Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-253

JUNE TERM, 2018

In re Rusty Brooks*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 430-10-13 Bncv
		Trial Judge: John W. Valente

In the above-entitled cause, the Clerk will enter:

Petitioner appeals from the denial of his petition for post-conviction relief (PCR). He raises numerous arguments. We affirm.

Petitioner was found guilty by jury of two counts of aggravated sexual assault on a minor. The victim was his twelve-year-old daughter. We affirmed petitioner's conviction on appeal. See State v. Brooks, 2013 VT 27, 193 Vt. 461. Among other things, we concluded that certain statements that petitioner made to police were properly admitted at trial. See id. ¶¶ 8, 22, 24. We also emphasized the strength of the prosecution's case against petitioner, pointing to petitioner's testimony at trial, the admission of a recording of petitioner's police interrogation, and petitioner's written confession to having sex with his daughter. Id. ¶ 30.

In October 2013, petitioner filed a PCR petition alleging ineffective assistance of counsel. Petitioner's expert categorized petitioner's claims in relevant part as follows: trial counsel was ineffective because he: (1) stipulated to the admissibility of an audio recording of petitioner calling someone from jail without first listening to the audiotape with petitioner; (2) failed to consult with, retain, and/or call an expert on false/involuntary confessions; (3) failed to request a jury instruction on voluntariness; and (4) failed to object during the State's closing arguments. The court made extensive findings and ultimately denied petitioner's PCR. We address the court's reasoning with respect to each claim below. Petitioner appealed from the court's order.

I. Legal Standard

As we have explained, "post-conviction relief is not a vehicle for reexamining a defendant's guilt or innocence, but is rather designed to correct fundamental trial errors without jeopardizing the State's interest in finality." In re Rebideau, 141 Vt. 254, 257 (1982). To prevail on his ineffective-assistance-of-counsel claim, petitioner needed to show that his lawyer's performance fell below an objective standard of reasonableness and that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In re Dunbar, 162 Vt. 209, 212 (1994) (citing Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). In considering the first prong, defense counsel is "strongly presumed to have

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. As to the second prong, the "touchstone" for measuring prejudice "is whether the error undermined confidence in the outcome of the criminal trial." In re Sharrow, 2017 VT 69, ¶ 9, __ Vt. __. We review the PCR court's factual findings for clear error and its legal conclusions de novo. Id. ¶ 11. As set forth below, we find no basis to disturb the court's decision.

II. Petitioner's Claims

A. Phone Call Stipulation

As noted above, petitioner argued that his trial counsel was ineffective because he stipulated to the admissibility of a recorded call from jail without first listening to the audiotape with petitioner. Petitioner directed the person on the line to delete material from his computer. Trial counsel stipulated that petitioner was speaking to his wife. At trial, petitioner testified that he was, in fact, speaking to his niece. We find it unnecessary to discuss this claim in detail. The PCR court found that petitioner failed to show that trial counsel's conduct fell below the standard expected of a reasonable Vermont attorney. Even if the attorney's conduct did fall below the applicable standard, the court continued, petitioner failed to show prejudice. In his brief on appeal, petitioner focuses solely on the prejudice prong of the two-part Strickland test. Aside from a general assertion that both prongs are satisfied, petitioner does not articulate any particular claim of error in the court's assessment of Strickland's first prong. Thus, his claim must necessarily fail. See In re Grega, 2003 VT 77, ¶ 7, 175 Vt. 631 (mem.) (explaining that "[u]nless petitioner is able to satisfy both prongs of the [Strickland] test, it cannot be said that the conviction or sentence resulted from a breakdown in the adversary process that renders the result unreliable" (quotation and alteration omitted) (emphasis added)).

B. Petitioner's Statements to Police

1. Factual Findings

We thus turn to petitioner's claims stemming from statements that he made to police. These include his claims concerning counsel's failure to call an expert witness on false confessions and the absence of a voluntariness instruction. The PCR court made the following findings. In August 2009, two detectives interviewed petitioner. After waiting six hours in a holding cell following the first interview, a detective approached petitioner to arrange for his dinner. Petitioner made several statements to the detective. The detective informed petitioner of his Miranda rights, took petitioner into a room, and questioned him for approximately seventy-five minutes. The detective then provided petitioner with a blank statement form and left the room. Petitioner made a statement on the form, which he subsequently signed in the detective's presence. The statement provided:

> I, Rusty Brooks, had sex with my daughter [ ] as I loved her and felt close to her and was have [sic] sexual problems with my wife and was thinking that it was my fault and could not get her aroused [sic]. I relize [sic] it was wrong dirty and bad and am very sorry and I would like very much to get counseling and have my family back. I love my hole [sic] family and they mean the world to me once again I am very sorry and hope I get the help I need to get my family back. Please make it known that I am very sorry.

Brooks, 2013 VT 27, ¶ 30.

Trial counsel moved to suppress petitioner's statements on Miranda and voluntariness grounds. At a hearing on the motion, trial counsel inquired into factors related to a voluntariness inquiry, and although he had not raised this precise issue in his written motion, the court allowed him to pursue this argument. Both parties questioned the detective about the interview. Counsel argued that the statements were involuntary because of "the amount of time [petitioner] was held without any information, any food, any knowing what's happening at all," which wore down petitioner's ability to invoke his rights and ask for a lawyer. Counsel also pointed to "the length of this interrogation" and "the persistence of it," as well as petitioner's "eventual execution of the written statement." He asserted that "the whole process wore him down" and made "it difficult for him to give a voluntary statement." The trial court suppressed petitioner's first statement made before Miranda warnings were administered but denied the motion to suppress as to the other statements. Trial counsel's theory at trial was that petitioner's statements were not inculpatory and that the written statement was merely a summation of his denial of guilt, which he had expressed during the interview.

On the third day of trial, the court received a question from a juror following the State's cross-examination of petitioner. The juror asked if they could "disregard the written confession if we think it was obtained improperly." The judge responded that this was a legal question that he would deal with in his instructions. The parties and the court discussed possible instructions, construing the juror's question as raising a Miranda issue, which was not for the jury to decide. In discussing the juror's question, defense counsel asked for "some generalized language about the circumstances under which that piece of evidence was obtained." Defense counsel emphasized that he did not want the court to isolate the Miranda issue because, he argued, it could suggest to the jury that it had to accept the confession.

At the charge conference, the judge indicated that he would instruct the jury not to consider the issue of whether petitioner was properly advised of his legal rights concerning the interview sessions as this was a legal issue for the court alone to decide. The jury would decide what weight to give them. The judge then commented: "I think it's up to counsel to flesh that out and argue that these actually weren't admissions, if that's the argument; or that he was simply following what an officer was saying versus the State's argument that the details and such show that he clearly was admitting the offense." Trial counsel did not specifically request the model jury instruction on voluntariness or propose an instruction as to the burden of proof regarding voluntariness. He did not believe that the interview contained a "confession," much less an involuntary one. Therefore, he did not ask for the model voluntariness instruction.

Ultimately, the court instructed the jury as follows:

> You have heard testimony and evidence that Defendant made certain statements to [police] concerning the alleged offenses and gave a written statement. It is your duty to determine whether he made the statements and what weight to give them, even if he made them.
>
> I do instruct you that you are not to consider the issue of whether he was properly advised of his legal rights concerning the sessions. That is a legal issue for the Court alone to have decided. And the Court has ruled the statements are admissible for your consideration at trial. But what weight you give them is for you alone to decide.

2. Legal Standards

As the PCR court explained, "[w]hen a defendant challenges a confession or inculpatory statement, the prosecution must establish by a preponderance of the evidence that the confession or statement was made voluntarily." State v. Pontbriand, 2005 VT 20, ¶ 22, 178 Vt. 120. A voluntary statement is one that is "the product of a rational intellect and the unfettered exercise of free will." State v. Sullivan, 2013 VT 71, ¶ 37, 194 Vt. 361 (quotation omitted). "[T]he police may use some psychological tactics in eliciting a statement from a suspect," and "[e]ven where such tactics have an impact on a suspect's decision to talk to the police, the resulting statements are voluntary so long as they reflect a product of the suspect's own balancing of competing considerations." Pontbriand, 2005 VT 20, ¶ 22 (quotations omitted). "A confession or inculpatory statement is involuntary if coercive governmental conduct played a significant role in inducing the statement." Id. ¶ 21.

With respect to petitioner's ineffective-assistance-of-counsel claim, the test is not whether there were other strategies available to defense counsel, but instead "whether trial counsel had any reasonable strategy and whether [he] pursued it with adequate preparation and diligence." In re Russo, 2010 VT 16, ¶ 16, 187 Vt. 367 (quotation omitted).

3. Expert Witness Claim

Petitioner argued below that trial counsel was ineffective for failing to consult or retain an expert on false confessions. Petitioner's expert opined that such an expert could have educated the court at the suppression hearing or the jury at trial, including providing information on "the Reid Method" of interrogation. Even if this expert did not testify, petitioner argued that consultation would have provided trial counsel with ideas for questions to ask various witnesses and helped with oral argument strategy.

The PCR court concluded that trial counsel did not breach his duty to investigate by failing to contact a false-confession expert. The court found that challenges based on critiques of the Reid Method, an interrogation technique, were still an emerging field and counsel could not be faulted for failing to pursue this possible defense. See In re Kirby, 2012 VT 72, ¶ 13, 192 Vt. 640 (mem.) ("Where the theory of law is untested or unsettled, counsel cannot be faulted for failing to raise every possible defense—this is both an unduly heavy and impractical burden."). The court cited a recent case where proposed testimony on this topic was found not to meet the Daubert standard. See United States v. Jacques, 784 F. Supp. 2d 59 (D. Mass 2011); see also United States v. Rodriguez-Soriano, No. 1:17-cr-197, 2017 WL 6375970, at *2 (E.D. Va. Dec. 11, 2017) (observing that "[m]ost circuit courts to directly consider the admission of expert testimony on false confessions have determined such testimony is inadmissible," and district courts have similarly "found false-confession expert testimony inadmissible (citing cases)). The court also noted there were only three continuing legal education classes (CLEs) on this issue in Vermont during the decade prior to petitioner's trial and petitioner could not cite more than one instance in which a Vermont defense attorney had put forward a false-confession expert at trial. Petitioner similarly did not identify any Vermont court decisions granting a suppression motion or ruling that a statement was involuntary based on a critique of the Reid Method. The court thus found that trial counsel's decision not to consider reaching out to a false-confession expert for retention as a witness or consultation did not fall below the standard of care expected of Vermont attorneys.

Petitioner challenges the PCR court's conclusion on appeal. He argues that the court should have found that three CLE trainings in ten years was proof that awareness of the false-confession issue was essential to public defenders in Vermont. He asserts that the law on expert

testimony regarding false confessions goes back to at least the 1990s and argues that in several out-of-state cases, attorneys have been found ineffective for failing to present false-confession expert testimony. Petitioner maintains that a reasonable strategic choice required an understanding of options, and he argues that counsel's actions were not reasonable here.

Petitioner's arguments essentially challenge the PCR court's assessment of the weight of the evidence. We do not reweigh the evidence on appeal. The court's findings here are supported by the evidence and they support the court's conclusion. See In re Grega, 2003 VT 77, ¶ 6, 175 Vt. 631 (mem.) ("If the findings are supported by any credible evidence, and the conclusions reasonably follow therefrom, this Court will not disturb the trial court's judgment."). While petitioner disagrees with the PCR court's conclusion, he fails to demonstrate any error.

4. Failure to Request a Jury Instruction on Voluntariness

We thus turn to petitioner's argument that trial counsel was ineffective in failing to request a jury instruction on voluntariness. In his PCR petition, petitioner cited Vermont Rule of Evidence 104(a), which provides that "if the court rules that a confession is voluntary, the confession may be admitted but the issue of voluntariness shall be submitted to the jury." See Reporter's Notes, V.R.E. 104 (explaining that this "rule follows the so-called 'Massachusetts rule' " while "[t]he Federal and Uniform Rules follow the 'orthodox' rule . . . under which the judge makes the sole determination of voluntariness"). Petitioner also cited State v. Yoh, 2006 VT 49A, 180 Vt. 317, where this Court held that a defendant "was entitled to have the jury charged not to consider the confession unless it found the confession voluntary beyond a reasonable doubt." 2006 VT 49A, ¶ 29. Petitioner's expert opined that a reasonable Vermont attorney would have requested language in line with a model instruction and Yoh. The court found the expert credible on this point and while it was a close case, it concluded that trial counsel's performance fell below an objective standard of reasonableness.

The court then considered whether petitioner was prejudiced by trial counsel's action. As noted above, petitioner needed to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." In re Williams, 2014 VT 67, ¶ 29, 197 Vt. 39 (quoting Strickland, 466 U.S. at 694). The court concluded that petitioner failed to meet this standard.

The PCR court observed that this Court had conducted its own analysis of the statements and found them to be voluntary. See Brooks, 2013 VT 27, ¶¶ 17-25. Given the trial court's conclusions at the suppression hearing and this Court's conclusions on appeal regarding the voluntariness of the statements, the PCR court found no reasonable probability that the jury would have concluded beyond a reasonable doubt that petitioner's statements were not made voluntarily. Therefore, trial counsel's failure to seek such an instruction was not prejudicial.[1] See id. ¶ 30.

Petitioner challenges the court's conclusion on appeal. He maintains that the absence of a voluntariness instruction affected the outcome because during trial, a juror questioned whether the jury could "disregard the written confession if we think it was obtained improperly." Petitioner contends that the prosecutor's unsuccessful attempt to strike this juror as well as her statement about the statements' admissibility during closing argument "further highlight the prejudicial

[1] In reaching its conclusion, the PCR court also noted that petitioner had not presented any affidavits or other evidence from the jurors. Petitioner argues, and the State agrees, that this was an erroneous rationale. We do not rely on this rationale in reaching our decision.

nature" of the missing instruction. Petitioner also asserts that the PCR court conflated this Court's "legal analysis regarding [his] Miranda waiver with the jury's factual duty to determine voluntariness." Petitioner cites Sharrow, 2017 VT 69, ¶ 14, and asserts that he lacked "the benefit of full, fair, and correct instructions."

We are not persuaded by petitioner's arguments. We find this case is very similar to Yoh, 2006 VT 49A. There, as here, the court concluded that it was error not to instruct the jury to consider the voluntariness of a defendant's confession. Id. ¶ 29. We found no prejudice, however, because "[t]here was no reasonable probability that the jury would have reached a different conclusion as to the voluntariness of [the defendant's] confession if it had been charged properly." Id. ¶ 30. In that case, the jury heard testimony about the facts surrounding each of the defendant's interviews. The defendant's trial strategy in that case "was not to convince the jury that his confession was coerced," but instead "to convince the jury that his statement, while voluntary, was false." Id. We reasoned that while the jury could have disbelieved the defendant's incriminating statements, "it could not have concluded, even if properly instructed, that there was any doubt as to the voluntariness of the statements." Id.

We reach a similar conclusion here. Our analysis of this issue in petitioner's direct appeal, while not dispositive, is compelling. We specifically considered whether petitioner's interview was unduly coercive and whether the detectives' statements "were so manipulative or coercive that they deprived [petitioner] of his ability to make an unconstrained, autonomous decision to confess." Brooks, 2013 VT 27, ¶ 23 (quotation omitted). We concluded that "the facts do not suggest that [petitioner's] will was overborne by coercion or manipulation," finding it "significant that [he] did not immediately confess after waiving his rights." Id. ¶ 24. We also noted that "[t]hroughout most of the second interview, [petitioner] maintained his innocence and denied sexually assaulting his daughter." Id. We reasoned that petitioner's "continued assertion of innocence after waiving his rights strongly suggests that he did not consider his earlier statement to be incriminating and that, consequently, he did not feel manipulated or coerced by the first, unwarned interrogation such that his subsequent waiver of rights was involuntary." Id. We further found no indication that petitioner's waiver of his rights "was anything but knowing and voluntary," and we rejected petitioner's "claims that his confession was a product of coercive psychological police tactics and not voluntary because he was confined to a cell without food, water, shoes, or outside contact." Id. ¶ 25. We found "no evidence to suggest that [petitioner] was so uncomfortable as to inform anyone of his deprivations; nor did [petitioner] testify that he was pressured, coerced, or threatened into speaking." Id. Given the evidence in this case, we discern no prejudice from the failure to include a voluntariness instruction. Petitioner's arguments do not persuade us otherwise.

D. Failure to Object to the Prosecutor's Closing Arguments

We turn next to petitioner's challenge to his trial counsel's failure to object to various statements in the State's closing argument. The PCR court found multiple instances in which the prosecutor used inflammatory statements to appeal to the jurors' sympathies, expressed her personal belief as to the credibility of the evidence and witnesses, and asked the jurors to put themselves in the place of the child victim. The prosecutor stated, for example, that the complainant was a child "of complete integrity," and she asked the jury to imagine being "asked to remember the details [of sexual assault] that you tried so hard to forget," stating that the child's inability to remember the details was "totally predictable, understandable," and it "corroborate[d] yet again her truthfulness, her integrity." In her rebuttal, the prosecutor also appeared to express her personal belief on the credibility of petitioner's statements, calling them "reliable," "true," and "honest." The PCR court found the statements indistinguishable from similar statements deemed

inappropriate by this Court in other cases. The court concluded that trial counsel's inaction in the face of such statements fell below an objective standard of reasonableness.

Nonetheless, the PCR court found no "reasonable probability that, absent the error[], the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. The court noted that, like the cases that petitioner relied upon, this case involved improper sexual conduct with a child, and those cases, like this one, essentially presented a credibility contest. This case differed, however, because it included a written confession that was submitted as evidence to the jury. The PCR court noted that this Court held in petitioner's direct appeal that the statement was properly admitted. It emphasized that the purpose of an ineffective-assistance-of-counsel claim is "to ensure a fair trial." Id. at 686 (explaining that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"). The PCR court concluded that given the specific facts of this case, including the admission of petitioner's written statement, trial counsel's shortcomings did not meet this standard here.

Petitioner argues that the PCR court was wrong to distinguish cases where we have found prejudice resulting from a prosecutor's statements during closing. He maintains that, as in those cases, he was deprived of his right to a fair trial and his conviction should be reversed. He does not provide any detailed argument in support of this claim. Instead, he asserts generally that it "cannot be said to be harmless" when a prosecutor fails to confine her "argument to the evidence of the case and inferences properly drawn from it." State v. Madigan, 2015 VT 59, ¶ 30, 199 Vt. 211.

We find petitioner's arguments unpersuasive. We recognize that "prosecutors must present the State's case with earnestness and vigor," but "they also have a corresponding duty to refrain from improper methods and to guard against conduct unintentionally trespassing the bounds of propriety." Id. ¶ 30 (quotation and alteration omitted). Similarly, "[w]e have long condemned prosecutors' statements conveying their beliefs or opinions about a case." State v. Rehkop, 2006 VT 72, ¶ 34, 180 Vt. 228. We found plain error in Rehkop where the prosecutor stated during closing that "he would have considered charging the defense witnesses with perjury" and blatantly stated "his opinion that the defense witnesses lied under oath when they testified." Id. ¶ 38. The prosecutor there further attempted "to undermine the credibility of the defense witnesses by purporting to quote from transcripts not in evidence," which we found "manifestly and egregiously improper." Id. (quotation omitted). In Madigan, we concluded that a prosecutor's statement "exhorting the jury to imagine what it would be like to be [the complainant] . . . poor . . . maybe hungry" was improper. 2015 VT 59, ¶ 31 (quotation omitted). We considered this error, taken in combination with several other errors in the admission of evidence, not to be harmless. Id. ¶ 33.

Each case must, of course, be judged on its own merits, and we agree with the PCR court that this case is distinguishable from Madigan, Rehkop, and similar cases cited by petitioner. The key distinction is petitioner's written statement, which was submitted to the jury, in which petitioner admitted to having sex with the complainant and detailed his reasons for doing so. The prosecution's case against petitioner was very strong, as we emphasized in petitioner's direct appeal. See Brooks, 2013 VT 27, ¶ 30. On this record, petitioner fails to show that, had trial counsel objected to the prosecutor's statements or moved for a mistrial, there was a reasonable probability of a different outcome.

E. Cumulative Errors

Finally, the PCR court considered petitioner's argument that trial counsel was ineffective considering the collective impact of the above-described conduct. To the extent that petitioner was arguing that no reasonable attorney would make all of the challenged decisions in the same case, the court rejected this position. It explained that despite the litany of challenged decisions, the court had concluded, with two exceptions, that counsel's conduct was reasonable. Petitioner's expert did not sufficiently or persuasively describe how each decision, even if found reasonable when viewed in isolation, would combine in such a way as to become unreasonable. The expert similarly did not explain how the two instances where counsel acted unreasonably, if combined, would create prejudice when they created no prejudice considered alone.

On appeal, petitioner again cites his trial counsel's alleged shortcomings, only two of which were found by the PCR court to fall below an objectively reasonable standard. He maintains that the errors in this case, in combination, prejudiced his right to a fair trial. In light of our conclusions above, we, like the trial court, reject petitioner's argument that prejudice "result[ed] from the cumulative impact of multiple deficiencies." Harris ex. rel. v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (quotation omitted).[2]

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

[2] In his reply brief, petitioner attempts to raise certain arguments that were not included in his opening brief, including a challenge to the PCR court's evaluation of a particular claim. We do not consider these arguments. See Bigelow v. Dep't of Taxes, 163 Vt. 33, 37 (1994) ("[I]ssues not briefed in the appellant's or the appellee's original briefs may not be raised for the first time in a reply brief.").