COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP995-CR **Cir. Ct. No. 1996CF964525**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO MCAFEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and MICHAEL B. BRENNAN, Judges. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. Antonio McAfee appeals from a judgment entered after a jury convicted him of first-degree intentional homicide, while

armed, in violation of WIS. STAT. §§ 940.01(1) and 939.63 (2003-04).[1] He also appeals from an order denying his postconviction motion for a new trial.

¶2 McAfee raises four claims of error: (1) his trial counsel provided ineffective assistance of counsel which prejudiced him; (2) the trial court findings of fact made during a ***Machner*** hearing[2] were clearly erroneous; (3) the trial court erred in limiting his postconviction presentation of evidence in support of his motion for a new trial; and (4) his conviction and sentence should be vacated in the interests of justice.

¶3 Because trial counsel's representation of McAfee was not deficient, because the trial court's findings of fact at the ***Machner*** hearing were not clearly erroneous, because McAfee waived any error that may have occurred in limiting his postconviction presentation of evidence in his motion for a new trial, and because the issues were fully and fairly tried, thus not warranting a discretionary reversal in the interests of justice, we affirm.

BACKGROUND

¶4 On September 17, 1996, at approximately 8:25 p.m., Milwaukee Police Officers Wendolynn Tanner and Brian Ketterhagen attempted to detain McAfee in an alley just north of 2100 West Hampton Avenue and just east of North 21st Street in the City of Milwaukee, to investigate possible drug activity. McAfee fled north and Officer Tanner gave chase on foot. McAfee's route was as

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

follows. He ran three or four houses north in the alley and then turned left through a yard onto North 21st Street. He ran north past two houses and then west through a yard located at 4841 North 21st Street. Officer Ketterhagen remained in the squad car.

¶5 Immediately after Officer Tanner began his chase, Officer Ketterhagen reversed his squad car south out of the alley onto West Hampton Avenue and drove west. As Officer Ketterhagen reached North 21st Street, he observed the suspect run west across North 21st Street, followed by Officer Tanner. In an effort to keep up with the chase, Officer Ketterhagen pulled into a west and northbound alley of the 21st Street block. The alley did not go all the way through the block to the north, but dead-ended at a split-rail fence running east to west, somewhat south of the 4841 North 21st Street location. As Officer Ketterhagen was driving north in the alley with the squad's lights on, he observed the suspect come through an opening in a stockade fence located on the east side of the alley at the 4841 North 21st Street address north of the split-rail fence. Officer Ketterhagen, while seated in his squad, noticed the suspect "kinda [hide] himself around the corner … to the south of the gap in the stockade fence." He saw the suspect extend his arm and fire numerous shots at Officer Tanner as he came through the opening in the fence. Officer Tanner fell backwards to the ground. Officer Ketterhagen exited the squad and began to fire at McAfee. McAfee ran north in the grassy area north of the fence. Officer Ketterhagen continued to shoot at McAfee until he lost sight of him. He then returned to his fallen partner and radioed to dispatch, "officer down."

¶6 Officer Ketterhagen did not know if any of the bullets he fired hit McAfee, but investigators soon discovered a trail of blood which led them to 4952

North 22nd Street, the home of McAfee's aunt. Police found McAfee hiding in a closet inside the home with the .357 revolver used to shoot Tanner.

¶7 According to the Milwaukee County Medical Examiner, Officer Tanner suffered three gunshot wounds in the shootout and was pronounced dead shortly after the incident. The fatal shot passed under his right armpit, through his heart and lungs, and out the left side of his body, severing his aorta. The source of the bullet that caused the heart wound was not identified. Another "potentially fatal" shot severed Officer Tanner's spinal cord, ricocheted through his chest cavity, and lodged a bullet near his right clavicle. The bullet recovered from Officer Tanner's body from this shot was linked to McAfee's gun. The third shot passed through Officer Tanner's left arm and was deemed to be a flesh wound, not fatal in nature.

¶8 The jury returned a guilty verdict on the charge and the trial court sentenced McAfee to a term of life imprisonment without the possibility of parole. The trial court denied McAfee's postconviction discovery motion. This court, however, reversed the trial court's order and directed the trial court to supervise the discovery process of electron microscope testing in an attempt to determine who fired the bullet that killed Officer Tanner. The testing proved to be inconclusive. McAfee filed a petition for a new trial alleging ineffective assistance of trial counsel. After a ***Machner*** hearing, the trial court denied McAfee's petition. He now appeals.

ANALYSIS

¶9 McAfee claims his trial counsel was ineffective in two respects. First, he contends that trial counsel's singular reliance on a "friendly fire, cover-up" defense to the charge of first-degree intentional homicide was deficient

performance because it was irrationally based on record facts and law which precluded a verdict of acquittal. Second, he argues that trial counsel failed to properly investigate, develop, and present evidence to impeach the State's "ambush theory."

STANDARD OF REVIEW

¶10 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 224, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697. Because we resolve this case on the performance prong, we need not address the prejudice portion of the test. An attorney's performance is not deficient unless he or she made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687).

¶11 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***Id.*** at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective

assistance of counsel is a question of law for which no deference to the trial court need be given. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶12 The right to effective assistance of counsel does not guarantee a criminal defendant either the best defense or the best defense attorney possible. *See* ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***Id.*** (citation omitted).

¶13 Rather, defendants who claim their conviction should be reversed because they received ineffective assistance must prove "that they have been denied a fair trial by the gross incompetence of their attorneys." ***Kimmelman v. Morrison***, 477 U.S. 365, 382 (1986). Lest there be any misunderstanding, a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial. A criminal defense attorney's performance is not expected to be flawless. The Sixth Amendment does not demand perfection. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Strickland***, 466 U.S. at 689.

APPLICATION

¶14 In this appeal, McAfee presents a plethora of examples why his trial counsel was ineffective. Essentially, however, as stated above, he asserts two categories of claimed error: (1) trial counsel's singular reliance on a "friendly fire, cover-up" defense was deficient because it was irrationally based on record facts and law which precluded acquittal; and (2) trial counsel was deficient in her failure to properly investigate, develop evidence, and cross-examine witnesses so as to impeach the State's "ambush theory" and, in turn, more effectively argue for the lesser-included offense of first-degree reckless homicide.

¶15 McAfee's "singular reliance" claim of deficient performance is based upon several propositions: inadequate cross-examination of Officer Ketterhagen to expose gross inconsistencies between the physical evidence and his testimony; failure to investigate, present, and argue that McAfee's medical records and the strike marks on both the stockade and split-rail fences impeached the State's "ambush theory" and support a verdict of first-degree reckless homicide; and failure to argue the lesser-included crime of first-degree reckless homicide in closing argument. We shall address each of these assertions in turn.

A. Cross-Examination.

¶16 McAfee claims that in cross-examining Officer Ketterhagen, his trial counsel should have examined in greater depth what he now perceives as "gross inconsistencies" between the physical facts and Officer Ketterhagen's account of how Officer Tanner was shot and the events that immediately followed. In doing so, he cites seven instances of preferred, suggested cross-examination. We have reviewed these preferred lines of questioning and concede that, in hindsight, they might have been more productive in achieving a reckless homicide verdict. Such a level of performance, however, is not the test.

¶17 In ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973), our supreme court enunciated that a defendant "is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation." Also, strategic choices made after counsel's thorough investigation of the facts and law are nearly unchallengeable. *See* ***Strickland***, 466 U.S. at 690. This court concluded in ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992), that trial counsel may select a particular defense from the available defenses and need not undermine the chosen approach

with inconsistencies. Similarly, our supreme court stated in ***State v. Wright***, 2003 WI App 252, ¶35, 268 Wis. 2d 694, 673 N.W.2d 386, that: "Even if it appears in hindsight that another defense would have been more effective, counsel's strategic decision will be upheld as long as it is founded on rationality of fact and law."

¶18 Finally, in making a determination whether trial counsel's performance was objectively reasonable, "the court may rely on reasoning which trial counsel overlooked or even disavowed." ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838.

¶19 A review of the ***Machner*** hearing record amply demonstrates that trial counsel was a seasoned and skillful practitioner of criminal law. She had tried first-degree homicide cases in the past and she had represented defendants who had been charged with first-degree intentional homicide in which an alternate lesser-included charge of reckless homicide had been submitted to a jury. Thus, she had gone through the difficult process of considering and formulating alternative trial strategies such as were presented in this trial. As the result of hundreds of hours of investigation and analysis, trial counsel decided to use a "friendly fire, cover-up" strategy, suggesting to the jury that the fatal shot received by Officer Tanner was from the gun of Officer Ketterhagen. Officer Ketterhagen was the only witness to testify who was present at the scene of the shooting. The State obtained two statements from McAfee, who admitted he fired in the direction of Officer Tanner during the chase to deter Officer Tanner from continuing his pursuit. McAfee never admitted that he actually shot Officer Tanner. The bullet from the fatal shot was never recovered, but the bullet from the potentially fatal shot, which entered Officer Tanner's back and lodged in his clavicle, was recovered and found to be from McAfee's .357 revolver.

¶20 The critical issue then became, from whose gun was the fatal bullet fired? There is no dispute that reckless homicide was an appropriate alternate verdict question. Trial counsel, with McAfee's consent, requested the submission of the lesser-included charge of reckless homicide.

¶21 The difference in the strategy utilized by trial counsel from that advocated by McAfee on appeal is subtle, but nevertheless significant. On appeal, McAfee claims that seven additional areas of inquiry should have been made of Officer Ketterhagen to further bolster the lesser-included charge of reckless homicide. Trial counsel, on the other hand, insofar as cross-examining Officer Ketterhagen was concerned, narrowed the scope of impeaching the "ambush" theory of the State by concentrating on the inconsistencies in Officer Ketterhagen's version of events; *i.e.*, when he first heard shots fired, where either McAfee and Officer Tanner were located when the firing began, and the position of Officer Tanner's body on the ground after the shooting. The purpose of this form of cross-examination was to build a case for "friendly fire, cover-up."

¶22 Doubtless, a cross-examination can always be improved and made more comprehensive. Indeed, retrospect can breed genius. As the trial court astutely remarked, however, "Ineffective assistance of counsel case law does not require that every fact be admitted, every defense be raised, or even that the best defense be made." It requires only that a professionally competent defense be made that is objectively reasonable. Under the circumstances of this case, it could reasonably be argued that to concede that McAfee killed Officer Tanner had elements inconsistent with the "friendly fire, cover-up" defense because to do so would detract from McAfee's original first line of defense that he did not intend to shoot Officer Tanner. Consequently, we conclude that trial counsel's cross-examination was rationally based and objectively adequate.

B. Absent Medical Records.

¶23 McAfee's second basis for claiming deficient performance by his trial counsel's singular reliance upon the "friendly fire, cover-up" theory of defense was her failure to investigate, present, and argue that his medical records and the strike marks on both the stockade and split-rail fences impeached the State's "ambush theory," and supported a verdict of first-degree reckless homicide. We shall first examine the medical record issue.

¶24 It is undisputed that McAfee suffered a bullet wound to the calf of his right leg. During trial, no evidence was received as to the precise nature of the wound. In postconviction discovery, however, a medical report from Froedtert Hospital was found demonstrating that the bullet wound to the right calf was frontal in nature. McAfee argues that his trial counsel ought to have discovered this medical report in pretrial discovery and then, during the trial, exploited the anterior description of the wound as contained in the report to impeach the "ambush theory" of the State's case. Counsel's oversight in not obtaining the medial report notwithstanding, the frontal nature of the wound to McAfee's right calf was not beyond trial counsel's consideration or strategy. The record shows that in final argument, trial counsel, in response to the State's suggestive argument that McAfee received a posterior right calf wound, succinctly had this to say:

> Mr. McCann has suggested that Antonio McAfee was shot in the back of the leg. Ladies and gentlemen, it is your collective recollections that you must rely on …. I submit to you that there's no evidence in this record that Antonio McAfee was shot in the back of the leg.

¶25 In rebuttal, the State returned to the same theme claiming, "When you're running away, limping and you're not looking back, and you are not looking away, you got a bullet in the back of the leg, don't you?" Trial counsel

objected to this line of argument. The State, in effect, confessed error, albeit innocent error, and crafted a curative instruction advising the jury to disregard any argument concerning the wound to McAfee's leg.[3] Thus, it can be readily seen that the nature of the calf wound, and its implication, in terms of the physical evidence presented by the State, was within trial counsel's knowledge and scope of strategy. How trial counsel used this knowledge was well within the accepted realm of discretionary power.

¶26 McAfee claims that specifically introducing evidence of the anterior nature of McAfee's right calf wound would have "dramatically impeached the prosecution's ambush theory." Making such an assertion, however, does not provide an imprimatur for its validity. There is no dispute here that the frontal calf wound was caused by a bullet from a police gun. Accordingly, the bullet was from either the gun of Officer Tanner or Officer Ketterhagen.

¶27 Based on the record, there are three obvious alternative scenarios in which the calf wound could have been inflicted. First, if McAfee was lying in wait to the south of the opening in the stockade fence through which Officer Tanner entered, it is possible that, in an exchange of gunfire, McAfee could have suffered the anterior wound to his calf. Second, when Officer Ketterhagen, who was positioned south of the split-rail fence behind McAfee began firing, McAfee could have turned around to ascertain who was firing and, in the process, been shot by Officer Ketterhagen in the front of his right calf. Finally, when McAfee started running north from the opening in the fence, presumably firing toward his

[3] McAfee did not object to the curative instruction and its acceptance has not been raised as grounds for a postconviction claim of ineffective assistance of trial counsel.

traveled path, he could have momentarily turned around and, in the process, suffered a frontal calf wound from the gun of Officer Ketterhagen. Not one of these scenarios would have been inconsistent with the "ambush theory." Thus, there is no reasonable basis in the record to demonstrate that this evidence would have dramatically impeached the State's "ambush theory." McAfee's claim is constructed on the shifting sands of speculation. He does not adequately explain how an anterior wound to his calf would defeat the ambush theory, and thus make a difference in the outcome of the case.

¶28 It is manifest from the record that the significance of the wound was not ignored, even though the role it played during the trial was not cast as McAfee would now, in retrospect, have it. It is clear that regardless of the absence of the medical report during trial pinpointing the anterior nature of the calf wound, trial counsel, because of her command of the facts, was conscious of the importance of the wound's location and used it in a reasonable way to enhance the "friendly fire, cover-up" theory of defense. Based on the foregoing, we cannot conclude that trial counsel's actions were objectively irrational.

C. Bullet Strike Marks.

¶29 We now turn to the claim of deficient counsel concerning bullet strike marks on the stockade and split-rail fences. McAfee argues that trial counsel unreasonably failed to cross-examine the investigating police officers or the State's forensic firearms expert with the physical evidence both to impeach the "ambush theory" of the State and to corroborate the lesser-included defense of first-degree reckless homicide.

¶30 McAfee reasons as follows. Officer Ketterhagen testified that McAfee ran from the area of the stockade fence after he finished shooting at

Officer Tanner from an ambush position just south of the opening in the stockade fence. If, however, the sources of these strikes as testified to by Detective Steven Springola are from McAfee, he would have been firing these shots as he was moving away from the stockade fence opening and would have been many feet north of the area in which Officer Tanner came through the fence and was killed. This would have presented strong evidence of reckless shooting while moving or running, rather than an ambush.

¶31 McAfee further asserts that there was evidence of additional bullet strikes in the stockade fence about which there ought to have been further inquiry through cross-examination to show their locations were consistent with the locations from which Officer Ketterhagen was firing.

¶32 As an appellate court, we shall not second-guess a trial attorney's "'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

¶33 From a review of the record, there is no doubt that trial counsel was attuned to the importance of the location of the bullet casings that were found, the bullet hole in the post of the split-rail fence and the bullet marking discovered on the stockade fence. She questioned Detective Springola in depth about the inconsistencies in his testimony; *i.e.*, his morning testimony wherein he stated that the direction of the bullet marks in the stockade fence were consistent with Officer Ketterhagen's firing from a southerly direction; whereas in the afternoon, he changed his testimony and stated that the direction of the bullets causing the marks was from north to south. This cross-examination lent further persuasive weight to the "cover-up" theory of defense. She further questioned Detective Springola

about the bullet hole in the fencepost of the split-rail fence located eighteen inches from the ground and the spent shell casing laying not far from where Officer Tanner was found. This factor provided support for the "friendly fire" version of events.

¶34 Trial counsel also challenged the State's firearms expert, Reginald Templin, but not in the manner to the liking of appellate counsel. Her cross-examination of Templin was very brief, referring only to his acknowledgement of a laboratory report. Then, in closing argument, she assumed a negative tact and argued the paucity of evidence in the report that was used to support the State's "ambush theory" and its reply to the "friendly fire, cover-up" defense. There is a reasonable basis in the record for these stratagems. We cannot conclude, as argued by appellate counsel, that they were a product of irrationality.

D. Final Argument.

¶35 Lastly, McAfee claims trial counsel irrationally failed during final argument to argue for the lesser-included offense of first-degree reckless homicide and failed to analyze the physical evidence from a view consistent with the lesser-included charge. For reasons to be stated, we reject this claim of deficient performance.

¶36 Both parties cite ***Yarborough v. Gentry***, 540 U.S. 1, 5-12 (2003). We profit from the United States Supreme Court's teaching:

> The right to effective assistance extends to closing arguments. Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," but which issues to sharpen

> and how best to clarify them are questions with many reasonable answers…. Judicial review of a defense attorney's summation is therefore highly deferential ….
>
> ….
>
> Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach. As one expert advises: "The number of issues introduced should definitely be restricted. Research suggests that there is an upper limit to the number of issues or arguments an attorney can present and still have persuasive effect." Another authority says: "The advocate is not required to summarize or comment upon all the facts, opinions, inferences, and law involved in a case. A decision not to address an issue, an opponent's theory, or a particular fact should be based on an analysis of the importance of that subject and the ability of the advocate and the opponent to explain persuasively the position to the fact finder." In short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion.
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> When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect…. Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.

Id. (citations omitted). To better understand the nature of this claim of deficient performance on the part of trial counsel at closing argument, we briefly review the context in which it was made. The trial court gave its final instructions to the jury before closing argument. Contained within the instructions were five different instances in which the jury was informed that if it was not convinced beyond a reasonable doubt by the evidence presented that McAfee was guilty of first-degree intentional homicide, then it ought to consider whether he was guilty of first-degree reckless homicide. McAfee had requested the lesser-included charge. The jury knew that should it find the evidence insufficient to satisfy the elements of

first-degree intentional homicide, it was then obligated to decide whether McAfee was guilty of reckless homicide. It is presumed that the jury followed the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).

¶37 In addition, the court also informed the jury that the theory of defense was that McAfee did not intend to kill Officer Tanner. During the trial, in order to support the theory of defense and to offer an explanation for the tragic death of Officer Tanner, McAfee presented evidence suggesting that friendly fire on the part of Officer Ketterhagen was the cause of Officer Tanner's death and then the police tried to cover-up the mistake. Statements taken from McAfee by police investigators indicated that his firing in the direction of Officer Tanner was only for the purpose of deterrence. This was the overall strategy agreed upon by both trial counsel and the accused.

¶38 Trial counsel decided to stress lack of intent to kill Officer Tanner because, if successful, it is quite obvious that the jury would then have to consider the reckless homicide charge. The record reflects that this stratagem, at the time of trial, seemed to be the most prudent route to follow. At the postconviction ***Machner*** hearing, trial counsel agreed that the over-arching theme of her summation was that her client did not intend to kill Officer Tanner. This was her general argument, supported by the absence of any admission of intent in the two statements McAfee had given to police investigators. Trial counsel conceded that her client had shot at Officer Tanner, but under circumstances and for reasons other than intent to kill. The reckless homicide lesser-included charge was quite obviously a fallback position but, first and foremost, trial counsel had to dissuade the jury that McAfee exhibited an intent to kill Officer Tanner. That she was unsuccessful on this point is irrelevant. Thus, we cannot agree with McAfee that trial counsel's closing argument constituted deficient performance.

¶39 McAfee also faults his trial counsel for concluding her argument by declaring: "Ladies and Gentlemen, Antonio McAfee, as a matter of law, is not guilty." Because trial counsel's declaration can reasonably be construed as strategy, we reject this claim. The trial court instructed the jury that for both intentional homicide and reckless homicide it had to conclude that the accused caused the death of Officer Tanner. The difference between the two types of crimes is that in the former instance, an accused caused the death of the victim with the intent to kill that person, but not so in the latter instance. The court told the jury it was for it to decide what type of homicide the accused was guilty of, if he was guilty at all. McAfee, by claiming that Officer Tanner's death was caused by friendly fire, emphatically denied any intent to kill him or, for that matter, cause his death. Logically then, there was no admission of his awareness that his conduct was practically certain to cause Officer Tanner's death. Thus, trial counsel's closing exclamation that McAfee was not guilty as a matter of law was consistent with the trial strategy and was not irrational under the facts or the law.

¶40 Trial counsel's summation was a coherent whole. Nothing in the "friendly fire, cover-up" sub-theme could be construed as inconsistent with the lack of intent theory of defense. Counsel exploited this theory to great advantage in the contradictions in Detective Springola's testimony, in the lack of details in Templin's expert testimony, and in the location of the bullet hole in the vertical post of the split-rail fence, and the shell found near the base of the post.

¶41 The same, however, cannot be said for the emphasis sought by McAfee on appeal. As noted by the postconviction motion court, the approach taken by trial counsel presumes the accused was not the shooter; whereas, the approach now advocated by McAfee presumes that he was. Such a tactic introduces a subtle but significant difference in emphasis that could place in

jeopardy a strategy that was reasonably based and agreed to by the accused. Trial counsel was not required to dilute the persuasiveness of her chosen defense by accompanying it with elements of a defense that were inconsistent. Because trial counsel's summation strategy was reasonable, her exercise of discretion was not erroneous. Consequently, her performance in closing argument was not deficient.

E. Findings of Fact at Hearing.

¶42 Next, McAfee claims that the trial court's findings of fact following the ***Machner*** hearing were clearly erroneous. He requests that this court order a new trial. We reject McAfee's request. Our review of the denial of an ineffective assistance claim presents a mixed question of fact and law. We shall not reverse a trial court's factual findings unless they are clearly erroneous. ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. A trial court has the responsibility, when acting as a trier of fact, to determine the credibility of each witness. A trial court can properly reject even uncontroverted testimony if it finds the facts underpinning the testimony are untrue. "Even when a single witness testifies, a trial court may choose to believe some assertions of the witness and disbelieve others." ***Id.*** (citing ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978)). This is especially true when the witness is the sole possessor of the relevant facts. ***Kimbrough***, 246 Wis. 2d 648, ¶29.

¶43 The ***Machner*** hearing focused upon trial counsel's strategic choices and the reasons for the choices. In the trial court's written ***Machner*** decision, it cited several instances in counsel's testimony, which led it to believe that trial counsel conceded error so as to become an advocate for her former client. Based on these instances, it determined: "Her easy and ready admission of deficient performance or error lessened her credibility as to the reasoning for certain

decisions before and at the jury trial in this case." As a result, the trial court found that counsel's testimony at the ***Machner*** hearing was not completely credible, as it appeared that she was conceding deficiencies in her performance to help McAfee obtain a new trial.

¶44 McAfee has difficulty accepting this assessment, but such function is well within the acknowledged powers of a finder of fact. Each of the instances of claimed erroneous fact-finding relate to trial counsel's concessions that trial tactics or strategy could have been performed differently or in a better fashion. In the first instance, trial counsel conceded error for failing to place more emphasis on the lesser-included offense of reckless homicide. McAfee claims that counsel's failure to argue reckless homicide to the jury, given its strength relative to the friendly fire defense, can only constitute error. In respect to this claim, the trial court found that emphasizing the reckless homicide lesser-included charge would introduce elements of inconsistency and jeopardize McAfee's defense that he did not intend to shoot to kill Officer Tanner; but rather, that Officer Ketterhagen was responsible for that shot. McAfee may disagree with the logic of that finding, but there is a factual basis in the record to adopt such a position as earlier recognized by trial counsel. This was not a clearly erroneous finding.

¶45 Second, trial counsel's concession that her cross-examination of Officer Ketterhagen with physical evidence inconsistencies was inadequate is contrary to the record. Here again, it is reasonable to assume that the trial court discounted this concession or totally rejected it. The trial court, citing from the record, noted that during cross-examination, trial counsel repeatedly used earlier motion hearing transcripts to impeach Officer Ketterhagen concerning the key sequence of events. The trial court's determination as to the weight to give to this concession by trial counsel was not clearly erroneous.

¶46 Third, trial counsel's admission that she had no explanation for her failure to obtain the Froedtert Hospital record which would have assisted the defense, was not credible. The record shows that trial counsel did not procure the hospital record through discovery. It also shows, however, that trial counsel was aware of the nature of the right calf wound and that counsel used this knowledge to defend McAfee. Trial counsel demonstrated the importance of the location of the leg wound in her final argument and, particularly so, when the State suggested in its rebuttal argument that the wound was to the back of the leg. At that point, defense counsel objected, obtained a concession of error by the State, and a curative instruction from the court. In retrospect, it may have been better to obtain the medical record before trial, to lend support for the location of the wound and whatever defensive strategies could be developed from its presence. Nevertheless, it is obvious from the record that trial counsel was aware of the significance of the location of the wound from a tactical standpoint and used it most effectively to prevent the State from taking advantage of improper argument. The ***Machner*** finder of fact recognized this nuance, concluded from the circumstances of the trial that trial counsel was cognizant of the significance of the wound's location, and consequently determined there was no deficient performance. The ***Machner*** hearing court's finding was not clearly erroneous.

¶47 Fourth, counsel conceded she failed to appreciate at trial, the corroborating support of Detective Springola's recantation testimony concerning the direction from which bullets were fired causing marks on the stockade fence; she claims that if she had recognized its significance, she would have argued it to the jury. The record reflects, however, that the ***Machner*** finder of fact found counsel was familiar with the evidence of the bullet holes, the strike marks on the fence, and from what direction they may have come. The record further reflects

that trial counsel used this knowledge to impeach Detective Springola's afternoon recantation and used the contradiction in her final argument. It was clearly not erroneous for the ***Machner*** finder of fact to reject this concession.

F. Limitation at Machner Hearing.

¶48 Next, McAfee claims the trial court improperly limited the focus of the testimony of the ***Machner*** hearing it ordered in response to his amended motion for a new trial. After this court reversed the order of the trial court denying postconviction discovery, McAfee filed an amended motion for a new trial for, among other reasons, ineffective assistance of counsel. On October 15, 2003, the trial court conducted a hearing to consider the scope of the motion. The trial court initially indicated its conclusion that a ***Machner*** hearing was warranted based upon the submissions of McAfee's appellate counsel. It also indicated its intention to limit the inquiry to three subjects: (1) whether McAfee was shot in the front or the back of his leg; (2) trial counsel's performance with respect to the various bullet holes and strike marks on the fences; and (3) the adequacy of counsel's closing argument. The State objected, arguing that that there was no need for an evidentiary hearing on any subject other than the inadequacy of trial counsel's final argument. The trial court rejected the State's position. It then asked for comments from postconviction counsel.

¶49 Postconviction counsel made the following response:

> I would say only that I agree that it's essential that the three areas of inquiry that the court has limited the Machner hearing to are appropriate because they overlap in certain respects; and even if the court were to attempt to, to limit it even further, Ms. Shellow's answers, not the questions understand, but her answers in terms of providing a thoughtful, intelligent answer to why things were done would necessarily go to some of the evidence that had been adduced or has not been adduced.

> So I guess I'm not concerned that we can't limit this. There's no intention by us, or need by us, to retry the case; and I think the matter should go forward as the court has proposed.

There can be no doubt that this response constitutes a waiver of any objections McAfee now attempts to raise. *See* ***State v. Echols***, 175 Wis. 2d 653, 679, 499 N.W.2d 631 (1993) (party must object to ruling in trial court in order to preserve issue for appeal). This claim of error will not be considered.

G. Discretionary Reversal.

¶50 Finally, McAfee claims that, pursuant to WIS. STAT. § 752.35, he is entitled to a discretionary reversal because the real controversy was not fully and fairly tried; thus, justice has miscarried. We disagree.

¶51 WISCONSIN STAT. § 752.35 permits this court to reverse a trial court's judgment if we conclude either: (1) the real controversy has not been fully tried, or (2) it is probable that justice has miscarried. We shall, however, exercise this discretionary power to reverse only in exceptional cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶52 The bases for McAfee's discretionary reversal claim are multiple: (1) trial evidence never established who fired the fatal bullet; (2) important medical evidence was not presented to the jury; (3) the only eyewitness, Officer Ketterhagen, was never asked to explain the inconsistencies between the "ambush theory" and the gunshot evidence on the two fences, the location of McAfee's calf wound, the blood found north of the fence opening, rather than west of the opening, and the inconsistencies in his radio reports; and (4) trial counsel requested the jury to return a verdict of acquittal, which was not possible under the facts and law. We decline McAfee's request to order discretionary reversal.

¶53 This case had only one eyewitness, Officer Ketterhagen, whose version of events McAfee strongly contested. McAfee did not dispute that he fired at Officer Tanner seven times. Rather, he claimed he did not fire at him for the purpose of killing him, but only to either deter him or discourage him from continuing his pursuit. The jury thus had to draw inferences from the circumstantial evidence it was presented either by direct examination or from cross-examination.

¶54 Earlier in this opinion we concluded that the choice of evidence presented, and how it was developed to fit the trial strategy of the defense, was to be treated with deference and was not irrationally determined. We eschew revisiting that consideration. We therefore decline to order a new trial under WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.