

FILED: May 22, 2019

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MATT RYAN FRAZIER,
Petitioner-Appellant,

v.

STATE OF OREGON,
Defendant-Respondent.

Malheur County Circuit Court
15CV1447

A162640

J. Burdette Pratt, Senior Judge.

Argued and submitted on August 17, 2017.

Jason E. Thompson argued the cause for appellant. Also on the briefs was Ferder Casebeer French & Thompson, LLP.

Rebecca M. Auten, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before DeHoog, Presiding Judge, and Egan, Chief Judge, and Aoyagi, Judge.

EGAN, C. J.

Reversed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- No costs allowed.
 Costs allowed, payable by Respondent.
 Costs allowed, to abide the outcome on remand, payable by
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1 EGAN, C. J.

2 Petitioner appeals a judgment denying post-conviction relief from
3 convictions of two counts of fourth-degree assault, and one count each of second-degree
4 assault and strangulation. The post-conviction court concluded that petitioner's trial
5 counsel performed inadequately by failing to object, move to strike, or request a limiting
6 instruction after the victim in the case testified about "prior abuse" committed by
7 petitioner. However, the post-conviction court concluded that counsel's failure did not
8 prejudice petitioner. On appeal, petitioner raises a single assignment of error, arguing
9 that the court erred in so concluding. The state cross-assigns error to the court's
10 conclusion that petitioner's trial court counsel performed deficiently. We agree with
11 petitioner and reverse.

12 To obtain post-conviction relief based on a claim of inadequate assistance
13 of counsel, petitioner first must demonstrate "by a preponderance of the evidence that
14 [his or her counsel] failed to exercise reasonable professional skill and judgment." *Green*
15 *v. Franke*, 357 Or 301, 312, 350 P3d 188 (2015) (brackets in original). If petitioner
16 meets that burden, he must also prove that he was prejudiced, or in other words, that his
17 "counsel's failure had a tendency to affect the result of his trial." *Id.* The "tendency to
18 affect the outcome standard demands more than mere possibility, but less than
19 probability." *Id.* at 322. Our review of a post-conviction court's determinations on these
20 issues is for errors of law, and we are bound by the court's findings of historical fact if
21 there is evidence in the record to support them. *Id.* at 312.

1 The material facts pertaining to petitioner's inadequate assistance claim are
2 not in dispute. In the underlying criminal proceeding, petitioner was charged with one
3 count each of second-degree assault and strangulation, and two counts of fourth-degree
4 assault. All of the charges arose out of physical altercations between petitioner and J,
5 petitioner's wife at the time, that had occurred on two separate days. At trial, petitioner
6 and J testified. Each told a different story about the altercations. J testified that, on the
7 first day, petitioner grabbed her by the throat and took her to a wall, choking her for
8 "seconds," long enough for J to "feel like [she] was going to pass out." Regarding the
9 second day, J testified that, after an argument, petitioner followed her into their bedroom,
10 grabbed a lamp off the bedside table, and hit her over the head with it. Petitioner, on the
11 other hand, testified that he never assaulted or choked J. Petitioner testified that he and J
12 had a verbal altercation, during which J broke a lamp on the floor. Petitioner testified
13 that he told J that it was not acceptable to destroy household items, that he was leaving,
14 and that J began "running around screaming" that she was going to get petitioner arrested.
15 Further, petitioner testified that J hit herself with the lamp.

16 In her testimony, J made several statements in response to questions about
17 the history of her relationship with petitioner. After the prosecutor asked J how it "came
18 about" that she and petitioner moved to Oregon, J testified that they had first moved to
19 California "after [petitioner] had hit [her] in the head in Alabama with [a], a wooden box,
20 and [she] became not able to control him [herself]." On cross-examination, after the
21 defense attorney asked J whether there was still a mark visible on her neck from the

1 alleged strangulation, J testified that she also had a scar "from the first time when he hit
2 [her] with the metal box in Alabama." Also on cross-examination, after the defense
3 attorney asked whether J was ready to move back to Alabama when the altercations
4 occurred, J testified that she was not, and explained,

5 "I'm here now because I like it here. It's better than Alabama. I
6 mean, there's women's rights. There's people who want to help you.
7 Before when I got beat, nobody cared, and I thought that it was okay. But
8 when I got here, they gave me resources that showed me, when I opened
9 the book and I read and learned what an abusive husband was about, I
10 realized that I was in an abusive relationship."

11 Neither the prosecutor nor the defense objected or made any motions or requests for jury
12 instructions regarding J's testimony. Ultimately, the jury found petitioner guilty of all
13 four charges. On the charge of assault in the second degree, the jury voted 10 to 2 to
14 convict petitioner. On the remaining charges, the jury voted 11 to 1. Petitioner appealed
15 the judgment of conviction, and we affirmed without opinion in *State v. Frazier*, 270 Or
16 App 600, 351 P3d 89 (2015).

17 Petitioner sought post-conviction relief, making several arguments that his
18 counsel was constitutionally inadequate under Article I, section 11, of the Oregon
19 Constitution. Relevant to this appeal, petitioner alleged:

20 "(3) Trial counsel failed to object, move to strike, or request a
21 curative instruction after the alleged victim testified to prior abuse that
22 allegedly petitioner committed in Alabama against her. (Tr. 24)"

23 With respect to that claim, the post-conviction court found that petitioner's trial counsel
24 had performed inadequately by failing to object, move to strike or request a curative
25 instruction "after the victim testified regarding abuse at the hands of the [p]etitioner in

1 Alabama at page 24 of the trial transcript." The court explained:

2 "In a case where the victim is alleging that the defendant assaulted her and
3 the defendant is denying any assault, testimony regarding prior abuse
4 would be very prejudicial. Allowing testimony of prior bad acts that go to
5 the heart of the dispute without objection or a curative instruction would be
6 difficult to justify as a reasonable strategic decision."

7 Ultimately, however, the post-conviction court concluded that petitioner had failed to
8 prove prejudice. The post-conviction court focused solely on the statement about
9 "getting hit in the head with a box" on page 24 of the trial court transcript. The court
10 noted:

11 "There is no testimony about how it happened or even whether it
12 was intentional or accidental. It is far less harmful than other testimony by
13 the victim on cross examination at page 47-48 of the trial transcript, where
14 the victim discusses, without objection, a history of being beaten while in
15 Alabama."

16 Because petitioner did not explicitly cite pages 47 to 48 of the transcript in his petition for
17 relief, the court concluded that the reference at page 24 "could not have had a tendency to
18 affect the outcome of the trial."

19 Petitioner filed objections to entry of the proposed general judgment
20 denying him post-conviction relief. Petitioner argued that his citation to page 24 of the
21 trial court transcript was a "courtesy citation" that did not confine his argument solely to
22 the statements found on that page. The court denied petitioner's objection to entry of the
23 proposed judgment and entered a general judgment.

24 Petitioner appeals the post-conviction court's judgment, arguing, as he did
25 below, that the court erred in concluding that he was not prejudiced by his counsel's

1 failure to object, move to strike, or request a curative instruction after J testified regarding
2 "prior abuse." Petitioner argues that, in his petition for post-conviction relief, he did not
3 allege only that counsel was inadequate for failing to respond properly to J's statements at
4 page 24 of the trial transcript. Petitioner contends that his "courtesy citation" did not
5 limit his argument to page 24, and that his allegation was generally "that trial counsel
6 should have done something to either keep [the evidence of prior abuse] out, or, at the
7 least, instruct the jury with what it could and could not do with that evidence if it was in."
8 The state responds that the post-conviction court was correct in determining that
9 petitioner's claim was limited to the statement occurring on page 24 of the trial court
10 transcript. As noted above, the state also cross-assigns error to the post-conviction court's
11 conclusion that petitioner demonstrated that his counsel performed deficiently. Finally,
12 the state argues that petitioner was not prejudiced by any inadequate performance.

13 We begin with the state's argument that petitioner's claim is confined to the
14 testimony on page 24 of the trial transcript. If a petitioner satisfies his burden to prove
15 facts alleged in his petition, and "thereby establishes one or more of the grounds for relief
16 set forth in ORS 138.530(1), the post-conviction court must grant relief." *Ogle v. Nooth*,
17 292 Or App 387, 388, 424 P3d 759 (2018), *rev allowed*, 364 Or 407 (2019). The court's
18 "authority to grant relief is not entirely constrained by the precise manner in which a
19 petitioner alleges a claim for relief" as it extends "to matters within the scope of the
20 pleaded claims." *Id* at 392 (brackets and internal quotation marks omitted). So long as
21 the grounds for relief are "directly traceable to the allegations of the petition," a post-

1 conviction court has authority to grant relief even if the petitioner "neither alleged nor
2 argued" the specific theories of prejudice upon which the post-conviction court grants
3 relief. *Id.* at 392-93 (citing *Abbott v. Baldwin*, 178 Or App 289, 295-96, 36 P3d 516
4 (2001), *rev den*, 334 Or 75, *cert den*, 537 US 901 (2002)). A ground for relief is unlikely
5 to fall within the scope of the petition if it requires "different proof and different legal
6 analysis" from the pleaded claim. *Leyva-Grave-De-Peralta v. Blackletter*, 232 Or App
7 441, 453, 223 P3d 411 (2009), *rev den*, 348 Or 114 (2010).

8 In this case, petitioner alleged that his trial counsel performed inadequately
9 by failing to intervene, either by objecting, moving to strike, or requesting a curative
10 instruction, after the "alleged victim testified to prior abuse that allegedly petitioner
11 committed in Alabama against her." Petitioner cited to one page of the trial court
12 transcript. Because of that citation, the post-conviction court did not consider any of the
13 other instances where testimony of "prior abuse" came up at petitioner's trial in
14 considering whether petitioner's counsel performed inadequately. However, read fairly,
15 petitioner's allegation of "prior abuse" encompasses more than the testimony on page 24.
16 That citation served as an example of where the "prior abuse" came up, but petitioner did
17 not argue that his counsel performed inadequately solely in failing to object to the
18 testimony at page 24. His claim was broader, as he argued that counsel was inadequate in
19 failing to object, move to strike, *or request a curative instruction*. In particular, the
20 request for a curative instruction *could* have occurred long after the testimony on page
21 24. Thus, petitioner's claim was not confined to page 24. *See Johnson v. Myrick*, 285 Or

1 App 395, 401, 396 P3d 285, *rev den*, 362 Or 175 (2017); *Sullivan v. Popoff*, 274 Or App
2 222, 232 n 6, 360 P3d 625 (2015), *rev den*, 358 Or 833 (2016) (holding that a claim of
3 inadequate assistance of counsel based upon a failure to object to certain evidence does
4 not encompass a claim based upon the failure to request a limiting instruction regarding
5 that evidence). Petitioner's several specific allegations of inadequacy and his reference to
6 "prior abuse" were broad enough to encompass J's testimony outside of that occurring on
7 page 24 of the transcript. All of J's testimony regarding prior abuse was directly
8 traceable to petitioner's claim. Moreover, the post-conviction court would likely apply an
9 identical legal analysis to the testimony outside of page 24, namely, whether a reasonable
10 attorney exercising reasonable professional skill and judgment would have intervened
11 during or after the testimony. Accordingly, the post-conviction court erred in limiting its
12 consideration of prejudice to the one specific instance on page 24.

13 Given the actual breadth of petitioner's claim for relief, we next address the
14 state's cross-assignment of error. The state argues that, regardless of the scope of
15 petitioner's claim, the post-conviction court erred in determining that petitioner's trial
16 counsel performed deficiently. The state contends that petitioner's trial counsel made a
17 reasonable strategic decision in deciding not to object or request a limiting instruction.
18 Suffice it to say, we agree with petitioner that this case was a "credibility contest between
19 J and petitioner," and that, because of that context, the court was correct when it
20 concluded that petitioner's counsel performed deficiently in failing to take *any* action
21 after any of the instances where J testified about "prior abuse." Thus, we reject the state's

1 argument without further discussion.

2 Finally, in light of the actual breadth of petitioner's claim for relief, we
3 conclude that petitioner was prejudiced by his counsel's failure to intervene after J's
4 testimony about prior alleged abuse. To demonstrate prejudice, a petitioner must "show
5 that his trial counsel's deficient exercise of skill and judgment had a tendency to affect the
6 result of the prosecution." *Green*, 357 Or at 321 (internal quotation marks omitted).
7 Here, the post-conviction court's conclusion that petitioner was not prejudiced hinged on
8 the fact that it understood petitioner's claim to be limited to page 24 of the trial transcript.
9 Indeed, the court noted that page 24 of the transcript was "far less harmful" than J's later
10 testimony that, after coming to Oregon, she was given literature that made her realize she
11 was in an abusive relationship. We agree with the post-conviction court's suggestion that
12 counsel's error in failing to object, move to strike, or request a limiting instruction after
13 all of the incidents where J testified about prior alleged abuse would have had a tendency
14 to affect the outcome of this case. At the criminal trial, J alleged that defendant had
15 assaulted her. Petitioner denied the assault, there were no other witnesses to the alleged
16 assault, and there was no definitive physical evidence that petitioner committed the
17 assault. *See Stevens v. State of Oregon*, 322 Or 101, 108-09, 902 P2d 1137 (1995)
18 (omissions by trial counsel had a tendency to affect the outcome of the trial because there
19 were no other witnesses to the alleged crime and the prosecution "necessarily turned on
20 the credibility of the complaining witness and of [the] petitioner"). As the case thus
21 necessarily turned on J's and petitioner's credibility, testimony regarding petitioner's prior

1 acts of abusive behavior toward J would have a tendency to affect the outcome. The
2 post-conviction court erred in concluding otherwise. Petitioner satisfied his burden to
3 establish the facts alleged in his petition on the ground for relief regarding his trial
4 counsel's inadequate performance, and the post-conviction court was required to grant
5 relief. Therefore, we reverse.

6 Reversed.