his right to testify and continued to pursue the theory that he was not the shooter. Dkt. No. 34-12 at 37:8–10.

Frost's fear that conviction of the charged crimes was likely if the jury concluded Montour was the shooter was not unreasonable. Kruizenga had testified that Montour had fired six to seven shots directly at him. Kruizenga testified that the car in which Montour was riding was only ten to fifteen feet away and he "could see down" the barrel of the gun as Montour shot at him. Dkt. No. 34-9 at 98:04–09. Adrian Valadez likewise testified that there were four to six shots and that he saw Montour point the gun in his direction. *Id.* at 151:15–52:08. True, Frost could have argued that the fact that Kruizenga was struck in the lower leg and that the only bullet recovered appeared to have struck the lower part of the back door to the bar suggests that the shooter was not intending to kill. But the first shots were fired before Kruizenga and Valadez fled back into the bar, and only one bullet and a possible fragment were ultimately found. The investigating officer testified about the difficulties of locating bullets at the scene and of hitting a target from a moving vehicle. Dkt. No. 34-10 at 43:11–19; 60:20–61:13. Given this evidence, it was not unreasonable for Frost to focus in her closing on the State's argument that Montour was the shooter.

This may be a case that, "[i]n hindsight, it might well have been better to urge the jury to convict on the lesser-included offense, rather than go for broke by seeking an acquittal on the more serious charge." *McAfee*, 589 F.3d at 356. But as the court noted in *McAfee*, "we do not second-guess an attorney's performance with the benefit of hindsight. Instead, as *Strickland* dictates, we

make 'every effort . . . to evaluate the conduct from counsel's perspective at the time.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). While several witnesses identified Montour as the shooter, Frost did not stand idly by and do nothing to rebut this testimony. During closing arguments, Frost highlighted various inconsistencies in the stories among those who testified, including differences in where the gun was when it was fired, whether Kruizenga and Valadez split up or ran in the same direction following the shooting, what the car looked like, and what color it was. She also emphasized that there was only one individual who testified that wasn't under the influence of alcohol that night. Finally, Frost noted the tension among the victims and Montour, implying that the victims would have had a motive to identify Montour as the shooter based on their prior acrimonious interactions. Her argument "might well have swayed a few jurors and forced a compromise verdict—not guilty of intentional homicide but guilty on the lesser-included offense." *Id.*

Citing *United States ex rel. Barnard v. Lane*, Montour argues that Frost's failure to argue for the lesser-included offense and decision to pursue an all-or-nothing defense left him "with no defense at all." 819 F.2d 798, 803 (7th Cir. 1989). But unlike this case, *Barnard* was not governed by AEDPA. Moreover, in *Barnard*, the defendant was charged with murder, and his trial counsel failed to request a jury instruction on justification and manslaughter, even in the face of the defendant's admission that he shot the victim and the jury's clear reluctance to find the defendant guilty of murder. *Id.* at 803–04. Here, the trial court instructed the jury on the lesser included offense of first-degree recklessly endangering safety and specifically told the jury that it should consider the lesser charge if it was unable to agree on the more serious charge. Montour was not left without any defense. Unlike counsel in *Barnard*, Frost's strategy was not to abandon Montour's only defense "in the hope that a jury's sympathy [would] cause them to misapply or

ignore the law they [were] sworn to follow." *Id.* at 805. Instead, Frost formulated and persisted with the theory that Montour was not the shooter and presented evidence and closing argument to support that theory—the mere fact that she chose not to highlight the lesser-included offense, which might have undercut her case for acquittal, does not automatically render her performance deficient.

Finally, even if the Court were to conclude that the Wisconsin Court of Appeals unreasonably applied *Strickland* in concluding that Frost's performance was not constitutionally deficient, Montour would still have to establish prejudice. Because the Wisconsin Court of Appeals did not reach the issue of prejudice, the Court reviews it *de novo*. *See Dunn v. Jess*, 981 F.3d 582, 595 (7th Cir. 2020). To demonstrate prejudice, Montour must show, based on the totality of the evidence, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694–95. "This does not require a showing that counsel's actions more likely than not altered the outcome," but the likelihood of a different result must be "substantial, not just conceivable." *Harrington*, 562 U.S. at 111–12 (internal quotation marks and citations omitted).

Unlike many other habeas cases involving lesser-included offenses, the jury in this case received instructions on the lesser-included offense and considered it during its deliberations. Thus, the jury could have found Montour guilty of first-degree recklessly endangering safety had it entertained doubt on the more serious charge. It did not. Montour argues that, had Frost presented closing argument with respect to the lesser-included offense, there is a reasonable probability that the jury would have instead convicted him of that charge. To support this argument, Montour asserts that Frost should have summarized the following evidence for the jury during closing arguments: (1) Officer Mair testified that an individual would fire at someone's

"center mass," such as the chest, if he wished to use deadly force; (2) a ballistics expert testified that bullets typically travel in a straight line from whatever direction the barrel is pointed in; and (3) bullet damage found on the back door of the bar was low to the ground and Kruizenga's bullet wound was located slightly above his ankle. According to Montour, if summarized appropriately during her closing, Frost would have been able to argue that Montour lacked the intent to kill Kruizenga and Valadez because the evidence demonstrated that he fired at the ground, not at Kruizenga or Valadez's center mass. Had the evidence been presented and argued in this way, Montour asserts that there "is a reasonable probability that the jury would have had reasonable doubt regarding the attempted first-degree intentional homicide charge," and the jury would have instead returned a verdict on the lesser-included offense. Dkt. No. 61 at 20.

But Montour fails to account for the counterarguments that the State could have advanced. For one, the State argued during its initial closing argument that "you do not fire a handgun at another human being from ten feet away with any other intention than to kill them." Dkt. No. 34-11 at 93:17–25. Furthermore, Montour's argument ignores the testimony of both Kruizenga and Adrian Valadez that he shot directly at them when they were standing outside the bar and assumes that Montour is an accurate shot. Because Kruizenga was struck in the lower leg and at least one of the bullets appears to have struck the lower part of the screen door, Montour argues that the jury would likely have found he was aiming low. But it is just as plausible that Montour missed due to the difficulty of firing a handgun from a moving vehicle as his targets were fleeing into the bar.

Montour also ignores the fact that the jury heard the evidence he wished Frost had summarized. His argument is essentially that, had Frost offered the argument he now wishes she had given, the jury would have convicted Montour on the charge of first-degree recklessly endangering safety instead of attempted first-degree intentional homicide. *See* Dkt. No. 61 at 20.

But the jury had all of the evidence he believes it needed to acquit him of attempted first-degree intentional homicide. Put simply, while an argument for the lesser-included offense may raise the *possibility* that the jury would have convicted Montour on that charge, the mere recapping of evidence at closing argument does not create a *reasonable probability* that the jury would have done so. In other words, while it is conceivable that the jury may have chosen to convict Montour on the lesser-included offense, Montour has not shown that the likelihood of a different result is "substantial." *Harrington*, 562 U.S. at 111–12 (internal quotation marks and citations omitted). Therefore, Montour has failed to demonstrate prejudice.

CONCLUSION

For the foregoing reasons, Montour's petition for writ of habeas corpus (Dkt. No. 1) is **DENIED**. The Clerk is directed to enter judgment dismissing the case. Because reasonable jurists could reach a contrary decision, however, a certificate of appealability will be granted on the issue of whether Montour's trial attorney was ineffective.

Montour is advised that the judgment entered by the Clerk is final. A dissatisfied party may appeal this Court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. *See* Fed. R. App. P. 3, 4.

SO ORDERED at Green Bay, Wisconsin this 21st day of July, 2022.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

A-5

United States District Court

EASTERN DISTRICT OF WISCONSIN

TYLER A. MONTOUR,

Petitioner,

v.

JUDGMENT IN A CIVIL CASE
Case No. 19-C-1604

CATHY A. JESS,

Respondent.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that Montour's petition for writ of habeas corpus is DENIED and this case is DISMISSED.

Approved: s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

Dated: July 21, 2022

GINA M. COLLETTI
Clerk of Court

s/ Mara A. Corpus
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TYLER A. MONTOUR,

Petitioner,

v. Case No. 19-C-1604

CATHY A. JESS,

Respondent.

DECISION AND ORDER DENYING MOTION TO DISMISS

In November 2015, Petitioner Tyler Montour was convicted in state court of one count of attempted first-degree intentional homicide and one count of possession of a firearm by a felon in violation of Wis. Stat. §§ 939.32(1)(a), 940.01(1)(a), and 941.29(2). He was sentenced to a total of 40 years of imprisonment and additional terms of extended supervision. The Wisconsin Court of Appeals affirmed his conviction, and the Wisconsin Supreme Court denied his petition for review. On November 1, 2019, Montour filed a petition for writ of habeas corpus, claiming that his Sixth Amendment right to the effective assistance of counsel was violated because his attorney unreasonably failed to argue for the lesser included offense of recklessly endangering safety. The petition also appeared to assert a claim that trial counsel provided ineffective assistance in recommending that Montour reject the State's pretrial offer to allow him to plead guilty to the lesser charge, but Montour has clarified that this claim is not part of his current petition. The case is before the Court on Respondent's motion to dismiss on the ground that Montour procedurally defaulted and thus failed to exhaust his state court remedies. Because of the unusual procedural

history of the case, the Court appointed counsel. For the reasons that follow, the Court now concludes that Respondent's motion should be denied.

BACKGROUND

On June 12, 2015, a person identified in court records as BK was shot in the leg outside a Walworth County bar. Several years earlier, BK and an accomplice had entered the home of Montour's sister and her husband while masked and armed, threatened them, and stole some "weed." Though charged with first-degree recklessly endangering safety, burglary, and possession of a firearm by a felon, a jury found BK guilty only of the firearm charge. BK encountered Montour at the Hawks Nest bar on the evening of June 12, 2015, and they exchanged words about BK's robbery of Montour's sister. Later that evening, as BK and his friends were standing outside the bar, he saw Montour lean out the passenger window of a dark sedan, yell an epithet at him, and fire a handgun six or seven times in his direction. One of the bullets struck BK in the leg. Montour was charged with attempted first-degree intentional homicide and possession of a firearm by a felon.

The State offered to allow Montour to plead guilty to first-degree reckless endangerment and felon in possession of a firearm, but Montour on advice of counsel rejected the State's offer. Although the driver of the vehicle from which the shots were fired, as well as several other eyewitnesses, identified Montour as the shooter, counsel pursued a strategy that Montour was not the shooter and argued as much in her closing to the jury. In her closing argument to the jury, counsel did not contend that the evidence was insufficient to show the intent to kill required for attempted first-degree intentional homicide and said nothing about the lesser included offense of first-degree reckless endangerment. The jury found Montour guilty of attempted first-degree intentional homicide and possession of a firearm by a felon.

Montour filed a postconviction motion alleging his trial counsel had been constitutionally ineffective in failing to argue for the lesser included crime of reckless endangerment after it became clear from the evidence that Montour was the shooter. His trial counsel testified at an evidentiary hearing on the motion that the defense strategy was to insist on a speedy trial in the hope that the State's witnesses would fail to show up for trial. Counsel testified that, even though the State's witnesses all showed up and identified Montour as the shooter, it never crossed her mind to change the defense. Dkt. No. 15-3 at 22–23. Even after Montour told her that he wanted to testify and explain to the jury that, while he did shoot in BK's direction, he only intended to scare him, counsel continued with the defense that he was not the shooter and strongly encouraged him not to testify since his testimony would be inconsistent with the "all or nothing" defense strategy. *Id.* at 23. Counsel acknowledged that she should have considered a change in the "all or nothing" strategy after Montour indicated he wished to testify and admit to the shooting, but without an intent to kill. *Id.*

The trial court found that counsel's performance was not constitutionally deficient and denied Montour's motion for postconviction relief. The Wisconsin Court of Appeals affirmed his conviction and the order denying his motion for postconviction relief. Montour's postconviction counsel then filed a "partial petition for review" with the Wisconsin Supreme Court pursuant to Wis. Stat. § 809.32(4), which describes the procedure an attorney must follow if the attorney believes the petition for review her client requested the attorney file would be frivolous and without arguable merit.

A petition seeking review of a criminal case by the Wisconsin Supreme Court is normally required to contain the following:

> (a) A statement of the issues the petitioner seeks to have reviewed, the method or manner of raising the issues in the court of appeals and how the court of appeals

> decided the issues. The statement of issues shall also identify any issues the petitioner seeks to have reviewed that were not decided by the court of appeals. The statement of an issue shall be deemed to comprise every subsidiary issue as determined by the court. If deemed appropriate by the supreme court, the matter may be remanded to the court of appeals.
>
> (b) A table of contents.
>
> (c) A concise statement of the criteria of sub. (1r) relied upon to support the petition, or in the absence of any of the criteria, a concise statement of other substantial and compelling reasons for review.
>
> (d) A statement of the case containing a description of the nature of the case; the procedural status of the case leading up to the review; the dispositions in the circuit court and court of appeals; and a statement of those facts not included in the opinion of the court of appeals relevant to the issues presented for review, with appropriate citation to the record.
>
> (e) An argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues presented. All contentions in support of the petition must be set forth in the petition. A memorandum in support of the petition is not permitted.
>
> (f) An appendix containing, in the following order:
>
> 1. The decision and opinion of the court of appeals.
>
> 2. The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition.
>
> 3. Any other portions of the record necessary for an understanding of the petition.
>
> 4. A copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

Wis. Stat. § 809.62(2).

If, however, the attorney is of the opinion that a petition for review in the supreme court under § 809.62 would be frivolous and without any arguable merit, the attorney shall advise the client of the reasons for this opinion and that the client has the right to file a petition for review. Wis. Stat. § 809.32(4). If requested by the client, the attorney is then required to file a petition

satisfying the requirements of §§ 809.62(2)(d) and (f), and the client is required to file a supplemental petition satisfying the requirements of §§ 809.62(2)(a), (b), (c), and (e). *Id.*

In compliance with the statute, Montour's attorney filed a "partial" petition for review setting out the information required in §§ 809.62(2)(d) and (f). Dkt. No. 15-5. The Clerk of the Wisconsin Supreme Court then sent Montour a letter advising him that on September 6, 2018, his attorney had filed a petition for review of the decision of the Wisconsin Court of Appeals. Dkt. No. 15-6. The letter informed Montour that "[p]ursuant to Wis. Stat. §§ 809.32(4) and 809.62, you are required to file a statement of reasons in support of the review within 30 days of the date of the decision of the court of appeals." *Id.* It further stated, "[i]f we do not receive such a statement within the prescribed time, this matter will be submitted to the court for appropriate action." *Id.* The letter indicates that copies of "Rules 809.32 and 809.62" were enclosed.

Montour did not respond to the letter or file the required supplement to the petition filed on his behalf. By order dated December 11, 2018, the Wisconsin Supreme Court denied the no-merit petition for review. Dkt. No. 1-1 at 12. Montour then filed his petition for federal relief pursuant to 28 U.S.C. § 2254.

ANALYSIS

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies. 28 U.S.C. § 2254(b)(1). As the Seventh Circuit explained in *Lewis v. Sternes*:

> Inherent in the habeas petitioner's obligation to exhaust his state court remedies before seeking relief in habeas corpus, see 28 U.S.C. § 2254(b)(1)(A), is the duty to fairly present his federal claims to the state courts. *Baldwin v. Reese*, 541 U.S. 27 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in the federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." *Id.* at 276. Fair presentment in turn requires the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings. *Boerckel*, 526 U.S. at 845. This means that the petitioner must raise

> the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory. *Ibid.*

390 F.3d 1019, 1025–26 (7th Cir. 2004).

A federal court generally "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Procedural default is an adequate and independent state law ground that precludes federal review. *Reed v. Harris*, 489 U.S. 255, 262 (1989). If a petitioner fails to fairly present a claim to the state courts for consideration and no longer has any opportunity to do so, the claim is considered procedurally defaulted. *Lewis*, 390 F.3d at 1026 ("A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim."). That is what Respondent contends Montour did here.

Respondent argues that Montour procedurally defaulted his claim that his attorney was ineffective by failing to supplement his attorney's "partial petition for review" of the decision issued by the Wisconsin Court of Appeals. But Montour did in fact seek review of the decision of the Wisconsin Court of Appeals affirming his conviction. His attorney apparently believed that a petition for review would be frivolous and lack arguable merit and filed instead a "partial petition for review," utilizing the procedure Wisconsin law prescribes for a "no-merit" petition for review. *See* Wis. Stat. § 809.32(4). The record is silent as to whether Montour's attorney ever discussed this procedure with Montour. In any event, upon receipt of his attorney's "Partial Petition for Review," the clerk of the Wisconsin Supreme Court sent Montour a letter that read as follows:

> Dear Tyler A. Montour:
>
> On September 6, 2018, your appointed counsel filed a petition for review of the court of appeals decision dated August 15, 2018. The petition states you will be responsible for providing reasons in support of the review.

> Pursuant to Wis. Stats. § 809.32(4) and 809.62 you are required to file a statement of reasons in support of the review within 30 days of the date of the decision of the court of appeals. If we do not receive such a statement within the prescribed time, this matter will be submitted to the court for appropriate action.

Dkt. No. 15-6. Because Montour failed to file a statement of reasons in support of the review as the letter directed, Respondent argues he failed to fairly present his claim to the Wisconsin Supreme Court and thereby procedurally defaulted his claim.

But the letter did not tell Montour that he needed to comply with § 809.32(4) in order to preserve his right to have his petition considered by the supreme court. To the contrary, it said that if the court did not receive his statement of reasons within the prescribed time, "this matter would be submitted to the court for appropriate action." Dkt. No. 15-6. Moreover, the Wisconsin Supreme Court did not hold that Montour procedurally defaulted his right to review. The court's one-sentence order reads:

> A petition for review pursuant to Wis. Stat. §§ 808.10 and (Rule) 809.32(4) having been filed on behalf of defendant-appellant-petitioner Tyler A. Montour, and considered by this court;
>
> IT IS ORDERED that the petition for review is denied, without costs.

Dkt. No. 18-1. In other words, the court did not dismiss Montour's petition for review for failing to comply with § 809.32(4); it simply denied the petition using the same wording it uses in each order denying a petition for review. If Wisconsin intended to make a failure to file a supplemental petition to a "partial petition" a procedural default, it did not plainly do so.

Notwithstanding the language used by the court in its order denying Montour's petition for review, Respondent argues that Montour nevertheless procedurally defaulted his claim because he failed to comply with § 809.32(4). Respondent argues that in failing to supplement his attorney's petition, Montour failed to fairly present his claim to the Wisconsin Supreme Court. In support of this argument, Respondent cites *Promotor v. Pollard*, 628 F.3d 878, 889 (7th Cir. 2010), in which

the court held that "[a]ppending a prior court's decision without developing an independent position does not allow meaningful review of the substance of the claims." But the petition for review filed on Montour's behalf provided far more than the decision of the court of appeals. The detailed statement of the case in the petition included a description of the case's procedural history through the courts at each level (e.g., pretrial, trial, sentencing, postconviction, appeal). Dkt. No. 15-5 at 3–23. This part of the petition clearly set out Montour's claim of ineffective assistance of counsel.

"No magic formula exists for presenting a federal constitutional claim . . . ." *Villanueva v. Anglin*, 719 F.3d 769, 775 (7th Cir. 2013). Nor do courts "require a hypertechnical congruence between the claims made in the federal and state courts." *Anderson v. Benik*, 471 F.3d 811, 814–15 (7th Cir. 2006). Instead, the court looks to "whether the petitioner (1) relied on pertinent federal cases employing constitutional analysis; (2) relied on state cases applying constitutional analysis to a similar factual situation; (3) asserted the claims in terms particular to a specific constitutional right; or (4) alleged a pattern of facts well within the mainstream of constitutional litigation." *Villanueva*, 719 F.3d at 775 (citing *Verdin v. O'Leary*, 972 F.2d 1467, 1473–74 (7th Cir. 1992)).

The partial petition for review filed on Montour's behalf meets this standard. The twenty-page statement of the case provided by Montour's attorney clearly laid out the sole claim on appeal, i.e., whether his trial attorney was ineffective in failing to argue for the lesser included offense of reckless endangerment. The phrase "ineffective assistance of counsel" is a well-recognized term of art specific to the Sixth Amendment right to counsel, *see Strickland v. Washington*, 466 U.S. 668 (1984), and the pattern of facts described in the petition, especially those related to Montour's motion for postconviction relief, fall well within the mainstream of constitutional litigation. Respondent does not argue otherwise.

This is not a case in which the petitioner buried a federal claim within a state-law claim or presented it in unusual terms. The petition for review filed on his behalf at least implicitly set out the operative law and explicitly the applicable facts that he thought entitled him to relief. *Compare Mills v. Kemper*, No. 19-CV-412 (E.D. Wis. Feb. 25, 2020). Dkt. No. 29-2. Montour's sole claim was explicitly rejected by the Wisconsin Court of Appeals, and it was that decision that he asked the Wisconsin Supreme Court to review. While the partial petition for review submitted on his behalf may not have fully complied with the procedural statutes governing the filing of such petitions, it was more than sufficient to provide the court with fair notice of the claim he requested the court to review. Absent any evidence that the Wisconsin Supreme Court denied Montour's request for review because he violated a procedural rule, the Court is unable to conclude there exists an adequate and independent state-law basis for its decision. The Court therefore concludes that Montour exhausted his state court remedies.

IT IS THEREFORE ORDERED that Respondent's motion to dismiss (Dkt. No. 14) is **DENIED**.

IT IS FURTHER ORDERED that within 60 days of the date of this order Respondent shall answer the petition, complying with Rule 5 of the Rules Governing § 2254 Cases.

IT IS FURTHER ORDERED that the parties shall abide by the following schedule regarding the filing of briefs on the merits of Petitioner's claim: (1) Petitioner shall have 45 days following the filing of Respondent's answer within which to file his brief in support of his petition; (2) Respondent shall have 45 days following the filing of Petitioner's initial brief within which to file a brief in opposition; and (3) Petitioner shall have 30 days following the filing of Respondent's opposition brief within which to file a reply brief, if any.

Pursuant to Civil Local Rule 7(f), the following page limitations apply: briefs in support of or in opposition to the habeas petition must not exceed thirty pages and reply briefs must not exceed fifteen pages, not counting any caption, cover page, table of contents, table of authorities, and/or signature block.

Dated at Green Bay, Wisconsin this 25th day of February, 2021.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2018

Sheila T. Reiff
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. 2017AP573-CR **Cir. Ct. No. 2015CF219**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYLER A. MONTOUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY and KRISTINE E. DRETTWAN, Judges. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. A jury convicted Tyler Montour of attempted first-degree intentional homicide and being a felon in possession of a firearm. Postconviction, Montour argued that his trial counsel was ineffective. After an evidentiary hearing, the circuit court concluded that counsel did not perform deficiently and was not ineffective. We agree and affirm the judgment of conviction and the order denying Montour's postconviction motion.[1]

¶2 At Montour's jury trial, the victim testified that he and Montour had an encounter in the bar, and the victim saw Montour leave the bar. Shortly after the victim exited the bar, the victim saw Montour hanging out of the passenger side window of a passing vehicle, Montour yelled an epithet and fired a handgun six or seven times at the victim, wounding the victim in the leg. Another witness offered testimony similar to the victim's. The driver of the vehicle testified about Montour's role in the shooting. Other witnesses presented information supporting the State's theory that Montour was the shooter. Montour's counsel explored inconsistencies in the witnesses' statements.

¶3 The State requested that the jury be instructed on the lesser included offense of first-degree recklessly endangering safety. Defense counsel conceded that the lesser included offense instruction was appropriate, even though she would have preferred that the jury not be so instructed.

¶4 At closing, the State argued that Montour was the shooter and urged the jury to convict him of the charged offenses: attempted first-degree intentional

[1] The Honorable David M. Reddy presided over trial and entered the judgment of conviction. The Honorable Kristine E. Drettwan entered the order denying Montour's posconviction motion.

homicide and being a felon in possession of a firearm. In her closing argument, defense counsel suggested that someone else was the shooter and argued that there was insufficient evidence to convict Montour of the greater crime, attempted first-degree intentional homicide. The jury convicted Montour of the greater crime.

¶5 Postconviction, Montour moved the circuit court for a new trial due to ineffective assistance of trial counsel because counsel should have conceded his role as the shooter and asked the jury to convict him of the lesser included offense, first-degree recklessly endangering safety. Montour contended that he and counsel never discussed the possibility of seeking instructions on a lesser included offense, but had they done so, Montour would have consented to an argument that he acted recklessly rather than with intent to kill when he fired at the victim and other witnesses. Montour claims that he would have agreed to this defense because a number of unbiased citizen witnesses placed him at the bar and stated that he fired the shots. Montour claimed he did not know that he could disagree with counsel about the previously determined "Montour was not the shooter" defense and request that his defense focus on the lesser included offense.

¶6 The circuit court held an evidentiary hearing on Montour's ineffective assistance claim. After hearing testimony from trial counsel and Montour, the circuit court made the following findings of fact about "the circumstances of the case and the counsel's conduct and strategy." ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). Trial counsel was experienced. From the outset, counsel and Montour agreed that Montour's defense was that he did not fire the firearm. They wanted a speedy trial because they believed that the State's witnesses had credibility issues. Counsel and Montour met and had sufficient time to prepare for a speedy trial.

¶7 The turning point in the defense came at the conclusion of day two of the trial as the State's case was ending. As he and counsel discussed whether he would testify, Montour admitted to counsel that he had fired the weapon, information not previously shared with counsel during the development of the "Montour was not the shooter" trial strategy. Montour wanted to testify about his involvement in the shooting. Counsel recommended against testifying at trial because his testimony would be at odds with the strategy they had discussed and had been pursuing to that point in the trial. Montour had a colloquy[2] with the circuit court about his decision not to testify.

¶8 The circuit court made the following credibility determinations. The court deemed not credible Montour's claim that he could not discuss trial strategy with counsel; Montour had the opportunity to and was capable of raising his concerns about trial strategy with counsel even before he conceded to counsel that he fired the weapon, which had the potential to upend the defense's trial strategy. The court deemed counsel credible on this issue and found that she and Montour discussed the possibility of a lesser included offense, and Montour agreed to forego a defense focusing on a lesser included offense.[3]

¶9 The circuit court further found that trial counsel's strategy was the same during preparation and at trial: Montour was not the shooter. Once trial started, counsel continued in the previously selected strategy to avoid changing strategy before the jury. Counsel believed that urging conviction of a lesser

[2] Montour does not challenge the adequacy of the colloquy.

[3] Montour alleged that prior to trial, trial counsel told him his case "was good as any," there was a "fifty-fifty chance" he could be acquitted of the charged offenses, and a jury would never convict him of the attempted first-degree intentional homicide charge.

included offense would be problematic because the trial strategy had been "all or nothing." Even though the jury was instructed on the lesser included offense, counsel believed that there was no reason to argue the lesser included offense because such an argument would have required abandoning the trial strategy that Montour was not the shooter.

¶10 The circuit court placed great weight on the fact that Montour did not tell counsel he was the shooter until the close of the State's case. The court found that Montour "was playing a game of bluff with the jury and even with his own attorney and he can't blame her now for his actions and for what he chose to tell her and when. It's difficult to be a defense attorney with regard to what you know about what your client did, what they tell you, and what they don't tell you." The court also cogently reasoned:

> I note his admitting that he was participating, he was admitting to firing a weapon, a gun, in the direction of where the victims were standing and that's clearly strong evidence to convict on the charge that he was convicted of, that he was charged with. So there's definitely a strategic reason for her at that point advising him not to testify. It flew in the face of everything they had discussed before trial and how the trial was being conducted.

Finally, after Montour revealed to counsel that he was the shooter, the circuit court engaged him in a colloquy about his decision not to testify. That Montour chose not to testify supports an assessment that Montour was aware of the relevant circumstances and still chose not to testify.

¶11 The circuit court concluded that trial counsel did not perform deficiently and rejected Montour's ineffective assistance claim. Trial counsel had a strategy and made decisions consistent with that strategy and her experience. Given the state of the evidence before trial, including the somewhat shaky witness

testimony, and Montour's untimely disclosure to counsel that he was the shooter, counsel made a reasonable decision to employ an "all or nothing" strategy throughout the trial. Montour's mid-trial disclosure that he was the shooter would have undermined the defense strategy. In this context, electing not to argue for the lesser included offense was part of the trial strategy to which Montour and counsel committed before Montour leveled with counsel about his involvement in the shooting.

¶12 On appeal, Montour argues that his trial counsel performed deficiently because she did not change the "all or nothing" trial strategy to pursue the lesser included offense option after the jury heard evidence that Montour possessed and fired the firearm.

¶13 To prevail on an ineffective assistance of counsel claim, "a defendant must demonstrate both that (1) counsel's representation was deficient; and (2) this deficiency was prejudicial." ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. We will not disturb the circuit court's findings of fact unless they are clearly erroneous. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). However, the determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. ***Id.***

¶14 "To demonstrate deficient performance, the defendant must show that his counsel's representation 'fell below an objective standard of reasonableness' considering all the circumstances." ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). In evaluating counsel's performance, we are highly deferential to counsel's strategic decisions. ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334.

¶15 As we have stated, we will uphold the circuit court's findings of fact unless they are clearly erroneous. The circuit court's findings were based on credibility determinations, which were for the circuit court to make. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. On this record, the circuit court's findings regarding "'the circumstances of the case and the counsel's conduct and strategy,'" ***Thiel***, 264 Wis. 2d 571, ¶21 (citation omitted), were not clearly erroneous.

¶16 Applying the law governing deficient performance to the circuit court's findings and considering the foregoing, we conclude that counsel did not perform deficiently. Trial counsel developed and pursued a strategy that Montour was not the shooter. Montour chose to pursue that strategy while withholding crucial information that undermined that strategy. Montour argues that the way the evidence came in necessitated a strategy change. As is clear from the record, the strategy issues arose because Montour belatedly informed his counsel that he was the shooter. "[A] defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." ***State v. Gary M.B.***, 2004 WI 33, ¶11, 270 Wis. 2d 62, 676 N.W.2d 475 (citation omitted).

¶17 On this record, trial counsel did not perform deficiently. We need not consider whether Montour was prejudiced by trial counsel's performance. ***Maloney***, 281 Wis. 2d 595, ¶14 ("We need not address both components of the inquiry if the defendant makes an insufficient showing on one.").

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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December 11, 2018

To:

Hon. Kristine E. Drettwan
Circuit Court Judge
P.O. Box 1001
Elkhorn, WI 53121

Hon. David M. Reddy
Walworth County Circuit Court Judge
P.O. Box 1001
Elkhorn, WI 53121

Kristina Secord
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You are hereby notified that the Court has entered the following order:

No. 2017AP573-CR State v. Montour L.C.#2015CF219

A petition for review pursuant to Wis. Stat. §§ 808.10 and (Rule) 809.32(4) having been filed on behalf of defendant-appellant-petitioner, Tyler A. Montour, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

STATE OF WISCONSIN: CIRCUIT COURT: COUNTY: WALWORTH

BRANCH 3

STATE OF WISCONSIN,)
)
Plaintiff,) CASE NO.2015CF219
)
-vs-) **ORAL RULING**
)
TYLER A. MONTOUR,)
)
Defendant.)

THE HONORABLE KRISTINE E. DRETTWAN
JUDGE PRESIDING

APPEARANCES

ATTORNEY DIANE M. DONOHOO, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

ATTORNEY ANN RENE AUBERRY appeared on behalf of the defendant who appeared in person.

DATE OF PROCEEDINGS:

MARCH 1, 2017

KATIE GIEBEL
COURT REPORTER

Ex. 13
000842

(In open court.)

THE COURT: Court will call on the record now 15CF219, State of Wisconsin vs. Tyler Montour. Appearances please.

MS. DONOHOO: Diane Donohoo for the State.

MS. AUBERRY: Attorney Anne Auberry appears on behalf of Mr. Tyler Montour who is present in court. Good morning, Your Honor.

THE COURT: Good morning. We are on today for the Court to make its decision with regard to the defendant's postconviction motion for relief requesting a new trial based on ineffective assistance of trial counsel during the jury trial. I have reviewed the written submissions by both the State and the defense. Clearly, I heard the testimony during the hearing on December 14th and I have reviewed the file. Is there anything else that the defense wishes to add to their motion or argument at this time?

MS. AUBERRY: No, Your Honor.

THE COURT: Ms. Donohoo?

MS. DONOHOO: Nothing.

THE COURT: Well, as I said, I've reviewed everything here and I'm ready to make my decision. What I note is that during the evidentiary hearing on December 14th of 2016 both Attorney Melissa Frost and the defendant did testify. Attorney Frost testified that she has been an

attorney for 17 years, predominantly with criminal defense work for the prior 10 years. She has held -- she has been a part of a number of jury trials, including some very serious cases, and she has won acquittal. I know from my own involvement in the Walworth County criminal justice system for many, many years now that one of the acquittals that she won was on a homicide.

Attorney Frost testified, first of all, with regard to strategy. She testified that she and the defendant had discussed from the outset that their strategy was that the defendant did not do this crime, that someone else did. They decided that they wanted to have a speedy trial because the State's witnesses were possibly unavailable, uncooperative, absent, and of unsavory character and the defendant and Ms. Frost felt that the evidence was such in the case that it was a good case to fight at trial. And so that was their strategy, to have a speedy trial and to deny that he had done this, that the State had the wrong person.

She testified that she met with the defendant a good amount of time, especially considering the speedy demand, and that she felt she was prepared for trial. She testified with regard to strategy that she didn't feel they had enough to file a *Denny* motion -- and she has filed those in the past -- in order to specifically pinpoint another shooter. So she did not file a *Denny* motion. She did not feel it was legally

supported, but she did feel that the defense was good for showing the jury that the defendant did not commit the crime, essentially, that the State would not be able to meet their burden of proof that this defendant committed this crime.

And I note she testified that the defendant did not tell her that he was the shooter during any of this preparatory. It wasn't until -- I think it was after day two of the trial that the defendant -- and this is by his own testimony as well -- stated what he would testify to if he went up as a witness, that he had indeed fired the gun. So that's important to know.

Now the defendant testified that he and Ms. Frost did discuss strategy before the trial and that their strategy was that he did not commit this crime. He testified that they discussed whether the State's witnesses would be cooperative or even show up and that he never told Ms. Frost that he would testify he was the shooter until after Pedro testified.

And the Court, in looking at the transcript and at the minutes from the trial, notes that Pedro was the last witness called by the State on day two and that testimony did end for the day at that point. And so he told her that the night of day two after the State had presented its witnesses. And I note that Pedro at that point had been given immunity by the State for his testimony. So that is the evidence that's in the record with regard to the defendant and Ms. Frost

having a strategy here, what their plan was for trial.

Second, I look at -- and I'm trying to address here things that were raised by the defense in terms of potential ineffective assistance of counsel. A second item that was identified was the offer and whether or not the defendant should have accepted it. Attorney Frost testified that she conveyed the State's offer to the defendant and that the offer was to plead to the lesser included, the lesser included that was later given as a jury instruction to the jury for deliberation, and that the offer was that the State would recommend ten years.

Ms. Frost testified that she discussed this with the defendant and that she did not encourage him to take the offer. Again, because of what she felt were the strengths of the defense case, which some of them I've already gone through, because of the circumstances of the case with regard to the eyewitnesses being maybe unavailable, uncooperative, concern with regard to the nature of the character of the alleged victims in terms of something to argue to the judge even if he was convicted.

She also noted for the defendant, which he had observed firsthand also because of an experience that happened before Judge Reddy with regard to the prosecutor, the prosecutor was the DA at the time, Mr. Necci, and Ms. Frost discussed with the defendant his inexperience and his poor

trial skills and the fact that he may very well alienate the jury. And she noted during her testimony on December 14th that Mr. Necci did live up to her expectations as to how he would perform at trial with regard to that.

So for those reasons she did not encourage the defendant to take the offer, but she did tell him, per her testimony, that it was up to him as to whether he wanted to take it or not. And I note, again, he had not told her he was the shooter at this point. So the strategy here is he didn't do it.

She also testified that they discussed the possibility of his being convicted and that it was maybe a 50/50 shot. There were no guarantees. She told him that. Now, the defendant testified at the motion hearing that he understood what the offer was and that he rejected it after consulting with Ms. Frost. He also noted during his testimony that he did not concede that he had a gun that night so he wouldn't take the lesser included because then he would have to concede that he was also a felon in possession of a firearm.

He also testified that he was concerned about the State's recommendation to the Court at sentencing and that this was something that he and his attorney had discussed, but that ultimately he chose not to take that offer and he regrets his decision now after having been convicted of a first degree

attempted intentional homicide.

Another avenue that the defense has identified as potential ineffective assistance of counsel is with regard to Ms. Frost's strategy during the trial itself and whether or not it should have changed midstream. Ms. Frost testified that she was ready for trial. There was an issue with regard to some jail tapes, getting them at the very last minute, in fact during the first day of trial, and that that caused her to lose sleep, but she testified that her strategy remained the same during the trial.

She made a strategic decision that she would not give an opening statement before the start of the State's case because she did not know who would show up to testify and she did not want to submit to the jury the defendant's story before hearing everything that came out. That's a smart strategic decision in this Court's opinion.

She stated that she did not discuss their strategy with the defendant after the trial started. She believed that the strategy of -- that he didn't do it should be stuck to. She was concerned that if they changed the strategy midstream, that they would lose. And at the end of the State's case after Pedro testified, she still believed that sticking with the strategy was reasonable and the best option that they had.

Now, the defendant testified during the hearing on December 14th that he felt during the trial that his -- that

this strategy was not going to work, but he did not bring it up with his attorney. He did not discuss it with her and I note that he definitely had the opportunity to. They both testified that they met the night after day two to talk about whether or not he would testify. He definitely had the opportunity to talk to her outside of the courtroom to discuss it with her.

And I find that he does not seem, during his testimony to me, I did not find him to be shy or the retiring sort of person such that he was incapable of speaking up to his attorney. To the contrary, I think that the relationship that they had before trial was very open, very communicative, and so I don't find it credible that he just wasn't able to bring that up to her. He made a choice not to change the strategy and not to talk to her about it. He could have.

Another avenue that the defense questions the effectiveness of Ms. Frost is with regard to whether or not the lesser included jury instruction should have been given, whether it should have been argued against, whether she should have argued for it during closings. Ms. Frost testified that before the trial she and the defendant discussed the possibility of the lesser included instruction and she noted to him that it would be hard to argue against it and, again, that their strategy was all or nothing.

She testified she did not object to the lesser

included instruction when it was being discussed during the jury instruction conference and she did not discuss it with him during the trial. They had already discussed it prior to trial. And she noted that, again, the strategy here that she and the defendant had agreed on was all or nothing. And so that was her position with regard to the lesser included jury instruction, why she didn't argue for a lesser during closings and that she wasn't going to argue against it at the conference.

Now, the defendant testified -- well, at least he stated in the affidavit that he asks the Court to consider here as part of his case. In his affidavit he denies that he and Ms. Frost discussed the possibility of a lesser included and now states that he would have taken that option. He would have wanted that instruction as part of it and he would have wanted it to be argued for.

Of course, he's making those comments, first of all, with the benefit of hindsight having been convicted by the jury of the original charge. And quite frankly, I find that statement to be not credible because it's made with the benefit of hindsight and because I found Ms. Frost to be credible and she testified they did talk about it.

So -- and I also keep in mind here that he did not tell Ms. Frost that he was the shooter until the close of the State's case. So quite frankly, he was playing a game of

bluff with the jury and even with his own attorney and he can't blame her now for his actions and for what he chose to tell her and when. It's difficult to be a defense attorney with regard to what you know about what your client did, what they tell you, and what they don't tell you. It's a very difficult road. It's almost a balance beam that has to be walked.

Another avenue that the defense is pointing out as possible ineffective assistance by Ms. Frost is whether or not he should have testified. Both parties stated that they discussed on that night of the second day of trial at the close of the State's case whether or not he should testify. And he told her at that point that he would admit his participation and testify, but she advised him not to testify because she felt he would get convicted if he did and that it was contrary. Testifying that he was involved in it was contrary to the strategy that they had employed and that she had utilized up until that point.

Now, I note that Ms. Frost now said during the hearing that maybe they should have talked about it more and she clearly feels poorly and bad that he was convicted, but again, that's with the benefit of hindsight. She did relate during the hearing what he would have testified to and so clearly she considered that, but again, it was contrary to the strategy and so she advised against him testifying.

Plus, I note his admitting that he was participating, he was admitting to firing a weapon, a gun, in the direction of where the victims were standing and that's clearly strong evidence to convict on the charge that he was convicted of, that he was charged with. So there's definitely a strategic reason for her at that point advising him not to testify. It flew in the face of everything they had discussed before trial and how the trial was being conducted.

Now, the defendant testified in that December hearing that he did engage in the colloquy with Judge Reddy in terms of whether or not he would testify. I note that according to the transcript and the minutes that this colloquy with Judge Reddy was done during the defendant's case. I think it was actually done after a couple of witnesses had been called by the defense. So it was after he had had that discussion with Ms. Frost the night before.

He testified in December that it was his free will. It was his choice not to testify and the transcript clearly shows a colloquy between Judge Reddy and the defendant and that it was his choice to make. Judge Reddy even said during that colloquy that he could revisit his decision after Blake Kruizenga testified again if he so chose and he did not exercise that right to revisit it. So this was his choice. I think there's a clear record with regard to his choice not to testify.

The legal standard then in terms of whether or not Ms. Frost was ineffective trial counsel for the defendant is that pursuant to *Strickland v. Washington* and our own *State v. Pitsch*, P-I-T-S-C-H, the defendant has to show two things. He has to show that there was deficient performance by counsel and that he was prejudiced because of it. If the defendant fails to meet one prong of that test, the Court need not consider the other prong.

The standard for deficient performance is that are there or were there by counsel acts or omissions under the totality of the circumstances which were outside the wide range of professionally competent legal assistance. I note that judicial scrutiny here is highly deferential to the decisions that are made by that counsel and the Court is to avoid a determination of ineffectiveness based on hindsight. The Court is to determine was the assistance reasonable under the facts of the case viewed from that perspective at the time that the representation was happening.

I note I am to consider were there deliberate trial strategies which fall in the range of professionally competent assistance or was the attorney incompetent. I note that a lawyer's performance, I am not to find it deficient unless that lawyer made errors so serious that counsel was not -- that the lawyer was not functioning as counsel as guaranteed by the Sixth Amendment. The second prong of the test is the

prejudice part and the Court would have to find that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

So when I apply the first prong of this test, meaning was there deficient performance here by Ms. Frost, when I perform -- excuse me, when I apply this standard to Ms. Frost's performance, I do not find that she was ineffective. She engaged in deliberate trial strategies based on the circumstances, the facts of the case, the discussions that she had with the defendant before trial, and based on her own experience which she has 17 years as an attorney, 10 primarily as defense counsel.

Some of those facts and circumstances that she was considering and that she talked about with the defendant and that they agreed upon for their strategy, quite frankly, with the -- looking at it from the perspective that they had at the time which is what I am to do, it was a defense attorney's dream, that case before trial. To have those kinds of witnesses and victims, to be able to discredit, if they even show up, if they're even cooperative with the State.

It looked like, at the time, a great case for being able to show reasonable doubt or be able to show that the State cannot make their case beyond a reasonable doubt. I find that their strategy and her decision to use that strategy as counsel was reasonable given the facts that they knew at

the time. I definitely find it was within the range of professionally competent assistance.

She also discussed, and I have already made the findings, with regard to her advice to the defendant before trial to not go with the lesser included. And again, it was his choice not to although he denies it now in the affidavit, but I have already said I don't find that to be a credible statement.

I find that her performance was not ineffective with regard to her advice to him not to testify given the facts that they knew at the time. And I find that it was his choice not to testify. He is the one that made that choice ultimately, but her advice to him, looking at it from the perspective of how the case was going at the time and all of those factors, was reasonable and professionally competent assistance.

If he would have got up there and testified as I've already said that, yes, he was the shooter and he shot in the direction of those people, that went against their entire trial strategy. And to change strategy midstream like that is usually not a good idea because then you lose face completely in front of the jury.

I also find that she was not deficient in her decision not to argue for the lesser included during her closing argument and not to argue against it during the jury

instructions. This was a strategy that she employed. She's trying to get the best out of this case that she possibly can and they made the decision they were going for all or nothing and he did not want to take that plea agreement. It was with her advice, but ultimately it was his decision. He didn't want the plea agreement and the plea agreement was for the lesser included and he rejected that. So her performance was not defective.

I know that during the trial she expressed -- not during the trial, during the hearing in December -- she expressed her concerns over her performance at trial again and those are in the record. I don't need to repeat them here. But I would note that trials are not scripted performances. They're not plays that you just have a script that you go by and you know everything that's going to happen and all of the evidentiary concerns and the testimony has been figured out ahead of time. I wish it were that easy, but it's not.

Unforeseen and unforeseeable things happen during trials and the attorneys, whether it's the State or the defense, have to be ready to roll with the punches which I think Attorney Frost did here. To -- again she clearly feels badly that he was convicted, but looking at her performance from the perspective of when the trial was going on and all of the preparation up until that point, her performance was not deficient.

There are things that happen during trials that make you lose sleep. You might not get a lot of sleep during a trial. Every trial attorney, whether it's from the prosecution or the defense side, knows that. You don't always make the greatest decisions during trial. You might be thinking about it that night and think, oh, I shouldn't have done that or I should have said this or I should not have said this. Well, that's hindsight. You're not always perfect. So I think that to pick apart her performance now given all of the circumstances here is unwarranted.

And her self-doubt with regard to how she conducted the trial, it speaks in her favor as a person in terms of questioning her performance because they lost. But looking at it from the perspective of the trial, no, it's not reasonable to do that. Her performance was not deficient. Again, I've already said that to have argued both, he didn't do it, but if he did do it, he didn't shoot to kill during a closing argument would have been conflicting and not -- made them incredible to the jury.

I find that just because their strategy didn't work doesn't mean that it wasn't logical, professionally competent, and reasonable. It was a reasonable strategic decision given the facts and circumstances that were known at the time. So I do not find that her performance was deficient and I do not find that his Sixth Amendment rights were violated.

The Court does not have to consider the other prong here. The defense has not met their burden of proof with regard to showing deficient performance, but just briefly for the record I'm going to state that, first of all, as I've already found, Ms. Frost did not make unprofessional errors here warranting a finding of deficient performance. But even if I did, which I don't, I don't think under the second prong there is any reasonable probability -- and the key word there is reasonable -- that the result would have been different if things had been -- things had been done differently during the trial.

The evidence in the record supports a conviction of attempted intentional first degree homicide, that he was the shooter, that he shot at the victims, that he hit one of them. And so even if he had testified, even if they had changed their strategy to an admission of a lesser included, number one, he would have been admitting guilt, admitting felon in possession of firearm, so there's a surefire conviction there and that went against their strategy.

But even if he had testified, the evidence still would have been he shot in the direction of the victims and so I don't think there's a reasonable probability here that this result would have been anything but an attempted first degree intentional homicide. The standard for intent is that you acted with the specific purpose to or that you were aware your

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But even if he had testified, the evidence still would have been he shot in the direction of the victims and so I don't think there's a reasonable probability here that this result would have been anything but an attempted first degree intentional homicide. The standard for intent is that you acted with the specific purpose to or that you were aware your

conduct could cause that result. Anyone with half a brain knows that if you fire a gun in the direction of somebody, their death could occur, that you are aware that their death could occur and is probable to occur.

So I don't think that there's a reasonable probability here that the result of trial would have been different regardless. I don't think either prong has been met and I am denying the motion. Ms. Donohoo, is there anything else from the State today?

MS. DONOHOO: If there is an order to be prepared, I would ask that the defense prepare it just stating for the reasons stated on the record the Court denies the motion.

THE COURT: Ms. Auberry, is there anything else you would like the Court to address today?

MS. AUBERRY: No. I will, in fact, prepare the motion Ms. Donohoo referred to. I assume that needs to be done electronically as of today's date?

THE COURT: Yes, March 1st. Thank you for reminding me. I say that sarcastically. All right, thank you. We're adjourned.

(End of the proceedings.)

STATE OF WISCONSIN)
)
COUNTY OF WALWORTH)

I, Katie Giebel, a court reporter in and for the State of Wisconsin, hereby certify that the foregoing 18 pages comprise a true, complete, and correct transcript of the proceedings had at the Oral Ruling held before the Honorable Kristine E. Drettwan, Branch 3, on March 1, 2017, at the Walworth County Judicial Center, Elkhorn, Wisconsin.

In witness whereof I have hereunto set my hand this 12th of March, 2017.

Katie Giebel(electronically signed)

Katie Giebel