Exhibit A

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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*.

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

United States District Court

EASTERN DISTRICT OF WISCONSIN

TYLER A. MONTOUR,

Petitioner,

v.

CATHY A. JESS,

Respondent.

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

☐ **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

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).