No. 16-2301

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMAL THOMAS,

Petitioner-Appellant,

v.

GEORGE STEPHENSON

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan, Case No. 2:09-CV-12958

REPLY OF APPELLANT JAMAL THOMAS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT—
The Record Evidence Remains Insufficient to Support Mr. Thomas's Conviction for Assault with Intent to Commit Murder 2

A. The State Overreaches Regarding the Standard of Review 4

B. The State Concedes that Mr. Thomas's Warning to Mr. Harrison and Levelling of His Pistol Do Not Support a Beyond-a-Reasonable-Doubt Finding of Present Intent to Kill 6

C. The Actions Taken by Larry Davidson Remain Insufficient to Prove Intent to Kill Beyond a Reasonable Doubt as to Mr. Thomas 7

CONCLUSION 11

CERTIFICATE OF COMPLIANCE 14

TABLE OF AUTHORITIES

CASE **PAGE**

Cavazos v. Smith,
565 U.S. 1 (2011) 5

Jackson v. Virginia,
443 U.S. 307 (1979) 4-5, 5

Newman v. Metrish,
543 F.3d 793 (6th Cir. 2008) 5

People v. Cameron,
No. 306391, 2013 WL 951213 (Mich. Ct. App. Feb. 26, 2013) 8

People v. Johnson,
Nos. 278955, 279522, 2008 WL 4724317
(Mich. Ct. App. Oct. 28, 2008) 8-9

People v. King,
534 N.W.2d 534 (Mich. Ct. App. 1995) 9

People v. Taylor,
375 N.W.2d 1, 8 (Mich. 1985) 7

Tanner v. Yukins,
867 F.3d 661 (6th Cir. 2017) 5

STATUTES

28 U.S.C. § 2254(d)(1) 4

28 U.S.C. § 2254(d)(2) 4

OTHER AUTHORITIES

Federal Habeas Manual § 13:32 (2017 ed.) 12

Though not in so many words, the State all but concedes the insufficiency of the evidence offered at trial in purported support of Mr. Thomas's conviction for assault with intent to commit murder, and thus—in fact if not in form—also concedes Mr. Thomas's entitlement to habeas corpus relief as to his AWIM conviction only.

The State abandons the theory, on which the decision below and the decision of the Michigan Court of Appeals were primarily based, that Mr. Thomas's threat to the victim, Rodney Harrison, is sufficient to sustain Mr. Thomas's AWIM conviction. In fact, the State expressly concedes that "the state court's determination that Thomas' own actions proved the elements of assault with intent to murder could be construed as unreasonable." State's Br., Doc. 20, at 25.

Instead of relying on Mr. Thomas's threat that he would shoot Mr. Harrison if he moved or made noise, the State pivots and tries to assert that Mr. Thomas's co-defendant's kicks to Mr. Harrison's back and single hit with the butt of his gun proved assault with intent to commit murder as to *Mr. Thomas*. But reasonable assessment of those actions—and, indeed, the State's own unguarded assessment—belies this assertion: The State acknowledges in a moment of candor that the kicks and strike by Davidson were intended, not to kill, but rather "to coerce Harrison into telling [the perpetrators] w[h]ere the money [allegedly hidden in Mr. Harrison's house] was located." *Id.* at 28-29.

The crimes committed against Mr. and Mrs. Harrison were dreadful ones deserving of hefty punishment, and nothing herein is intended to downplay the seriousness of those offenses. Indeed, their seriousness is clearly conveyed by Mr. Thomas's convictions (and lengthy sentences) for first degree home invasion, felonious assault, possession of a firearm by a felon, and possession of a firearm in the commission of a felony—convictions not presently at issue. But in its understandable keenness to condemn the crimes committed against the Harrisons, the jury overreached. The evidence does not support Mr. Thomas's conviction for assault with intent to commit murder. Only that conviction and the accompanying sentence are presently at issue, and both should be vacated.

ARGUMENT[1]

The Record Evidence Remains Insufficient to Support Mr. Thomas's Conviction for Assault with Intent to Commit Murder.

The State does not take issue with the fact, and thus concedes, that the Michigan Court of Appeals conducted no "meaningful legal or factual analysis" in

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[1] As to the facts of the case, the parties largely agree on the substance in their respective recitations while, as expected, diverging modestly at times in their characterizations of those facts. An exception is the State's assertion that Mr. Thomas "was convicted . . . of his role in . . . beating [Mr. Harrison] while Davidson searched the home for . . . money." State's Br. at vii. This is not true. There is no evidence that Mr. Thomas ever struck, or attempted to strike, Mr. Harrison. *See* 4/10/06 Trial Tr., RE 25-3, PageID# 682 (Q. Do you remember if Mr. Thomas . . . ever punched or kicked you? A. [Mr. Harrison:] It was [Davidson] who did the kicking and the hitting."). The assertion in the State's brief to the contrary may well have been an inadvertent error.

affirming Mr. Thomas's AWIM conviction on direct appeal. Opening Brief ("Br."), Doc. 19, at 8. The State similarly does not respond to, and thereby grants, that the district court, in denying Mr. Thomas's petition for habeas relief as to the AWIM conviction, provided no independent analysis of its own but rather simply block-quoted a multi-paragraph excerpt of the deficient Michigan Court of Appeals opinion. *See id.*

Rather than attempting to make up for these fundamental deficiencies, the State, in its opposition brief, takes a page from the same book. Instead of providing a thorough legal analysis, it merely provides an extended reiteration of the facts and of the standard for habeas review, followed by nearly bald assertions that the facts are sufficient to support Mr. Thomas's AWIM conviction. The State ironically accuses Mr. Thomas of "an attack on current Michigan case law." State's Br. at 32. But in fact it is *the State* that refuses to apply—and all but ignores—Michigan law.[2] The State's brief does not engage even once with the substance of any Michigan case, let alone apply that substance to the case at bar, and it has failed to identify a single Michigan case other than this one in which threats like those here, or actions like those of Mr. Thomas's co-defendant, were

[2] Of the twelve Michigan state-court cases the State cites, five are cited merely in setting out the elements of AWIM, one is cited for the elements of aiding and abetting, one for the elements of assault with intent to do great bodily harm less than murder, and five occur only in block quotes from the Michigan Court of Appeals opinion.

found sufficient to support a conviction for assault with intent to commit murder. *Cf.* Br. at 16, 18-19 (Mr. Thomas "is not aware of a single Michigan case" where the pointing of a gun, or acts as unlikely to produce death as those committed by Davidson, were held sufficient to sustain an AWIM conviction).

Mr. Thomas, by contrast, has embraced Michigan case law. And those cases show that his AWIM conviction is unsupportable and therefore must be vacated. *See* Br. at 12-19.

A. The State Overreaches Regarding the Standard of Review.

As acknowledged above and in Mr. Thomas's opening brief, there is no doubt that the standard of review in habeas cases is—as it should be—a challenging one for habeas petitioners to satisfy. *See* Br. at 9-10. Mr. Thomas must show that the State court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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)(1), (2). In this sufficiency-of-the-evidence case, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*,

443 U.S. 307, 319 (1979). The State court's determination of this issue is entitled to deference. *Tanner v. Yukins*, 867 F.3d 661, 672 (6th Cir. 2017).[3]

Not content with this exacting standard, the State asserts that Mr. Thomas must satisfy a standard that is "even higher" than "bare rationality," *i.e.*, that the Michigan Court of Appeals's decision affirming Mr. Thomas's conviction need not even be rational. State's Br. at 32-33. Not so. Though the governing standard is high, it is still the case that while "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court[,] [t]he federal court instead may do so . . . if the state court decision was 'objectively unreasonable.'" *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (citation omitted). And a state-court decision rejecting a sufficiency challenge *is* unreasonable where a "mere modicum" of evidence supports the conviction (let alone where, as here, no evidence supports the conviction). *Jackson*, 443 U.S. at 320. As this Court recently put it, even on habeas review, "inculpatory evidence" that "establishes, at best, 'reasonable speculation'" of guilt is insufficient to support a conviction beyond a reasonable doubt. *Tanner*, 867 F.3d at 672 (quoting *Newman v. Metrish*, 543 F.3d 793, 797 (6th Cir. 2008)).

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[3] The district court's denial of habeas relief, by contrast, is reviewed *de novo*. *Id.* at 671.

The standard for habeas relief is thus very demanding but not, as the State would have it, all but impossible to satisfy. It has been met here, and Mr. Thomas's AWIM conviction and sentence should be vacated.

B. The State Concedes that Mr. Thomas's Warning to Mr. Harrison and Levelling of His Pistol Do Not Support a Beyond-a-Reasonable-Doubt Finding of Present Intent to Kill.

The State does not devote a single sentence of its 38-page brief to refuting Mr. Thomas's argument that his threat to Mr. Harrison (*i.e.*, his warning to Mr. Harrison that he would shoot him if he moved or made noise, and his levelling of his pistol) was insufficient to prove specific, present intent to kill—that is, that his threat was not designed to bring about Mr. Harrison's death. *See* Br. at 11-18. To the contrary, the State concedes that "the state court's determination[4] that Thomas' own actions proved the elements of assault with intent to murder could be construed as unreasonable." State's Br. at 25.

But even that is an understatement. The Michigan Court of Appeals's holding—that a reasonable factfinder could conclude that Mr. Thomas's threat was sufficient to prove a present, specific intent to kill beyond a reasonable doubt—defies rationality. And the State does not deny that no other Michigan case has ever held such a threat sufficient to sustain a conviction for assault with intent to

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[4] And, by extension, the district court's determination, given that the district court relied exclusively on the Michigan Court of Appeals's decision on this point without providing its own analysis.

commit murder. The *threat itself*, after all, was made to effect Mr. Harrison's cooperation, not his death. As set out in detail in Mr. Thomas's opening brief, Michigan courts are unsurprisingly unanimous in upholding AWIM convictions only where the act at issue was intended to bring about the victim's death. Br. at 16-17. Such plainly was not the case here.

C. The Actions Taken by Larry Davidson Remain Insufficient to Prove Intent to Kill Beyond a Reasonable Doubt as to Mr. Thomas.

Having abandoned the threat theory, the State focuses its brief on the assertion that Davidson's kicks and pistol strike were sufficient proof to support *Mr. Thomas's* conviction for assault with intent to commit murder. But even this attempt is half-hearted. After an extended recitation of the facts, procedural history, and standard governing habeas cases, the State's argument on this point consists in its entirety—without appeal to statute, case law, or even reasoned disputation—of the bald conclusion that Davidson's actions were sufficient to prove intent as to Mr. Thomas.

But that position doesn't hold water. The kicks and pistol strike were not "naturally adapted to produce death." *People v. Taylor*, 375 N.W.2d 1, 8 (Mich. 1985). And the State fails to cite a single case holding that actions like Davidson's are sufficient to prove intent even as to *the actor himself*, let alone as to his accomplice. There is good reason for this: As Mr. Thomas has previously stated,

he is "unaware of a single Michigan case in which the acts supporting an assault-with-intent-to-commit-murder conviction were as unlikely to produce death as those committed by Davidson here." Br. at 18-19. The State appears to concur, as it too is unable to point to any such case. *Michigan v. Cameron*, No. 306391, 2013 WL 951213 (Mich. Ct. App. Feb. 26, 2013)—wherein the defendant bashed the victim's head into a wall, causing her to lose consciousness—comes closest, but there the Michigan Court of Appeals *reversed* the defendant's AWIM conviction. The State's brief doesn't say a word about *Cameron* or any of the numerous other cases supporting Mr. Thomas's position that are cited and discussed in his opening brief. *See* Br. at 15-17, 18-19.

In addition to the cases cited in Mr. Thomas's opening brief, *People v. Johnson*, Nos. 278955, 279522, 2008 WL 4724317 (Mich. Ct. App. Oct. 28, 2008), is instructive. There, the defendant was convicted of assault with intent to commit murder after his accomplice shot their victim in the leg during an attempted carjacking, severing a major artery. *Id.* at *3-4. On appeal, the prosecution argued that "because [the co-defendant] utilized a firearm to sever a major artery," specific intent to kill was established. *Id.* at *4. But the Michigan Court of Appeals disagreed and vacated both defendants' convictions: "[T]o accept the prosecution's argument, one would have to conclude that [the co-defendant] shot [the victim] in the shin with the hope that a fatal injury would result. Such a theory

is contrary to logic." *Id.* Had the co-defendant intended to kill the victim, the court said, he would have shot him in the head or torso. *Id.* Here, Davidson's blows to Harrison, while inexcusable, rise nowhere near the level of an artery-severing gunshot wound. And just as the co-defendant in Johnson would have shot his victim in the head or torso had he wanted to kill him, so here, as the State acknowledges, had Davidson sought to kill Mr. Harrison, he would have "put [or attempted to put] four bullets into Harrison." State's Br. at 30.

Further, even if the State had convincingly argued—from case law or otherwise—that Davidson's actions were sufficient to show his intent to kill, still Mr. Thomas should prevail here, given that, in order to impute that intent to Mr. Thomas under an aiding and abetting theory, the evidence must also show beyond a reasonable doubt that Mr. Thomas knew that Davidson intended the kicks and pistol butt to cause Mr. Harrison's death. *People v. King*, 534 N.W.2d 534, 539 (Mich. Ct. App. 1995) ("A defendant may be convicted as an aider and abettor in a specific intent crime" only "if he participated in the crime and either [1] possessed the specific intent to commit the crime or [2] knew that the principal possessed that intent."). And the State, once again, does not lift a finger to counter the argument,

Br. at 19-20, that Davidson's actions are insufficient to prove this additional point essential to conviction.[5]

In the end, even the State does not believe what a reasonable factfinder *must* be able to believe in order for the State to prevail—that Davidson's brief blows were intended to kill Mr. Harrison, and that Mr. Thomas knew this to be the case. To the contrary, the State explicitly acknowledges that Davidson struck Mr. Harrison *not* in order to kill him, but in order "to coerce [him] into telling [the perpetrators] where the money [supposedly hidden somewhere in the house] was located."[6] *Id.* at 28-29. And no other assault was committed that could support an AWIM conviction. The State argues that "Davidson's statement that he'd have to

[5] The State never argues that the evidence supports a conclusion—let alone a beyond-a-reasonable-doubt conclusion—that Mr. Thomas knew that Davidson intended for his blows to cause Mr. Harrison's death. Rather, the only thing the State argues Mr. Thomas "knew" about Davidson's intent was that Davidson supposedly "inten[ded] to shoot Harrison." *Id.* at 29-30. But Davidson never actually shot or attempted to shoot Mr. Harrison, and thus whether or not he possessed the intent to kill Mr. Harrison in the future by shooting him—and whether Mr. Thomas knew about it—is irrelevant. For Mr. Thomas's AWIM conviction to survive, the evidence must show that Mr. Thomas knew Davidson committed the assault (*i.e.*, the kicks and gun strike) with the specific intent to kill Mr. Harrison thereby. *See* Br. at 17-18.

[6] This position—the *State's* position—is the only one that makes sense, as Mr. Harrison would have been of no help to Davidson in his search for the stockpile of cash supposedly hidden in Mr. Harrison's home if he were dead. And, importantly, Mr. Harrison testified that only *after* Davidson kicked and struck him did Davidson point his gun at Mr. Harrison and say, "I'm about to kill you," 4/10/06 Trial. Tr., RE 25-3, PageID# 718-19, further bolstering the conclusion that Davidson did not intend his kicks and hit to kill.

put four bullets into Harrison"—*not* his brief blows rendered in order to get Mr. Harrison to divulge the location of the money—could, "support[] . . . [the] conclusion" that Davidson was going to kill Mr. Harrison. *Id.* at 30. But, ultimately, Davidson did not shoot or attempt to shoot—Mr. Harrison. *Id.* at 31. The State posits, counterfactually, that Davidson and Mr. Thomas "would have" tried to kill Mr. Harrison had events that night been different. *Id.* But even assuming that bald allegation is true, what a defendant might have done under different circumstances has no bearing on the sufficiency (or insufficiency) of evidence supporting his AWIM conviction. The facts remain that Davidson never fired or attempted to fire any shots.[7] The men never actually attempted to kill Mr. Harrison. And assault with intent to commit murder was not committed.

CONCLUSION

For the reasons above, as well as those discussed in his opening brief, Petitioner Jamal Thomas respectfully requests that this Court reverse the district court's judgment with respect to his conviction for assault with intent to murder

[7] Q. There were no gun shots that night; were there?

A. (No audible response.)

Q. I'm sorry?

A. [Mr. Harrison:] No.

4/11/06 Trial Tr., RE 25-4, PageID# 754.

and issue a writ of habeas corpus vacating his conviction and sentence for the same.[8]

Dated: January 2, 2017

Respectfully submitted,

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[8] Should the Court grant the writ and vacate Mr. Thomas's conviction and sentence for assault with intent to commit murder, the State urges this Court to affirmatively "find that . . . the evidence . . . is sufficient to convict [Mr. Thomas] of assault with intent to commit great bodily harm less than murder." State's Br. at 35. But a habeas court should resort to reclassification of an offense in only the rarest of circumstances. *See* Brian R. Means, *Federal Habeas Manual* § 13:32 (2017 ed.) (reclassification should be considered only "[i]n rare cases"). And rather than this Court unilaterally entering a conviction for assault with intent to do great bodily harm less than murder without input from the State court, Mr. Thomas submits that the more prudent course, should this Court decide that it will not simply vacate his conviction and sentence for assault with intent to commit murder (as Mr. Thomas urges it to do), would be to vacate the sentence and conviction and give the State court the opportunity to determine whether entry of a conviction for assault with intent to do great bodily harm less than murder is appropriate at this juncture under State law.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,053 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1). As permitted by Federal Rule of Appellate Procedure 32(g)(1), I have relied on the word count function of Microsoft Word in preparing this certificate.

2. I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Emmett E. Robinson
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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2017, this Reply of Appellant Jamal Thomas was filed with the United States Court of Appeals for the Sixth Circuit via the Court's ECF system. Counsel of record will receive notice of, and be able to access, the filing via that system.

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