

FILED: September 04, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN STEVEN BURCHAM,
Petitioner-Respondent,

v.

STEVEN FRANKE,
Superintendent,
Two Rivers Correctional Institution,
Defendant-Appellant.

Umatilla County Circuit Court
CV110550

A150449

James R. Hargreaves, Senior Judge.

Argued and submitted on December 06, 2013.

Karla H. Ferrall, Assistant Attorney General, argued the cause for appellant. With her on the brief were Mary H. Williams, Deputy Attorney General, and Anna M. Joyce, Solicitor General.

Jessie Wm. Barton argued the cause and filed the brief for respondent.

Before Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.*

GARRETT, J.

Portion of judgment reversing petitioner's convictions on Counts 7, 8, 9, and 10 reversed; otherwise affirmed.

*Garrett, J., *vice* Duncan, J.

1 GARRETT, J.

2 Petitioner was convicted of several crimes arising from an incident in
3 which he provided alcohol to a 16-year-old girl and, while she was intoxicated, sexually
4 assaulted her. We affirmed petitioner's convictions on direct appeal. Petitioner then
5 sought post-conviction relief on the ground that his trial counsel was inadequate. The
6 post-conviction court accepted the petition and reversed petitioner's judgment of
7 conviction in its entirety. The state appeals, assigning error to that ruling. We affirm in
8 part and reverse in part.

9 I. BACKGROUND

10 The facts pertinent on appeal are undisputed. In September 2007, the
11 victim, F, was invited by her friend, S, to attend a birthday party for S's father. Petitioner,
12 who is S's uncle, was also at the party. At the time, F was 16 years old; petitioner was
13 48. After the party, petitioner invited F and S to his home to see his taxidermy collection.
14 When they arrived, petitioner prepared margaritas. F and S each drank at least six
15 margaritas. Petitioner later served other mixed drinks and shots of alcohol. The girls
16 accepted all of the drinks that petitioner gave them, although F poured out some of the
17 shots on the ground because she was worried about having had "severely too much" to
18 drink. After several hours, petitioner began to dance with F. S was alarmed because she
19 realized that F was "very drunk," and S thought that the dancing was inappropriate. By
20 the end of the night, F was slurring her words and having trouble walking. Petitioner
21 called S's parents and told them that, because S and F had been drinking, they were going

1 to stay overnight at his house.

2 At about 2:00 a.m., F and S decided to go to bed. Petitioner told them that
3 they could sleep in his spare bedroom. Before going there, F went to get a glass of water.
4 As she was returning, petitioner stopped her in the hallway, took her into his bedroom,
5 laid her on his bed, and removed her pants and underwear. F testified that she attempted
6 to stand up but could not because she was "severely intoxicated." She testified that
7 petitioner performed oral sex on her and then attempted to penetrate her vagina with his
8 penis. F felt a "sharp shooting pain" that jolted her out of her "extremely drunken state."
9 F ran out of the room screaming for S.

10 S found F in the hallway and brought her back to the guest bedroom. S
11 retrieved F's pants and underwear and helped her get dressed. F was "crying frantically."
12 S drove them back to S's parents' house. The next day, S's father took S and F to the
13 police station, where they were both interviewed by police. Later, S's mother took S and
14 F to the hospital. F was interviewed by Sexual Assault Nurse Examiner (SANE) Kathy
15 Wade. A SANE is an emergency room nurse who specializes in examining victims of
16 sexual assaults. S was present during the interview. During her examination of F, Wade
17 observed "a small, linear * * * skin tear, that was about a centimeter long * * * between
18 [F's] hymen and her labia minora." Wade attempted to photograph F's injuries, but the
19 camera she was using failed. Instead, Wade drew the location of the injury on a printed
20 diagram of a woman's genital area that was included in a standardized documentation
21 form. On that same form, Wade wrote "small skin tear, non-bleeding, approx 1 cm long."

1 Petitioner was charged with two counts of rape in the first degree, ORS
2 163.375 (Counts 1 and 2); two counts of sodomy in the first degree, ORS 163.405
3 (Counts 3 and 4); two counts of sexual abuse in the first degree, ORS 163.427 (Counts 5
4 and 6); two counts of sexual abuse in the second degree, ORS 163.425 (Counts 7 and 8);
5 and two counts of furnishing alcohol to a minor, ORS 471.410 (Counts 9 and 10).

6 As charged in this case, the crimes alleged in Counts 2, 4, and 6 required
7 the state to prove, *inter alia*, that F was "incapable of consent by reason of mental
8 incapacitation." At the relevant time, "[m]entally incapacitated" was defined in ORS
9 163.305(4) (2007), *amended by* Or Laws 2009, ch 770, § 1, as follows:

10 "'Mentally incapacitated' means that a person is rendered incapable of
11 appraising or controlling the conduct of the person at the time of the alleged
12 offense because of the influence of a controlled or other intoxicating
13 substance *administered to the person without the consent of the person* or
14 because of any other act committed upon the person without the consent of
15 the person."¹

16 (Emphasis added.) The state's theory at trial was that, at the time of the sexual contact, F
17 was mentally incapacitated because petitioner "administered" alcohol to her without her
18 "consent"; that is, although F had voluntarily consumed the drinks, her age made her
19 legally unable to consent to drink alcohol. Consistently with that theory, the state argued
20 during its opening statement that

¹ In 2009, the legislature amended the definition of "mentally incapacitated" by deleting any reference to a controlled substance that is administered without the consent of a person. Or Laws 2009, ch 770, § 1. Thus, under current law, in order to show that a person was "mentally incapacitated," the state need prove only that the person was rendered "incapable of appraising or controlling the conduct of the person at the time of the alleged offense." ORS 163.305(4). Nevertheless, all references to ORS 163.305 in this opinion are to the 2007 version of the statute.

1 "[F] was mentally incapacitated as a result of the alcohol * * * that
2 the [petitioner] administered to her, essentially. And that--so this mental
3 incapacitation, it means something maybe a little bit different than what we
4 would think of in layperson's terms. The actual definition is that a person
5 becomes mentally incapacitated as a result of any intoxicating substance,
6 drugs or alcohol, administered to them without their consent.

7 "And while [F] might have agreed to take some of these drinks, she
8 cannot legally consent to do that in this situation."

9 At trial, Wade testified for the state about her examination of F. She
10 testified that a tear of the skin like what she found on F is "usually caused by a blunt
11 force trauma." Wade also testified that her observations during her examination of F
12 were consistent with the account that F gave during the interview at the hospital. In
13 particular, she explained that similar skin tears can be caused by the penetration of the
14 vagina by a penis. On cross-examination by petitioner's trial attorney, Wade
15 acknowledged that the tear could have been caused by something other than sexual
16 penetration. Petitioner's attorney also cross-examined Wade about her protocols for
17 interviewing sexual assault victims, recording their responses, and documenting forensic
18 evidence. He did not, however, specifically question Wade about the camera failure or
19 the hospital's protocols for documenting evidence of sexual assault.

20 In its instructions to the jury, the trial court explained that the charges in
21 Counts 2, 4, and 6 were based on the state's theory that F was unable to "legally consent"
22 to the consumption of alcohol. For example, with respect to Count 2, the court explained:

23 "In this case, the defendant is charged with * * * Count 2, Rape in
24 the First Degree, that said defendant * * * did unlawfully and knowingly
25 engage in sexual intercourse with [F], a female who was incapable of
26 consent by reason of mental incapacitation caused by the defendant

1 administering alcohol to [F], [F] being unable to legally consent to the
2 consumption of alcohol because she is sixteen years old and a minor."

3 At a later point during the jury instructions, the court explained what the state was
4 required to prove in order to obtain convictions on Counts 2, 4, and 6. Those
5 explanations tracked the language of the relevant criminal statutes. For example, the
6 court informed the jury that,

7 " [i]n this case, to establish the crime of Rape in the First Degree, the
8 State must prove beyond a reasonable doubt the following four elements (1)
9 that the act occurred in Deschutes County, Oregon (2) that the act occurred
10 on or about September 8th, 2007 (3) that [defendant] knowingly had sexual
11 intercourse with [F]; and (4) that [F] was incapable of consent by reason of
12 mental incapacitation."

13 The court further explained to the jury that

14 "mentally incapacitated means a person is rendered incapable of appraising
15 or controlling his or her conduct at the time of the alleged offense because
16 of the influence of a controlled or other intoxicating substance administered
17 to the person without his or her consent or because of any other act
18 committed on the person without his or her consent[.]"

19 Petitioner's trial counsel did not challenge the jury instructions or otherwise
20 contest the state's theory that the absence of "consent" under the statute could be
21 established by the mere fact of F's age.

22 The jury acquitted petitioner on Counts 1, 3, and 5, which alleged,
23 respectively, first-degree rape, first-degree sodomy, and first-degree sexual abuse on the
24 ground that F had been "physically helpless."² The jury convicted petitioner of the
25 remaining counts, including Counts 2, 4, and 6 (the three "mentally incapacitated"

² See ORS 163.305(5) ("Physically helpless' means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.")

1 counts). Petitioner appealed; we affirmed his conviction without issuing an opinion.
2 *State v. Burcham*, 239 Or App 362, 246 P3d 520 (2010). Petitioner then filed a petition
3 for post-conviction relief, alleging that his trial counsel provided inadequate assistance
4 that deprived petitioner of his due process rights under Article I, section 11, of the
5 Oregon Constitution, and the Sixth and Fourteenth Amendments to the United States
6 Constitution. The post-conviction court reversed petitioner's judgment of conviction in
7 its entirety. The state now appeals.

8 II. DISCUSSION

9 A post-conviction claim of ineffective assistance of counsel involves a two-
10 part inquiry:

11 "First, we must determine whether petitioner demonstrated by a
12 preponderance of the evidence that [petitioner's lawyer] failed to exercise
13 reasonable professional skill and judgment. Second, if we conclude that
14 petitioner met that burden, we further must determine whether he proved
15 that counsel's failure had a tendency to affect the result of his trial."

16 *Lichau v. Baldwin*, 333 Or 350, 359, 39 P3d 851 (2002). The Supreme Court has
17 observed that evaluating the constitutional adequacy of an attorney's trial performance is
18 necessarily a fact-specific endeavor; thus, "[t]he search for a single, succinctly-stated
19 standard, objectively applicable to every case, is a fool's errand." *Krummacher v.*
20 *Gierloff*, 290 Or 867, 873-74, 627 P2d 458 (1981). Without question, however,
21 "adequate" assistance requires an attorney to "investigate the facts and * * * law to the
22 extent appropriate to the nature and complexity of the case so that [counsel] is equipped
23 to advise his [or her] client, exercise professional judgment[,], and represent the defendant

1 in an informed manner." *Id.* at 875. "In reviewing the decision of the post-conviction
2 court, we are bound by its findings of historic facts that are supported by evidence in the
3 record." *Lichau*, 333 Or at 359 (citing *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621
4 (1968)).

5 The post-conviction court reversed petitioner's judgment of conviction on
6 two grounds. First, the court concluded that petitioner's trial counsel had been inadequate
7 for failing to challenge the state's interpretation of the terms "administer" and "consent"
8 in the relevant criminal statutes. Second, the court concluded that petitioner's trial
9 counsel had been inadequate for failing to retain a qualified medical expert. According to
10 petitioner's post-conviction petition, hiring a qualified medical expert would have
11 allowed him to present evidence to rebut the state's explanation for the skin tear and to
12 more effectively cross-examine Wade. The court entered a judgment allowing the
13 petition for post-conviction relief, reversing the judgment of conviction, and remanding
14 the case "for retrial or other appropriate proceedings."

15 For the reasons that follow, we conclude that the post-conviction court
16 correctly ruled that petitioner was entitled to relief with respect to Counts 2, 4, and 6, all
17 of which involved the state's novel theory about the meaning of the term "consent" in the
18 statute defining mental incapacitation.³ The post-conviction court erred, however, in
19 reversing petitioner's convictions on Counts 7, 8, 9, and 10, because the record does not

³ We do not reach petitioner's alternative argument that his counsel should have also objected to the state's interpretation of the term "administered."

1 support a conclusion that the inadequacy of petitioner's trial counsel had a tendency to
2 affect the result of the trial on those four counts.

3 A. *The State's Mental Incapacitation Theory*

4 In its first assignment of error, the state argues that the post-conviction
5 court erred in concluding that petitioner's trial attorney was inadequate for failing to
6 challenge the state's theory that F was mentally incapacitated at the time of the sexual
7 assault. That theory relied on a novel interpretation of the term "consent" as used in ORS
8 163.305(4) (defining "mentally incapacitated"); the state argued that F's age rendered her
9 unable to consent to the consumption of alcohol. The petition for relief alleged, in
10 relevant part, that the state's theory that F was "mentally incapacitated because she was
11 under 21 years old and could not legally consent to consume the alcohol * * * did not
12 state a crime under statutes in effect at the time of the alleged offenses[.]" The post-
13 conviction court agreed and concluded that a competent defense attorney would have
14 recognized the state's interpretation as pure "silliness":

15 "To me, it just seems the clear and easy, straightforward reading of
16 the statute is, you give somebody something without their knowledge or
17 consent, meaning, * * * well, in the old days, it was the vodka in the fruit
18 punch at the fraternity party. Today it's some sort of drugs in something.
19 At first the person doesn't consent because they don't know it's there.

20 "To me, that's the only rational reading of this statute * * *.

21 "[A]nybody, I think, who would sit down and spend the time to look
22 at the statute would realize that the state, in offering their instruction and
23 claiming this to be the way the statute reads, given reading the statute on its
24 face, any lawyer who was competent would raise [an] objection."

25 On appeal, the state argues that the interpretation of ORS 163.305(4) that

1 the state advanced at petitioner's trial was reasonable. The state explains that the statute
2 did not have "a clearly understood meaning at the time" because "[n]either Oregon
3 statutes nor case law provide that 'consent,' as used in [that statute], means only consent
4 as a matter of fact." Those observations, however, beg the real issue in this case. As the
5 Supreme Court has held, "[i]t is the 'reasonable professional skill and judgment' standard,
6 and not generalized and imprecise rules of thumb such as 'unsettled questions of law,' that
7 determines whether counsel rendered inadequate assistance." *Burdge v. Palmateer*, 338
8 Or 490, 500, 112 P3d 320 (2005). Thus, the first step in our analysis requires us to
9 determine whether

10 "a lawyer exercising reasonable professional skill and judgment would have
11 recognized the statutory ambiguity, would have seen an interpretation that
12 could benefit the defendant, and would have concluded under the
13 circumstances that the potential benefits of advancing that interpretation
14 exceeded any risks."

15 *Id.* at 497.

16 If we determine that a reasonable exercise of professional skill and
17 judgment should have led petitioner's counsel to challenge the state's interpretation of
18 ORS 163.305(4), we also must decide whether petitioner was prejudiced by his counsel's
19 failure to do so. *Lamb v. Coursey*, 238 Or App 647, 652, 243 P3d 139 (2010), *rev den*,
20 350 Or 230 (2011). Here, petitioner argues that he was prejudiced because, among other
21 reasons, his trial counsel failed to challenge the state's interpretation of ORS 163.305(4)
22 by moving for a "judgment of acquittal, directed verdict[,], or an arrest of judgment."
23 Whether or not defendant was prejudiced by his trial counsel's failure to make those

1 motions depends on whether those motions would have been successful. *See Lamb*, 238
2 Or App at 652 (whether the petitioner was prejudiced by his trial attorney's failure to
3 argue that a three-year statute of limitations applied to one of his felony charges
4 depended upon whether a hypothetical motion to dismiss on that ground would have been
5 successful).

6 In short, the two-step inquiry into whether petitioner's trial counsel was
7 inadequate requires us, in the context of this case, to determine (1) whether petitioner's
8 counsel, in the exercise of reasonable professional skill and judgment, should have
9 challenged the state's interpretation of ORS 163.305(4) at trial; and (2) whether, if such a
10 challenge had been made, it would have been successful.

11 Following the methodology explained in *Burdge*, we conclude that
12 petitioner's trial attorney should have challenged the state's interpretation of ORS
13 163.305(4). The state's theory was that F was "unable to legally consent to the
14 consumption of alcohol because she is 16 years old and a minor." The text of ORS
15 163.305(4), however, does not include the phrase "legal consent" or any other term that
16 would indicate that the legislature intended the term "consent" to mean anything other
17 than factual consent. An attorney who is reasonably competent to practice law in this
18 state should be aware that Oregon courts follow a methodology of statutory interpretation
19 that makes the "text and context" of a statute the most persuasive evidence of its intended
20 meaning. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009); *PGE v. Bureau of*
21 *Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). Here, it should have been

1 obvious that the state's theory of criminal liability was at significant variance from the
2 text and context of the statute on which the state relied. That, in turn, should have
3 prompted petitioner's attorney to "investigate the facts and * * * law" to determine
4 whether it would be prudent to challenge the state's theory. *Krummacher*, 290 Or at 875.

5 In light of the foregoing, the state's argument on appeal that petitioner's trial
6 attorney was not inadequate because the state's interpretation of ORS 163.305(4) (2007)
7 was "reasonable" or "plausible" misses the mark. Even assuming, without agreeing, that
8 the state's interpretation was reasonable or plausible, the issue is whether petitioner's
9 counsel could have urged a different plausible interpretation that would have benefitted
10 petitioner at trial. The answer is plainly yes.

11 We also conclude that, under the circumstances, the potential benefits of
12 challenging the state's interpretation exceeded any risks. *Burdge*, 338 Or at 497.
13 Because the state's theory of criminal liability was embedded in the language of the
14 indictment itself, a successful motion for a directed verdict or for a judgment of acquittal
15 would have resulted in the dismissal of Counts 2, 4, and 6. An unsuccessful motion
16 would have presented no risk to petitioner. Those motions would have raised a pure
17 question of law and would have been decided by the trial court. For all of those reasons,
18 we conclude that petitioner's trial counsel failed to exercise reasonable professional skill
19 and judgment by not challenging the state's construction of ORS 163.305(4).

20 We also conclude that, had petitioner's trial counsel challenged the state's
21 interpretation of ORS 163.305(4), that challenge would have been successful. When

1 interpreting a statute, we apply the framework established in *PGE*, 317 Or 606, and
2 subsequently modified by *Gaines*, 346 Or 160. Under that framework, the goal of
3 statutory interpretation is to discern the intent of the legislature that enacted the statute.
4 *Gaines*, 346 Or at 171. The most persuasive evidence for determining the legislature's
5 intent is the "text and context" of the statute itself. *Id.* A statutory term's "context"
6 includes both its immediate context (the "phrase or sentence in which the term appears")
7 and the "broader context," which includes other statutes "on the same subject." *State v.*
8 *Stamper*, 197 Or App 413, 417-18, 106 P3d 172, *rev den*, 339 Or 230 (2005). We also
9 will consider any "pertinent legislative history." *Gaines*, 346 Or at 172. If the
10 legislature's intent remains unclear, we will resort to "general maxims of statutory
11 construction." *Id.*

12 Here, the text of ORS 163.305(4) required the state to prove that a person
13 was under the "influence of a controlled or other intoxicating substance" and that that
14 substance was "administered to the person without the consent of the person." Thus, the
15 statute refers to simple "consent." We typically assume that the legislature intends words
16 of common usage to be "given their plain, natural, and ordinary meaning." *PGE*, 317 Or
17 at 611. The ordinary meaning of "consent" is "to give express agreement." *Stamper*, 197
18 Or App at 417 (citing *Webster's Third New Int'l Dictionary* 482 (unabridged ed 2002)).

19 Nothing in the plain text or immediate context of the statute injects *capacity*
20 to consent into the analysis. The state, however, cites *Stamper* for the proposition that
21 "the word 'consent' includes both actual and legal capacity to consent." In *Stamper*, the

1 defendant challenged his conviction for second-degree sexual abuse, the elements of
2 which are set out in ORS 163.425. *Id.* at 415. Reviewing that conviction required us to
3 interpret the statutory phrase "the victim does not consent thereto[.]" 197 Or App at 415.
4 We interpreted that phrase with reference to "other related statutes" including ORS
5 163.315(1)(a), which provides that a person lacks the ability to consent to a sexual act if
6 the person is "[u]nder 18 years of age[.]" Ultimately, we concluded that, with regard to
7 ORS 163.425, "our best judgment is that the legislature intended the phrase 'the victim
8 does not consent' to apply either to actual lack of consent or incapacity to consent
9 because the victim was under the age of 18." *Id.* at 427.

10 Relying on *Stamper*, the state here cites several other statutes as "examples
11 of instances in which 'consent' means more than actual acceptance or willingness." *See*
12 ORS 163.315(1) ("A person is considered incapable of consenting to a sexual act if the
13 person is * * * [u]nder 18 years of age[.]"); ORS 163.197(3) (providing that, for the
14 purposes of the crime of hazing, the "[c]onsent of the person who is hazed is not a
15 defense"); ORS 163.215(1) (in the context of kidnapping and related offenses, providing
16 for an alternative definition of the term "without consent" when the victim "a person
17 under 16 years of age or who is otherwise incapable of giving consent").

18 The statutes cited by the state do not aid our analysis. Although ORS
19 163.315 can be said to be "related" to ORS 163.305(4) in that both statutes deal with the
20 subject of criminal sexual conduct, the other statutes on which the state relies are not
21 related to ORS 163.305(4) in any meaningful sense. There is a problem with the state's

1 reliance on ORS 163.315 as well. In drafting ORS 163.305(4), the legislature used the
2 term "without the consent of the person" in reference to the phrase "a controlled or
3 intoxicating substance [being] administered to the person." By contrast, ORS 163.315
4 does not use the term "consent" in reference to the consumption of intoxicating
5 substances; ORS 163.315 deals with when "[a] person is considered incapable of
6 consenting *to a sexual act*." (Emphasis added.) Thus, the meaning of the term "consent"
7 in ORS 163.315 does not help us to understand what the legislature intended the term
8 "without the consent of the person" to mean in ORS 163.305(4). The immediate contexts
9 in which those terms appear are simply too different. Because nothing convinces us
10 otherwise, we assume that the legislature intended to give the term "consent," as it
11 appears in ORS 163.315(4), its ordinary meaning. That is, we assume the legislature
12 meant "to give express agreement." *Stamper*, 197 Or App at 417.

13 Having determined that the state's interpretation of ORS 163.305(4) was
14 erroneous, we easily conclude that petitioner was prejudiced by his counsel's failure to
15 challenge that interpretation. That failure allowed petitioner to be convicted on Counts 2,
16 4, and 6 when those counts should have been dismissed. Even if the trial court had
17 accepted the state's theory, petitioner's statutory construction argument would have been
18 preserved and could have been brought before this court on direct appeal. Had that
19 occurred, we would have done precisely what we do now; for the reasons set forth above,
20 we would have concluded that the legislature intended the term "consent" in ORS
21 163.305(4) to have its ordinary meaning. We would, accordingly, have rejected the

1 state's argument that absence of consent could be established by a victim's age alone.

2 B. *The Expert Medical Testimony*

3 In his first and second claims, petitioner alleged the following:

4 "1. Trial counsel failed to conduct a complete investigation into the
5 medical evidence of a tear between [F's] hymen and her labia minora and
6 failed to retain and consult with a qualified medical expert in order to
7 prepare a defense and present evidence at trial on this issue.

8 "2. Trial counsel was not prepared to respond to the medical
9 evidence of the reported tear between [F's] hymen and her labia minora and
10 failed to effectively cross-examine the nurse, Kathy Wade, called as the
11 state's medical witness regarding this evidence."

12 On appeal, the state does not challenge the post-conviction court's
13 conclusion that petitioner's trial counsel was inadequate in both of those respects.
14 Therefore, the only question before us is whether the post-conviction court erred when it
15 found that petitioner had been prejudiced by his trial counsel's failures. For federal
16 constitutional purposes, proving prejudice requires a petitioner to prove that it is
17 "reasonably likely" that the result of the trial would have been different had counsel acted
18 differently. *Harrington v. Richter*, 562 US 86, 131 S Ct 770, 792, 178 L Ed 2d 624
19 (2011) (citing *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674
20 (1984)). Under the Oregon formulation, a defendant is prejudiced by his or her counsel's
21 inadequate representation when the counsel's "acts or omissions * * * [had] a tendency to
22 affect *the result* of the prosecution." *Krummacher*, 290 Or at 883 (emphasis added).
23 "Whether a petitioner has demonstrated prejudice is a legal question" and answering it
24 "may depend on the post-conviction court's findings." *Logan v. State of Oregon*, 259 Or

1 App 319, 327, 313 P3d 1128 (2013), *rev den*, 355 Or 142 (2014) (citing *Wyatt v.*
2 *Czerniak*, 223 Or App 307, 311, 195 P3d 912 (2008)). We will defer to the post-
3 conviction court's factual findings as long as they are supported by evidence in the
4 record. *Logan*, 259 Or App at 327 (citing *Derschon v. Belleque*, 252 Or App 465, 466,
5 287 P3d 1189 (2012), *rev den*, 353 Or 208 (2013)).

6 We begin by noting that the post-conviction court's resolution of this issue
7 has placed us in a tenuous position. Our standard for reviewing a decision by a post-
8 conviction court requires us to give great deference to the court's factual findings; we are
9 prohibited from reweighing the evidence in the record or speculating about "whether the
10 evidence might have supported other factual findings than those made by the trial court."
11 *Pratt v. Armenakis*, 201 Or App 217, 220, 118 P3d 821 (2005). Here, however, the post-
12 conviction court entered a judgment that does not articulate the factual bases for its
13 ultimate conclusion that petitioner was prejudiced. Rather, it merely refers us to the
14 "findings on record." Moreover, the court's only express finding on the issue of prejudice
15 appears to *reject* the idea that the Fitzgerald affidavit would have made any difference.

16 In the course of granting petitioner relief, the post-conviction court explained:

17 "I don't find the Fitzgerald affidavit very helpful, as I indicated
18 earlier, because, you know, to me these cases, they boil down to if the jury
19 believes the woman. Unless there's some gross findings of coaching or
20 some other real possibility, rather than all the guesswork that goes into
21 guessing about how else this injury could have occurred, juries just don't
22 buy it.

23 "And part of this is prejudice stuff. So, you know, I've really had
24 difficulty around this, because there's no question in my mind that he

1 should have consulted a medical expert and gotten prepared to testify. I
2 think it's really a close question whether there's prejudice shown here.

3 "I think since he so utterly failed, I think one has to come down on
4 the side of prejudice, but that's a close question, quite frankly, I have to
5 admit. So I think he's entitled to prevail on Counts 1 and 2--Claims 1 and 2
6 in regard to not being prepared and adequately cross-examining the
7 medical[.]"

8 In short, the post-conviction court concluded that petitioner had been prejudiced without
9 linking that conclusion to the factual record. That makes it more challenging to review
10 the court's decision in a way that gives appropriate deference to the court's factual
11 findings. Accordingly, we begin our analysis by explaining certain principles that help to
12 define the proper scope of review.

13 The first such principle is that, in the post-conviction context, "[t]he
14 allegations of the petition frame the issues that a post-conviction court can consider, and
15 a petitioner who fails to raise a claim in a petition for post-conviction relief has waived it
16 and is foreclosed from making arguments on claims not raised in the petition." *Hale v.*
17 *Belleque*, 255 Or App 653, 660, 298 P3d 596, *rev den*, 354 Or 597 (2013). Here, Claims
18 1 and 2 in petitioner's second-amended petition are specifically directed at "the *medical*
19 *evidence* of a tear between [F's] hymen and her labia minora." (Emphasis added.) We,
20 thus, confine the scope of our review of those portions of the record that are relevant to
21 petitioner's claims about the medical evidence of the skin tear observed by Wade. During
22 trial, Wade testified that her observation of that skin tear was "consistent" with the
23 allegation that petitioner had penetrated F. Because we have already concluded that the
24 post-conviction court did not err by granting petitioner relief on Counts 2, 4, and 6, the

1 only remaining count that required the state to prove penetration is Count 7, which
2 required the state to prove that petitioner subjected F to "sexual intercourse."⁴

3 The second principle is that, when a petitioner's claim for relief involves an
4 argument about how a witness might have testified at trial, it is incumbent on the
5 petitioner to provide "evidence by affidavit, testimony or otherwise as to what [the]
6 testimony would have been so as to allow an evaluation of the likely effect of that
7 testimony at trial." *Carias v. State of Oregon*, 148 Or App 540, 547, 941 P2d 571 (1997).
8 Here, petitioner provided such evidence in the form of an affidavit by Fitzgerald.⁵

9 Fitzgerald's affidavit presents two categories of evidence that are relevant to
10 the question before us. First, the affidavit suggests that, had petitioner's defense counsel
11 obtained a qualified medical expert, that expert would have been able to testify that the
12 trauma observed by Wade "could easily result from any number of causes, such as self-
13 stimulation, sex play or wearing tight blue jeans with no underwear." Second, the
14 affidavit claims that the medical evidence that Wade collected "was not properly
15 documented and may not have been properly performed in accordance with the Oregon

⁴ Count 8, the other count of sexual abuse in the second degree, alleged that petitioner subjected F to "deviate sexual intercourse," which is defined as "sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another." ORS 163.305(1).

⁵ During the post-conviction relief hearing, the state challenged the admission of the Fitzgerald affidavit as well as an affidavit by attorney Ryan Scott. The post-conviction court ruled that portions of Scott's affidavit were inadmissible because Scott was not qualified as a medical expert. The court otherwise allowed the affidavits. Because the state does not assign error to that ruling, we do not address it on appeal. ORAP 5.45(1).

1 Sexual Assault Response Team [(SART)] protocols." According to Fitzgerald, those
2 protocols "require a full-length, fully clothed photo of the patient for purposes of
3 identification prior to commencing the actual examination, in addition to photographs of
4 each and every identifiable injury to include a color reference scale and a measurement
5 scale." Fitzgerald also averred that she would have also told petitioner's trial attorney to
6 familiarize himself with the hospital's procedures for sexual assault exams.

7 As quoted above, the post-conviction court found that Fitzgerald's
8 testimony about other possible causes for F's skin tear would not likely have made a
9 difference to the jury. Evidence in the record supports that finding. Significantly, the
10 Fitzgerald affidavit never claimed that an expert witness would have been able to testify
11 that the skin tear observed by Wade could *not* have been caused by sexual intercourse.
12 Moreover, Wade did acknowledge on cross-examination that an alternative explanation
13 for F's skin tear was possible. Thus, because the jury had already been informed that the
14 skin tear was not conclusive evidence of penetration, it was reasonable for the post-
15 conviction court to conclude that additional testimony on that point would not have
16 discredited Wade. We also note that calling an expert witness to testify on behalf of
17 petitioner would not have been a risk-free proposition. As the original prosecuting
18 attorney testified to the post-conviction court, she would have asked Fitzgerald "if it was
19 possible that the victim's injury was caused by forcible sexual intercourse, and she would
20 be forced to concede that it was at least possible." The force of that concession may very
21 well have ended up harming petitioner.

1 As to the second subject covered in Fitzgerald's affidavit--Wade's
2 documentation of F's injuries--the post-conviction court made no explicit findings.
3 Consistently with our standard of review, we presume that the court made findings with
4 respect to the weight of that evidence that were consistent with its ultimate conclusion.
5 *Chew v. State of Oregon*, 121 Or App 474, 476-77, 855 P2d 1120, *rev den*, 318 Or 24
6 (1993). That is, we assume that the trial court found that a more effective critique of
7 Wade's examination procedures would have been helpful to petitioner. Turning to the
8 question of whether there is evidence to support that implicit finding, we consider
9 specifically whether there is evidence of how Wade *would* have testified had she been
10 cross-examined in the manner in which Fitzgerald suggested. *Carias*, 148 Or App at 547.

11 Petitioner did not take Wade's deposition in order to ascertain what her
12 responses to those questions might have been. The issue, therefore, is whether there is
13 evidence in Fitzgerald's affidavit that permits a reasonable inference about how Wade
14 would have responded to Fitzgerald's suggested cross-examination strategies. With
15 respect to whether Wade's examination was done in accordance with SART protocols, it
16 is not possible to infer that Wade would have given answers that would have been helpful
17 to petitioner. Rather, the record indicates that medical guidelines at the time specifically
18 provided that alternative methods of documenting injuries include "careful drawings
19 using body diagrams." Attorney General's Sexual Assault Task Force, *SART Handbook*
20 81 (2006).

21 The record does indicate that St. Charles Hospital's own procedures for

1 sexual assault examinations contemplate photographic documentation.⁶ The evidence in
2 this case, however, does not permit an assumption that a cross-examination highlighting
3 that fact would have been helpful to petitioner. Notably, Wade testified that she initially
4 attempted to photograph F's injuries and that the camera failed, so she decided to
5 document her observations by diagramming F's injuries by hand. Petitioner presented no
6 evidence that that was an unreasonable decision under the circumstances.⁷ Moreover,
7 although the Fitzgerald affidavit asserts that the lack of photographic documentation
8 made it "impossible * * * to properly verify or rebut Ms. Wade's testimony," Fitzgerald
9 was still able to opine later in her affidavit that Wade's description of F's injury would
10 have enabled a medical expert to testify that there were plausible alternative explanations
11 for the skin tear other than sexual penetration. Fitzgerald does not explain how Wade's
12 decision to diagram, rather than photograph, F's injuries affected the *integrity* of Wade's

⁶ Those hospital procedures provide, in pertinent part,

"4. Physical exam--Victims of sexual assault are assessed for actual and potential injuries secondary to the assault, based on history given or complaints of discomfort. ER physician will be consulted as needed for injuries that may warrant X-rays or are of concern to the SANE.

"a. Any case in which there is reported or suspected physical abuse, the ER physician will be consulted and requested to conduct a medical exam.

"b. Photographs will be taken with 35mm or Polaroid camera of all injuries identified during the exam

"c. Colposcope photographs of genitalia are taken by the SANE nurse."

⁷ For example, although Fitzgerald's affidavit speculates that the hospital probably had other cameras available, there is no evidence in the record that that was so.

1 examination in this case. And the record is also silent as to what information, if any,
2 could be gleaned from a photograph of F's injury that could not be gleaned from Wade's
3 diagram and description.

4 To illustrate the point, we turn to a case relied upon by petitioner.

5 Although that case, *State v. Hites-Clabaugh*, 251 Or App 255, 283 P3d 402 (2012), is not
6 a post-conviction relief case, its analysis of a claim about erroneously excluded expert
7 testimony is relevant here. In *Hites-Clabaugh*, the investigators who interviewed the
8 alleged victim had failed to follow "the child abuse investigation protocols * * * adopted
9 by Marion County's multidisciplinary child abuse team and * * * promulgated by the
10 Oregon Department of Justice." 251 Or App at 262. At trial, the defendant attempted to
11 call a psychologist as an expert witness. *Id.* at 259. The state objected and, in
12 accordance with OEC 103(1)(b), the defendant made an offer of proof. The defendant
13 stated that the psychologist was prepared to testify "as an expert on the necessity to use
14 protocols that have been promulgated by the State of Oregon in sex abuse cases." *Id.* at
15 262. The trial court excluded the testimony, in part, because it reasoned that the failure to
16 follow those protocols was not a proper topic for expert testimony. *Id.* at 260. The court
17 further explained that, "if counsel could provide statutory authority for the use of the
18 protocols in question, then it would consider giving a jury instruction concerning them."
19 *Id.* On appeal, we concluded that that exclusion was reversible error. We reasoned that
20 the

21 "defendant was entitled to present evidence not only of the existence and
22 details of those protocols, but also to adduce expert testimony concerning

1 why adherence to such protocols is important. To the extent that the trial
2 court excluded the proffered evidence on the ground that the subject could
3 be addressed by means of a jury instruction, but not evidence, the court
4 erred."

5 *Id.* at 266 (emphasis in original).

6 In short, one of the critical factors in *Hites-Clabaugh* was that the excluded
7 expert testimony would have helped the jury understand the importance of adherence to
8 the protocols. That is not to say that a petitioner must always present such evidence. We
9 conclude only that, in this case, petitioner had to do more than simply present evidence
10 that Wade departed from her hospital's policy regarding photographs. That is so because
11 the record demonstrates that Wade had a ready response: the camera did not work. Thus,
12 to permit a reasonable inference that cross-examining Wade about the hospital's
13 investigatory protocols would have yielded responses that were helpful to petitioner's
14 case, petitioner was required to present some evidence suggesting that Wade's decision
15 was unreasonable given the circumstances. He failed to do so.

16 In short, the record does not support a finding--if the post-conviction court
17 indeed made it--that petitioner would have benefitted at trial by cross-examination of
18 Wade regarding the hospital's protocols. Moreover, other findings made by the post-
19 conviction court (specifically, the explicit finding that the court did not "find the
20 Fitzgerald affidavit very helpful") militate against a conclusion of prejudice, rather than
21 for it. Accordingly, we conclude that the trial court's legal conclusion that petitioner was
22 prejudiced was not supported by evidence in the record. Thus, the post-conviction court
23 erred in concluding that petitioner demonstrated that his trial counsel's failures alleged in

1 Claims 1 and 2 had the tendency to affect the outcome of the prosecution. For purposes
2 of petitioner's federal constitutional claims, we also conclude that the evidence in the
3 record does not support a determination that it was "reasonably likely" that the result of
4 petitioner's trial would have been different.

5 C. *Disposition*

6 A petitioner is entitled to have a conviction reversed only after
7 demonstrating that his or her trial counsel was constitutionally inadequate and that
8 counsel's failure "had a tendency to affect the result of his trial." *Lichau*, 333 Or at 359.
9 A necessary corollary to that rule is that, when a petitioner is convicted of multiple
10 counts, a petitioner is not entitled to relief on those counts that his or her counsel's
11 constitutional inadequacy had no tendency to affect. *Galloway v. Nooth*, 247 Or App
12 164, 186, 268 P3d 736 (2011). Here, petitioner was convicted of seven counts: one
13 count of first-degree rape (Count 2), one count of first-degree sodomy (Count 4), one
14 count of first-degree sexual abuse (Count 6), two counts of second-degree sexual abuse
15 (Counts 7 and 8), and two counts of furnishing alcohol to a minor (Counts 9 and 10). The
16 jury found petitioner not guilty of Counts 1, 3, and 5. As explained above, the post-
17 conviction court correctly ruled that petitioner was denied effective assistance of counsel
18 when his trial attorney failed to challenge the state's interpretation of "mentally
19 incapacitated" in ORS 163.305(4). We disagree, however, with the court's similar
20 conclusion with regard to the trial attorney's failure to more thoroughly prepare for and
21 cross-examine the state's medical expert.

1 state's statutory interpretation of the term "mentally incapacitated." We also agree with
2 the post-conviction court that petitioner was prejudiced by his trial attorney's failure to do
3 so. Accordingly, we affirm that portion of the judgment that reversed the convictions on
4 Counts 2, 4, and 6. As to Counts 7 and 8, however, we conclude that the record does not
5 support the post-conviction court's conclusion that petitioner was prejudiced by any
6 failure to more thoroughly cross-examine the nurse who examined F after the attack. In
7 addition, there was no showing that the two counts of conviction for furnishing alcohol to
8 a minor (Counts 9 and 10) were (or could have been) affected by any alleged inadequacy
9 of counsel. Accordingly, we reverse that portion of the judgment that reversed
10 petitioner's convictions on Counts 7, 8, 9, and 10.

11 Portion of judgment reversing petitioner's convictions on Counts 7, 8, 9,
12 and 10 reversed; otherwise affirmed.