

No. 19-4142

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Mar 19, 2020

DEBORAH S. HUNT, Clerk

STEPHEN THOMPSON,

)

Petitioner-Appellant,

)

v.

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O R D E R

CHRISTOPHER LAROSE, Warden,

)

Respondent-Appellee.

)

Before: NALBANDIAN, Circuit Judge.

Stephen Thompson, an Ohio prisoner represented by counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Thompson applies to this court for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2014, a jury found Thompson guilty of felonious assault of a peace officer, two counts of assault of a peace officer, obstructing official business, and operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. The convictions arose when Thompson drove his vehicle toward a police officer while intoxicated. The trial court sentenced Thompson to a total of eight years of imprisonment and a fine of \$750, to be followed by a mandatory five-year period of post-release control. The Ohio Court of Appeals affirmed in part, but remanded for resentencing. *State v. Thompson*, No. 15AP0016, 2016 WL 3570469, at *12 (Ohio Ct. App. June 30, 2016). The Ohio Supreme Court declined to accept jurisdiction of the appeal. *State v. Thompson*, 69 N.E.3d 750 (Ohio 2017) (table). On remand, the trial court reduced Thompson's prison term to six-and-one-half years.

In 2018, Thompson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he argued that: (1) the trial court's exclusion of the testimony of three expert

witnesses violated his right to present a complete defense; (2) the evidence was insufficient to support his felonious assault conviction; and (3) the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is unconstitutional. A magistrate judge recommended that the petition be denied. Over Thompson's objections, the district court adopted the report and recommendation, denied the petition, and declined to issue a COA.

Thompson now applies to this court for a COA, arguing that: (1) contrary to the magistrate judge's conclusion, he fairly presented his complete-defense claim to the Ohio Court of Appeals as a federal claim; (2) he was denied the opportunity to present a complete defense by the exclusion of the testimony of his expert witnesses; and (3) insufficient evidence supported a finding that he knowingly committed felonious assault. Thompson abandons his constitutional challenge to AEDPA by failing to raise it in his COA application. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial of a motion is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

When reviewing a district court's application of the standards of review of 28 U.S.C. § 2254(d) after a state court has adjudicated a claim on the merits, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (1) "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"; nor (2) "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); *see Miller-El*, 537 U.S. at 336.

Complete-Defense Claim

The Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment “guarantee[] criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). The right is not “unlimited,” and “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” *United States v. Scheffer*, 523 U.S. 303, 308 (1998). The constitutional right to present a complete defense allows defendants a “meaningful opportunity” to put forward a complete defense but “not an unlimited right to ride roughshod over reasonable evidentiary restrictions.” *Wynne v. Renico*, 606 F.3d 867, 870 (6th Cir. 2010) (quoting *Crane*, 476 U.S. at 690; *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003)). The right to present a complete defense ultimately means that “state-law evidentiary restrictions cannot be ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Wynne*, 606 F.3d at 870 (quoting *Scheffer*, 523 U.S. at 308).

Thompson claims that his Sixth and Fourteenth Amendment rights to present a complete defense were violated by the trial court’s failure to admit the testimony of three of his expert witnesses: Henry Lipian, Choya Hawn, and Thomas Tomasheski. He asserts that Lipian would have testified that it would have been difficult for Thompson to perceive that the officer was in his path when he drove his vehicle at him due to the “wall of light” created by the headlights and spotlight of the police vehicles; that Hawn would have testified that the second and third shots that struck Thompson’s car were fired after Thompson had already passed by the officer; and that Tomasheski would have testified to various investigative errors committed by the officers involved in the incident, which would have undermined their credibility.

In addition to finding that Thompson did not fairly present this claim to the state courts, the district court conducted a de novo merits review. First, the district court agreed with the Ohio

Court of Appeals' determination that Lipian's opinion was based, in part, on Thompson's voluntary intoxication at the time of the incident. Because in Ohio voluntary intoxication is not a valid consideration in determining the existence of a mental state as an element of a criminal offense, *see* Ohio Rev. Code § 2901.21(E), the Ohio Court of Appeals concluded that the trial court did not err by concluding, under Ohio Rule of Evidence 403(A), that the probative value of the evidence was outweighed by "the danger of unfair prejudice, or confusion of the issues, or of misleading the jury." *See Thompson*, 2016 WL 3570469, at *6. The Ohio Court of Appeals also excluded Hawn's testimony based on Ohio Rule of Evidence 403(A). Although Hawn's ballistics testimony had probative value concerning the officer's reactions and position when he fired the shots, the focus of the indictment was on Thompson's actions and whether he knowingly caused or attempted to cause physical harm to the officer. *Id.* The testimony thus might confuse the jury on the proper focus of their deliberations. Reasonable jurists would agree that these were not arbitrary or disproportionate evidentiary reasons to exclude Lipian's and Hawn's testimony.

The Ohio Court of Appeals found that the proposed testimony of Tomasheski concerning the officer's alleged investigative errors was not relevant pursuant to Ohio Rules of Evidence 401 and 402. Any investigative errors that may have been committed by the officers, such as failing to stop Thompson earlier or calling for backup, are irrelevant to whether Thompson committed a felonious assault. This was not an arbitrary or disproportionate evidentiary reason to exclude this testimony. Reasonable jurists could not debate the district court's decision to reject Thompson's complete-defense claim on the merits, and this court therefore need not analyze whether Thompson fairly presented this claim in state court.

Sufficiency-of-the-Evidence Claim

When evaluating the sufficiency of the evidence, this court must determine "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 inquiry involves two layers of deference: one to the jury's verdict under *Jackson*, and a second to the state court's decision under § 2254(d). *See Coleman v.*

Johnson, 566 U.S. 650, 651 (2012) (per curiam). When assessing the sufficiency of the evidence, this court does not weigh the evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury. *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994). “All reasonable inferences and resolutions of credibility are made in the jury’s favor.” *United States v. Washington*, 702 F.3d 886, 891 (6th Cir. 2012). “Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.” *United States v. Kelley*, 461 F.3d 817, 825 (6th Cir. 2006) (quoting *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999)).

Thompson argues that the evidence was insufficient to sustain a conviction for felonious assault, specifically whether he was aware that his actions would probably result in an attempt to cause physical harm to the officer. *See* Ohio Rev. Code § 2903.11(A). The Ohio Court of Appeals determined that the prosecution offered sufficient evidence to establish the required mental state of “knowingly.” Evidence was presented that, after Thompson pulled into a driveway pursuant to a traffic stop, he made eye contact with one officer before turning his vehicle around and driving toward the two separate sets of headlights in the driveway. This indicates that Thompson was aware that there was more than one officer present. Thompson was also able to maneuver his car around the driveway and the yard and then drive directly toward the officer with his headlights on, which supported a jury finding that Thompson perceived the officer. *See Thompson*, 2016 WL 3570469, at *9. Although Thompson asserted that a “wall of light” would have made it difficult to see and he had only a moment to perceive the officer, it is not the place of a reviewing court to reweigh the evidence or substitute its judgment for that of the jury. *See Wright*, 16 F.3d at 1440. In light of AEDPA’s deferential standard, reasonable jurists could not debate the district court’s conclusion that the Ohio Court of Appeals’ decision was not contrary to, or involved an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

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Thompson has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk