

FILED: December 14, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NATHAN GALLOWAY,
Petitioner-Respondent,

v.

MARK NOOTH,
Superintendent, Snake River Correctional Institution,
Defendant-Appellant.

Malheur County Circuit Court
09037239P

A143119

Linda Louise Bergman, Senior Judge.

Argued and submitted on October 06, 2010.

Patrick M. Ebbett, Assistant Attorney General, argued the cause for appellant. With him on the briefs were John R. Kroger, Attorney General, and Jerome Lidz, Solicitor General.

Dennis Balske argued the cause and filed the brief for respondent.

Before Schuman, Presiding Judge, and Brewer, Chief Judge, and Wollheim, Judge.*

SCHUMAN, P. J.

Judgment vacated and remanded for entry of judgment granting petition for post-conviction relief with respect to convictions for attempted aggravated murder, attempted murder, and burglary in the first degree, and denying such relief on all other convictions.

*Brewer, C. J, vice Rosenblum, S. J.

1 SCHUMAN, P. J.

2 Petitioner brought this action for post-conviction relief after having been
3 convicted of arson, first-degree burglary, reckless endangerment, attempted murder, and
4 attempted aggravated murder. The post-conviction court granted a new trial on the
5 ground that petitioner's trial counsel provided inadequate assistance (1) by failing to
6 investigate and discover evidence that would have undermined the state's case that the
7 threat posed by the fire was serious and (2) by failing to discredit petitioner's
8 codefendant, who made statements to the police implicating petitioner in the charged
9 crimes. Defendant appeals, arguing that petitioner's counsel was not constitutionally
10 deficient; that, even if she was, petitioner was not prejudiced as a result; and that, in all
11 events, the post-conviction court's grant of a new trial on all counts is an error apparent
12 on the face of the record. We conclude that petitioner's defense was prejudicially
13 affected by counsel's constitutionally deficient performance with respect to petitioner's
14 convictions for attempted aggravated murder, attempted murder, and first-degree
15 burglary, but not with respect to his other convictions. Accordingly, we vacate the
16 judgment and remand for entry of a judgment granting post-conviction relief on the
17 charges of attempted aggravated murder, attempted murder, and first-degree burglary,
18 and denying such relief on all other charges.

19 The charges against petitioner in the underlying criminal case stemmed
20 from the allegation that he set a fire in the basement garage of the home of Crook County
21 Deputy District Attorney Ron Brown in the early morning hours on August 14, 2002, and

1 another fire in a nearby park the following night. A grand jury indicted petitioner on nine
2 counts of attempted aggravated murder, five counts of attempted murder, six counts of
3 first-degree arson, two counts of first-degree burglary, four counts of recklessly
4 endangering another person, and one count of second-degree arson. The second-degree
5 arson charge was based on the fire at the park; all of the other counts were based on the
6 fire at Brown's home. Two of petitioner's friends, Buker and Walsh, were also convicted
7 of a number of offenses based on the fires. Buker went to trial after petitioner; Walsh
8 entered into a plea agreement after Buker's trial.

9 Evidence of the following facts was presented at petitioner's criminal trial.
10 On two occasions in May 2002, before the fires at issue in this case, petitioner was
11 arrested, and Brown filed informations charging petitioner with fourth-degree assault and
12 second-degree theft. When petitioner was lodged in the Crook County jail following his
13 second arrest, he was intoxicated, and he made boisterous statements and threats,
14 including, "I'm going to kill those fucking cops," "[F]uck you and the government,"
15 "Fuck the DA, I don't like the DA," "Crook County Circuit Court, you make no fucking
16 sense," and, "I've killed hundreds of thousands of people." Petitioner was later released.

17 Petitioner had a court appearance on August 8, 2002. Although Brown had
18 filed the charges in that case, he was not the prosecutor appearing for the state. Later that
19 day, petitioner told Buker that he was being prosecuted for something he did not do. He
20 stated that he was "going to fix it" and was going to set something on fire or blow
21 something up. Petitioner's statements were overheard by Prewitt, a friend of Buker's.

1 A few days later, Buker borrowed a bottle of rubbing alcohol from a
2 neighbor.

3 On August 14, 2002, at around 1 a.m., petitioner was with Buker and
4 Prewitt and again said that he was going to "fix somebody that was prosecuting him" by
5 "blowing somebody up and blowing up a DA's house." Prewitt testified at petitioner's
6 criminal trial that she did not take him seriously at the time.

7 At about 3 a.m. the same day, Brown and his family awoke to a smoke
8 detector sounding. Brown could smell smoke as he went down the stairs to the main
9 floor of the house. He did not see any smoke on that floor, so he opened the door leading
10 to the basement garage. The stairwell was full of smoke. He slammed the door shut and
11 called 9-1-1 while his wife got their three children out of the house. Two police officers,
12 McMurrian and Bottoms, responded to the call. McMurrian, who arrived first, found the
13 garage door open and a fire burning inside. The garage was filling with smoke.
14 According to McMurrian, when he first went into the garage, the fire was six to seven
15 feet across and the flames were six to seven feet high and were hitting the exposed joists
16 above. He attempted to put it out with a fire extinguisher, but the fire continued to burn
17 after the extinguisher was exhausted. He and Bottoms then retrieved a garden hose that
18 Brown had pulled around from the side of the house. According to Brown, the flames
19 were five to six feet high at that point. The officers put the fire out with the hose. The
20 fire department arrived shortly thereafter.

21 The fire had burned some clothing and a scarecrow that were piled on an

1 area rug on the concrete floor, in front of the washer and dryer. Various small plastic
2 items were found in the pile, melted and burned, including some toothbrushes and two
3 spare wheels from a stroller. The Browns used their garage as a storage room. Items in
4 the garage included children's and adults' bicycles, a baby crib, a high chair, and toys. A
5 gasoline can was within 10 feet of the fire. Brown checked the can and found that it
6 contained the same amount of gasoline that it had before the fire. Other than the items in
7 the pile and the rug, nothing was burned. However, a section of the heating duct along
8 the ceiling in the garage had been removed and was lying on the floor. Brown said that
9 the duct had been intact the day before.

10 Petitioner was seen by the police two blocks from the Browns' house
11 shortly after the fire there was extinguished. He told them that he had seen the fire trucks
12 go by and was trying to see what was going on.

13 The firefighters concluded that the fire resulted from spontaneous
14 combustion caused by compression of bleach and laundry detergent. They began to clean
15 up the fire scene. Later in the day, Brown put some of the burned items in the garbage,
16 which was picked up the same day.

17 The next night, at about 1:30 a.m., a fire was set at Ochoco Creek Park.
18 Several items, including cups from a nearby convenience store and the top half of a
19 package of chewing gum, were found at the scene. McMurrian and Bottoms, who both
20 responded to that fire as well, went to the convenience store and learned that petitioner,
21 Buker, Walsh, and a woman, Close, had been there earlier in the night, and that Close had

1 purchased the same kind of gum as the package found in the park. The officers went to
2 Buker and Walsh's apartment, which was within two blocks of the park and three blocks
3 of Brown's house. As they were arriving, they saw petitioner and Buker walking toward
4 the apartment from the direction of the park. Bottoms told petitioner that it was
5 suspicious that he had been seen near both fires, to which petitioner replied that Bottoms
6 "couldn't prove anything." The officers went into the apartment, where they found Close.
7 Bottoms found the other half of the chewing gum package in Buker's bedroom.

8 Later that morning, at about 8:30, an Oregon State Police arson detective,
9 Kollen, went to the park to investigate. He found that there were actually two separate
10 fires started there. A partially burned piece of notebook paper was found at the starting
11 point of one of them. Kollen concluded that the fires had been intentionally set. The
12 paper was later matched to a notebook belonging to Buker.

13 After investigating the park fire, Kollen went to the Browns' house. He had
14 been told that the fire department had concluded that the fire there was caused by
15 spontaneous combustion. When he arrived, he immediately saw the disconnected heating
16 duct and became suspicious. The remains of the burned clothing had been rolled up in a
17 piece of carpet and were sitting outside the house. Kollen picked through the remains
18 and found a burned book of matches. The Browns did not keep matches in the house.
19 Kollen concluded that the fire there was also an arson.

20 At petitioner's criminal trial, Kollen testified that he had not smelled any
21 accelerant at the Browns' house but that he believed one had likely been used to start the

1 fire, because clothing generally does not readily burn, and it appeared to him that the
2 items in the pile had "burned pretty good." He testified that petroleum-based accelerants
3 often leave a "sheen" that is visible when water is poured on the area where the fire
4 started. He said he had poured water on the garage floor and that there was no sheen. He
5 therefore suspected that alcohol, which does not leave any sheen, had been used. Kollen
6 acknowledged that a crime lab report indicated that no flammable liquid was found on
7 items from the fire that were tested, but he testified that the crime lab cleans its
8 equipment with alcohol, so items are not tested for alcohol unless that test is specifically
9 requested, in which case the equipment is first cleaned with another substance. Testing
10 for alcohol was not requested in this case, he said, so it was to be expected that the report
11 would show that no alcohol was found. Kollen did not explain why the test was not
12 requested.

13 Petitioner was arrested in connection with the fires on the same day that
14 Kollen investigated them. He was lodged at the Crook County jail. A corrections deputy
15 placed petitioner in a cell opposite the cell in which two of petitioner's friends were
16 lodged. The deputy overheard petitioner talking to one of his friends. Petitioner said that
17 the police were "trying to pin the fire down at the DA's house on [him]." The friend
18 asked if petitioner had an alibi. He replied, "I told my girlfriend what to say to the cops."

19 Buker was interviewed by the police several times in the week following
20 the fires. He initially denied knowing anything about either incident. Over the course of
21 the interviews, however, he eventually implicated petitioner in both fires and then

1 admitted that he was involved in both as well. Ultimately, Buker said that he, petitioner,
2 and Walsh had been together, and Walsh said that he had walked past Brown's house and
3 the garage door was open. According to Buker, Walsh said he had seen motorcycles in
4 the garage, and the three of them walked there with the intention of stealing the
5 motorcycles. Buker said that petitioner went into the garage and came out saying that
6 there was nothing worth stealing. He said that they then went back to Buker and Walsh's
7 apartment, retrieved a bottle of rubbing alcohol, and returned to the Browns', where
8 petitioner started the fire while he and Walsh stayed across the street. Among other
9 things, Buker also stated that, on the way back to the Browns' house, petitioner told him
10 that they were going to burn it "from the ground up."

11 While petitioner was in jail, he admitted his involvement in both fires to
12 another inmate, Lane, and stated that, at Brown's house, he had "poured the alcohol" and
13 Walsh had "lit the match." Lane reported those statements to Detective O'Daniel, the
14 lead investigator of the fires, but, before discussing them, asked if he could get a reduced
15 sentence in exchange for the information. O'Daniel told him that he could not offer a
16 deal.

17 Petitioner told another inmate, Naef, that he was going to have Buker and
18 Walsh "whacked" for "snitching" on him. During the conversation, he referred to Brown
19 as "Smoky" and bragged and laughed about the fact that he might be sentenced to up to
20 60 years. At the time, Walsh was going to be the best man at Naef's wedding.

21 When petitioner was brought to trial, the state's theory was that he had

1 started the fire at Brown's house with the intent to kill Brown and his family. It called a
2 number of witnesses who testified about the facts set out above.

3 The defense called only one witness, Fine, one of the firefighters who had
4 responded to the fire at the Browns' house. He acknowledged that he had initially
5 concluded that the fire was caused by spontaneous combustion. However, on cross-
6 examination, he testified that, after communicating with the police department, he had no
7 doubt that the fire was an arson. He also stated that burning plastic gives off toxic fumes.
8 Finally, he stated that, had there not been working smoke detectors in the house, the
9 possibility that the fire could have resulted in death was very great.

10 In closing arguments, the prosecutor relied primarily on three things in
11 arguing to the jury that it should find that petitioner intended to kill the Brown family: the
12 removed heating duct, petitioner's motive, and the use of an accelerant.¹ First, the
13 prosecutor argued that the "missing duct work is clear indication of the intent of
14 [petitioner]. He's going to start a fire and he's going to maximize the effect of that fire.
15 This is deliberately removed. [Petitioner], before he set the fire, took off the duct work
16 so the smoke would travel more readily up into that house. And it did."

17 Later, the prosecutor argued, "[Petitioner] had a persistent problem as he
18 perceived it. [Petitioner] did not like Deputy [DA] Ron Brown. He did not like, told you

¹ The prosecutor did not argue that the size of the fire demonstrated an intent to kill, but he did refer to the size of the fire, describing it as involving "flames six to seven feet high, almost touching the rafters." He also did not expressly argue that the presence of plastic items in the fire was evidence of intent to kill, but he did mention the burning plastic twice in his argument, as well as the "noxious fumes that can come from plastic."

1 quite clearly, the District Attorney or the court system, and he did something about it."

2 He went on:

3 "What you know, what you know from the evidence in this case,
4 what you know from his statements and what you know from what other
5 people have told you. And you know from physical evidence in the sense
6 that there's an accelerant used and you know that [petitioner] and Mr. Buker
7 are tied like that, they're together. * * *

8 * * * * *

9 "And then you look at motivation and you look at Mr. and Mrs.
10 Brown. * * *

11 "Mr. Brown is a problem and a thorn in the side of [petitioner].
12 [Petitioner] perceived a problem and he sought a permanent solution. * * *

13 "Why didn't he use the gas can? That will be a question Ms. Kimble
14 will raise for you. Well, the gas can's not obvious. You know, you don't
15 intend to carry out this plan hoping that there's a gasoline can somewhere in
16 that garage. No. You bring what you have and, in this case, alcohol with
17 you to that scene so you can light the fire. That is intent to kill. And ladies
18 and gentlemen, the intent to kill an entire family."

19 In the defense closing argument, petitioner's counsel, Kimble, attempted to
20 raise reasonable doubts about the state's case. She argued that the police had focused
21 their investigation on petitioner very quickly and had virtually ignored other leads.
22 Kimble also pointed out that no fingerprints or DNA on any of the evidence matched
23 petitioner. She also noted that Buker and Walsh's apartment was never searched to see if
24 Buker still had the bottle of rubbing alcohol that he had borrowed from his neighbor.
25 Kimble observed that none of the evidence had been tested for alcohol. She also noted
26 that some evidence was lost in the initial clean-up after the fire in the Browns' house,
27 before Kollen concluded that it had been an arson.

1 With respect to petitioner's motive, Kimble argued that the charges that
2 Brown had filed against petitioner were not very serious and would not inspire a person
3 to kill a family of five in revenge. She pointed out that Brown was not the prosecutor in
4 court on August 8, when petitioner first told Buker that he was being wrongly prosecuted
5 and was going to "fix it" by setting a fire or blowing something up.

6 Kimble attempted to cast doubt on the statements Buker made in his
7 interviews with Detective O'Daniel, pointing out that Buker had changed his story and
8 minimized his own role in the fires. She noted that, at one point Buker himself told
9 O'Daniel that he had lied in their previous interview.

10 Kimble attempted to discredit Prewitt's testimony, pointing out that Prewitt
11 was Walsh's former girlfriend and that she visited him in jail once a week, suggesting that
12 Prewitt was attempting to pin the blame for the fires on petitioner in order to help Walsh.
13 She also pointed out that Prewitt had not initially told the police about petitioner's August
14 8 statement to Buker, and only mentioned it months later.

15 Kimble attempted to discredit Lane's testimony about petitioner's admission
16 to having "poured the alcohol" while Walsh "lit the match" by noting that Lane had three
17 prior felony convictions and had begun his interview with O'Daniel by asking if he could
18 get a deal on his own charges. Similarly, she observed that Naef was Walsh's good
19 friend.

20 The jury convicted petitioner on all counts. It also found aggravating facts
21 that the state had charged with respect to several of the counts. As to the six first-degree

1 arson charges, the jury found that the offenses represented a threat of serious physical
2 injury and threat to human life. As to one of the first-degree burglary charges, Count 21,
3 the jury found that the offense occurred in an occupied dwelling and represented a threat
4 of serious physical injury and a threat to human life. The court sentenced petitioner to
5 consecutive 120-month sentences on four of the attempted aggravated murder convictions
6 and a consecutive term of six months on the second-degree arson conviction for the fire
7 in the park. A number of the remaining convictions were merged for sentencing, and the
8 court ultimately imposed two concurrent 90-month terms for the first-degree arson
9 convictions and 18 months for the burglary convictions, all to be served concurrently
10 with the other sentences. Thus, the court sentenced petitioner to a total of 40 years and
11 six months in prison.

12 Two months later, Buker was tried for his involvement in the fires.² The
13 state charged Buker with one count of attempted murder, two counts of first-degree
14 arson, and one count each of first-degree burglary, recklessly endangering another
15 person, and second-degree arson. The state's case against Buker was largely the same as
16 its case against petitioner. The state called Prewitt, who again testified that petitioner had
17 threatened to "blow up" someone's house or set it on fire in order to "correct the problem
18 that the judicial system caused him * * *."³ The state also presented the same witnesses,

² Buker's trial, particularly his defense, is pertinent to petitioner's post-conviction case because it demonstrates the sort of evidence that could have been presented at petitioner's criminal trial.

³ As she had at petitioner's trial, Prewitt testified that she had not taken petitioner

1 and elicited essentially the same testimony, as to the size of the fire at Brown's house and
2 the facts that a heating duct had been removed, that plastic had been added to the fire,
3 that alcohol may have been used as an accelerant, and that Buker had borrowed a bottle
4 of rubbing alcohol a few days before the fire. The state also played for the jury the
5 recordings of Buker's police interviews. In addition, the state put on testimony by a
6 psychologist, who opined that Buker did not lack the mental capacity to form intent.

7 Buker's attorney, Perkins, mounted a two-pronged defense. First, he put on
8 evidence suggesting that Buker lacked the ability to form the intent necessary to commit
9 the crimes with which he was charged. In support of that defense, Perkins called two
10 psychologists who testified that Buker had been diagnosed with mild mental retardation,
11 attention deficit hyperactivity disorder, and organic mental disorder. They testified at
12 length about Buker's mental conditions and opined that his ability to form intent was
13 extremely limited, that he had difficulty remembering events accurately and would be
14 susceptible to suggestion. Perkins also called several lay witnesses, who testified that
15 Buker was unable to take care of himself and allowed people to take advantage of him.

16 In addition to the evidence concerning Buker's ability to form intent,
17 Perkins put on evidence challenging the state's case that the participants in the fire at the
18 Brown residence had intended to kill Brown and his family. First, he called as a witness
19 Wright, one of the firefighters who had responded to that fire. Wright testified that the

seriously, but she went further at Buker's trial, explaining that she had always known petitioner "to be a person that rants and raves about everything."

1 first thing he did upon arriving at the scene was to bend over and smell the pile of laundry
2 that had burned, and that he did not smell anything. Perkins called another firefighter,
3 Hite, who testified that, on a scale of one to ten, the fire at the Brown house was a "two"
4 in terms of its seriousness, with a "one" being "something simple like a toaster fire,
5 something on a counter, * * * that doesn't damage anything except for there's a little bit
6 of smoke in the room."

7 Finally, Perkins called as a witness Slagle, an accident reconstructionist
8 who had worked on more than 100 fires. Slagle investigated the fire at the Brown house
9 in May 2003, three weeks before Buker's trial and nine months after the fire. Based on
10 the reports from the police and fire investigations, Slagle concluded that the fire had been
11 set intentionally. However, he asserted that an accelerant had not been used. He
12 concluded that no petroleum-based accelerant had been used, based on the report of the
13 test conducted by Kollen, the Oregon State Police arson detective, which revealed no oily
14 sheen on the floor of the garage. Slagle also concluded that alcohol had not been used,
15 for two reasons. First, he noted that, when water is put on a fire started with alcohol, the
16 "alcohol actually dries the water and it will actually separate so you'll get a lack of water
17 in certain areas where the alcohol is," which Kollen's report did not note. Second, he
18 asserted that Wright would have detected alcohol when he smelled the pile of clothes that
19 had been burned. Slagle testified that, in a test he conducted as part of his investigation,
20 he had burned two piles of clothes, one with alcohol and one without, for 10 minutes
21 before extinguishing them with a fire hose. He testified that he could still smell alcohol

1 on the first pile.

2 Slagle also testified that the two piles of clothes he had burned were each
3 approximately one foot in radius, which, he had deduced from the fire department report,
4 was the size of the pile at the Browns' house.⁴ He had videotaped the test, and the tape
5 was played for the jury during Slagle's testimony. As the tape was playing, Slagle
6 commented that the flames on both piles were two to three feet high.

7 Slagle also testified about the heating duct in the Brown home. He stated
8 that it was a cold air return duct and that there was no evidence that it had been forcibly
9 removed or that the fire had caused it to fall down.

10 Finally, Slagle also testified about the threat that the smoke from the fire
11 presented. He opined that it did not create a threat of serious physical injury to the
12 occupants of the house. According to Slagle, because the smoke would have had to
13 travel horizontally through the cold air return duct and then up through the heat register,
14 the smoke migration would have been minimal. He opined that most of the smoke that
15 entered the living area had gone through the door at the top of the stairs between the
16 garage and the living area when Brown opened it. He also testified that the small piece of
17 plastic that was burned with the pile of clothes would not have made any difference to the
18 toxicity of the smoke. Slagle stated as well that there was not enough fuel on the fire to
19 generate a significant amount of smoke and that the fire would have gone out on its own

⁴ On cross-examination, Slagle explained that the fire department's report indicated that the fire had burned a two-foot diameter circle into the rug on which the pile had burned. He stated that the pile of clothes would have been that size or smaller.

1 eventually.

2 On cross-examination, Slagle conceded that he did not know how long the
3 fire at the Browns' house had burned. He also conceded that some smoke had reached the
4 living area of the house and had even left soot stains on the molding.

5 In closing arguments, Perkins primarily focused on Buker's mental
6 condition, arguing that Buker lacked the mental capacity to form the intent to commit the
7 charged offenses or to aid and abet petitioner in committing them, and that his confession
8 in the police interviews was a product of suggestion. He also argued, however, that the
9 state had failed to prove that either Buker or petitioner had the intent to kill. In support of
10 that position, he cited Hite's testimony that the fire was a "two on the scale of one to ten,"
11 as well as Slagle's testimony about the likely size of the fire, the amount and the toxicity
12 of the smoke it produced, and his conclusions that no accelerant was used and that the
13 heating duct was not forcibly removed.

14 The jury acquitted Buker of attempted murder, but it convicted him of the
15 other charges.

16 In 2009, petitioner initiated this action for post-conviction relief, claiming
17 that he had been denied adequate assistance of counsel at his criminal trial. Petitioner
18 alleged several grounds in support of that claim, two of which are pertinent on appeal.
19 First, he alleged that Kimble failed to conduct an adequate investigation of the fire at the
20 Brown residence and, because of that, failed to secure evidence dispelling the inference
21 that petitioner had intended to kill anyone. Second, he alleged that Kimble was

1 inadequate for failing to challenge the reliability of Buker's statements during his police
2 interviews, in which he implicated petitioner in the fires.

3 After petitioner initiated this action, Kimble filed an affidavit describing
4 her preparation for petitioner's trial and her conduct of the defense. She stated that,
5 within a week after being appointed to represent petitioner, she went to the Brown
6 residence, looked into the open garage from the street, and walked around the sidewalk of
7 the property to examine several areas described in the police reports, but did not go into
8 the garage or onto the property. Kimble stated that she consulted with a private
9 investigator and arson expert, Smith, and that he reviewed relevant police and fire
10 marshal reports and answered her questions about the incendiary properties of rubbing
11 alcohol. Kimble then asserted that petitioner had "described in careful detail to [her] how
12 the fire originated, what was used to start the fire, and the manner in which duct work
13 was removed in the Brown garage * * *." Kimble stated that, based on what petitioner
14 had told her, she "did not believe it would be any more informative or productive for
15 [her] to retain Smith or another arson investigator to further examine the scene of the
16 Brown fire." She stated that she did, in fact, telephone one of the firefighters who had
17 responded to the fire to discuss the fire department's initial conclusion that the fire had
18 resulted from spontaneous combustion. Kimble went on to state that she did not know
19 whether, had the fire not been put out when it was, it "would have gone out by itself
20 without causing structural damage to the house" or "whether the smoke caused by the fire
21 would have risen to the ceiling of the garage and/or exited the garage through the open

1 garage door." She also stated that she did not know how much smoke entered the living
2 area or "whether it actually posed a serious danger of killing the Browns." She also
3 stated that she was surprised at trial by the various witnesses' descriptions of the size of
4 the fire, which made it sound bigger than the police and fire department reports had
5 seemed to describe.

6 Later in the affidavit, Kimble stated, "I am unaware of any evidence which
7 would have rebutted the State's inference that [petitioner] intended to kill the Brown
8 family. Thus, I did not present such a defense."

9 After Kimble made that affidavit, petitioner filed his trial memorandum, to
10 which he attached, as an exhibit, a copy of an affidavit made by Perkins. In his affidavit,
11 Perkins stated, among other things, that, by establishing that petitioner, Walsh, and Buker
12 did not intend to kill Brown or his family, he was able to obtain a not guilty verdict on the
13 attempted murder charge against Buker. Perkins stated that Slagle's investigation and
14 testimony were "critical" in providing him with evidence necessary to establish that the
15 fire in Brown's house was not set with an intent to kill.

16 In response to Perkins's affidavit, Kimble made a second written
17 declaration. In it, Kimble reiterated that petitioner had admitted to her that he had set the
18 fire intending to kill Brown and that he and Walsh had used rubbing alcohol and had
19 pulled the heating duct down from the ceiling. She also reiterated that she had consulted
20 informally with Smith, the arson expert, and that he had "merely confirmed" petitioner's
21 statements about the fire. Kimble stated that it had been Smith's assessment that

1 petitioner's plan to kill the Browns would have been successful had the smoke detectors
2 not awakened the Browns. Kimble challenged Perkins's assertion that he had proved at
3 Buker's trial that petitioner did not intend to kill anyone in the Brown house; rather, she
4 averred, Perkins had proved only that *Buker* did not intend to kill anyone.

5 Subsequently, petitioner obtained affidavits from two investigators hired by
6 his post-conviction counsel. One investigator, Cupit, averred that he had interviewed
7 Smith and that Smith had stated that he recalled reviewing "'about three pages' which
8 included a fire report and a probation violation" report, and had concluded that the "fire
9 was not going to do much" because there was a "low fuel load" and because the garage
10 door was open, "disallowing sufficient heat to build up." According to Cupit, Smith told
11 him that the heating duct "had obviously been removed by the suspects * * *."

12 The other investigator, Bates, averred that, in February 2008, petitioner's
13 post-conviction counsel hired her to be present and take notes while he interviewed
14 Kimble. According to Bates, during the interview, Kimble never indicated that she
15 believed that petitioner intended to kill anyone, and she characterized the incident as a
16 prank to scare Brown. Bates stated that Kimble had told counsel that Walsh had pulled
17 down some duct work but did not state that he had done so in order to kill the occupants
18 of the home.

19 A hearing was held on the petition for post-conviction relief. At the
20 hearing, petitioner called as an expert witness a criminal-defense attorney who has
21 specialized in murder cases since 1983. He testified about the appropriate standard of

1 legal representation in a case such as petitioner's. Among other things, he testified that an
2 attorney's obligation to investigate thoroughly and determine the best defense is the same
3 regardless of whether the defendant confesses to the attorney that he or she actually
4 committed the charged crime, explaining, "The mere fact your client said they did it
5 doesn't mean the state can meet its many burdens, and you have a duty to investigate
6 thoroughly and figure out the best possible * * * defense that you can put up on behalf of
7 your client." He testified further that the proper standard for determining the best theory
8 of defense is to hire experienced investigators to investigate the case and use the
9 information that they discover to narrow the case and concentrate on a particular defense.

10 The expert witness also testified that he had read the transcripts from
11 petitioner's and Buker's respective criminal trials, as well as the various affidavits filed in
12 this case. He opined that Kimble's representation did not meet the standard for adequate
13 and effective assistance of counsel in Oregon. In his view, Kimble failed to discover
14 information that she would have found had she investigated properly. He testified that,
15 had she conducted an adequate investigation, a defense theory based on lack of intent to
16 kill would have been available, citing the evidence presented by the defense in Buker's
17 trial.

18 At the conclusion of the hearing, the court granted post-conviction relief,
19 ordering a new trial. The court noted that the state's case as to intent to kill consisted
20 chiefly of evidence of the threat posed by the fire--the size of the fire, the use of an
21 accelerant, and the removal of the duct. It explained, "[T]he jury gets to look at the facts

1 of the case and decide did somebody who did all that intend to kill somebody?" It
2 concluded that, given the nature of the state's case, hiring a fire investigator and putting
3 on evidence contradicting the state's evidence was critical to petitioner's defense against
4 the attempted murder and attempted aggravated murder charges. The court concluded
5 that, in addition to its relevance to the question whether petitioner intended to kill, the
6 level of the fire was also critical to the arson charges, suggesting that Kimble could have
7 persuaded the jury to find defendant guilty of a lesser offense if she had offered evidence
8 that the fire was less serious than portrayed by the state.

9 The court found that Kimble "never even considered attacking the State's
10 proof of intent to kill" and, furthermore, that she "didn't see the issue"--that is, that she
11 did not see that the state would have to prove not only that petitioner started the fire, but
12 that his conduct constituted specific crimes, elements of which the state would have to
13 prove with evidence concerning the threat posed by the fire. It further found that,
14 because Kimble "didn't see the issue," her failure to hire a fire investigator and to
15 challenge the state's evidence of the threat posed by the fire could not have been a
16 strategy decision.

17 The court went to on conclude that Kimble was also deficient in failing to
18 discredit Buker. It noted other failures by Kimble that "in themselves would not justify
19 post-conviction relief, but when taken with everything else, became even more serious."
20 The court entered a judgment with written findings and conclusions, at the end of which
21 it stated, "The conviction is set aside, the sentence vacated and the case returned for a

1 new trial."

2 On appeal, defendant (the superintendent of the Snake River Correctional
3 Institution, where petitioner is incarcerated) argues that the post-conviction court erred in
4 granting relief. In his first assignment of error, he contends that Kimble's failure to
5 investigate the fire at the Brown home more extensively was not objectively unreasonable
6 and, in any event, that petitioner suffered no prejudice as a result. In his second
7 assignment of error, defendant argues that Kimble attacked Buker's credibility effectively
8 and thus was not deficient but, even if she was, petitioner was not prejudiced. In his third
9 and final assignment of error, defendant asserts that, if petitioner is entitled to relief, it
10 should extend only to the attempted murder and attempted aggravated murder
11 convictions.

12 To demonstrate inadequate assistance of counsel under Article I, section 11,
13 of the Oregon Constitution, a petitioner must show, "by a preponderance of the evidence,
14 facts demonstrating that trial counsel failed to exercise reasonable professional skill and
15 judgment and that petitioner suffered prejudice as a result." *Trujillo v. Maass*, 312 Or
16 431, 435, 822 P2d 703 (1991). The petitioner suffered prejudice if counsel's failure had a
17 tendency to affect the result of the trial. [*Burdge v. Palmateer*](#), 338 Or 490, 492, 112 P3d
18 320 (2005). Whether a criminal defense counsel's failure to investigate, discover, or
19 adduce evidence had a tendency to affect the outcome of a case must be assessed in light
20 of the totality of the circumstances. [*Horn v. Hill*](#), 180 Or App 139, 148, 41 P3d 1127
21 (2002). Under the Sixth Amendment to the United States Constitution, a petitioner must

1 show that "counsel's representation fell below an objective standard of reasonableness"
2 and that "there is a reasonable probability that, but for counsel's unprofessional errors, the
3 result of the proceeding would have been different." *Strickland v. Washington*, 466 US
4 668, 688, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984). We review post-conviction
5 proceedings for errors of law. *Chew v. State of Oregon*, 121 Or App 474, 476, 855 P2d
6 1120, *rev den*, 318 Or 24 (1993). "The issues before us are whether the facts found by
7 the post-conviction court are supported by evidence in the record, and whether the legal
8 conclusion drawn from those facts is correct. We are bound by the [post-conviction]
9 court's findings of fact if they are supported by evidence in the record." *Id.*

10 We begin with defendant's contention that Kimble's investigation of the fire
11 at the Browns' house demonstrated reasonable professional skill and that the post-
12 conviction court erred in concluding otherwise. Defendant advances two general
13 arguments in support of that contention. First, he asserts that Kimble reasonably believed
14 that another investigation would be fruitless in light of petitioner's detailed confession to
15 her that he intended to kill the Browns. That argument is unpersuasive. It assumes that
16 petitioner did, in fact, make that confession to Kimble, despite the post-conviction court's
17 express decision not to make that finding. In its initial statement of "findings and
18 conclusions," the court wrote, "The defendant told his attorney that he started the fire and
19 wanted to kill the occupants." Petitioner filed a motion to amend that finding, arguing
20 that Kimble's statement about petitioner's confession was not credible in light of
21 testimony by Bates, a witness to post-conviction counsel's interview with Kimble, that

1 Kimble there stated that petitioner did *not* intend anything more than a "prank." *See* ___
2 Or App at ___ (slip op at 18). Subsequently, in an amended statement of "findings and
3 conclusions," the court wrote that Kimble "*claims* that the defendant told her that he
4 started the fire and wanted to kill the occupants." (Emphasis added.)

5 In any event, even assuming that petitioner did make that confession, it
6 does not follow that an investigation would have been fruitless. Kimble could not know
7 from petitioner's alleged confession whether evidence existed that would cast doubt on
8 the state's case. Additional investigation was necessary to make that determination.

9 Second, defendant argues that Kimble's decision not to arrange for a further
10 investigation of the fire was the product of her reasoned assessment of the case after
11 reviewing the evidence, talking to petitioner, and evaluating her options. Defendant
12 contends that Kimble did not pursue that line of inquiry because "there was nothing to
13 see." According to defendant, the evidence that the fire was set below the living space
14 and that the heating duct was removed demonstrated that, regardless of the size of the
15 fire, petitioner intended for the smoke to enter the living area. Thus, in defendant's view,
16 additional evidence of defendant's intent was cumulative and unnecessary.

17 We disagree. The state's case as to intent to kill rested to a significant
18 degree on the evidence of the threat posed by the fire--primarily the use of an accelerant
19 and the removal of the duct. The jury was asked to infer from that evidence that
20 petitioner intended to kill the Browns. As the defense presented in Buker's trial
21 illustrates, evidence could be adduced to challenge the state's evidence of the threat posed

1 by the fire. Thus, issues *could have been* raised as to petitioner's intent. Contrary to
2 defendant's argument, there was something to see. Further investigation was necessary to
3 make an informed determination as to how to proceed with petitioner's defense.

4 In short, we reject defendant's argument that the post-conviction court erred
5 in concluding that Kimble failed to exercise reasonable professional skill.

6 We turn to defendant's argument that petitioner suffered no prejudice as a
7 result of Kimble's failure to conduct a more extensive investigation. Defendant focuses
8 on Slagle's testimony at Buker's trial and argues that it is unlikely that it would have had
9 an effect on the verdict in petitioner's case, for two reasons: (1) because Slagle's
10 testimony was problematic on the merits and (2) because it had little bearing on
11 petitioner's intent because the risk the fire posed to the occupants of the house would
12 have been of little utility to the jury in evaluating intent.

13 We disagree with both arguments. As the post-conviction court observed,
14 the jury was asked to look at the evidence and decide whether a person "who did all that"
15 intended to kill the Browns. As the record of Buker's trial shows, further investigation
16 would have uncovered evidence suggesting that the fire was not as serious as portrayed
17 by the prosecution, that an accelerant was not used, and that the heating duct was not
18 forcibly removed. It is true that, as the state argues, such evidence, if it had been
19 presented at petitioner's trial, might not have persuaded the jury that petitioner did not
20 intend to kill the Browns. Slagle's testimony was not utterly persuasive in every respect.
21 In addition, there was other evidence, not related to the threat posed by the fire, from

1 which an intent to kill could be inferred--namely, the evidence of petitioner's motive and
2 Prewitt's testimony that petitioner talked about "blowing somebody up and blowing up a
3 DA's house."

4 Certainty, however, is not the appropriate standard in gauging the impact of
5 trial counsel's performance. Rather, the question is merely "whether the omitted evidence
6 would have a *tendency* to affect the outcome of the prosecution." *Horn*, 180 Or App at
7 148 (emphasis in original). The omitted evidence in this case meets that standard.
8 Further investigation would have revealed more than just the evidence presented by
9 Slagle at Buker's trial. For example, firefighter Hite testified at Buker's trial that, on a
10 scale of one to ten, the fire at the Browns' house was a "two" in terms of its seriousness.
11 Furthermore, Prewitt's testimony and the other evidence of petitioner's motive were not
12 unassailable. Had the jury been persuaded that the threat from the fire did not
13 demonstrate an intent to kill, it may have found that evidence unpersuasive as well. It
14 follows that, with respect to the charges for crimes that contained, as an element,
15 intention to kill, petitioner was prejudiced by Kimble's failure to provide adequate
16 assistance of counsel and, furthermore, that petitioner is entitled to post-conviction relief
17 on those charges.

18 In his second assignment of error, defendant challenges the post-conviction
19 court's conclusion that Kimble was constitutionally inadequate in failing sufficiently to
20 discredit Buker. We agree with defendant. While Kimble's investigation regarding the
21 seriousness of the fire was nonexistent and evidence that the fire was not nearly as

1 serious as the prosecution painted it to be was arguably significant, her challenge to
2 Buker's credibility was simultaneously more extensive and, to the extent it was shallow,
3 less prejudicial. During her closing argument, for example, Kimble highlighted the
4 contradictions in Buker's two interviews with police interrogators. She pointed out that
5 Buker altered his account of the events, shifted blame, minimized his own role, and
6 admitted to officers that he had lied to them. Petitioner maintains that his trial counsel
7 should also have introduced evidence regarding Buker's marginal intelligence and his
8 susceptibility to suggestion. But, as we noted on petitioner's direct appeal, albeit in the
9 context of determining whether allowing some of Buker's testimony was plain error, "the
10 'gravity of error' in admitting Buker's statements was not significant. * * * Buker's
11 statements were * * * largely cumulative and not likely to have had an impact on the
12 jury's verdict." [State v. Galloway](#), 202 Or App 613, 619-20, 123 P3d 352 (2005), *vac'd*
13 *on other grounds*, 345 Or 315 (2008). We adhere to that conclusion. Trial counsel's
14 treatment of Buker's testimony was not constitutionally inadequate.

15 That brings us to defendant's third assignment of error. The post-conviction
16 judgment refers to and incorporates the court's "Amended Findings and Conclusions,"
17 which state, in turn, "The conviction is set aside, the sentence vacated and the case
18 returned for a new trial." Although the use of the singular "conviction" creates some
19 confusion, we nonetheless infer from the court's findings and conclusions that it intended
20 to grant relief on all charges. Defendant asserts that, in doing so, the court erred.
21 According to defendant, the operative petition for post-conviction relief focused

1 exclusively on the attempted aggravated murder and attempted murder charges. He also
2 asserts that petitioner offered no evidence or argument for why counsel's performance
3 had any tendency to affect the verdict on any of the other charges. Defendant
4 acknowledges that this assignment of error is unpreserved, but he argues that we should
5 review it anyway because he first learned of the post-conviction court's intention to grant
6 relief on all convictions when the court issued its judgment and thus had no opportunity
7 to object or otherwise challenge the court's ruling before it became final. We agree.
8 Although an extremely attentive and perceptive attorney might have been able to discern
9 from statements at trial that the court intended to grant complete relief, we conclude that
10 expecting defendant's counsel to do so in this case would be expecting too much. We
11 therefore consider defendant's third assignment of error.

12 As discussed above, we conclude that trial counsel's performance was
13 constitutionally inadequate only with respect to her failure to investigate, and put on
14 evidence regarding, the lethal potential of the fire that petitioner set at the Browns' home.
15 That failure obviously had no tendency to affect the jury's verdicts regarding crimes that
16 did not have, as an element, an intention to kill or to cause injury to a person or persons.
17 Thus, the inadequacy had a tendency to affect the verdicts in the attempted aggravated
18 murder and attempted murder charges. It also had a tendency to affect the first-degree
19 burglary verdict; that crime, as charged and prosecuted in this case, involved entering and
20 remaining in a building and, therein, "attempt[ing] to cause physical injury to any
21 person." ORS 164.225(1)(b). The inadequacy did not, however, have an effect on the

1 arson charges; neither first- nor second-degree arson requires the state to prove an
2 intention to harm persons. ORS 164.315; ORS 164.325. The same is true, obviously, of
3 *recklessly* endangering.

4 Judgment vacated and remanded for entry of judgment granting petition for
5 post-conviction relief with respect to convictions for attempted aggravated murder,
6 attempted murder, and burglary in the first degree, and denying such relief on all other
7 convictions.