

10-3045-pr
Langston v. Smith

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5
6 August Term, 2010

7
8 (Argued: October 18, 2010

Decided: January 7, 2010)

9
10 Docket No. 10-3045-pr

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12
13 KEVIN LANGSTON,

14
15 *Petitioner-Appellee,*

16 —v.—

17
18 JOSEPH SMITH, Superintendent of Shawangunk Correctional Facility,

19
20 *Respondent-Appellant.*

21
22
23 Before:

24 FEINBERG, NEWMAN, and LYNCH, *Circuit Judges.*

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27 Petitioner-appellee Kevin Langston sought habeas relief in the United States District
28 Court for the Eastern District of New York following the state appellate court’s affirmance
29 of his conviction for felony assault and second-degree criminal possession of a weapon. The
30 district court (Edward R. Korman, *J.*) held that the evidence presented at trial was
31 insufficient to sustain Langston’s felony assault conviction and granted partial relief.

1 Respondent-appellant Joseph Smith, the Superintendent of Shawangunk Correctional
2 Facility, appealed. We find that no reasonable jury could have convicted Langston of felony
3 assault, and that the state appellate court unreasonably applied Jackson v. Virginia, 443 U.S.
4 307 (1979), in concluding otherwise.

5 We therefore AFFIRM the district court’s grant of the writ.

6 _____
7 WARREN S. LANDAU (Lynn W. L. Fahey, *on the brief*), Appellate Advocates,
8 New York, New York, *for Petitioner-Appellee*.

9 _____
10 MORGAN J. DENNEHY, Assistant District Attorney (Leonard Joblove, Ann
11 Bordley, and Victor Barall, Assistant District Attorneys of Counsel, *on the*
12 *brief*), *for* Charles J. Hynes, District Attorney, Kings County, Brooklyn, New
13 York, *for Respondent-Appellant*.

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16 GERARD E. LYNCH, *Circuit Judge*:

17 In 2003, a New York jury convicted petitioner-appellee Kevin Langston of felony
18 assault and criminal possession of a weapon in the second degree.¹ New York’s felony
19 assault statute criminalizes actions taken “[i]n the course of and in furtherance of the
20 commission . . . of a felony” that cause “serious physical injury” to a non-participant. N.Y.
21 Penal Law § 120.10(4). At trial, the prosecution demonstrated that one of Langston’s

1 ¹ “A person is guilty of criminal possession of a weapon in the second degree when,
2 with intent to use the same unlawfully against another, [he] possesses a loaded firearm.”
3 N.Y. Penal Law § 265.03(1)(b).

1 accomplices shot and seriously injured NYPD Detective Arthur Marquez during what
2 appears to have been an attempted robbery. Langston was not charged with committing the
3 assault in furtherance of the felony of attempted robbery. Instead, the jury was instructed that
4 to convict Langston of felony assault, it had to find that Langston committed the assault “in
5 the course of and in furtherance of” the felony of criminal possession of a weapon, a finding
6 the jury implicitly made by finding Langston guilty of felony assault.

7 Langston, after unsuccessfully challenging the sufficiency of the evidence against him
8 on direct appeal, see People v. Langston, 806 N.Y.S.2d 886 (2d Dep’t), leave to appeal
9 denied, 816 N.Y.S.2d 755 (2006), sought habeas relief in the Eastern District of New York
10 (Edward R. Korman, *J.*). Judge Korman granted Langston’s petition after determining that
11 the evidence at trial was constitutionally insufficient to prove the “in furtherance of” element
12 beyond a reasonable doubt. Langston v. Smith, No. 07-cv-2630, 2010 WL 3119284, at *7
13 (E.D.N.Y. Aug. 6, 2010). Respondent-appellant Joseph Smith, the Superintendent of
14 Shawangunk Correctional Facility (“the State”), appealed.

15 **BACKGROUND²**

16 On May 8, 2002, a confidential informant introduced John Robert, an undercover
17 officer in the NYPD’s Firearms Investigation Unit, to local gun dealer Edward Moultrie.

1 ² Because we are conducting constitutional sufficiency review, we present “the
2 evidence in the light most favorable to the prosecution.” Jackson v. Virginia, 443 U.S. 307,
3 319 (1979).

1 Following that meeting, Moultrie agreed to facilitate Robert's purchase of four 9mm
2 handguns. A few days later, Robert and Marquez (together, "the officers") met Moultrie
3 and "his man" Langston at Junior's Restaurant in Brooklyn, New York to carry out the
4 deal.

5 When the officers arrived at Junior's, Langston insisted that the sale take place at a
6 high-rise housing project a few miles away and directed them to 301 Sutter Avenue, the
7 building in which he grew up. Once there, Moultrie, Robert, and Marquez waited outside
8 while Langston entered the building, purportedly to initiate contact with the sellers.
9 Langston testified that he looked for, but was unable to find, his friend E-Town, who had
10 previously agreed to sell Robert and Marquez the weapons and to compensate Langston
11 for his efforts. Langston did, however, make contact with Gamel Cherry, an acquaintance
12 who lived in the building.³ Langston testified that Cherry agreed to provide the weapons
13 necessary to complete the sale.

14 After making arrangements with Cherry, Langston returned outside, informed
15 Robert and Marquez that the sellers needed the money up-front, and offered to act as
16 courier for the transaction. Robert rejected this proposal, but agreed to "do the deal"
17 inside the building. Robert, Marquez, and Moultrie then followed Langston into 301

1 ³ The jury need not have credited Langston's testimony that the arrangement with
2 Cherry was impromptu, and was entitled to infer that Langston and Cherry had been working
3 together from the start, as Langston implied to the undercover "purchasers."

1 Sutter Avenue where Langston greeted a few people, including Ralph Wyman, who were
2 milling about the lobby. After Robert again refused to prepay, Langston convinced the
3 officers to make their purchase in the sixth floor hallway. On their way up, the elevator
4 stopped on the fifth floor, where Skyler Brownlee was waiting. When the elevator door
5 opened, Brownlee acknowledged Langston, but did not get on the elevator.

6 On the sixth floor, Langston and Robert continued to argue about the mechanics of
7 the deal. At one point, Cherry entered the hallway from the stairwell and joined in
8 Langston's unsuccessful efforts to secure prepayment. Cherry demanded that the officers
9 produce identification. After Marquez complied, Cherry, apparently satisfied, told Robert
10 and Marquez that they were "going to get what [they] came . . . for" and left the hallway.

11 While awaiting Cherry's return, Langston tried to convince Robert to reimburse
12 him for cab fare from Manhattan to Brooklyn. Suddenly, Cherry, Brownlee, and Wyman
13 burst into the hallway with guns drawn and opened fire on the officers.⁴ A bullet from the
14 initial volley of shots struck Marquez's hand, causing permanent damage. Robert and
15 Marquez returned fire before retreating into the stairwell to escape their assailants.
16 Langston, who had been standing next to Robert at the time of the shooting, also fled the
17 scene. Police officers found him inside a nearby train station bleeding from gunshot
18 wounds to his arm and buttocks.

1 ⁴ At trial, the government alleged that a fourth individual, Leonard Barber, also
2 participated in this assault. Barber was tried separately and acquitted of all charges.

1 Back-up officers responding to the scene discovered Moultrie lying partially
2 paralyzed on the hallway floor with wounds to his back and face. Crime scene
3 investigators recovered a 9mm handgun, twenty-seven discharged 9mm shells (all of
4 which came from the officers' weapons), and ballistics evidence from a .22 caliber pistol,
5 including one discharged shell, one live cartridge, and numerous bullet fragments.

6 A grand jury indicted Langston on thirteen counts ranging from attempted murder
7 to attempted criminal sale of a firearm. People v. Langston, Ind. No. 3508 (N.Y. Sup. Ct.
8 Kings Co. 2002). At trial, Langston testified in his own defense. He insisted that he
9 barely knew Cherry and had never met Wyman or Brownlee. While Langston admitted to
10 attempting to arrange a gun sale, he vehemently denied any involvement in plotting a
11 robbery or any knowledge that Cherry, Wyman, or Brownlee possessed weapons other
12 than those offered for sale.

13 Five counts went to the jury: felony assault, second-degree criminal possession of
14 a .22 caliber handgun, third-degree criminal possession of a .22 caliber handgun, second-
15 degree criminal possession of a 9mm handgun, and third-degree criminal possession of a
16 9mm handgun. The jury acquitted Langston of the possession charges related to the 9mm
17 handgun, but convicted him of felony assault and second-degree possession of the .22
18 caliber weapon. As instructed by the trial judge, reaching this verdict required the jury to
19 find, beyond a reasonable doubt, that the assault on Marquez was committed in

1 furtherance of the felony weapon possession.

2 The trial court sentenced Langston to twenty-five years' imprisonment on the
3 felony assault count and to a concurrent five-year sentence on the possession count.

4 Brownlee, Wyman, and Moultrie all pleaded guilty to criminal possession of a weapon in
5 the second degree. Brownlee and Wyman were sentenced to ten years' imprisonment,
6 while Moultrie received a twelve-month sentence. Cherry was tried with Langston,
7 convicted of felony assault, and sentenced to twenty-five years.

8 On direct appeal, Langston primarily argued that the evidence presented at trial
9 was insufficient to prove that he acted in concert with Cherry, Wyman, and Brownlee.
10 Langston also insisted that, while he intended to sell weapons, he did not anticipate that
11 the transaction would degenerate into a shootout and, therefore, he should not be held
12 liable for Marquez's injuries. Langston also argued that the State failed to prove beyond
13 a reasonable doubt that the assault was committed in furtherance of the weapon
14 possession. The Appellate Division of the New York Supreme Court rejected Langston's
15 claims and affirmed his conviction. People v. Langston, 806 N.Y.S.2d at 886-87, leave to
16 appeal denied, 816 N.Y.S.2d at 755.

17 After exhausting his state-law remedies, Langston filed a timely petition in the
18 district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court
19 concluded that the evidence was insufficient to prove the "in furtherance of" element of

1 felony assault beyond a reasonable doubt and granted Langston's petition. Langston v.
2 Smith, 2010 WL 3119284, at *7. However, the district court denied the petition with
3 respect to Langston's conviction for second-degree weapon possession and rejected
4 Langston's claim that the prosecution failed to prove that he acted in concert with Cherry,
5 Brownlee, and Wyman. Id. at *4. Langston does not appeal this portion of the district
6 court's ruling, perhaps because he has now been incarcerated for more than eight years,
7 three years longer than his sentence on the possession charge.⁵

8 DISCUSSION

9 I. Standard of Review

10 We review the district court's grant of Langston's habeas petition de novo. Jones
11 v. Keane, 329 F.3d 290, 294 (2d Cir. 2003). Our review focuses on the state appellate
12 court's decision upholding Langston's conviction. Since that court rejected Langston's
13 insufficiency claim on the merits, we must determine whether its ruling was erroneous,
14 and, if so, whether the error resulted from an "unreasonable application" of the

1 ⁵ A different district court judge denied habeas relief to Cherry, who made arguments
2 similar to Langston's. See Cherry v. Walsh, No. 09-CV-1452, 2009 WL 2611225 (E.D.N.Y.
3 Aug. 25, 2009). Unlike Langston, however, Cherry did not preserve his sufficiency claim,
4 and therefore he was procedurally barred from raising it on habeas appeal. Id. at *9-10. That
5 district court, in dicta, also addressed the merits of Cherry's claim and rejected his
6 insufficiency argument. Id. at *11-12. We find the district court's analysis in Cherry, which
7 cited no caselaw to support its interpretation of the "in furtherance of" element, unpersuasive,
8 and for the reasons set forth below agree with Judge Korman's contrary analysis in the
9 instant case.

1 sufficiency of the evidence standard laid out by the Supreme Court in Jackson v. Virginia,
2 443 U.S. 307 (1979). See 28 U.S.C. § 2254(d)(1).⁶

3 II. The Merits

4 A. Due Process Requirements

5 Langston argues that his conviction violated the Due Process Clause of the
6 Fourteenth Amendment, which forbids conviction “‘except upon proof beyond a
7 reasonable doubt of every fact necessary to constitute the crime with which [the
8 defendant] is charged.’” Jackson, 443 U.S. at 315, quoting In re Winship, 397 U.S. 358,
9 364 (1970). This requirement “‘provides concrete substance for the presumption of
10 innocence – that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at
11 the foundation of the administration of our criminal law.’” Winship, 397 U.S. at 363,
12 quoting Coffin v. United States, 156 U.S. 432, 453 (1895).

13 Despite the importance of this constitutional principle, judges must be highly
14 deferential to the jury’s verdict of conviction: courts “‘view[] the evidence in the light
15 most favorable to the prosecution,” Jackson, 443 U.S. at 319, and will uphold the jury’s

1 ⁶ Langston’s argument that the State waived its entitlement to section 2254(d)
2 deference is unpersuasive. Even if we assume that this standard of review is waivable, the
3 State’s ambiguous statements to the district court, when reviewed in context and in
4 conjunction with its pre- and post-hearing submissions, cannot reasonably be construed as
5 a waiver. Cf. 28 U.S.C. § 2254(b)(3) (“A State shall not be deemed to have waived the
6 exhaustion requirement . . . unless the State, through counsel, expressly waives the
7 requirement.”).

1 verdict unless “the evidence that the defendant committed the crime alleged is nonexistent
2 or so meager that no reasonable jury [could convict],” United States v. MacPherson, 424
3 F.3d 183, 187 (2d Cir. 2005) (internal quotation marks omitted). That said, “a conviction
4 based on speculation and surmise alone cannot stand,” United States v. D’Amato, 39 F.3d
5 1249, 1256 (2d Cir. 1994), and courts cannot “credit inferences within the realm of
6 possibility when those inferences are unreasonable,” United States v. Quattrone, 441 F.3d
7 153, 169 (2d Cir. 2006).

8 This “standard must be applied with explicit reference to the substantive elements
9 of the criminal offense as defined by state law.” Jackson, 443 U.S. at 324 n.16; Henry v.
10 Ricks, 578 F.3d 134, 138 (2d Cir. 2009). “[W]here a fact to be proved is also an element
11 of the offense . . . it is not enough that the inferences in the government’s favor are
12 permissible. . . . [T]he inferences [must be] sufficiently supported to permit a rational
13 juror to find that the element . . . is established beyond a reasonable doubt.” United States
14 v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995).

15 B. The Elements of New York Penal Law § 120.10(4)

16 New York’s felony assault statute characterizes as first-degree assault actions
17 causing serious physical injury that occur “in the course of and in furtherance of the
18 commission . . . of a felony.” N.Y. Penal Law § 120.10(4). In so doing, it replaces the
19 intent to injure requirement traditionally associated with the crime of assault with the

1 intent to commit the underlying felony (here, criminal possession of a .22 caliber
2 handgun). See People v. Snow, 530 N.Y.S.2d 913, 915 (4th Dep’t 1988), aff’d, 543
3 N.Y.S.2d 385 (1989). In this respect, felony assault is closely akin to the common-law
4 and statutory crime of felony murder, which punishes killings as murder, even in the
5 absence of intent to kill, when death is caused in furtherance of a felony.⁷

6 The trial judge instructed the jury that in order to convict Langston of felony
7 assault it had to find four elements beyond a reasonable doubt: (1) Langston either
8 committed or aided and abetted “the crime of criminal possession of a weapon,” (2)
9 Marquez suffered a “serious physical injury,” (3) Langston or another participant caused
10 Marquez’s injury “while in the course of and in furtherance of the commission of criminal
11 possession of a weapon,” and (4) “Marquez was not a participant in the crime.” (Tr.
12 1124-26.) Langston argues that the evidence at trial failed to establish that Marquez’s
13 injury was caused in furtherance of the weapon possession.

14 Although the precise boundaries of the “in furtherance of” requirement remain
15 uncharted, the New York courts have provided sufficient guidance for us to resolve
16 Langston’s petition. Under New York law, “meaning and effect should be given to all [of

1 ⁷ See, e.g., N.Y. Penal Law § 125.25(3) (“Acting either alone or with one or more
2 other persons, he commits or attempts to commit [one of ten enumerated violent felonies]
3 and, in the course of and in furtherance of such crime or of immediate flight therefrom, he,
4 or another participant, if there be any, causes the death of a person other than one of the
5 participants.”).

1 a statute's] language, if possible, and words are not to be rejected as superfluous when it
2 is practicable to give to each a distinct and separate meaning." N.Y. Stat. Law § 231.
3 Therefore, "in the course of" and "in furtherance of" "must be construed as two distinct
4 proof elements, each of which has independent meaning." People v. Afzal, No. 3736-07,
5 2009 N.Y. Slip Op. 51291(U), at *7 (Sup. Ct. N.Y. Co. June 23, 2009). In other words,
6 the assault "must have a nexus" with the underlying felony beyond the fact that they
7 occurred at the same time. Id.

8 As the New York Court of Appeals has repeatedly said, to be guilty of felony
9 assault, the defendant must injure the victim "in the attempted execution of the unlawful
10 end." People v. Joyner, 308 N.Y.S.2d 840, 842 (1970) (internal quotation marks
11 omitted);⁸ see also People v. Cahill, 777 N.Y.S.2d 332, 386 (2003) (Graffeo, J.,
12 concurring in part and dissenting in part) (explaining that in 1965 the legislature adopted
13 the "in the attempted execution of" language as part of the "in furtherance of"
14 requirement), quoting People v. Wood, 201 N.Y.S.2d 328, 332 (1960); People v. Ryan,
15 263 N.Y. 298, 303 (1934). "[T]he act which results in [injury] must be in furtherance of
16 the unlawful purpose." Cahill, 777 N.Y.S.2d at 336 (Graffeo, J., concurring in part and

1 ⁸ New York's felony murder statute, like its felony assault statute, uses the "in
2 furtherance of" language. See N.Y. Penal Law § 125.25(3). As a result, New York's felony
3 murder jurisprudence provides useful guidance in interpreting the felony assault statute. See
4 People v. Spivey, 599 N.Y.S.2d 477, 479-80 (1993) (applying felony murder jurisprudence
5 to felony assault prosecution); People v. Snow, 530 N.Y.S.2d 913, 915 (4th Dep't 1988)
6 (same).

1 dissenting in part) (internal quotation marks omitted); see also People v. Taylor, 738
2 N.Y.S.2d 497, 506 (Sup. Ct. Queens Co. 2002).

3 People v. Swansbrough provides an example. In that case, a jury convicted Tonya
4 Swansbrough of, among other things, felony assault and unlawful imprisonment for her
5 role in an attack on an unarmed woman. 802 N.Y.S.2d 777, 778 (3d Dep’t 2005). A
6 male co-defendant had facilitated the assault by restraining the victim during the beating
7 and the jury concluded that the assault was committed in furtherance of that unlawful
8 imprisonment. Id. The state appellate court reversed Swansbrough’s felony assault
9 conviction, holding “that the evidence . . . was insufficient to support the conclusion that
10 the assault was committed to further the unlawful imprisonment . . . [R]ather, any
11 unlawful imprisonment was committed in furtherance of the assault.” Id. at 779. In
12 effect, the court found that the assault was not committed “in the attempted execution of”
13 the unlawful imprisonment, even though the assault likely aided the unlawful
14 imprisonment and the two crimes occurred at the same time.⁹

15 As Swansbrough implies, the efficacy of the action taken in furtherance of the
16 underlying felony is irrelevant; the law is only concerned with whether the action was

1 ⁹ While Swansbrough held, in the alternative, that “because [the trial court] should
2 have dismissed the unlawful imprisonment count under the merger doctrine, there was no
3 underlying felony to serve as the basis for a felony assault,” it did so only after first
4 concluding that any unlawful imprisonment was not committed in furtherance of the assault.
5 802 N.Y.S.2d at 778-79.

1 committed with such a design. For example, in People v. Slaughter the New York Court
2 of Appeals upheld a felony murder conviction after an imprudently-driven get-away car
3 crashed into another vehicle, killing its occupant, despite the fact that the reckless driving
4 that caused the victim's death did not, as it turned out, facilitate the defendant's crime, but
5 actually thwarted his escape and led to his apprehension. 577 N.Y.S.2d 206, 209-10
6 (1991).

7 C. Sufficiency of the Evidence

8 The prosecutor tried this case as a botched robbery. He began his opening
9 statement by arguing that "Langston and the men he was working with never had any
10 intentions of selling any guns. Instead, they planned a robbery. And when that didn't
11 work they shot [Marquez] and then tried to shoot [Robert]." (Tr. 461.) The prosecutor
12 then reenforced this argument during summation, asserting that "[Langston's] plan was to
13 lure two people . . . into Brooklyn . . . have them outnumbered, have them outarmed and
14 then take what they have got." (Tr. 1091.)

15 There is no question that the evidence presented at trial supported the
16 prosecution's robbery theory. Had the jury convicted Langston after being asked to
17 decide whether the assault on Marquez had been committed in furtherance of an
18 attempted robbery, affirmance of that verdict would present no difficulty. However,
19 Langston was not charged with attempted robbery, and the trial judge instructed the jury

1 that to convict Langston of felony assault it had to find, beyond a reasonable doubt, that
2 “[he] or another participant caused . . . serious physical injury to Arthur Marquez while in
3 the course of and in furtherance of criminal possession of a weapon.” (Tr. 1125.) Under
4 New York law, that instruction’s reference only to the criminal possession charge
5 eliminated all other possible theories of conviction. See People v. Bell, 48 N.Y.2d 913,
6 915 (1979); People v. Suggs, 745 N.Y.S.2d 706, 706 (2d Dep’t 2002); People v. Wilson,
7 624 N.Y.S.2d 718, 719 (4th Dep’t 1995).

8 In contrast to the prosecution’s repeated focus on the alleged attempted robbery,
9 the requirement in the jury charge that the assault be committed in furtherance of weapon
10 possession was wholly ignored. The prosecution’s sole mention of the necessary
11 relationship between Marquez’s injuries and the underlying possession charge occurred in
12 a single sentence during summation:

13 The part that I want you to cue in on and the part that I want
14 to talk to you about is that Artie Marquez suffered these
15 injuries *while* Kevin Langston, along with the other young
16 men in this case, jointly, together possessed guns that were
17 loaded and that worked.

18
19 (Tr. 1100) (emphasis added). Even here, the prosecutor spoke only of the required
20 *temporal* relationship between the assault and the weapon possession; he altogether
21 ignored the “in furtherance of” requirement.

22 In keeping with this confused approach, the prosecutor presented no evidence
23 tending to show that the officers were assaulted “to further,” Swansbrough, 802 N.Y.S.2d

1 at 779, the possession of the very guns used in the attack – the theory on which the State
2 principally defends the conviction in this Court. To the contrary, based on the evidence
3 that he did present, the prosecutor concluded that “there [was] a very specific reason why
4 these guns were pulled and used” and that was to “wrest . . . money from [Robert and
5 Marquez].” (Tr. 1098.) As the prosecutor seemingly admitted, shooting Marquez was in
6 no way part of a plan to ensure that the guns used in the assault remained in the shooters’
7 possession; rather, the guns were used specifically in an attempt to rob.

8 The facts of this case are remarkably similar to those in Swansbrough. There, the
9 unlawful imprisonment was committed for the purpose of facilitating the assault, rather
10 than the assault being committed to further the unlawful imprisonment, 802 N.Y.S.2d at
11 779; here, Cherry, Brownlee, and Wyman possessed weapons for the “very specific
12 reason” of assaulting and robbing Robert and Marquez – they did not assault the officers
13 in order to retain their own weapons. (Tr. 1098.) The evidence in Swansbrough could
14 not support the conclusion that the assault was committed “to further” the unlawful
15 imprisonment, 802 N.Y.S.2d at 779, even though the assault likely aided efforts to
16 restrain the victim. Here, even though shooting Marquez and Robert may have made it
17 less likely that Langston and his accomplices would lose their guns, the evidence against
18 Langston failed to demonstrate that the assault was committed to further the weapon
19 possession. As the district court held:

1 The District Attorney argues that the purpose of the assault
2 was to further the goal of criminally possessing the guns – in
3 other words, Langston’s accomplices appeared and opened
4 fire in order to prevent the detectives from taking the weapons
5 with which they were committing the assault. Such a scenario
6 strains the bounds of imagination and simply could not be
7 inferred from the evidence presented at trial. Indeed, the
8 District Attorney’s argument gets it exactly backwards – the
9 criminal possession was committed in furtherance of the
10 assault and attempted robbery, the assault was not committed
11 in furtherance of the criminal possession of the weapons.

12 Langston v. Smith, 2010 WL 3119284, at *7 (internal citation omitted).

13 We do not hold that criminal possession of a weapon may never support a felony
14 assault conviction. In circumstances where, unlike here, the continued possession of the
15 weapon underlying the felony assault charge is threatened before the assault takes place, a
16 jury might reasonably infer that the assault was committed to prevent the victim from
17 disarming his assailant (i.e., that the victim was assaulted in furtherance of the assailant’s
18 continued possession). For example, had Marquez responded to a threatened robbery by
19 reaching for Cherry’s gun in an attempt to disarm him, then a jury might reasonably
20 conclude that Cherry caused Marquez’s injuries in furtherance of his continued
21 possession of that weapon.

22 Unlike that example, however, the evidence offered in this case demonstrated that
23 Cherry, Brownlee, and Wyman ambushed Robert and Marquez. Far from responding to
24 any attempts to disarm them, the gunmen appeared on the scene without warning,

1 immediately opened fire on the officers, and injured Marquez in their initial attack. There
2 was no manifest threat prior to the ambush that might permit a jury to conclude, beyond a
3 reasonable doubt, that the assault was in furtherance of retaining possession of the
4 conspirators' own weapons. The State effectively concedes as much in its reply brief by
5 providing an example of an assault *not* in furtherance of possession of a weapon:

6 [S]uppose that Individual A had a motive to harm Individual
7 B. And suppose that Individual A [was] walking down the
8 street, armed with a weapon; that individual A happened to
9 see Individual B; and that Individual A took out his weapon
10 and shot Individual B, causing him physical injury or serious
11 physical injury. Under that scenario, Individual A would not
12 be guilty of felony assault, for the simple reason that, under
13 that scenario, there would be no evidence that the shooting
14 was "in furtherance" of the weapon possession.

15
16 That example of an ambush on an unsuspecting victim precisely fits the facts of this case.

17 The State nevertheless argues that the assault was committed in furtherance of
18 retaining possession of the very weapons used in the assault. Unable to rely on any active
19 – or even threatened – attempts to disarm Cherry and his crew, the State speculates that
20 the gunmen "must have concluded that" Robert and Marquez would try to disarm them
21 and, therefore, part of the reason for the shooting was to maintain their possession of the
22 guns.¹⁰

1 ¹⁰ At times, the State appears to argue that, because both the assault and the possession
2 were in furtherance of the attempted robbery, they must have been in furtherance of each
3 other as well. This claim rests on the logical fallacy that one of two independent efforts to
4 bring about the same end necessarily aids the other. In furtherance of preparing for a

1 That theory, however, requires us to engage in pure conjecture untethered from the
2 evidence presented at trial. As the prosecutor stated in summation,

3 [Langston] didn't think that Artie Marquez or John Robert
4 were undercover officers who could protect themselves, who
5 could defend themselves, who had guns of their own, who
6 were trained on how to use those guns and use those guns to
7 save their lives. He thought they were crooks. He thought
8 they were gun traffickers, perfect victims of crime.

9 (Tr. 1089.) All of the evidence presented at trial supports the prosecutor's own argument
10 that Langston and his fellow conspirators were unaware of the officers' ability to protect
11 themselves. Robert and Marquez were posing as prospective purchasers, rather than
12 current owners, of handguns. Neither Robert nor Marquez revealed their weapons prior
13 to the shooting. Langston, who testified at trial, never implied that he believed that the
14 officers were armed. There was no evidence that the shooters believed that merely
15 displaying their weapons and demanding the purported purchasers' money would have
16 put their guns at risk, or that their actions were motivated by anything other than a desire
17 to injure and steal. In sum, there simply was no evidence indicating that Langston and his
18 accomplices saw Robert and Marquez as a threat to their own continued weapon
19 possession or that Cherry, Brownlee, and Wyman opened fire in order to protect the very

1 successful vacation one might both stop the mail and pack a suitcase. Although both of these
2 actions further the success of the planned vacation, it cannot be inferred that the packing was
3 done in furtherance of stopping the mail. Neither can it be logically inferred that, because
4 both the possession and the assault were committed in furtherance of an attempted robbery,
5 the assault was committed in furtherance of the possession.

1 guns that they used in the attack.¹¹ We cannot project into the gunmen’s minds those
2 thoughts necessary to sustain the conviction when the evidence presented at trial does not
3 support it and the prosecution’s own summation flatly rejected it.

4 The mere fact that Langston and his accomplices had reason to believe that Robert
5 and Marquez were criminals does not change this calculation. “[I]t could not seriously be
6 argued that such a ‘modicum’ of evidence could by itself rationally support a conviction
7 beyond a reasonable doubt.” Jackson, 443 U.S. at 320; cf. Brown v. Palmer, 441 F.3d
8 347, 352-53 (6th Cir. 2006) (distinguishing between “reasonable speculation” and
9 “sufficient evidence” in addressing habeas relief under Jackson v. Virginia). Allowing a
10 conviction to stand on this evidence would read the “in furtherance of” requirement out of
11 the statute, exactly what the New York courts and the New York legislature have
12 counseled against. Therefore, we conclude that the evidence at trial was constitutionally
13 insufficient to sustain Langston’s conviction for felony assault.¹²

1 ¹¹ Indeed, it makes no sense to infer that the gunmen acted in furtherance of the
2 possession of the weapons used to shoot Marquez when those weapons were taken from a
3 place of complete safety and brought to the sixth floor where they were displayed and fired.
4 No reasonable jury could find, beyond a reasonable doubt, that Cherry, Brownlee, and
5 Wyman took their guns out from wherever they were stored, burst through the hallway door,
6 and began firing on the unsuspecting officers in order to retain possession of those very guns.

1 ¹² Nor is there merit to the State’s alternative theory, that the assault was committed
2 in furtherance of the possession, not of the guns used in the assault, but of the weapons that
3 the officers initially intended to buy. The State argues that the jury may have believed that
4 Langston and his accomplices feared that Robert and Marquez would lose their patience,
5 locate the four 9mm handguns that they had come to purchase, and try to take them by force,

1 While we conclude that Langston's due process rights were violated, in order to
2 grant the writ it is not enough for us merely to disagree with the state appellate court's
3 conclusion about the sufficiency of the evidence; rather, habeas corpus will be granted
4 only if the state court applied Jackson v. Virginia in an unreasonable manner. See 28
5 U.S.C. § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 411 (2000); see also Gilchrist v.
6 O'Keefe, 260 F.3d 87, 93 (2d Cir. 2001). Furthermore, since Jackson calls for the
7 application of a "general" standard, the state court is entitled to additional "leeway."
8 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

9 However, even after giving the state court the appropriate deference, we can think
10 of no reasonable application of Jackson that would permit affirmance of Langston's
11 conviction.¹³ The prosecution presented no evidence to support its theory that Langston's

1 and that, to prevent that from happening, the conspirators decided to neutralize the threat by
2 shooting the officers before they could seize the hidden weapons. However, no evidence that
3 Langston (or any other participant in the crime) ever possessed the guns that Moultrie had
4 agreed to sell to the officers was presented at trial. To the contrary, the prosecutor
5 emphatically argued to the jury that "there were no guns for sale" and thus that the proposed
6 sale was, from the beginning, a ruse to set up the intended robbery. (Tr. 1019.) Absent
7 evidence that these guns even existed, a conviction under this theory would be "based on
8 speculation and surmise alone" and would therefore violate the Due Process Clause.
9 D'Amato, 39 F.3d at 1256; see also Jackson, 443 U.S. at 314 ("[A] total want of evidence
10 to support a charge will conclude the case in favor of the accused."); United States v.
11 Broxmeyer, 616 F.3d 120, 126-27 (2d Cir. 2010). If the state appellate court relied on this
12 theory, despite its total lack of evidentiary support, in denying Langston relief, it would
13 necessarily have acted unreasonably. See Fiore v. White, 531 U.S. 225, 229 (2001).

1 ¹³ Nor does the Appellate Division's single-sentence rejection of Langston's argument
2 provide us with such an explanation. The totality of the state appellate court's analysis is

1 accomplices acted in furtherance of their continued possession of the very weapons that
2 they used to ambush Robert and Marquez. As a result, the jury would have had to rely on
3 pure conjecture to establish an element of the offense beyond a reasonable doubt. Insofar
4 as the state appellate court found otherwise, its ruling unreasonably applied Jackson v.
5 Virginia.

1 CONCLUSION

2 Although both Jackson v. Virginia and 28 U.S.C. § 2254(d)(1) dictate deferential
3 standards, this is one of the rare cases where no reasonable jury could conclude that the
4 prosecution proved guilt beyond a reasonable doubt, and the state appellate court
5 unreasonably applied Jackson v. Virginia in reaching a contrary conclusion. We therefore
6 AFFIRM the district court's grant of Langston's petition.

1 contained in the conclusory statement that “[t]he people also established by legally sufficient
2 evidence that the defendant was guilty of assault in the first degree.” People v. Langston,
3 806 N.Y.S.2d at 887. Nevertheless, the court's error is understandable. Although Langston
4 preserved his insufficiency argument for appellate review, the briefing that the state appellate
5 court received masked the strength of his claim. Langston devoted less than five pages of
6 his fifty-page appellate brief to this issue, and the State's opposing brief mischaracterized
7 Langston's insufficiency claim as resting on the assertion “that the resulting injury had to
8 advance the cause of the [underlying] felony,” an argument that the New York Court of
9 Appeals has expressly rejected. See Slaughter, 577 N.Y.S.2d at 209-10. Langston's reply
10 brief failed to respond to this mischaracterization of his argument. Moreover, given the
11 manner in which this case was tried and Langston's argument to the Appellate Division that
12 he was not involved in planning a robbery, it would have been easy to misunderstand the
13 conviction to have been based on the obvious – but as this case was tried, legally unavailable
14 – theory that the assault was committed in furtherance of an attempted robbery.